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The Case for Enforcing Adhesive Arbitration Agreements - With Particular Consideration of Class Actions and Arbitration Fees

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Articles

The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees

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Arbitration clauses appear in a wide variety of the form contracts through which consumers obtain goods, services and credit, as well as in employment agreements, and other contracts of ordinary individuals. These “adhesive” agreements to arbitrate are generally enforced by courts, but this enforcement is quite controversial.¹ Countless law review articles criticize it,² while the few that defend it are usually

1. Several major newspapers have run stories on the topic, *see, e.g.*, Reynolds Holding, *Private Justice*, S.F. CHRON., Oct. 7, 2001, at A1; Caroline E. Mayer, *Hidden in Fine Print: “You Can’t Sue Us”*, WASH. POST, May 22, 1999, at A1; Barry Meier, *In Fine Print, Customers Lose Ability to Sue*, N.Y. TIMES, Mar. 10, 1997, at A1; Jane Spencer, *Signing Away Your Right to Sue*, WALL ST. J., Oct. 1, 2003, at D1., and many bills have been introduced in Congress to stop enforcement of some or all adhesive arbitration agreements; *see, e.g.*, Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 840 (2002) (citing bills).

2. *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Margaret M.

limited in important ways.³ This Article defends the general enforcement of adhesive arbitration agreements.

Section I shows that this general enforcement is socially desirable and that it benefits most consumers, employees, and other adhering parties. Section II introduces the doctrines on which courts most commonly rely in refusing to enforce particular adhesive arbitration agreements, the unconscionability and “effectively vindicate” doctrines, and applies them to typical adhesive arbitration agreements, that is, agreements whose enforcement would send an individual’s claims (as opposed to a class action) to arbitration under a process which requires that individual to incur costs comparable to, or lower than, the costs that

Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857; Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2002); Margaret L. Moses, *Privatized “Justice”*, 36 LOY. U. CHI. L.J. 535 (2005); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C.L. REV. 931 (1999).

3. Some are limited to defending enforcement only in a particular context, such as employment agreements. *See, e.g.*, Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); David Sherwyn, J. Bruce Tracey, & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999). Others are limited in offering only tentative or qualified support for enforcement. *See, e.g.*, Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741 & 771-72 (suggesting benefits of enforcement, but taking no position on “the possibility that corporations pass on the benefits of arbitration to their customers,” and concluding that “in one-time consumer transactions and when arbitration agreements do not provide for administration by an independent arbitral institution—courts and legislatures may view more skeptically claims that arbitration clauses in consumer contracts are beneficial”); Keith N. Hylton, *Agreements to Waiver or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000) (“[S]uggest[ing] a presumption in favor of enforcing these agreements, especially where parties are informed. Exceptions to this presumption largely should be based on informational disparities.”); Yifat Pud, *An Economic Analysis of Arbitration Clauses in Consumer Contracts*, available at <http://www.frg.eur.nl/rile/emle/Theses/pud.pdf> 32 (2002) (“[T]he significant source of market distortions that ought to be treated by regulation is asymmetric information.”).

would have been incurred in litigating her claims. Section II concludes that typical adhesive arbitration agreements are generally enforceable under a proper application of the unconscionability doctrine, and are probably enforceable under the “effectively vindicate” doctrine.

Sections III and IV apply the unconscionability and “effectively vindicate” doctrines to two issues that are now hotly contested in the courts: an arbitration agreement’s prohibition of class actions (discussed in Section III) and the costs of pursuing a claim in arbitration (discussed in Section IV). Section III argues that courts too often refuse to enforce adhesive arbitration agreements that prohibit class adjudication and that this unwarranted refusal is typically due to the courts’ misapplication of the unconscionability doctrine. Section IV discusses adhesive arbitration agreements held unenforceable simply because they require plaintiffs to pay forum fees higher than those required in litigation. Courts making this holding erroneously treat one cost of arbitration—the forum fee that pays the arbitrator and arbitration organization—in isolation, when they should be comparing the *total* costs of pursuing a claim in arbitration with the total costs the plaintiff would face in litigation. Under this standard, most adhesive arbitration agreements should survive costs-based challenges because the streamlined process of most arbitrations will result in process-cost savings for plaintiffs that more than offset the difference in filing fees.

I. THE BASIC ANALYSIS OF ADHESIVE ARBITRATION AGREEMENTS

A. *Reducing Costs and Passing on the Savings*

Few doubt that enforcement of adhesive arbitration agreements benefits the businesses that use such agreements. This consensus is unsurprising; if businesses using these agreements did not benefit from them, why would they continue to use them? The consensus view is that businesses using adhesive arbitration agreements do so because those businesses generally find that those agreements lower their dispute-resolution costs.⁴

4. Research revealed no doubt about this premise among consumer arbitration’s many critics or its few defenders. There is one scholar who doubts that employers benefit from adhesive arbitration agreements with their employees, see Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000), but that is different from doubting that those employers that use such agreements tend to benefit from them. Of course, it is possible that some businesses using adhesive

In the case of consumer arbitration agreements, this benefit to businesses is also a benefit to consumers. That is because whatever lowers costs to businesses tends over time to lower prices to consumers. While the entire cost-savings is passed on to consumers only under conditions of perfect competition,⁵ some of the cost-savings is passed on to consumers under non-competitive conditions, even monopoly.⁶ The extent to which cost-savings are passed on to consumers is determined

arbitration agreements are acting against their own interests by doing so. People make mistakes. Similarly, it is possible that some businesses that choose not to use arbitration agreements are acting against their own interests. Given the variety of businesses and their situations, it seems likely that adhesive arbitration agreements are in the interests of some businesses, but not others. This Article argues, not that all businesses would benefit from using adhesive arbitration or even that all businesses using adhesive arbitration benefit from it, but only that businesses using adhesive arbitration *tend to* benefit from it.

5. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 7 (6th ed. 2003) (“The forces of competition tend to make opportunity cost the maximum as well as minimum price.”); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93.

6. See, e.g., POSNER, *supra* note 5, at 276 & Figure 9.4 (“If costs fall (unless these are fixed costs), the optimum monopoly price will fall and output will rise.”), and “virtually all costs are variable in the long run.” *Id.* at 123. A good explanation of this point is Jerry A. Hausman & Gregory K. Leonard, *Efficiencies from the Consumer Viewpoint*, 7 GEO. MASON L. REV. 707 (1999).

To begin with the extreme case of a monopolist, price will decrease when marginal cost decreases. This claim is unexceptional to any student of intermediate microeconomics. However, we have been continually surprised over the years that many lawyers at the antitrust agencies refuse to accept this proposition and instead claim that a monopolist will “pocket the cost savings” and not pass any of them on to consumers. This claim is based on the incorrect assertion that only competition forces a firm to pass along cost savings. In fact, however, profit maximization by the firm causes it to pass along at least some of the cost savings in terms of a lower price, even if the firm is a monopolist.

Why does profit maximizing behavior cause a monopolist to pass along to consumers some of the cost savings? A monopolist sets its price so that marginal revenue equals marginal cost. If the monopolist lowers its price (by a small amount), three effects result. First, the monopolist achieves lower revenue on its existing unit sales; second, it sells more units because of the lower price; and third, its total costs increase because of the extra production. At the profit maximizing optimum, the net effect of these three terms is zero—they cancel each other out. However, if the last term, which is the cost of the extra production, becomes smaller due to efficiencies, the total net effect becomes positive because the added revenue from the price decrease exceeds the added production cost. Thus, the monopolist can increase its profits by reducing its price, causing marginal revenue and marginal cost to be equal once again.

Id. at 708-09 (citations omitted).

by the elasticity of supply and demand in the relevant markets.⁷ Therefore, the size of the price reduction caused by enforcement of consumer arbitration agreements will vary, as will the time it takes to occur. But it is inconsistent with basic economics to question the existence of the price reduction.⁸

The analogous point can be made about the effect on wages of the enforcement of employment arbitration agreements. While one can question the size or timing of the wage increase caused by this enforcement, it is inconsistent with basic economics to question the

7. See, e.g., Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 367 (1991). Craswell points out that the analysis becomes more complicated if the source of the cost-savings (here arbitration) affects consumers' willingness to pay for the goods or services in question, and the analysis becomes still more complicated if consumers, rather than being homogeneous, have varying preferences. *Id.* at 368-83. These complications are not present in the context of adhesion arbitration agreements if we accept the contention, often made by opponents of such agreements, that adhering parties rarely notice arbitration clauses at the time of contracting. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 691 (1996) ("Arbitration clauses are often buried in seemingly insignificant places, camouflaged as insignificant junk mail, written in very small print, and written in technical terms not likely to be meaningful to most."). If adhering parties do not notice the arbitration clause, then the clause cannot implicate adhering parties' willingness to pay or varying preferences.

8. Some scholars want to see empirical evidence before accepting economic theory's prediction that, by lowering costs to businesses, arbitration tends over time to lower prices to consumers. Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 851 (2004) ("there is nothing to suggest that vendors imposing arbitration clauses actually lower their prices in conjunction with using arbitration clauses in their contracts."); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 95 (2004) ("[N]o published studies show that the imposition of mandatory arbitration leads to lower prices.").

There is also an absence of "published studies" and other empirical evidence showing that arbitration does not tend over time to lower prices. In the absence of empirical study, should one presume the predictions of economic theory or the opposite? Consistent with economic theory, there is anecdotal evidence that some businesses are willing to lower prices for consumers who accept arbitration. See, e.g., *Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410, 1412-13 (M.D. Ala.1998) (consumer had choice between arbitration and 16.96% interest rate, and no arbitration and a 18.96% rate).

existence of it.⁹ This point applies similarly with respect to adhesive arbitration agreements in other contexts as well. It is merely an example of the general insight that contract terms favorable to sellers go hand-in-hand with lower prices. “Recognition of this has been standard in the law-and-economics literature for at least a quarter of a century.”¹⁰

B. The Source(s) of the Cost Reduction

While there is consensus that the enforcement of adhesive arbitration agreements lowers the dispute-resolution costs of the businesses that use them, there is uncertainty about the source(s) of this cost-reduction. One possible source is that comparable cases brought by adhering parties, such as consumers and employees, generally lead to lower awards in arbitration than in litigation. This is the story of arbitration as “self-help deregulation” for business. If a business wants to reduce the legal liability imposed by, for example, consumer protection regulation, the business does not need to work for change through the political system; it can use self-help to reduce its liability by requiring its customers to agree to arbitration. If this “self-help

9. Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 747-51 (2001).

10. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 92.

The law-and-economics literature features debate about the existence of, and proper response to, the problem of imperfect information causing unregulated form contract terms to be too harsh to the consumer with respect to terms about which consumers are often ignorant and (therefore) too favorable to the consumer with respect to those terms, such as price, about which consumers are typically knowledgeable.

Id. In other words, one must distinguish between two arguments, one modest and the other ambitious, about the terms of form contracts. The modest argument (which this Article makes) is that the addition of a contract term that benefits sellers (businesses) yields a quid pro quo “in the form of lower prices or some other change [in contract terms] favoring consumers.” Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 212 n.95 (1998). The ambitious argument is that the quid pro quo consumers get is necessarily sufficient to make the terms of form contracts efficient “in the sense that buyers would prefer the price/term combination offered by sellers to any other economically feasible price/term combination.” Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1216 (2003) (providing an excellent summary of this ambitious argument, *id.* at 1208-16, before rejecting it in the rest of the article.).

deregulation” story is true, then enforcement of arbitration agreements has costs to consumers and employees (lower awards and, therefore, lower settlements,¹¹ as well as benefits (lower prices or higher wages).

By contrast, a different possible source of arbitration’s cost-savings to business defendants is that arbitration reduces the business defendant’s process costs—the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal. It is possible that the amount of awards is identical in arbitration and litigation but the business defendant’s cost of getting to the award is lower in arbitration. If this is true—if all arbitration’s benefits to the business defendant come from lower process costs—then arbitration benefits both parties to the contract. The process-cost savings benefit consumers and employees, who receive better prices or wages, and benefit the business defendant to the extent the business did not pass on the cost-savings arbitration produced.

The only harm from process-cost savings comes to those (like lawyers) who sell process.¹² But even this is a benefit to society as a whole.

To the extent that the costs of adjudication are reduced, disputes can be resolved more efficiently, i.e., fewer resources need to be devoted to adjudication. Some bright young people who would have become trial lawyers enter other fields instead. Whatever those people produce is a gain to society from the cost savings of arbitration.¹³

11. Settlement negotiation is conducted “in the shadow” of the expected result of adjudication. See, e.g., STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 1.7(c) (2001).

12. To the extent enforceable arbitration agreements reduce the need for the services of business litigators, those litigators’ interests are at odds with the interests of their clients. For an observation about the interests of plaintiffs’ lawyers, see *infra* note 13.

13. Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, CATO Institute Policy Analysis No. 433, April 18, 2002, at 9, available at http://www.cato.org/pub_display.php?pub_id=1292.

In this respect, the business defendant’s process-cost savings from arbitration differ from the savings a business achieves, as in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), by a forum-selection clause that relegates claims against it to a forum that it finds geographically convenient. “As to the . . . savings to the cruise line, due to not having to defend suits in remote locations, there is a corollary increase in expenses to those passengers who must litigate far from home.” Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 66 (1995). By contrast, as to the business defendant’s process-cost savings from arbitration,

So the happy story about adhesive arbitration agreements is that they are all about reducing process costs. They do not affect the outcomes of cases in any significant or systematic way; they merely get to the outcomes more efficiently. According to this story, arbitration arising out of adhesive agreements is an entrepreneurial, private-sector innovation producing what disputing parties want: quick, inexpensive, common-sense adjudication of disputes. By contrast, civil litigation in the public-sector court system is slow and archaic, full of legalistic jargon, technicalities and formalities that produce a lot more work for lawyers without producing a corresponding increase in justice for the disputing parties who have to pay the lawyers. It is even possible that the amount of awards on consumer and employee claims is higher in arbitration than in litigation but the business defendant's process costs in arbitration are so much lower in arbitration that, for the business, the process-cost savings outweighs the increase in payments for awards and settlements.

Of course, the happy story that adhesive arbitration agreements just reduce process costs and the "self-help deregulation" story that such agreements just lower awards are not the only two possibilities. It is possible that adhesive arbitration results in *both* lower process costs for the business defendant and generally lower awards for adhering parties like consumers and employees. And it is possible—the following section suggests likely¹⁴—that, in addition to lowering process costs, adhesive arbitration tends to result in lower awards for some types of cases but higher awards in other types of cases.

C. Empirical Studies and Their Inherent Limits

The previous paragraphs show that the sources of arbitration's benefit to the business defendant matter in assessing the costs and benefits to adhering parties of enforcing arbitration agreements. It would be useful if empirical studies could reveal the extent to which each possible source is, in fact, contributing to arbitration's benefit to the business defendant. Unfortunately, this is not possible.

Empirical studies can tell us the relative levels of awards and process costs in arbitration and litigation, but that does not mean they can tell us the relative levels of awards and process costs in arbitration and

there is no reason to expect a corollary increase in expenses to plaintiffs. In fact, there is likely also a reduction in the plaintiff's process costs. Plaintiffs' costs of pursuing claims in arbitration are discussed in Section IV of this article, *infra*.

14. See *infra* Section I.C.

litigation *in comparable cases*. The probative value we give to empirical studies should turn on our level of confidence that the studied cases going to arbitration are comparable to the studied cases going to litigation. And, in reality, nobody knows whether the cases going to arbitration are comparable to the cases going to litigation. . . .

In other areas of study, a scholar can (to a great extent) overcome this methodological problem. Suppose, for example, that a court requires mediation of all cases with odd docket numbers, but not of cases with even docket numbers. A scholar could then compare the results of the odd cases to the results of the even cases and attribute any differences to the rule requiring mediation. With a sufficiently large sample size, we would be quite confident that the odd cases are comparable to the even cases. That is because the odd and even docket numbers are completely unrelated to anything that might plausibly affect the results of the cases.

In contrast, the selection of cases between arbitration and litigation is very different. [C]ases go to arbitration when, and only when, there is an arbitration agreement. The [parties that] use arbitration agreements may be systematically different from the [parties that] do not use arbitration agreements.¹⁵

In sum, “[e]mpirical studies are vulnerable to the possibility that the studied cases going to arbitration are systematically different from the studied cases going to litigation.”¹⁶ Therefore, in comparing arbitration and litigation, we must be cautious about how much weight we give empirical studies.

That said, the empirical evidence supports the aforementioned hypotheses that (1) reduced process costs are a significant source of the cost-savings businesses derive from arbitration,¹⁷ and (2) that arbitration tends to result in lower awards for some types of cases but higher awards in other types of cases.¹⁸ The empirical studies, which have been in the

15. Ware, *supra* note 9, at 755-56 (citations omitted).

16. *Id.* at 336. David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1564-66 (2005).

17. Ware, *supra* note 9, at 753-55 (citing and summarizing studies). That arbitration reduces process costs is confirmed by survey evidence. See ABA SECTION OF LITIGATION TASK FORCE ON ADR EFFECTIVENESS, SURVEY ON ARBITRATION (August 2003) at 19, available at <http://www.abanet.org/litigation/taskforces/adr/surveyreport.pdf>.

18. Ware, *supra* note 9, at 753-55 (citing and summarizing studies).

area of employment arbitration, indicate that employees win a higher percentage of their claims in arbitration than in litigation but employees who win in litigation win more money than employees who win in arbitration.¹⁹ The anecdotes I have heard from practicing lawyers suggest similar results in consumer arbitration: claims that would result in big-dollar jury awards tend to see lower awards in arbitration, but smaller-yet-meritorious claims, some of which might not be cost-effective to pursue at all in litigation, tend to see higher awards in arbitration.

If this empirical/anecdotal picture is accurate, then adhesive arbitration agreements give consumers and employees (1) better prices or wages and (2) extra leverage in small-yet-meritorious cases, but (3) reduced leverage in cases that could lead to a big-dollar jury award. For the vast majority of consumers and employees, the benefits of 1 and 2 outweigh the costs of 3 because it is the rare consumer or employee who actually has a claim that could lead to a big-dollar jury award.²⁰ If such a

19. *Id.* There is also a more recent study comparing employment arbitration and litigation. Theodore Eisenberg & Elizabeth T. Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (Mar. 5, 2003) (unpublished draft), available at <http://ssrn.com/abstract=389780>. It shows higher employee-win rates in arbitration when comparing the litigation of claims by all employees with only the arbitration of claims by higher-income employees, that is, employees whose agreement was negotiated, rather than promulgated. *Id.* at 13-14. The study makes this comparison between all litigation and only the arbitration of higher-income employees based on the assumption that “the economics of obtaining counsel effectively exclude most lower-pay employees from litigation.” *Id.* This study finds an “absence of evidence of significantly different award amounts between higher pay employee arbitrations and tried cases,” *id.* at 19, although it shows higher mean awards in litigation than in arbitration. *Id.* at 18. See also Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44. For a closely related paper, see Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003).

20. One might argue that the business misconduct deterred by big-dollar claims (and the threat of them) benefits all adhering parties, including the vast majority who will never themselves have such a claim. Supporting this argument would require a showing that the optimal level of deterrence is provided by the higher level of damages awarded in litigation rather than the lower level of damages awarded in arbitration. Of course, over-deterrence is as much a social cost as under-deterrence. See Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT’L ARB. 451 (2000).

If the expected damage award in arbitration is closer to the optimal level than the

dispute has already arisen, however, the price that a particular consumer or employee will charge for giving up 3 increases dramatically. In other words, it is entirely rational for a consumer, or employee, or other adhering party to prefer, at the time of contracting, that an arbitration clause be in the contract even if, at the time of a particular dispute, the adhering party prefers that an arbitration clause not be in the contract.

D. The Importance of Enforcing Pre-Dispute Agreements to Arbitrate

In discussing arbitration agreements, it is crucial to distinguish between pre-dispute agreements formed at the time of contracting and post-dispute agreements formed after a particular dispute has arisen. Critics of adhesive arbitration agreements conclude that arbitration must be bad for consumers and employees if businesses have to impose it through pre-dispute adhesion contracts, in which the arbitration clause is unlikely to be noticed by the consumer or employee, let alone the focus of attention. If arbitration really was good for them, consumers and employees would choose it post-dispute, when they have had time to consider (perhaps in consultation with a lawyer) the pros and cons of arbitration versus litigation.²¹ According to this view, only post-dispute

expected damage award in litigation, all else equal, arbitration will better deter wrongful conduct under the contract than litigation—*i.e.*, arbitration will have “deterrence benefits.” Deterrence benefits can result either from increasing the level of deterrence if the expected damages in court are too low (avoiding underdeterrence), or from decreasing the level of deterrence if the expected damages in court are too high (avoiding overdeterrence).

Id. at 465-66 (citation omitted). See also Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 581 (2003) (examining hypothesis “that contracting parties will choose the dispute resolution forum in which the difference between deterrence benefits, defined as avoided harms net of avoidance costs, and dispute resolution costs is the largest” and providing “empirical analysis. . .demonstrat[ing] the relative importance of deterrence factors in the decision to choose a dispute resolution forum”); *id.* at 580 (“Holding dispute resolution costs fixed, parties will structure their contract so that future disputes are resolved within the forum that provides the optimal level of deterrence against undesirable conduct. Thus, if expected damages in court exceed or fall below the optimal level, and expected damages under arbitration are closer to the optimal level, they will have an incentive to commit to arbitration.”).

21. See, e.g., Jean Braucher, *Common Sense and Contracts Symposium: The Gateway Thread—AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1167 (2000) (“Consumer ‘choice’ of arbitration can only be meaningful if it is a post-dispute choice, when the consumer is represented by counsel who can evaluate the system’s rules. The best way to reform arbitration systems is to make pre-dispute arbitration

arbitration agreements should be enforced.

Limiting enforcement to post-dispute agreements, however, would fail to produce all the social gains produced by enforcing pre-dispute arbitration agreements. That is because the social gains resulting from arbitration's lower process costs²² will not be realized nearly as often if an enforceable arbitration agreement can only be made after a dispute arises. Neither party is likely to agree, post-dispute, to arbitrate claims for which arbitration is expected to be less favorable to that party than litigation would be.²³ Thus post-dispute arbitration agreements are unlikely to occur even if both parties believe that the process costs (for both sides) are lower in arbitration than litigation.

clauses unenforceable in consumer contracts, so that the arbitration systems view consumers as customers as much as the businesses they deal with."); Charles Knapp, *Common Sense and Contracts Symposium: The Gateway Thread—AALS Contracts Listserv*, 16 *TOURO L. REV.* 1147, 1173 (2000) ("I think Jean Braucher has hit the nail in precisely the right place—if arbitration is so economically sound for everybody, then let the consumer be persuaded 'once the dispute has arisen' that arbitration is in her best interests too. The argument that 'but then the consumer might have a lawyer' obviously proves too much.").

22. See *supra* note 13 and accompanying text.

23. Several commentators have made this point with respect to employment arbitration. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 *OHIO ST. J. ON DISP. RESOL.* 559 (2001).

If the former employee cannot obtain counsel, it is not in the employer's interest to offer arbitration because the lower costs of arbitration will make more likely the pressing of a claim that otherwise simply would languish in the administrative agency. If, on the other hand, the former employee's economic losses are high enough to attract competent counsel, that lawyer is exceedingly unlikely (absent unusual circumstances) to proffer arbitration even if the lawyer would prefer not to go to trial. The reason the proffer will not be made is because it is not in the client's interest to do so, for such a proffer reduces the settlement value of the case as it takes off the table the in terrorem effect of a jury trial.

Id. at 567-68. Accord David Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 *BERKELEY J. EMP. & LAB. L.* 1 (2003); *id.* at 57 ("[P]laintiffs' and defense lawyers will rarely, if ever, simultaneously select to arbitrate the same case."); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 *WM. MITCHELL L. REV.* 313, 314 (2003) ("This evidence indicates that most employees will not be able to secure their employer's agreement to arbitrate once the dispute arises. The vast majority of employment disputes, however, do not involve enough damages to support contingent fee litigation. Therefore, outlawing pre-dispute agreements to arbitrate will leave many employees with no access to justice.").

By contrast, pre-dispute agreements are formed at a time when both parties are uncertain about whether there will be a dispute and, if so, what sort of dispute it will be.²⁴ That is the time when both sides have an incentive to choose the forum that reduces process costs. This explains why enforcement of pre-dispute arbitration agreements benefits consumers and employees as a whole even though it would be against some particular consumers' and employees' interests to agree to arbitration once a dispute has arisen.²⁵ In sum, the general enforcement of adhesive arbitration agreements benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties.²⁶

II. THE UNCONSCIONABILITY AND "EFFECTIVELY VINDICATE" DOCTRINES

A. *Unconscionability Generally: Ex Ante, Not Ex Post*

The Federal Arbitration Act (FAA), as interpreted by the Supreme Court, requires general enforcement of adhesive arbitration agreements.²⁷ Section 2 requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."²⁸ As the Supreme Court explained in *Doctor's Associates, Inc. v. Casarotto*,²⁹

24. Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 746.

25. It also explains why the interests of lawyers who represent consumer and employee plaintiffs are opposed to the interests of consumers and employees as a whole. Plaintiffs' lawyers represent the few consumers and employees who are harmed by enforceable arbitration agreements, that is, the few consumers and employees who have claims that could lead to a big-dollar jury award. By contrast, plaintiffs' lawyers do not represent the majority of consumers and employees who benefit from arbitration, that is, those who never have a dispute (but benefit from the better price or wage) and those who have the sort of small-yet-meritorious case that does not attract a lawyer to take the case to court.

For an observation about the interests of lawyers who litigate on behalf of business defendants, see *supra* note 12.

26. Furthermore, this enforcement does not make arbitration "mandatory." See Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 40-44 (2003).

27. FAA, 9 U.S.C. §§ 1-16 (2000).

28. *Id.* § 2.

29. 517 U.S. 681 (1996).

[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] § 2 Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.³⁰

In short, FAA section 2 requires parties to rely on contract law in objecting to enforcement of arbitration agreements. Other sources of law—such as employment law or “consumer protection” statutes—are out of bounds and thus cannot provide the grounds for a court’s conclusion that a particular arbitration agreement is unenforceable. Only contract law can provide such grounds.³¹

Unconscionability is the contract-law ground on which courts most often rely in denying enforcement to adhesive arbitration agreements.³² Unconscionability is generally thought of as coming in two forms: substantive unconscionability and procedural unconscionability. Substantive unconscionability, according to the Restatement (Second) of Contracts, means “terms unreasonably favorable to the stronger party,”³³

30. *Id.* at 686-87 (citations omitted) (quoting *Scherk v. Alberlo-Culver Co.*, 417 U.S. 506, 511 (1974)).

31. Does this legal doctrine conflict with the constitutional law regarding the right to jury trial? Compare Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (arguing that FAA’s contract-law standards of consent are inconsistent with jury-waiver standards of consent), with Stephen J. Ware, *Mandatory Arbitration: Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004) (arguing that FAA’s contract-law standards of consent are consistent with jury-waiver standards of consent) and Ware, *supra* note 26, at 39 (same).

32. See generally Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996). Arguments based on other contract-law grounds are generally heard by the arbitrator, rather than the courts, pursuant to the separability doctrine of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). See WARE, *supra* note 11, §§ 2.19-2.21.

33. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

or “gross disparity in the values exchanged.”³⁴ Procedural unconscionability deals with the process of contract formation, encompassing “not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power.”³⁵

Most statements of the law of unconscionability now hold that both procedural and substantive unconscionability are required before courts will grant relief from a challenged term. Judicial decisions have not consistently followed this principle, however, and some courts have suggested a vaguely mathematical metaphor in which a large amount of one type of unconscionability can make up for only a small amount of the other.³⁶

Many courts treat adhesion contracts, or at least those between parties of “unequal bargaining power,”³⁷ as automatically procedurally unconscionable.³⁸ Therefore, with respect to most adhesive arbitration

34. *Id.* § 208 cmt. c.

35. E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28 (2d ed. 1990) *see generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

36. Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17-18 (1993).

37. “[T]he concept [of unequal bargaining power] has proved so slippery and indefinable, so vague and nebulous, and so open to uncertainty that its utility for explaining any element of the bargaining relationship is doubtful.” Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 193 (2005). “Modern American courts have largely failed to infuse the concept of inequality of bargaining [power] with legally coherent meaning.” *Id.* at 199.

38. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (“The [Agreement] is procedurally unconscionable because it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely.”) (citing *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (1997)); *Lytle v. Citifinancial Servs., Inc.*, 810 A.2d 643, 658 (Pa. Super. Ct. 2002); *Whitney v. Alltel Comm’cs, Inc.*, 173 S.W.3d 300, (Mo. Ct. App. 2005); *Strand v. U.S. Bank Nat’l. Ass’n ND*, 693 N.W.2d 918, 923 (N.D. 2005) (“all adhesion contracts will include the most common indicators of procedural unconscionability—disparity of bargaining power, lack of bargaining choice, a preprinted standard form contract, and a ‘take it or leave it’ transaction”). *But see, e.g.*, *Novak v. Overture Serv., Inc.*, 309 F. Supp. 2d (E.D.N.Y. Mar. 25, 2004) (“An ‘agreement cannot be considered procedurally unconscionable, or a contract of adhesion, simply because it is a form contract.’”) (quoting *Rosenfeld v. Port Authority of New York and New Jersey*, 108 F. Supp. 2d 156, 164 (E.D.N.Y. 2000)).

agreements, the focus is entirely on substantive unconscionability.³⁹

How should courts decide whether a particular arbitration agreement is substantively unconscionable?⁴⁰ At one level, the question is unanswerable.

To declare an arbitration clause, or any contract term, substantively unconscionable requires a substantive theory of fairness to distinguish conscionable from unconscionable terms. “A substantive fairness theory assumes that a standard of value can be found by which the substance of any agreement can be objectively evaluated. Such a criterion has yet to be articulated and defended.” In short, values are subjective and substantive unconscionability is in the eye of the beholder.⁴¹

There is another level on which one can begin to give some content to the notion of substantive unconscionability, that is, “gross disparity in the values exchanged.”⁴² It is clear that a proper application of the unconscionability doctrine involves an assessment of the contract *ex ante*, rather than *ex post*.⁴³ In other words, a court should assess the

39. A similar result through different analysis was reached in *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572-74 (App. Div. 1998), which found no procedural unconscionability in a consumer form contract, but nevertheless found the contract unenforceable because “[w]hile . . . unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable.” *Id.* at 575.

40. With respect to substantive unconscionability, it is important to note that “[p]articular terms may be unconscionable whether or not the contract as a whole is unconscionable.” RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. e (1981). For that reason, one must distinguish whether an arbitration clause is unconscionable from whether the contract containing the arbitration clause is unconscionable. “In some cases, there may be no objection to the arbitration clause, while the container contract is unconscionable because of its other terms. The unconscionability of those contracts has nothing to do with arbitration and, under the separability doctrine, is an issue for the arbitrator, not the court, to decide.” Ware, *supra* note 32, at 1018. Here, the question is whether arbitration clause, in particular, is substantively unconscionable.

41. Ware, *supra* note 32, at 1018 (quoting Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 284 (1986) (citation omitted)).

42. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981).

43. *Id.* § 208 (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”); U.C.C. § 2-302(1)(2000) (“If the court as a matter of law finds the contract or any

“values exchanged” as of the time the contract was formed, rather than as of a later time, such as the time of a dispute.

The *ex ante* approach should prevent courts from finding that the typical adhesion arbitration agreement is unconscionable. In other words, courts should not hold an arbitration agreement unconscionable merely because the particular adhering party (e.g., consumer or employee), alleging unconscionability has a claim that is expected to result in a lower award if arbitrated than if litigated.⁴⁴ As explained above, the deal that seems to be implicit in most adhesive arbitration agreements is that the consumer or employee receives a better price or wage and greater leverage on small-yet-meritorious claims in exchange for reduced leverage on claims that could lead to a big-dollar jury award.⁴⁵ If there was nothing unconscionable about such a deal at the time it was formed—when there was uncertainty about whether there would be a dispute and, if so, what type of dispute—then the deal does not suddenly become unconscionable upon the occurrence of a dispute that could, if litigated, lead to a large jury award. A proper application of the unconscionability doctrine would not consider just the reduction in the value of the claim the plaintiff turned out to have. It would also consider the increase in the value of the other claims the plaintiff could have had and the better price or wage the plaintiff received due to the arbitration agreement.⁴⁶ The combination of these factors should, except

clause of the contract to have been unconscionable at the time it was made”); *id.*, cmt. 1 (“The basic test is whether . . . the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”).

44. It may be that most challenges to adhesive arbitration agreements are brought by plaintiffs whose lawyers have accurately concluded that the plaintiffs’ claims have a lower value in arbitration than in litigation. If the empirical/anecdotal picture described in Section I.C. is accurate then the few adhering parties who are harmed by enforceable arbitration agreements are those few who have claims that could lead to a big-dollar jury award and those are (roughly) the few that can attract a lawyer to represent them. These lawyers see that the value of their clients’ claims has been reduced by the arbitration agreement because the plaintiff is expected to receive a lower award in arbitration than would have been expected in litigation and this reduction in expectations reduces the settlement payment the plaintiff’s lawyer can negotiate.

45. *See supra* Section I.A.3.

46. Courts’ consideration of the price-reduction caused by contract terms that lower businesses costs has been endorsed by the Supreme Court in a ruling enforcing a forum-selection clause in an adhesion contract. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (“[I]t stands to reason that passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced

perhaps in a few rare cases, show that there was no “gross disparity in the values exchanged”⁴⁷ when the arbitration agreement was formed, and thus no unconscionability.

B. *The “Effectively Vindicate” Doctrine*

1. A Non-Contract-Law Ground

While FAA § 2 requires parties to rely on contract law in challenging enforcement of arbitration agreements, this requirement is in tension with the requirements of some other federal statutes, which are less oriented toward contractual freedom than is the pro-contract FAA. These other statutes give a class of beneficiaries—such as consumers, employees, or investors—rights that cannot be contracted away prior to a dispute.⁴⁸ In other words, these statutes create mandatory rules, rather than default rules. Enforcement of a pre-dispute agreement to arbitrate a claim arising out of these statutes is troubling because a flawed arbitration process or an erroneous decision by the arbitrator could deprive the statute’s beneficiary of the supposedly-mandatory rights.⁴⁹ If

fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”). The Seventh Circuit has twice endorsed courts’ consideration of the price-reduction caused by adhesive arbitration agreements. *See Metro East Center for Conditioning and Health v. Qwest Commc’ns*, 294 F.3d 924 (7th Cir. 2002) (Easterbrook, J.).

If arbitration offers benefits to Qwest and detriments to customers such as Metro East, these benefits are reflected in a lower cost of doing business that in competition are passed along to customers. There is *lots* of competition in interstate telecommunications service. Customers therefore are compensated through lower rates for any net loss they may experience in arbitration. They can’t accept the lower rates . . . while avoiding the means that made lower rates possible.

Id. at 927 (emphasis in original). *Accord* *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002) (Manion, J.).

47. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981).

48. *See e.g., infra* Section II.B.2.

49. If a party argues that a court has made an error of law, an appellate court will engage in de novo review and reverse if it finds error. By contrast, if a party argues that an arbitrator has made an error of law, a court will engage in very deferential review and thus likely confirm an arbitrator’s decision that rests on such an error. To put it another way, “error of law” is not a legally-recognized ground for vacating arbitration awards. *See* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999). For the same point in the context of international arbitration, *see* Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999).

this occurs, then the arbitration agreement effectively contracted away the very rights that a statute supposedly put beyond the reach of a pre-dispute contract. Thus, there is a tension between the FAA, which requires enforcement of such agreements unless there is a contract-law ground for denying enforcement, and the statute which prohibits enforcement of such agreements in order to preserve the rights at issue for the statute's beneficiaries.

The Supreme Court has resolved this tension against the FAA by recognizing a non-contract-law ground for denying enforcement of agreements to arbitrate claims arising out of these federal statutes. I call this the "effectively vindicate" ground. The Supreme Court said:

[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims. We have likewise rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants. These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because *so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions.*⁵⁰

The Court went on to hold that arbitration agreements should not be enforced when enforcement would prevent the prospective litigant from "*effectively . . . vindicate[ing] his or her statutory cause of action.*"⁵¹

2. The "Effectively Vindicate" Doctrine and State Claims

While courts can use the "effectively vindicate" ground with respect to claims arising out of federal statutes, the FAA precludes this ground with respect to claims arising out of state statutes. Under FAA §2 and *Casarotto*, the only permissible grounds for denying enforcement to arbitration agreements are grounds "for the revocation of *any* contract."⁵²

50. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000) (quotations omitted) (emphasis added). The Court previously used the "effectively vindicate" phrase in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act).

51. *Randolph*, 531 U.S. at 90 (emphasis added).

52. 9 U.S.C. § 2 (2000) (emphasis added); *see supra* notes 29-31 and accompanying text.

The “effectively vindicate” ground is not such a ground. So with respect to some federal claims there is tension between two federal statutes: the statute out of which the claim arises and the FAA. While this tension can be resolved against the FAA in cases involving two federal statutes, “the FAA certainly does not yield to a state statute or state common law doctrine with which it is in tension. That is because the United States Constitution makes federal law supreme over state law.”⁵³ So the FAA trumps mandatory state law although the FAA, to some extent, yields to mandatory federal law under the “effectively vindicate” doctrine.

Some state courts seem to get around this FAA preemption of mandatory state law by holding that an agreement is unconscionable if it prevents the plaintiff from “effectively vindicating” her rights under that statute.⁵⁴ If this end-run around FAA preemption of state statutes is permissible then courts should also hold that an agreement is unconscionable if it prevents the plaintiff from “effectively vindicating” her rights under state common law. There is no reason why claims arising under mandatory common law deserve less protection than

53. WARE, *supra* note 11, § 2.28(b); see U.S. CONST. art. VI, cl. 2; Green Tree Fin. Corp. of Ala. v. Wampler, 749 So.2d 409, 416 (Ala. 1999) (“Unlike *Paladino*, in which competing federal policies were in play, this present case arises under common-law principles governed solely by Alabama law and involves only one federal policy, that being a policy favoring arbitration.”).

54. See, e.g., Whitney v. Alltel Commc’ns, Inc., 173 S.W.3d 300 (Mo. Ct. App. 2005).

Whitney had allegedly been improperly billed a total of \$24.64. . . . [T]he [arbitration] award could not possibly approach the amount that would have to be expended in arbitrating the action. Accordingly, the costs would be so prohibitively expensive as to preclude, for all practical purposes, an aggrieved party from seeking redress for a violation of the *Merchandising Practices Act*. Any of Alltel’s other customers wishing to challenge the eighty-eight cent charge would face the same economic hurdle. Yet because of the many customers affected, Alltel would be entitled to retain millions and millions of dollars from what were allegedly improper and deceptive charges. Moreover, since no single customer could undertake a case against Alltel, the company could continue its improper and deceptive charges *ad infinitum* since none of its customers would have a practical remedy to bring about a stop to the conduct.

. . . This result would be unconscionable and in direct conflict with the legislature’s declared public policy as evidenced by the *Merchandising Practices Act* and similar statutes.

Id. at 313-14. This case involves an arbitration agreement that prohibits class action litigation and arbitration conducted on a classwide basis. The enforceability of such agreements is discussed *infra* in Section III.

claims arising under mandatory statutory law.⁵⁵

3. The Unknown Content of the “Effectively Vindicate” Doctrine

The Supreme Court has yet to flesh out the “effectively vindicate” doctrine. The Court has not set forth the elements that must be shown by a party invoking the doctrine to defeat enforcement of an arbitration agreement. Unlike the unconscionability doctrine, which developed outside arbitration, there is no non-arbitration body of case law to draw upon in developing the “effectively vindicate” doctrine. So the “effectively vindicate” doctrine could evolve in any number of possible directions.

One possibility is that there will be no significant difference between how courts apply the “effectively vindicate” doctrine and how they apply the unconscionability doctrine. If this occurs, then courts should not find the typical adhesion arbitration agreement unenforceable under the “effectively vindicate” doctrine for the same reasons⁵⁶ they should not find the typical adhesion arbitration agreement unenforceable under a proper (*ex ante*) application of the unconscionability doctrine.⁵⁷

55. Ware, *supra* note 49, at 732-33.

56. Section II.A.

57. If the “effectively vindicate” doctrine becomes virtually identical to the unconscionability doctrine then the “effectively vindicate” doctrine is redundant and unnecessary so long as states maintain unconscionability doctrines strong enough to effectively vindicate federal statutory rights.

The unconscionability doctrine is a matter of state contract law so states can vary in what they find unconscionable. Some states may have a broad unconscionability doctrine that aggressively regulates contract terms, while other states may have a narrow unconscionability doctrine or even none at all. The same is true with respect to the unconscionability of arbitration agreements, even though arbitration agreements are governed by a federal statute, the FAA. As noted above, the FAA incorporates state law on the defenses to contract enforcement, including unconscionability. So an arbitration agreement that is unconscionable under one state’s law may not be unconscionable under another state’s law.

While this diversity is generally permitted under the FAA, if a state’s courts were to find that all adhesive arbitration agreements are unconscionable the state would have run afoul of the Supreme Court’s command that state courts may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.” *Doctor’s Associates*, 517 U.S. at 687-88 n.3 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)). But what if a state’s courts went to the other extreme and held that no adhesive arbitration agreements are unconscionable? This would be within the state’s power to do, so

A more likely possibility, however, is that the “effectively vindicate” doctrine will incorporate an *ex post* perspective. The Court’s statements of the “effectively vindicate” doctrine thus far seem to consider the effects of the arbitration agreement from an *ex post* perspective because the Court’s focus is on whether the “prospective litigant effectively may vindicate his or her statutory cause of action.”⁵⁸ It is possible that courts will find that a typical adhesive arbitration agreement prevents effective vindication of a statutory right simply because the party asserting that right is expected to receive a lower award in arbitration than in litigation. This seems unlikely though, because of the difficulty (before the claim’s merits have been heard in any forum) of ascertaining the award expected in litigation and the award expected in arbitration. Proving what award is expected (by whom?) in each forum would be daunting without statistics on the levels of awards in comparable cases in arbitration and litigation. As noted above, nobody knows if the cases going to arbitration are comparable to the cases going to litigation.⁵⁹

C. *Summary and Transition*

There are then, several uncertainties in the legal doctrine. The unconscionability doctrine (especially its substantive component) remains notoriously subjective, despite courts working with the doctrine for generations now. The “effectively vindicate” doctrine is so new and ill-defined that it could evolve in any number of directions. And the relationship between the two doctrines remains an open question. All this uncertainty is sure to complicate the law on adhesive arbitration agreements for some time.

Despite all this uncertainty, it is clear that these two doctrines—unconscionability and “effectively vindicate”—are the field on which the battle over adhesive arbitration agreements is being fought. These are the doctrines—however flawed—courts use in assessing the enforceability of adhesive arbitration agreements. So it is worth exploring how these doctrines apply to the issues that are now hotly contested in the courts: an arbitration agreement’s prohibition of class

long as the plaintiff’s claims all arose out of state law. But if the plaintiff sought to assert a federal claim, then the state’s extremely narrow application of the unconscionability doctrine would be preempted by the federal law that an arbitration agreement is unenforceable if it prevents the plaintiff from effectively vindicating her federal statutory rights.

58. *See supra* note 57 and accompanying text.

59. *See infra* Section I.C.

actions (discussed in Section III) and the costs of pursuing a claim in arbitration (discussed in Section IV).

III. CLASS ACTIONS

A. *Arbitration Agreements that Prohibit Class Actions*

It is possible to write an agreement that requires arbitration of all claims except for those that, if litigated, could be pursued as part of a class action. I refer to such claims as “aggregatable” claims. While it is possible to except aggregatable claims from the duty to arbitrate,⁶⁰ few adhesive arbitration agreements are written that way. Many adhesive arbitration agreements simply require arbitration of all claims, thus implicitly requiring arbitration of aggregatable claims.⁶¹ Some adhesive arbitration agreements make this explicit by including language telling the adhering party that she is waiving her right to pursue class litigation.⁶²

If a court enforces an arbitration agreement that, implicitly or explicitly, prohibits class litigation then another question arises. Will the arbitration be conducted on a classwide basis or will it be traditional, individual arbitration? While there were very few instances of class arbitration before the Twenty-First Century,⁶³ the procedure seems to have become more common in the last few years, perhaps due to the

60. Agreements to arbitrate under the rules of the securities exchanges effectively except aggregatable claims from the duty to arbitrate because those rules provide that class actions are not eligible for arbitration. *See* NYSE Rule 600(d)(i), 2 N.Y.S.E. Guide (CCH) ¶ 2600 (2001); NASD Rule 10301(d)(1), NASD Manual (CCH) 7571 (2002). *See, e.g.,* Nielsen v. Piper, Jaffray & Hopwood, Inc, 66 F3d 145, 148-49 (7th Cir. 1995) (finding arbitration of class action prohibited by NASD Rules); Olde Discount Corp. v Hubbard, 4 F. Supp. 2d 1268, 1271 (D. Kan. 1998) (aff’d 172 F.3d 879 (10th cir. 1999) (same)).

61. *See, e.g.,* Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 448 (2003) (“All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration . . .”)

62. *See, e.g.,* Jenkins v. First Am. Cash Advance of Ga., L.L.C., 400 F.3d 868, 872 (11th Cir. 2005) (“YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES”).

63. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38 (2000).

Supreme Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*.⁶⁴ In cases arising out of adhesion contracts, class arbitration may appear to many courts as an attractive compromise between plaintiffs asking for class litigation and defendants seeking to limit the plaintiffs to individual arbitration.⁶⁵ But what if an adhesive arbitration agreement requires individual, rather than class, arbitration? In other words, what if the agreement prohibits class adjudication in any forum?⁶⁶

64. 539 U.S. 444 (2003). *Bazzle* involved Green Tree's form consumer loan contract, which contained an arbitration clause. *Id.* at 447. Plaintiffs sued Green Tree in South Carolina state court and asked the court to certify a class action. *Id.* at 449. Green Tree sought to stay the court proceedings and compel arbitration. *Id.* The trial court both (1) certified a class action and (2) entered an order compelling arbitration. *Id.* Green Tree then selected an arbitrator with the plaintiffs' consent and the arbitrator, administering the proceeding as a class arbitration, awarded the class \$10,935,000 in statutory damages, along with attorney's fees. *Id.* The trial court confirmed the award, and Green Tree appealed claiming, among other things, that class arbitration was legally impermissible. *Id.* On appeal, the South Carolina Supreme Court held that the contracts were silent with respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form. *Id.* at 450. The Supreme Court granted certiorari to consider whether that holding is consistent with the FAA. *Id.*

While three dissenting justices thought the arbitration clause prohibited class arbitration, *id.* at 458-59, the Court agreed with the South Carolina Supreme Court that the clause was silent on whether class arbitration was permitted. *Id.* at 450-51. Rather than affirming the South Carolina Supreme Court, however, the Court held that the arbitrator, rather than a court, should decide whether this silent contract should be interpreted to permit or prohibit class arbitration. *Id.* at 451-52. Therefore, the Court remanded for further proceedings. *Id.* at 454.

65. On the other hand, there are due process, doctrinal and practical concerns about class arbitration. These concerns are well discussed in Carole J. Buckner, *Due Process in Classwide Arbitration*, 58 FLA. L. REV. 185 (2006); Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DEN. U. L. REV. 301 (2004).

66. This question is discussed in Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration*, 20 OHIO ST. J. ON DISP. RESOL. 451 (2005); Myriam Gilles, *Opting Out of Liability*, 104 MICH. L. REV. 373 (2005); 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 (2005); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 775-78 (2003); Jean R. Sternlight & Elizabeth J. Jenson, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/ Spring 2004, at 75, 75- 76; Robert S. Safi, Note, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV.

Many courts have enforced such agreements.⁶⁷ When a court does so, it may reduce the value of all aggregatable claims to zero.⁶⁸ That is, the claims are not worth pursuing except as part of a class because the process costs of pursuing them individually exceed the expected

1715 (2005); Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677 (2005); Jack Wilson, *No-Class-Action Arbitration Clauses, State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L.REV. 737 (2004); Lindsay R. Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631; Stephanie Smith, Comment, *The Use of Mandatory Arbitration Clauses to Prevent Class Actions: A Problem for Plaintiffs and a Problem for Society*, 2 J. AM. ARB. 129 (2003).

67. See, e.g., *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005); *Johnson v. West Suburban Bank*, 225 F.3d 366, 373-74 (3d Cir. 2000); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005); *Autonation USA Corp. v. Leroy*, 105 S.W.3d 190, 201 (Tex. Ct. App. 2003); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1260-61 (Del. Super. Ct. 2001); *Gras v. Associates First Capital Corp.*, 786 A.2d 886, 892 (N.J. Super. Ct. App. Div. 2001); *Med. Center Cars, Inc. v. Smith*, 727 So.2d 9, 20 (Ala. 1998) (stating that “to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration”); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (stating that “arbitration clauses are not unenforceable simply because they might render a class action unavailable”); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003) (finding arbitration clause “enforceable despite its prohibition on class actions”); *Ranieri v. Bell Atlantic Mobile*, 759 N.Y.S.2d 448 (2003) (stating that “given the strong public policy favoring arbitration . . . and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions . . . is neither unconscionable nor violative of public policy”) (citations omitted); *Strand v. U.S. Bank Nat. Ass'n ND*, 693 N.W.2d 918 (N.D. 2005).

68. Assuming that the per-claim “process costs” (the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal) of pursuing and defending claims in class adjudication and individual arbitration are identical, enforcement of the arbitration agreement reduces the value of claims expected to yield a higher per-claim award in class adjudication than in individual arbitration. Moreover, “class actions may provide significant economies of scale,” Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 753 (2001), so that the per-claim process costs of pursuing claims in class adjudication are lower than in individual arbitration. If this is true, then enforcing the arbitration agreement may also reduce the value of some claims expected to yield a lower per-claim award in class adjudication than in individual arbitration.

recovery. Assuming that enforcement of the arbitration agreement reduces the value of all aggregatable claims held by the plaintiff(s) challenging enforceability to zero, does this make the agreement unenforceable under either the unconscionability or “effectively vindicate” doctrines? Consider unconscionability first.

B. The Unconscionability Doctrine

As emphasized above, a proper application of the unconscionability doctrine involves an assessment of the contract *ex ante*, rather than *ex post*.⁶⁹ In other words, a court should assess the “values exchanged” as of the time the contract was formed, rather than as of a later time, such as the time of a dispute. The *ex ante* approach should prevent courts from finding that an arbitration agreement is unconscionable merely because its enforcement would reduce the value of all aggregatable claims and reduce to zero the value of the particular aggregatable claim held by the plaintiff(s) challenging enforceability. As explained above, the deal that seems to be implicit in most adhesive arbitration agreements is that the consumer or employee receives a better price or wage and greater leverage on small-yet-meritorious claims in exchange for reduced leverage on claims that could lead to a big-dollar jury award.⁷⁰ If the agreement prohibits class adjudication, then an additional term of this implicit deal is “reduced leverage on aggregatable claims.” But this additional term generates even more cost savings to the business than would have been achieved by an arbitration agreement without a prohibition on class adjudication,⁷¹ and some or all of these additional

69. *See supra* Section II.A.

70. *See supra* Section I.A.3.

71. Prohibiting class adjudication may generate cost-savings passed on to adhering parties that exceed the benefits class actions would have conferred on adhering parties. As Professor Chris Drahozal explains,

[C]lass actions too often may not achieve their theoretical benefits. One problem is conflicts of interest within the class. Even more problematic is the now well-recognized conflict of interest between class members and the attorneys representing the class. Precisely because class members frequently have small claims that do not give them much incentive to participate actively in the case, class actions tend to be run by, and for the benefit of, the plaintiffs’ attorneys. Settlements can be too low and come too early, and legal fees can be too high. Additionally, the prospect of immense class liability may create an “intense pressure to settle” on defendants, resulting in what some have called “blackmail settlements.” In either case, the parties, on net, may be better off with no class relief, with

savings are passed on to adhering parties (e.g., consumer and employees) through the process explained above.⁷² The deal implicit in an arbitration agreement with a prohibition on class adjudication becomes: an even better price or wage than would have been achieved by an arbitration agreement without such a prohibition, plus greater leverage on non-aggregatable, small-yet-meritorious claims in exchange for reduced leverage on claims that could lead to a big-dollar jury award and on aggregatable claims.

If there were nothing unconscionable about such a deal at the time it was formed—when there was uncertainty about whether there would be a dispute and, if so, what type of dispute—then the deal does not suddenly become unconscionable upon the occurrence of a dispute that produces aggregatable claims. A proper application of the unconscionability doctrine would not consider just the reduction in the value of the aggregatable claim the plaintiffs turned out to have. It would also consider the increase in the value of the other claims the plaintiffs could have had and the better price or wage the plaintiffs received due to both the arbitration agreement and its prohibition on class adjudication.⁷³ The combination of these factors should, except perhaps in a few rare cases, show that there was no “gross disparity in the values exchanged”⁷⁴ when the arbitration agreement was formed and thus no unconscionability.

Unfortunately, many courts seem to focus on the reduction (or elimination) in the value of the aggregatable claim the plaintiffs turned out to have without considering the increase in the value of the other claims the plaintiffs could have had and the better price or wage the plaintiff received due to both the arbitration agreement and its prohibition on class adjudication. For example, the Alabama Supreme Court said:

This arbitration agreement is unconscionable because it is a contract of adhesion that restricts the Leonards to a forum where the expense of

individuals giving up some deterrence benefits in exchange for reduced dispute-resolution costs (including attorneys’ fees) or reduced overdeterrence.

Drahozal, *supra* note 68, at 741 & 754 (citations omitted).

72. See *supra* Section I.A.

73. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991); *Metro East Ctr. for Conditioning and Health v. Qwest Commc’n*, 294 F.3d 924 (7th Cir. 2002), discussed *supra* note 47.

74. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981).

pursuing their claim far exceeds the amount in controversy. The arbitration agreement achieves this result by foreclosing the Leonards from an attempt to seek practical redress through a class action and restricting them to a disproportionately expensive individual arbitration.⁷⁵

The California Supreme Court recently issued a similar opinion.⁷⁶ Such courts are taking the *ex post* perspective of assessing unconscionability as of the time of the dispute, which is when the plaintiffs seeking a class adjudication would be better off with the right to a class adjudication than they would be lacking that right. By contrast, and to reiterate, a proper application of the unconscionability doctrine involves an assessment of the contract *ex ante*; a court should assess the “values exchanged” as of the time the contract was formed.

75. Leonard v. Terminix Int'l Co., 854 So. 2d 529, 539 (Ala. 2003). “Several courts confronting this issue have been favorably disposed to the view that an arbitration clause that defeats the prospects of class-action treatment in a setting where the practical effect affords the defendant immunity is unconscionable.” *Id.* at 536 (citing Knepp v. Credit Acceptance Corp. (In re Knepp), 229 B.R. 821, 842 (Bankr. N.D. Ala. 1999); Keating v. Superior Court, 645 P.2d 1192, 1207 (Cal.1982), *rev'd* in part and appeal *dismissed* in part on other grounds, Southland Corp. v. Keating, 465 U.S.1 (1984); Rollins, Inc. v. Foster, 991 F. Supp. 1426, 1437 (M.D. Ala. 1998); Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563 (1993); Williams v. Aetna Fin. Co., 700 N.E. 2d 859, 866-67 (Ohio 1998); State of West Virginia *ex rel.* Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002); and Ting v. AT&T, 182 F. Supp. 2d 902, 938-39 (N.D. Cal. 2002) *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003)).

Other recent cases finding prohibitions on class adjudication unconscionable include: Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004), *enforced*, 408 F.3d 592 (9th Cir. 2005); Whitney v. Alltel Commc'n, Inc., 173 S.W.3d 300 (Mo. Ct. App. 2005); Kinkel v. Cingular Wireless, LLC, 828 N.E.2d 812, 820 (Ill. App. 2005) (*appeal allowed*, 839 N.E.2d 1025 (Ill. 2005)).

76. Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76 (Cal. 2005).

We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.” (CIV. CODE, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Id. at 87.

C. *The “Effectively Vindicate” Doctrine*

As explained above, the Supreme Court has held that courts should not enforce agreements to arbitrate when doing so would prevent the prospective litigant from “effectively . . . vindicate[ing] his or her [federal] statutory cause of action.”⁷⁷

This “effectively vindicate” doctrine can be compared to the unconscionability doctrine in the context of arbitration agreements that prohibit class adjudication. Enforcing such an arbitration agreement, as explained above, may reduce the value of all aggregatable claims and may reduce the value of some of them to zero.⁷⁸

This might not often prevent enforceability under the “effectively vindicate” doctrine if courts apply that doctrine in the same (*ex ante*) manner that courts properly apply the unconscionability doctrine.⁷⁹ However, many courts have taken an *ex post* perspective in applying the unconscionability doctrine to adhesive arbitration agreements that prohibit class adjudication,⁸⁰ and it seems even more likely that courts will take an *ex post* perspective in applying the “effectively vindicate” doctrine because doing so finds support in the Supreme Court’s statements of that doctrine.⁸¹ Thus it seems likely that courts will bar enforcement of some adhesive arbitration agreements prohibiting class adjudication on the ground that that prohibition prevents some prospective litigants from “effectively vindicating” their rights by reducing or eliminating the value of some aggregatable claims.

How should a court decide whether a prohibition on class adjudication prevents a prospective litigant, typically the plaintiff, from effectively vindicating her rights? Basically, the court must decide whether the plaintiff has access to justice. Is her individual claim large enough to attract a lawyer, or is there a fee-shifting statute that is likely to do so? If not, does the arbitration agreement permit her to bring the claim in her local small claims court so that she can have access to justice even without hiring a lawyer? Or is the arbitration process as simple and informal as a small claims court so the plaintiff can pursue her individual claim in arbitration without a lawyer? If not, is there an administrative agency that will pursue the claim on her behalf and

77. *See supra* Section II.B.1 at note 54 (quoting *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000)).

78. *See supra* Section III.A.

79. *See supra* Section III.B.

80. *Id.*

81. *See supra* Section II.B.

provide her with the sort of remedy she would have received in class litigation? An affirmative answer to any of these questions should defeat an “effectively-vindicate” challenge to a prohibition on class adjudication.

IV. ARBITRATION COSTS

A. *The Supreme Court Gets It Right*

1. *Randolph*

In *Green Tree Financial Corp.-Alabama v. Randolph*,⁸² the Supreme Court held that the costs of pursuing a claim in arbitration can be a basis for denying enforcement to an arbitration agreement. The plaintiff in *Randolph* bought a mobile home with financing provided by the defendant.⁸³ The plaintiff brought a class action in federal court asserting violations of the Truth in Lending Act.⁸⁴ The defendant moved to compel arbitration based on its arbitration agreement with the plaintiff.⁸⁵

The arbitration agreement in *Randolph* was unusual because it did not say that arbitration would be conducted under the rules of a particular arbitration organization,⁸⁶ such as the American Arbitration Association or the National Arbitration Forum. Those organizations’ rules specify, among other things, the fees parties must pay the organization to file a case in arbitration.⁸⁷ By not incorporating the rules of any particular arbitration organization into the arbitration agreement, the agreement in *Randolph* was silent on the costs of arbitration. To compound this deficiency, the agreement was also silent on who would pay the costs.⁸⁸ By contrast, many other arbitration agreements say something about who will pay, such as that the costs of arbitration shall be shared equally by the parties,⁸⁹ or that the losing party shall pay all costs,⁹⁰ or that the

82. 531 U.S. 79 (2000).

83. *Id.* at 82.

84. 15 U.S.C. § 1601 et seq. (2000).

85. *Randolph*, 531 U.S. at 83.

86. *Id.* at 90 n.6.

87. See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, VAND. L. REV. (forthcoming).

88. *Randolph*, 531 U.S. at 90-91.

89. See, e.g., *Adler v. Fred Lind Manor*, 103 P.3d 773, 785 n.11 (Wash. 2004); *O’Quin v. Verizon Wireless L.P.*, 256 F. Supp. 2d 512, 518 (M.D. La. 2003);

adhering party shall pay up to a certain dollar amount and the business shall pay the rest.⁹¹

The District Court in *Randolph* granted the defendant's motion to compel arbitration but the Eleventh Circuit, relying on the "effectively vindicate" doctrine, reversed.⁹² It "conclud[ed] that the arbitration clause in this case is unenforceable, because it fails to provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration."⁹³

The Supreme Court reversed the Eleventh Circuit, holding that the record "provide[s] no basis on which to ascertain the actual costs and fees to which [Randolph] would be subject in arbitration."⁹⁴ The Court said that "[t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."⁹⁵ Nevertheless, the Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."⁹⁶ The Court placed the burden of proof on future parties asserting cost-based challenges to arbitration agreements.⁹⁷

2. The Unconscionability and "Effectively Vindicate" Doctrines Compared

The Supreme Court got it right in *Randolph*. "[L]arge arbitration costs" could rise to the level that would justify a court in denying enforcement to an arbitration agreement under either the unconscionability doctrine or the "effectively vindicate" doctrine. Consider the unconscionability doctrine first.

Gambardella v. Pentec, Inc., 218 F. Supp. 2d 237, 244 n.5 (D. Conn. 2002).

90. See, e.g., Bellevue Drug Co. v. Advance PCS, 333 F. Supp. 2d 318, 330-31 (E.D. Pa. 2004); Scovill v. WSYX/ABC, Sinclair Broad. Group, Inc., 312 F. Supp. 2d 955, 958-59 (S.D. Ohio 2004); Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 260 (3rd Cir. 2003).

91. See, e.g., Rivera v. Thomas, 316 F. Supp. 2d 256, 260-61 (D. Md. 2004); DeGroff v. Mascotech Forming Techs.-Fort Wayne, Inc., 179 F. Supp. 2d 896, 911 (N.D. Ind. 2001).

92. 178 F.3d 1149 (11th Cir. 1999).

93. *Id.* at 1158.

94. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 n.6 (2000).

95. *Id.* at 91.

96. *Id.* at 90.

97. *Id.* at 92.

If the plaintiffs' costs of pursuing claims under a particular arbitration agreement exceed the costs of pursuing them in litigation then, all other things being equal, enforcing the arbitration agreement lowers the value of those plaintiffs' claims. While an arbitration agreement should not be held unconscionable merely because it reduces the value of a particular plaintiff's claim,⁹⁸ high arbitration costs likely apply to *all* claims by all plaintiffs who are bound by the adhesive arbitration agreement at issue.⁹⁹ Thus high arbitration costs change the deal that seems to be implicit in most adhesive arbitration agreements from one that gives the consumer or employee a better price or wage and greater leverage on small-yet-meritorious claims in exchange for reduced leverage on claims that could lead to a big-dollar jury award,¹⁰⁰ to a deal that reduces the consumer/employee's leverage on all claims. But this reduced leverage generates even more cost savings to the business than would have been achieved by an arbitration agreement that did not require a high-cost arbitration process,¹⁰¹ and some or all of these additional savings are passed on to adhering parties (e.g., consumers and employees) through the process explained above.¹⁰² So the deal implicit in an arbitration agreement with such a requirement becomes: an even better price or wage than would have been achieved by an arbitration agreement that did not require a high-cost arbitration process, in exchange for reduced leverage on all claims.

If there were nothing unconscionable about such a deal at the time it was formed—when there was uncertainty about whether there would be a dispute—then the deal does not suddenly become unconscionable upon the occurrence of a dispute.¹⁰³ A proper application of the unconscionability doctrine would not consider just the reduction in the

98. *See supra* Section II.A.

99. Or at least all *similarly-sized* claims by all plaintiffs who are bound by the adhesive arbitration agreement at issue. Arbitration fees often depend on the size of the claims asserted. *See, e.g.*, Fee Schedule, AAA Commercial Arbitration Rules.

100. *See supra* Section I.A.3.

101. These savings are the result of some claims against the business being deterred by the high-cost process.

102. *See supra* Section I.A.

103. For an all-too-rare case taking the *ex ante* approach in applying the unconscionability doctrine to arbitration fees, *see Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 873 (8th Cir. 2004) (“Under Texas law, we only consider the circumstances at contract formation to determine if a contract is unconscionable, rendering Pro Tech’s current inability to afford the costs of arbitration irrelevant to the conscionability determination.”).

value of the plaintiff's actual and possible claims. It would also consider the better price or wage the plaintiffs received due to both the arbitration agreement and its requirement of a high-cost arbitration process.¹⁰⁴ The combination of these factors should—in some, but not all, cases of high-cost arbitration—show that there was no “gross disparity in the values exchanged”¹⁰⁵ when the arbitration agreement was formed and thus no unconscionability.

High arbitration costs would be analyzed similarly under the “effectively vindicate” doctrine if courts take an *ex ante* perspective in applying that doctrine. Courts have, however, generally taken an *ex post* perspective in applying the “effectively vindicate” doctrine to cases of allegedly high arbitration costs.¹⁰⁶ Under the *ex post* approach, courts should not enforce adhesive arbitration agreements that impose significantly higher costs of pursuing the claim than would be imposed in litigation of that claim because significantly higher costs would prevent the prospective litigant from “effectively . . . vindicate[ing] [his or her] statutory cause of action.”¹⁰⁷

3. Summary and Transition

To recap, the Court in *Randolph* was right to hold that “large arbitration costs” could rise to the level that would justify a court in denying enforcement to an arbitration agreement. The Court was also right to put the burden of proof on the party seeking to show a defense to the enforcement of a contract. Unfortunately, the Court said nothing about what the party seeking to avoid enforcement must show to meet this burden.¹⁰⁸ Lacking guidance from the Supreme Court on this question, most lower courts have gone badly astray.

104. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991), and *Metro East Ctr. for Conditioning and Health v. Qwest Commn's*, 294 F.3d 924 (7th Cir. 2002), discussed *supra* note 46.

105. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981).

106. See Section IV.B.

107. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (emphasis added).

108. *Id.* at 92 (“How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.”).

B. Lower Courts Get It Wrong

1. The Fundamental Error: Looking at Forum Fees in Isolation

The fundamental error of most lower courts, before and after *Randolph*, is that they have looked at one cost of arbitration in isolation, rather than considering the total costs of arbitration. The one cost of arbitration getting much more attention from lower courts than it deserves is the forum fee, the cost of paying the arbitrator and the arbitration organization. The forum fees of arbitration tend to be higher than the forum fees of courts. This is to be expected because courts are subsidized by the taxpayer and do not need parties in litigation to pay the judge or jury. By contrast, parties to arbitration must pay the arbitrator's fee, as well as the administrative costs of the arbitration organization. When the enforceability of an arbitration agreement is challenged based on allegedly high arbitration costs, most lower courts have stacked the deck against arbitration by myopically focusing on forum fees. Instead, courts should consider whether "large arbitration costs"¹⁰⁹ as a whole have, in a particular case, risen to the level that justifies denying enforcement of the arbitration agreement. Rather than looking at forum fees in isolation, courts should look at the plaintiff's total cost of pursuing the claim in arbitration as compared to litigation.

Perhaps the case most responsible for the prevalence of courts looking at forum fees in isolation was *Cole v. Burns International Security Services*,¹¹⁰ an influential D.C. Circuit decision decided a few years before *Randolph*. In the next few years leading up to *Randolph*, other federal circuits and the California Supreme Court followed *Cole*'s mistake of considering only forum fees rather than arbitration costs as a whole.¹¹¹ By contrast, the First Circuit seemed to realize that what

109. *Randolph*, 531 U.S. at 90.

110. 105 F.3d 1465, 1484 (D.C. Cir. 1997) ("[I]f an employee like Cole is required to pay arbitrators' fees ranging from \$500 to \$1,000 per day *or more*. . . in addition to administrative and attorney's fees, is it likely that he will be able to pursue his statutory claims? We think not.") (citation and footnote omitted). *Cole* has been narrowed by *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702 (D.C. Cir. 2001) (employee may be charged reasonable administrative expenses, but not filing fees or arbitrator fees), and *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821 (D.C. Cir. 2001) (*Cole* does not apply to common law claims).

111. *Shankle v. B-G Maintenance Mgmt. of Col., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) ("Assuming Mr. Shankle's arbitration would have lasted an average length of time, he would have had to pay an arbitrator between \$1,875 and \$5,000 to resolve his claims. Mr. Shankle could not afford such a fee, and it is

matters is the total cost of pursuing a claim and observed that “arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court.”¹¹²

Shortly after *Randolph*, the Fourth Circuit improved upon the First Circuit in recognizing that forum fees should not be considered in isolation. In *Bradford v. Rockwell Semiconductor Systems, Inc.*,¹¹³ the Fourth Circuit held:

Although the Cole court framed its concern with fee-splitting partially in terms of the fact that arbitrators’ fees are “unlike anything that [a claimant] would have to pay to pursue his statutory claims in court” because a claimant normally “would be free to pursue his claims in court without having to pay for the services of a judge,” *Cole, 105 F.3d at 1484-85*, we believe that the proper inquiry under *Gilmer* is not where the money goes but rather the amount of money that ultimately will be paid by the claimant. Indeed, we fail to see how a claimant could be deterred from pursuing his statutory rights in arbitration simply by the fact that his fees would be paid to the arbitrator where the overall cost of arbitration is otherwise equal to or less than the cost of litigation in court.¹¹⁴

unlikely other similarly situated employees could either.”) (citation omitted); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (“Because Avnet makes no promises to pay for an arbitrator, employees may be liable for at least half the hefty cost of an arbitration and must, according to the American Arbitration Association rules the clause explicitly adopts, pay steep filing fees (in this case \$2000).”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 765 (Cal. 2000) (“[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.”). The California Supreme Court recently confined *Armendariz* in *Boghos v. Certain Underwriters at Lloyd’s of London*, 30 Cal.Rptr.3d 787, 796 (Cal. 2005).

112. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir.1999); *see also Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).

113. 238 F.3d 549 (4th Cir. 2001).

114. *Id.* at 556. *See also id.* n.5 (“parties to litigation in court often face costs that are not typically found in arbitration, such as the cost of longer proceedings and more complicated appeals on the merits”). At least one court finding an arbitration agreement unenforceable recognized that forum costs should not be considered in isolation. *See Whitney v. Alltel Commc’n, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005).

[T]he Florida court spent all of three sentences rejecting the plaintiffs claim that the costs of arbitration were too prohibitive to vindicate his claim

Unfortunately, despite this point in *Bradford*, many courts continue to make the mistake of divorcing forum fees from arbitration costs as a whole.¹¹⁵

As noted above, rather than looking at forum fees in isolation, courts should look at them as part of the plaintiff's total cost of pursuing the claim. The plaintiff's total cost includes fees charged by the plaintiff's lawyer and expert witnesses, the time the plaintiff devotes to the case, and the cost of delay in receiving a remedy. A costs-based challenge to an arbitration agreement (under either the unconscionability or "effectively vindicate" doctrine) should fail unless the total cost the plaintiff faces in arbitration significantly exceeds the total cost the plaintiff would face in litigation.

This is not likely to be common. More likely, the total cost the plaintiff faces in arbitration will be *lower* than the total cost the plaintiff would face in litigation. As noted above, the empirical evidence indicates that there are process-cost savings derived from arbitration.¹¹⁶ And this stands to reason when one compares the procedural rules of arbitration with those of litigation. When compared with litigation, most arbitration proceedings streamline the entire process: pleadings, discovery, motion practice, trial or hearing, and appeal.¹¹⁷ This streamlined process results in less lawyer time spent on a case and thus lower legal fees. The savings of time and money produced by

based on a finding that the evidence did not establish that the plaintiff would incur prohibitive costs. In so doing, the Florida court focused entirely on the filing fees and hearing fees for arbitration and the fact that the contract provided for reimbursement of filing and hearing fees to the extent they exceeded what court costs would have been if the claim had been resolved in state court; the court did not consider the issue of attorneys fees and other costs.

Id. at 313 (discussing *Hughes v. Alltel Corp.*, No. 03 Civ. 127 (N.D. Fla. Mar. 31, 2004)).

115. See, e.g., *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004); *Cooper v. MRM Inv. Co.*, 367 F.3d 493 (6th Cir. 2004); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 269 (3d Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004), *enforced*, 408 F.3d 592 (9th Cir. 2005) (applying *Armendariz*); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003).

116. See *supra* Section I.C.

117. See the Federal Rules of Civil Procedure with the Commercial Arbitration Rules of the American Arbitration Association. As noted above, empirical studies confirm that reduced process costs are a significant source of the cost-savings businesses derive from arbitration. See *Ware*, *supra* note 9, at 753-55.

streamlined discovery alone may more than offset the higher forum fees in arbitration. Also, the time between the commencement of a case and its disposition is generally lower in arbitration than litigation.¹¹⁸ This means plaintiffs get their recoveries sooner, a pro-plaintiff feature of arbitration to the extent pre- or post-judgment interest rates fall below the relevant time value of money.¹¹⁹

2. The Error of Treating Contingent-Fee Cases Differently

One might object that the previous two paragraphs wrongly assume that the typical consumer or employee plaintiff pays her lawyer by the hour and pays—out of her own pocket—the other costs of litigation, such as court fees, expert witness fees, and the like. In fact, many consumer and employee plaintiffs pay their lawyers through a contingent fee, and the plaintiff's lawyer advances the other costs of litigation with the client's agreement that these advances will be repaid first out of any settlement or judgment proceeds.¹²⁰ Under such an arrangement, does it make sense to say that arbitration's streamlined process results in less lawyer time spent on a case and thus lower legal fees? The Sixth Circuit thinks not. In *Morrison v. Circuit City Stores, Inc.*,¹²¹ it said:

In many, if not most, cases, employees (and former employees) bringing discrimination claims will be represented by attorneys on a contingency-fee basis. Thus, many litigants will face minimal costs in the judicial forum, as the attorney will cover most of the fees of litigation and advance the expenses incurred in discovery. Thus, in many cases it might be concluded that, considering the costs incurred by the employee litigant, there is little or no difference between the expenses of the judicial and arbitral fora—with one important exception. In the arbitral forum, the litigant faces an additional expense—the arbitrator's fee and costs—which are never incurred in

118. See, e.g., David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1572-73 (2005).

119. See, e.g., *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742 (7th Cir. 1988) (Posner, J.) (stating that “pre- and post-judgment interest rates are frequently below market levels when the risk of nonpayment is taken into account”).

120. See *infra* note 133 (quoting *Morrison*). The Model Rules of Professional Conduct permit lawyers to pay the expenses of litigation only for indigent clients. But, no matter who the client, “a lawyer may advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter.” MODEL RULE OF PROFESSIONAL CONDUCT 1.8(e)(1999).

121. 317 F.3d 646 (6th Cir. 2003) (en banc).

the judicial forum.¹²²

This Article argues that, rather than looking at forum fees in isolation, courts should look at the plaintiff's total cost of pursuing the claim. The quote from *Morrison* suggests that this is a false distinction with respect to contingent-fee plaintiffs because, for such plaintiffs, the forum fees *are* the plaintiff's total cost of pursuing the claim.

What *Morrison* misses, however, is that contingent-fee agreements can be written in a variety of ways. They can be written to require the lawyer to advance discovery expenses, but they can also be written to require the plaintiff to pay discovery expenses. They can be written to require the lawyer to advance the forum fees of court, but they can also be written to require the plaintiff to pay the forum fees of court. They can be written to require the lawyer to advance the forum fees of arbitration, but they can also be written to require the plaintiff to pay the forum fees of arbitration.

As the previous paragraph shows, the forum fees of arbitration are no different from the forum fees of court (or from discovery expenses) with respect to whether the contingent-fee plaintiff or her lawyer will pay them. As Professor Drahozal explains:

On the face of it, there is no reason to expect contingent fee contracts to treat arbitration costs any differently than they treat other litigation expenses. One would expect lawyers to advance arbitration costs for their clients, just like any other litigation expense—if the claim is economically viable based on the expected award and the expected total costs of arbitration.

Indeed, anecdotal evidence suggest that this is in fact the case. . . .

Moreover, if the practice [of contingent-fee lawyers advancing arbitration forum fees] is not common now, it may be due to cases like the Sixth Circuit's *Morrison* decision. Cases invalidating arbitration agreements on cost grounds provide a strong disincentive for lawyers to finance arbitration costs, because if the lawyers do so, they may deprive their clients of a possible ground for invalidating the arbitration agreement in court.

At bottom, Public Citizen and the *Morrison* court have it exactly backwards. Arbitration costs do not “severely restrict[], or eliminate[], the advantage a consumer has under the contingency fee system.”

122. *Id.* at 664.

Instead, the contingent fee system provides a mechanism for overcoming possible liquidity and risk aversion constraints due to arbitration costs.

...

Morrison reasoned that contingent fee contracts enable claimants to avoid most if not all upfront costs in litigation, but that in arbitration claimants must pay arbitration costs upfront - regardless of whether they have a contingent fee contract with their attorney. That view incorrectly treats arbitration costs as somehow different from other litigation expenses, when there is every reason to believe that attorneys may be willing to advance arbitration costs the same way they are willing to advance other costs. This fundamental misunderstanding suggest that the Sixth Circuit should revisit its approach to resolving cost-based challenges to arbitration agreements.¹²³

In sum, *Morrison's* distinction between the forum costs of arbitration (which *Morrison* believes plaintiffs must pay) and the forum costs of court and discovery (which *Morrison* believes the plaintiff's lawyer will pay) is misguided. All these costs should be treated the same in a court's analysis because all these costs *could* be advanced by the plaintiff's lawyer or borne directly by the plaintiff. Whether the agreement a particular plaintiff happens to have with her lawyer requires the lawyer to advance some or all of these costs should not matter to a court assessing the enforceability of the arbitration agreement. To the extent courts do make it matter, these courts counter-productively "provide[] a strong incentive for strategic contracting between attorneys and their clients. Attorneys would only agree to advance arbitration costs for clients when they did not intend to challenge the arbitration agreement in court."¹²⁴

In addition to this pragmatic concern, there is a more basic reason why all costs should be treated the same in a court's analysis regardless of whether a particular plaintiff's agreement happens to require her lawyer to advance some costs. This basic reason is that costs borne by the plaintiff's lawyer are passed on to that lawyer's clients, the plaintiffs. Representing plaintiffs is a business and, as emphasized above, whatever affects the costs to businesses tends over time to affect the prices to

123. Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts* VAND. L. REV. (forthcoming).

124. *Id.*

consumers.¹²⁵ Here, the consumers are plaintiffs who consume the services provided by plaintiffs' lawyers.

If, for example, there is an increase in the discovery costs plaintiffs' lawyers incur, for things like traveling to depositions and paying expert witnesses, then plaintiffs' lawyers will pass on some or all of these cost-increases to their customers in the form of higher prices. This price-increase could come in the form of (1) a higher percentage of the settlement or judgment proceeds, or (2) an unwillingness to take cases that the lawyer would have previously accepted. To some extent, the contingent-fee lawyer is an insurer, spreading risk among her clients. Part of the insurance premium each client pays (the percentage of the judgment or settlement) covers the "loss" of discovery costs spent on cases that produce no judgment or settlement.¹²⁶ An increase in the losses insurers must pay tends to put upward pressure on premiums.

In sum, costs to plaintiffs' lawyers are costs to plaintiffs. So a comparison of the total costs the plaintiff faces in arbitration and litigation should include the costs her lawyer has agreed to advance. A court assessing a costs-based challenge to an arbitration agreement should ignore the agreement between the plaintiff and her lawyer. The court should compare the total costs of pursuing the claim in arbitration and litigation, regardless of who (plaintiff or her lawyer) is initially paying those costs. A costs-based challenge to an arbitration agreement (under either the unconscionability or "effectively vindicate" doctrine) should fail unless the total costs of pursuing a claim in arbitration significantly exceed the total costs of pursuing it in litigation.¹²⁷

As noted before the discussion of contingent fees,¹²⁸ this is not likely to be common. More likely, the total cost the plaintiff and her lawyer face in arbitration will be lower than the total cost they face in litigation.¹²⁹ The streamlined process of arbitration results in less lawyer

125. See *supra* Section I.A.1.

126. See, e.g., Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 376 (1998) (citing four functions of contingent fee contracts: (1) expanding access to justice by enabling claimants to finance litigation; (2) providing a source of financial credit; (3) avoiding agency costs due to shirking by lawyers; and (4) "offer[ing] clients a form of legal expense insurance").

127. See Section IV.A.2. for an application of the unconscionability and "effectively vindicate" doctrines in the context of a costs-based challenge to an arbitration agreement.

128. See *supra* Section IV.B.1.

129. *Id.*

time spent on a case¹³⁰ and, for contingent-fee lawyers, time is money because time spent on one case is time that cannot be spent on another case. If arbitration's streamlined process allows a reduction in the per-case time spent by the contingent-fee lawyer, that cost savings is as sure to be passed on to plaintiffs as the cost savings the contingent-fee lawyer would get from reduced out-of-pocket expenses for things like travel to depositions. Therefore, if arbitration has lower process costs, this advantage for arbitration should be reflected in the court's assessment of a costs-based challenge to an arbitration agreement even if the plaintiff has a contingent-fee agreement that requires her lawyer to advance such costs.

V. CONCLUSION

Adhesive arbitration agreements are controversial; their enforcement is opposed by many commentators. Nevertheless, the general enforcement of adhesive arbitration agreements benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties. Those who dispute this are apparently focused on the few consumers and employees who are harmed by enforceable arbitration agreements, that is, the few consumers and employees who have claims that could lead to a big-dollar jury award. In contrast to this myopic focus on the few, a more complete view of adhesive arbitration agreements would consider the majority of consumers and employees who benefit from their enforcement, that is, those who never have a dispute (but benefit from the better price or wage generated by arbitration's lower costs to businesses) and those who have the sort of small-yet-meritorious case that does not attract a lawyer to take the case to court. Fortunately, typical adhesive arbitration agreements are generally enforceable under a proper (*ex ante*) application of the unconscionability doctrine, and are probably enforceable under the "effectively vindicate" doctrine.

While current law poses little threat to the enforceability of typical adhesive arbitration agreements, the same cannot be said of adhesive arbitration agreements that prohibit class adjudication. Such agreements are too-often falling due to several courts taking the narrow *ex post* perspective of considering how the arbitration agreement affects the adhering party (usually the plaintiff), *given the existence of the particular*

130. *Id.*

dispute that gave rise to the litigation,¹³¹ rather than the more complete *ex ante* perspective of considering the arbitration agreement as of the time it was formed. If courts took the *ex ante* perspective on the effects of an arbitration agreement that prohibits class adjudication, they would consider, not just the reduction in the value of the claim the plaintiff turned out to have, but also the increase in the value of the other claims the plaintiff could have had and the better price or wage the plaintiff received due to both the arbitration agreement and its prohibition on class adjudication.

Finally, there is the troubling development of courts holding adhesive arbitration agreements unenforceable simply because they require plaintiffs to pay forum fees higher than those required in litigation. Rather than make this error of treating one cost of arbitration in isolation, courts should reject costs-based challenges unless the total costs of pursuing a claim in arbitration significantly exceed the total costs the plaintiff would face in litigation. Under this standard, most adhesive arbitration agreements should survive costs-based challenges because the streamlined process of most arbitrations will result in process-cost savings for plaintiffs that more than offset the difference in filing fees. And, contrary to the Sixth Circuit's *Morrison* opinion, this point holds even when the plaintiff's lawyer is working for a contingency fee.

131. See *supra* notes 75-76.