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ARBITRATION AMBUSH IN A POLICY POLEMIC

By
Amy J. Schmitz*

“**po·lem·ic** ... Etymology: French *polémique*, from Middle French, from *polemique* controversial, from Greek *polemikos* warlike, hostile, from *polemos* war; perhaps akin to Greek *pelemizein* to shake, Old English *ealfelo* baleful . . . an aggressive attack on or refutation of the opinions or principles of another.”¹

I. INTRODUCTION

The United States Supreme Court and Congress are embattled in a policy polemic over consumer arbitration. This polemic has encompassed questions regarding the delegation to private arbitrators of power to resolve business-to-consumer (“B2C”) disputes. Supreme Court jurisprudence has continued to strengthen arbitral power and strict enforcement of arbitration agreements and awards under the Federal Arbitration Act (“FAA”) over the past thirty years.² Moreover, the Court has generally reached pro-business conclusions despite sending mixed messages regarding the extent of arbitrators’ power and discretion.

In particular, the Court’s most recent arbitration opinions reach pro-business results but arguably conflict with respect to arbitral power. In *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, the Court arguably weakened arbitrator discretion by holding that the arbitrator had exceeded his authority or acted in manifest disregard by ordering class arbitration where the arbitration agreement

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¹ *Polemic Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/polemic> (last visited July 12, 2010).

² Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2011).

was silent on the class relief issue.³ Shortly thereafter, the Court in *Rent-A-Center v. Jackson* supported arbitrator power by reinforcing its prior rulings that narrow judicial review to claims specifically targeting agreements to arbitrate and sanctioning provisions allocating to arbitrators the authority to judge their own jurisdiction.⁴ Nonetheless, both opinions pleased business concerns: hinder class proceedings; stop judicial challenges to enforcement of arbitration contracts.

This jurisprudence seems to have fueled a policy push-back against arbitration in consumer contexts. Consumer protection initiatives once promoted private dispute resolution as means for efficiently settling consumers' claims. Recent congressional initiatives, however, challenge the Supreme Court's pro-arbitration jurisprudence by seeking to ban or limit arbitration in consumer contracts. This can be seen in renewed efforts to enact the Arbitration Fairness Act ("AFA"), which would ban pre-dispute arbitration agreements in consumer, employment, and civil rights contexts.⁵

In addition, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), signed into law on July 21, 2010, has placed arbitration in a firestorm of issues regarding public power and control over private contracts.⁶ Opponents and banking industry groups have denounced Dodd-Frank as creating expensive regulatory fluff in a campaign to take over private business and interfere with freedom of contract.⁷ Dodd-Frank supporters and consumer advocates,

³ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

⁴ *Rent-A-Ctr, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-80 (2010) (upholding the validity of a clause delegating to the arbitrator exclusive authority to decide arbitration agreements' enforceability).

⁵ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); see also *Developments in the Law* —

Access to Courts, Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration, 122 HARV. L. REV. 1170, 1170-81 (2009) [hereinafter *Access to Courts*] (discussing the AFA and critiquing its blanket approach).

⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) [hereinafter *Dodd-Frank*].

⁷ Dave Clarke & Jeff Roberts, *Tea Party Leader Calls for Repeal of Dodd-Frank*, WESTLAW NEWS & INSIGHT, Jan. 5, 2011, available at http://westlawnews.thomson.com/Securities_Litigation/News/2011/01_-

however, welcomed the Act as an engine for much-needed public oversight and consumer protection from rampant abuse of private power.⁸

This public/private debate led to Dodd-Frank provisions that target consumer arbitration as a suspect privatization of consumer claim resolution. In particular, the Act bans enforcement of pre-dispute arbitration clauses in mortgage contracts and with respect to claims under the whistle-blower provisions of the Act.⁹ Next, it calls for the creation of a Consumer Financial Protection Bureau (“CFPB”) to serve as the centralized agency in charge of writing and enforcing various lending and consumer protection regulations, which may include a prohibition or limitations on enforcement of pre-dispute arbitration agreements in consumer financial products and services contracts.¹⁰ Finally, the Act gives the Securities and Exchange Commission (“SEC”) power to limit or prohibit agreements requiring customers of any broker or dealer to arbitrate future disputes arising under federal securities laws.¹¹

These legislative and regulatory initiatives collide with the Supreme Court’s pro-arbitration stance, instigating a battle with arbitration in the front lines of a consumer policy polemic. The Court continues to limit judicial review of

January/Tea_Party_leader_calls_for_repeal_of_Dodd-Frank/ (last visited Jan. 10, 2011) (highlighting opponents’ challenges against the Act, and plans to call for its repeal).

⁸ See Ben Prosser, *New York Consumer Bureau Reaches Out to Wall Street*, N.Y. TIMES, DEALBOOK (Nov. 26, 2010), available at <http://dealbook.nytimes.com/2010/11/26/new-consumer-bureau-reaches-out-to-wall-street/?scp=1&sq=dodd-frank+%22consumer+watchdog%22&st=nyt> (last visited Jan. 10, 2011) (noting consumer advocates’ positivity regarding the Act).

⁹ Dodd-Frank § 1414. The provision amends the Truth in Lending Act (“TILA”) and is codified in 15 U.S.C. § 1639(c) (the Act’s effective date for provisions that do not call for regulations is July 22, 2010).

¹⁰ Dodd-Frank § 1028; see also Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009) (bill that is now the Dodd-Frank Act establishing an agency to regulate consumer financial products and services and authorizing the agency to approve pilot programs for effective disclosure of consumer contract terms); David S. Evans & Joshua D. Wright, *How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products*, 2 BLOOMBERG L. REP.: RISK AND COMPLIANCE 9, 9-14 (Oct. 2009), available at <http://ssrn.com/abstract=1491117> (critiquing the Dodd-Frank Act for advocating broad applications without adequate evidentiary basis).

¹¹ Dodd-Frank § 921 (amending 15 U.S.C. § 78(o) (1934)).

arbitration and support strict enforcement of arbitration agreements. Meanwhile, legislators and policymakers seek to curtail use of arbitration to resolve consumer claims, resulting in a seeming ambush against arbitration clauses. This Article discusses the competing arbitration policies of the Court and legislators, and urges a truce in the policy polemic through adoption of an alternative to all-or-nothing enforcement of arbitration contracts. Instead, companies should remain free to require arbitration in their B2C contracts conditioned on their compliance with clear procedural fairness rules.¹²

Part II of the Article depicts the evolution of arbitration law and courts' enforcement of arbitration agreements leading up to and including the Supreme Court's recent holdings in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* and *Rent-A-Center, West, Inc. v. Jackson*. Part III then discusses the legislative policy shift regarding private resolution of consumer disputes, and highlights the recent consumer protection initiatives that target consumer arbitration. Part IV raises questions regarding the propriety and effects of this arbitration ambush, and offers suggestions for carefully considered reforms that protect consumers without overly impeding beneficial use of arbitration. Part V concludes with a call for consideration of measured regulations that would rescue and revive arbitration from ambush.

¹² I have argued for procedural fairness regulations in lieu of an all-or-nothing approach in the past. See Amy J. Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, 28 BANKING & FIN. SERVICES POL'Y REP. 16, 16-35 (2009), available at <http://ssrn.com/abstract=1548670> [hereinafter Schmitz, *Regulation Rash*] (critiquing the AFA's approach and offering suggestions for procedural fairness regulations); Amy J. Schmitz, *Curing Consumers' Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627-32, 661-86 (2008), available at <http://ssrn.com/abstract=1270827> [hereinafter Schmitz, *Warranty Woes*] (discussing the need for procedural protections in consumer arbitration proceedings); Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37, 37-55 (2007), available at <http://ssrn.com/abstract=1230011> [hereinafter Schmitz, *Deference*] (advancing procedural regulation of arbitration in lieu of precluding arbitration).

II. EVOLUTION OF PRO-ENFORCEMENT ARBITRATION JURISPRUDENCE

Arbitration has had a long history. It emerged during ancient times and became a system for business parties to privately resolve their disputes. Furthermore, it has grown to encompass systems for keeping consumer, employment, and all types of claims out of the public courts. At the same time, courts once suspicious of arbitration now must strictly enforce arbitration agreements under the FAA and United States Supreme Court jurisprudence.

A. *Emergence of Arbitration and its Statutory Scheme*

Arbitration developed as a means for providing private and self-contained dispute resolution that culminates in a third-party determination, independent from the judiciary.¹³ Common law courts' fear of this private power with respect to dispute resolution, however, led courts to stymie enforcement of agreements to arbitrate. This prompted passage of the FAA to mandate specific enforcement of arbitration agreements and limited judicial review of arbitration awards.¹⁴ FAA drafters sought to create a remedial scheme aimed to ensure arbitration's independence from the judiciary.¹⁵

¹³ Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L. J. 667, 676-78 (1927) (emphasizing arbitration's independence, but noting arbitration "can by no means be relied upon as a solution of all litigious matters"); WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS 792-97 (1930) (discussing courts' power struggles with arbitration).

¹⁴ Poor, *supra* note 13, at 674-75 (explaining drafters' insistence that "once the parties have agreed upon arbitration, they must accept the result the arbitrator reaches no matter how obviously and plainly wrong it appears").

¹⁵ See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citing and quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)) (reiterating FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts").

1. Craving and Concern for Arbitration's Independence from the Courts

Arbitration “took its rise in the very infancy of Society” as a private and self-contained process, independent from the public courts.¹⁶ Communities created arbitration systems designed to quickly and efficiently determine disputes in accordance with local norms and customs and to provide private and equitable determinations that contributed to peace preservation in communal contexts.¹⁷ These self-contained arbitration systems served community and judicial needs for efficient, economical, equitable, and private proceedings.¹⁸

Merchant and trade groups are prime examples of communities that have relied on arbitration's function of providing efficient and economical means for adjudicating disputes in accordance with local norms, standards, and rules.¹⁹ For example, the New York Chamber of Commerce immediately established an arbitration system when it was founded in 1768, and continued to operate its independent system during the American Revolutionary War despite the closure of

¹⁶ JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 25 (1918) (quoting JOHN MONTGOMERIE BELL, *TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND* 1 (John Kirkpatrick ed., 2d ed. 1877)).

¹⁷ *Id.* at 22-27 (emphasizing arbitration's special utility); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 144 (1934) (quoting GERARD MALYNES, *CONSUEDO, VEL, LEX MERCATORIA: OR, THE LAW MERCHANT: DIVIDED INTO THREE PARTS, ACCORDING TO THE ESSENTIAL PARTS OF TRAFFICK NECESSARY FOR ALL STATESMEN, JUDGES, MAGISTRATES, TEMPORAL AND CIVIL LAWYERS, MINT-MEN, MERCHANTS, MARINERS AND OTHERS NEGOTIATING IN ALL PLACES OF THE WORLD* 303 (1622)); see also James A.R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357 (2001) (noting communal acceptance of arbitration in modern international sports).

¹⁸ See FRANCES A. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 3-611 (1948); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595, 597-8 (1928); Margit Mantica, *Arbitration in Ancient Egypt*, 12 ARB. J. 155, 155-59 (1957) (noting functions of arbitration as an independent process).

¹⁹ COHEN, *supra* note 16, at 25-38, 71-72, 78; LUJO BRENTANO, *ON THE HISTORY AND DEVELOPMENT OF GILDS AND THE ORIGIN OF TRADE-UNIONS* 33-39 (1870) (noting development of “guild law” in England to preserve liberty from neighboring nobles); Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. Q. 238, 246 (1930) (noting arbitration systems among trade associations).

the public courts.²⁰ Merchant groups valued arbitrators' specialized understanding of commercial issues and industry norms, and informal procedures that fostered continuing business relationships.²¹ Furthermore, arbitration's privacy and self-contained process protected disputants from public exposure and embarrassment of litigation.

As arbitration's popularity grew among trade and business communities, courts began to perceive arbitration as a threat to their power.²² In 1609, Lord Coke stated in *Vynior's Case* the "revocability doctrine," denouncing enforcement of arbitration agreements based on the theory that parties are free to revoke arbitrators' power at any time before they issue an award.²³ This doctrine was legally disingenuous, however, in that it eschewed contract enforcement principles and improperly treated impartial arbitrators as agents subject to the parties' control.²⁴

Courts' distrust of arbitration similarly led to their creation of the "ouster" doctrine to support courts' refusal to enforce agreements to arbitrate. Under this doctrine, courts held that parties could not contractually "oust" courts' jurisdiction.²⁵ This doctrine revealed hostility for arbitration, however, as courts continued to enforce settlement agreements and arbitration awards that had the same "ouster" effects as arbitration contracts.²⁶ The business community

²⁰ William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193, 207-12 (1956).

²¹ COHEN, *supra* note 16 at 71-72; Baum & Pressman, *supra* note 19, at 238, 250.

²² COHEN, *supra* note 16, at 83. Arbitration threatened a significant source of judicial business, as well as judicial jobs linked to the courts' caseloads.

²³ *Vynior's Case*, 77 Eng. Rep. 597 (1609). Lord Coke's dicta is now widely known among arbitration students and scholars, but has gained infamy for its "unsoundness"; COHEN, *supra* note 16, at 126-27.

²⁴ Sayre, *supra* note 18, at 598-607 (discussing "revocability" doctrine).

²⁵ *Kill v. Hollister*, 95 Eng. Rep. 532 (1746); COHEN, *supra* note 16, at 153, 164-70 (discussing "ouster" rule).

²⁶ *See Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) (discussing the confused state of the law before the enactment of the FAA).

responded with proposals for legislation requiring courts to put aside their jealousy of arbitration and enforce arbitration agreements.²⁷

2. Enactment of Arbitration Law to Combat Courts' Distrust

Originally, policymakers enacted international, federal, and state arbitration law intending to target enforcement of arbitration in business and trade contexts. This coincided with arbitration's roots and confronted courts' reluctance to share their power with arbitrators in these coveted contexts. Industry groups therefore created and pushed for such arbitration laws, and legislators enacted the laws with little debate or fanfare.

On the international level, the United States is among the vast majority of countries that have adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). This treaty seeks to insulate arbitration from parochial intrusions and generally mandates strict enforcement of arbitration agreements and awards in accordance with parties' agreements.²⁸ The United States Congress implemented this Convention through Chapter Two of the FAA, and courts have applied this law with a pro-enforcement glaze to promote both arbitration and international comity.²⁹ This has helped

²⁷ Poor, *supra* note 13, at 667, 74-75 (discussing development of 1854 English law to combat judicial distrust of arbitration).

²⁸ ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 68-9 (3d ed. 1999); The United Nations Conference on International Commercial Arbitration, June 10, 1958, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, arts.1-16, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf (last visited Mar. 20, 2011) [hereinafter New York Convention]; United Nations Comm'n on Int'l Trade Law ("UNCITRAL"), Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Feb. 26, 2010) (noting 144 countries had adopted the New York Convention).

²⁹ Federal Arbitration Act, 9 U.S.C. §§ 201-208 (implementing the New York Convention), §§ 301-307 (implementing the Panama Convention); Kenneth F. Dunham, *International Arbitration is Not Your Father's Oldsmobile Convention*, 2 J. DISP. RESOL. 323, 326-31 (2005) (discussing importance of the treaty and parties' power to dictate arbitration procedures under the New York Convention).

propel the popularity of arbitration in international contexts, and elevate United States courts as venues for enforcing arbitration agreements and awards.³⁰

United States courts similarly enforce domestic arbitration agreements under Chapter One of the FAA³¹ and its state counterpart, the Uniform Arbitration Act (“UAA”).³² These laws require courts to specifically enforce domestic arbitration agreements, and they augment this mandate with provisions for liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators if parties cannot do so by agreement, limited review of arbitration awards, and treatment of awards as final judgments.³³ Furthermore, courts apply FAA review standards narrowly in order to protect the independence and finality of arbitration.³⁴ At the same time, the Supreme Court consistently has held that the FAA preempts states from singling out arbitration for special treatment or otherwise hindering the enforcement of arbitration in contracts affecting interstate commerce. This leaves states with little power to regulate consumer arbitration provisions beyond application of general contract defenses.³⁵

³⁰ See Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233-255 (2006) (noting choice of United States law and venue in international arbitration contexts).

³¹ 9 U.S.C. §§ 1-16.

³² UNIF. ARBITRATION ACT, 7 U.L.A. § 1 (2000). The UAA is model legislation that nearly all states have adopted to require the same basic enforcement for local arbitration agreements and awards beyond the purview of the FAA. *Id.*

³³ See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124-35 (2002), available at <http://ssrn.com/abstract=943528> (discussing the FAA’s pro-efficiency remedial provisions).

³⁴ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (emphasizing that an arbitrator’s decision will be set aside “only in very unusual circumstances”); *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 649 (7th Cir. 2001) (refusing to vacate an award despite a record “suggest[ing] that the arbitrators lacked the professional competence required to resolve the parties disputes”).

³⁵ See *Doctor’s Assocs. Inc. v. Casarotto*, 517 U.S. 681 (1996) (finding the FAA limits challenges to arbitration agreements to general contract defenses, and therefore preempted state notice requirements that singled out arbitration clauses for special treatment); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding the FAA preempted Alabama law limiting consumer arbitration); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA applies in federal and state court).

B. Courts' Strict Enforcement of Arbitration

The Supreme Court's pro-enforcement reading of the FAA sanctions arbitrability of statutory rights unless Congress expressly precludes arbitration, and otherwise limits courts' scrutiny of arbitration agreements to general contract defenses such as lack of assent, unconscionability, or fraud.³⁶ Many courts then apply these general defenses in narrow and formalistic fashions.³⁷ In addition, courts heed the Court's holdings in cases, such as *Buckeye Check Cashing, Inc. v. Cardegna*, that require courts to narrowly limit their scrutiny of arbitration provisions to only those challenges that target the enforceability of an arbitration agreement itself, and do not merely implicate the enforceability of the underlying contract.³⁸ Moreover, the Court's holding in *Rent-A-Center, West, Inc. v. Jackson* has further limited this scrutiny by sanctioning contract provisions allowing arbitrators to determine the validity and scope of their own jurisdiction.³⁹

1. Arbitrability of Statutory Rights

The Supreme Court has held that statutory claims may be arbitrated unless the statute expressly precludes arbitration or there is very strong evidence that arbitration would severely hinder the statute's purpose. It therefore has condoned arbitration of a broad range of statutory claims extending to discrimination,

³⁶ See *Casarotto*, 517 U.S. at 687 (applying preemption).

³⁷ See Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006), available at <http://ssrn.com/abstract=1270836> [hereinafter Schmitz, *Unconscionability*] (discussing formalistic application of contract defenses).

³⁸ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (holding the illegality defense at issue was for the arbitrator and not the court because the defense did not target the arbitration clause); see also Richard L. Barnes, *Buckeye, Bull's-Eye, or Moving Target: The FAA, Compulsory Arbitration, and Common-law Contracts*, 31 VT. L. REV. 141, 174-75, 184 (2006) (discussing the narrowing impact of *Buckeye*).

³⁹ *Rent-A-Ctr, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-80 (2010) (holding clause in employment contract delegating to the arbitrator exclusive authority to decide arbitration agreements' enforceability was a valid delegation under the FAA).

consumer lending, and securities fraud.⁴⁰ Furthermore, courts have uniformly held that arbitration of statutory claims does not constitute state action subject to constitutional due process requirements.⁴¹ Most courts also construe arbitration clauses broadly to cover tort and statutory claims regardless of whether a clause gives express notice of such coverage.⁴²

The majority of courts have therefore held that statutory consumer claims such as Magnusson Moss Warranty Act (“MMWA”) claims may be subject to arbitration.⁴³ Courts have found MMWA claims are arbitrable even in cases where the applicable arbitration provision requires consumers to arbitrate outside of their home jurisdictions or requires consumers to pay administrative and filing fees in asserting small dollar claims.⁴⁴ In addition, courts often deny consumers’ claims that high arbitration initiation costs have an undue “chilling effect” on their statutory rights.⁴⁵

⁴⁰ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485-86 (1989) (overruling prior opinion to hold securities claims arbitrable); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-92 (2000) (finding TILA claims may be subject to binding arbitration under the FAA).

⁴¹ See Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1714-23, 1745-62 (2006) (arguing conclusion that private arbitration does not involve state action with respect to arbitral class actions).

⁴² See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 624-26 (1991) (finding statutory age discrimination statute could be subject to arbitration, explaining that arbitration clauses are little more than specialized forum selection clauses).

⁴³ See Schmitz, *Warranty Woes*, *supra* note 12, at 627-32, 641-50 (2008) (discussing courts’ holdings with respect to the arbitrability of MMWA claims).

⁴⁴ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1147-50 (7th Cir. 1997); *and* *Petition for Writ of Certiorari, Hill v. Gateway 2000, Inc.*, 1997 WL 33561488 (7th Cir. 1997) (rejecting the Hills’ claim that they should not be compelled to arbitrate their MMWA claims regarding a \$4,000 computer because the International Chamber of Commerce (ICC) rules incorporated in the form arbitration clause required the Hills to pay upwards of \$4,000 in arbitration costs). *But see* *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1337-41 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of same clause).

⁴⁵ See, e.g., *James v. McDonald’s Corp.*, 417 F.3d 672, 675-80 (7th Cir. 2005) (rejecting cost-based challenge of arbitration agreement).

It is difficult for consumers to satisfy the burden set by the Supreme Court in *Green Tree Fin. Corp. v. Randolph* of proving prohibitive arbitration costs.⁴⁶ In that case, the Court found that the consumer claimants failed to prove that their inability to pay arbitration costs would preclude vindication of their consumer protection claims under the Truth in Lending Act (“TILA”) because they had not established their lack of sufficient financial resources and liability for all arbitration costs.⁴⁷ The Court considered arbitrators’ discretion to limit or excuse fees for consumers unable to pay costs, and seemed to give credence to the lender’s offer at the oral arguments to pay costs if the costs proved to be prohibitive.⁴⁸

That said, some consumers have been successful in challenging enforcement of an arbitration agreement by showing that the high costs of arbitration are likely to hinder the consumers from vindicating their statutory rights.⁴⁹ Nonetheless, consumers who are successful in challenging arbitration of their statutory claims may nonetheless face costs and burdens of asserting statutory claims in court while arbitrating the tort and contract claims stemming from the

⁴⁶ *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000) (finding that although Randolph had provided information regarding high AAA arbitration fees and costs, it was not clear that she would bear these costs and that she could not pay them).

⁴⁷ *Id.*

⁴⁸ *See id.*; Oral Argument of *Green Tree Fin. Corp. v. Randolph* at 21 (US. Oct. 3, 2000), http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-1235.pdf.

(Although it is laudable for businesses to offer to pay such costs, such post-hoc offers allow them to avoid changing their contracts *ex ante*, thus reserving the benefits of such assistance to only those who expend resources and time to challenge cost provisions); *see also, James*, 417 F.3d at 675-80 (emphasizing that consumers would have to show that arbitration was truly more expensive than litigation in terms of overall costs); *Bailey v. Ameritrust Mtg. Co.*, 346 F.3d 821, 823-24 (8th Cir. 2003) (finding cost challenge of arbitrability was for the arbitrator under the parties’ agreement); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847-48 (N.D. Ill. 2001) (stating that the court would reconsider its ruling denying enforcement of an arbitration clauses due to high costs if the defendants agreed to pay these costs).

⁴⁹ *See Ball v. SFX Broad., Inc.*, 165 F. Supp. 2d 230, 238-240 (N.D.N.Y. 2001) (finding employee had satisfied the burden of proving prohibitive arbitration costs she could not bear).

same facts.⁵⁰ They also may have to arbitrate statutory claims against some, but not all, of the parties who may bear responsibility for the claims.⁵¹ This may leave the consumers in a procedural morass laden with costs and hassles.

2. Common Law Contract Defenses

The chief challenges of arbitration provisions are based on general contract defenses such as lack of assent, unconscionability, no consideration, or fraud.⁵² As noted, these challenges are only for the court to decide if they target an arbitration clause.⁵³ Furthermore, some courts have been formalistic in their applications of these defenses, while others have been more receptive to these claims in consumer and employment contexts. This has left unclear and uncertain case law, which generates litigation and decreases efficiency benefits arbitration seeks to provide.⁵⁴

⁵⁰ *Browne v. Kline Tysons Imports, Inc.*, 190 F. Supp. 2d 827, 828-33 (E.D. Va. 2002) (allowing litigation of MMWA claims, but ordering arbitration of TILA and state statutory and common law claims arising out of car sale); *Ball*, 165 F. Supp. 2d at 238-240 (requiring arbitration of the employee's non-statutory claims although she had prevailed on her cost-based challenge on the statutory claims).

⁵¹ *See Ex parte Jones*, 686 So. 2d 1166, 1166-68 (Ala. 1996) (finding there was no agreement to arbitrate between consumers and the non-signatory to the arbitration agreement); *Ex parte Martin*, 703 So. 2d 883, 886-88 (Ala. 1996) (holding arbitration clause in loan agreement between buyers and sellers did not apply to manufacturer); *but see Ex parte Gates*, 675 So. 2d 371, 374-75 (Ala. 1996) (enforcing arbitration against a consumer on behalf of non-signatory manufacturer based on broad arbitration clause).

⁵² *See Walton v. Rose Mobile Homes, L.L.C.*, 298 F.3d 470, 478 (5th Cir. 2002) (emphasizing that "courts can consider individual claims of fraud or unconscionability in arbitration agreements as they would in any other contract").

⁵³ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (solidifying the "separability" concept limiting courts' consideration to attacks on an arbitration clause itself); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-449 (2006) (emphasizing that the separability rule is a matter of federal law that precludes the court from deciding defenses going to a contract as a whole, including claims that the contract was illegal).

⁵⁴ *See Rent-A-Ctr, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-80 (2010) (exemplifying years of litigation over an arbitration clause).

a. *Unconscionability*

The most common challenges of arbitration clauses are based on unconscionability. This general contract defense generally requires consumers to prove that an arbitration agreement is both substantively and procedurally unconscionable.⁵⁵ Procedural unconscionability focuses on whether the bargaining process was unduly one-sided, whereas substantive unconscionability asks whether the terms of the provision are oppressive or otherwise unfair.⁵⁶ These claims have been successful, but the doctrine's malleable standards leave consumers with limited and uncertain results on their unconscionability claims.⁵⁷ Moreover, the Supreme Court is currently considering *AT&T Mobility L.L.C. v. Concepcion*, which questions how far state courts may go in using unconscionability to strike arbitration clauses.⁵⁸ The Court will determine whether the FAA preempts a state from applying unconscionability to condition enforcement of arbitration agreements in consumer cases involving small dollar claims on the consumers' freedom to proceed in class-wide arbitration.⁵⁹

Consumers' unconscionability challenges of an arbitration clause generally begin with a showing that the company provides the challenged arbitration clause

⁵⁵ *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3rd Cir. 2003) (noting both elements of unconscionability under most state contract law).

⁵⁶ *See id.* at 266 (finding "take-it-or-leave-it" contract prepared by the employer without negotiation by the employees was procedurally unconscionable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (finding one-year limitation on claims under the arbitration clause in an employment contract was substantively unconscionable because it deprived employees of the benefit of the continuing violations doctrine available under a state employment discrimination statute).

⁵⁷ *See Schmitz, Unconscionability, supra* note 37, at 73-90 (exploring development, evolution, and functions of unconscionability, and critiquing courts' formulaic application of unconscionability).

⁵⁸ *AT&T Mobility, L.L.C. v. Concepcion*, No. 09-893 (U.S. filed Jan. 25, 2010). Oral arguments were on November 9, 2010, and an opinion should be forthcoming by spring 2011. Attorneys and academics have stated that the outcome of this case could have significant impact on the future of consumer arbitration.; *see Kimberly Atkins, Future of Arbitration in Supreme Court's Hands*, *Lawyers USA*, Nov. 15, 2010 at 299 (highlighting arguments).

⁵⁹ *See AT&T Mobility, L.L.C. No. 09-893* (U.S. filed Jan. 25, 2010).

without negotiation.⁶⁰ The challenges then seek to prove that the clause contains oppressive terms such as “carve-outs” for the sellers’ option to litigate, cost and fee allocations that overly burden consumers, inconvenient arbitration hearing locations, and preclusions of statutory remedies.⁶¹ A court may then find the whole arbitration clause, or only certain provisions, unconscionable.⁶² If the court finds all or part of the clause unconscionable, the court may refuse to order arbitration or sever the offending procedures before directing the parties to arbitrate.⁶³

Some courts are more receptive to these unconscionability challenges, and this has been particularly true in states such as California.⁶⁴ For example, the court in *Ting v. AT&T Corp.* held that a confidentiality provision in AT&T’s Consumer Services Agreement was unconscionable under California law due to concerns that the clause would allow AT&T to hide its transgressions.⁶⁵ The court in that case emphasized that AT&T’s routine use of this clause allowed it to potentially prevent seven million Californians from obtaining information regarding discrimination claims against the company, including evidence consumers would need to prove patterns of discrimination or intentional misconduct. The confidentiality clause also provided AT&T undue advantages in gathering knowledge on how to

⁶⁰ See *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (describing adhesion contracts).

⁶¹ See CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS*, 113-14 (2002) (listing suspect terms and citing cases supporting and denying these claims).

⁶² *Harold Allen’s Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779, 781, 785 (Ala. 2002) (finding that selection of a provision giving consumer no opportunity to select arbitrator was fundamentally unfair).

⁶³ See *id.* (severing the unconscionable provision and affirming the court’s right to appoint an arbitrator).

⁶⁴ See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692-94 (Cal. 2000) (holding contract requiring employees to arbitrate wrongful termination and other employment claims unconscionable under California contract law); *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 442-44 (Ct. App. 2004) (voiding an arbitration clause in an employment contract due to the unconscionability of the clause’s cost-sharing and “carve-out” provisions).

⁶⁵ *Ting v. AT&T Corp.*, 319 F.3d 1126, 1133, 1149–52 n.16 (9th Cir. 2003) (the secrecy provision stated, “[a]ny arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award.”).

negotiate its form contracts and control claims.⁶⁶

However, most courts have been hesitant to strike arbitration provisions as unconscionable.⁶⁷ In *Tillman v. Commercial Credit Loans, Inc.*, for example, the court denied the consumers' challenge of an arbitration provision in their loan agreements although the provision subjected the consumers to high arbitration and appeal costs and precluded class relief.⁶⁸ The court rejected the trial court's findings that the arbitration provision was unduly one-sided, and stymied low income consumers' access to remedies by requiring them to assert their claims individually before arbitrators with average daily rates of \$1,225.⁶⁹ The court reasoned that litigation would likely cost more than arbitration overall, and class action waivers are generally enforceable.⁷⁰

b. Lack of Assent, Consideration, and Misrepresentation

Other contract defenses such as lack of assent or consideration, and misrepresentation remain available for challenging arbitration clauses. Although they can sometimes be successful, these claims are very narrow and generally difficult to establish. Furthermore, consumers usually face an uphill battle in making these claims due to many courts' applications of classical contract

⁶⁶ *Id.* at 1152 (the court's holding may have been the impetus for AT&T re-writing its confidentiality provision); *Id.* at n.16; *see also* *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) (holding confidentiality provision in arbitration agreement unconscionable); *McKee v. AT&T Corp.*, 191 P.3d 845, 858-59 (Wash. 2008) (holding the same provision unconscionable, highlighting concerns that the confidentiality provision augmented repeat player advantages).

⁶⁷ *See, e.g.*, *Fleetwood Enters., Inc v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (denying unconscionability challenge to an arbitration agreement); *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 963-65 (Ala. 2003) (enforcing a consumer's duty to arbitrate warranty, fraud, breach, and other claims); *Green Tree Fin. Corp. v. Lewis*, 813 So. 2d 820 (Ala. 2001) (denying unconscionability challenge to arbitration clause by illiterate consumer); *Garcia v. Wayne Homes, L.L.C.*, 2002 Ohio 1884 (App. 2002) (denying unconscionability challenge based on risk of prohibitive arbitration costs).

⁶⁸ *Tillman v. Commer. Credit Loans, Inc.*, 629 S.E.2d 865, 868-80 (N.C. Ct. App. 2006).

⁶⁹ *Id.* at 868-82.

⁷⁰ *Id.* at 868-74.

principles and endorsement of form terms as means for fostering efficiencies companies may pass on to consumers through lower prices and better quality goods and services.⁷¹ Courts therefore have enforced pre-printed form terms in papers sent with bills, product packaging, and “click-wrap” e-provisions accessible through links in contracts formed over the Internet.⁷²

For example, the court in *Hill v. Gateway 2000, Inc.* enforced an arbitration clause located in purchase terms buried among the papers that came with a computer the Hills bought over the phone.⁷³ The court emphasized in finding valid assent that it is the consumers’ duty to read form terms and that strict enforcement of form terms fosters efficient contracting.⁷⁴ Furthermore, the court upheld the arbitration clause although it precluded class relief and curtailed the Hills’ right to recover attorney fees under the MMWA.⁷⁵

Courts have applied this same reasoning to find assent to arbitration clauses in cellular phone service contracts where consumers must accept the clauses or cancel the services.⁷⁶ Courts also have enforced arbitration clauses contained in the packaging of products consumers did not purchase but received as gifts.⁷⁷ Furthermore, courts have rejected challenges of arbitration clauses that automatically become effective unless the recipient proactively opts out or otherwise disputes the clause within a stated time.⁷⁸ In all these cases, courts

⁷¹ See Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1515-20 (2007) (discussing tensions between objective and subjective enforcement theories); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 435-51, 485-87 (2002) (explaining why electronic contracts promote efficiency and are not adhesion contracts).

⁷² See Alces, *supra* note 71, at 1521-24 (discussing the expanding world of contracting practices).

⁷³ *Hill v. Gateway 2000, Inc.*, 105 F. 3d 1147, 1147-50 (7th Cir. 1997).

⁷⁴ *Id.* at 1148-50 (stating that “approve-or-return” provisions such as that in *Hill* make consumers better off “as a group”).

⁷⁵ *Id.*

⁷⁶ *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 704-706 (S.D. Ill. 2005).

⁷⁷ *Westendorf v. Gateway 2000, Inc.*, 2000 WL 307369 *1 (Del. Ch. Mar. 16, 2000) (enforcing arbitration clause in the box with a computer she received as a gift).

⁷⁸ *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108-1110 (9th Cir. 2002).

seemingly condone the illusory nature of consent to form agreements and change provisions that have become the norm in consumer and employment contexts.

At the same time, courts also are prone to deny lack of consideration claims under classical notions of contract. Most courts find that arbitration provisions are supported by adequate consideration if they are mutual or the arbitration clause is one of many promises in a contract.⁷⁹ Nonetheless, consumers sometimes prevail on such claims where they can show that a clause is non-mutual or heavily one-sided.⁸⁰ Still, many courts will strive to find other contract provisions or circumstances that constitute sufficient consideration to uphold these arbitration clauses.⁸¹

Fraud and misrepresentation claims also meet very limited success.⁸² As is true with all arbitration clause challenges, the claims must target the arbitration provision and not the contract as a whole.⁸³ Furthermore, fraud claimants bear a heavy burden in proving that the contract drafter intentionally or recklessly made material misrepresentations about the arbitration that the claimants relied on in accepting the arbitration provision.⁸⁴ It is generally not sufficient to claim that a seller's failure to disclose an arbitration clause impinged the consumers' rights.⁸⁵

⁷⁹ *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 808 (7th Cir. 2003) (emphasizing that consideration need not lie in the arbitration provision itself where the initial contracts allow for subsequent changes).

⁸⁰ *See Arnold v. United Co. Lending Corp.*, 511 S.E.2d 854, 858-62 (W. Va. 1998) (holding arbitration provision in consumer loan contract unconscionable where form provision allowed lender to seek foreclosure and collection actions in court).

⁸¹ *See Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341-44 (Ky. Ct. App. 2001) (denying consumers' challenge of an arbitration provision in a financing contract that allowed the lender to litigate collection and foreclosure suits, emphasizing that courts almost uniformly reject such challenges).

⁸² *See, e.g., In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756-58 (Tex. 2001) (challenging arbitration based on fraud, along with unconscionability, duress, and revocation).

⁸³ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that fraud in the inducement is an arbitrability question for the court unless it goes directly to the arbitration clause).

⁸⁴ *See Firstmerit Bank, N.A.*, 52 S.W.3d at 758.

⁸⁵ *Id.* at 752-53, 758-59 (denying consumers' fraud challenge of an arbitration addendum to a mobile home sales agreement based on seller's nondisclosure); *but see Prudential Ins. Co.*

3. Recent Supreme Court Reinforcement of Arbitration Contracts

Supreme Court pronouncements over the past thirty years have created substantive federal law insisting on strict enforcement of arbitration contracts under the FAA. The Court also has systematically narrowed judicial review of arbitration challenges to those specifically targeting arbitration clauses. Most recently, the Court in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.* and *Rent-A-Center v. Jackson* further fueled an overall pro-enforcement policy toward arbitration contracts even if it impedes class relief or allows arbitrators to determine their own jurisdiction.⁸⁶

a. *Stolt-Nielsen's Stance on Class Arbitration*

In recent years, concerns have heightened regarding the power of arbitration agreements to squash class action rights. Courts in California, for example, have become especially vigilant in holding class action waivers unenforceable in consumer contracts where they are likely to hinder statutory or small claims.⁸⁷ Courts have found that such effective exculpatory clauses are unconscionable under state law.⁸⁸

This has prompted arbitral institutions such as the American Arbitration Association (“AAA”) to develop rules for class arbitration, thereby allowing for enforcement of arbitration without denying individuals’ rights to join together to

v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (breaking from the majority to require express agreement to arbitrate statutory claims).

⁸⁶ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Rent-A-Ctr, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-80 (2010).

⁸⁷ *See Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. Sup. Ct. 2003) (holding class action waiver unenforceable where it targeted small consumer claims).

⁸⁸ *See, e.g., id.*; *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. Sup. Ct. 2007) (holding class action waiver in arbitration agreement unenforceable under California law).

save time and money in asserting their similar claims in class proceedings.⁸⁹ Furthermore, the United States Supreme Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle* delegated to arbitrators the determination of whether an arbitration agreement allows for class-wide arbitration.⁹⁰ In the wake of these developments, arbitrators began ordering class proceedings as long as the parties' arbitration agreement does not expressly preclude class proceedings.

The parties in *Stolt-Nielsen* were operating on this canvas. In that case, customers of large shipping companies sought to assert class arbitration on their antitrust claims relying on their standard "charter party" contracts requiring arbitration in New York.⁹¹ After the dispute arose, the parties selected arbitrators and asked them to determine whether their arbitration agreement allowed for proceedings under the AAA's class arbitration rules in light of their stipulation that the contract was "silent" and there was "no agreement" on that issue.⁹² The arbitrators decided that the agreement allowed for the class proceedings because the evidence did not show "intent to preclude" it.⁹³ They nonetheless stayed the proceedings pending appeal of their determination. After the Court of Appeals reversed the District Court's holding that the arbitrators' decision was in "manifest disregard" of the law, the United States Supreme Court granted *certiorari*.⁹⁴

The Supreme Court reversed the Court of Appeals decision, and Justice Alito in a five to three decision held that the parties could not be compelled to participate in class proceedings.⁹⁵ Justice Alito concluded that the arbitration panel had "imposed its own conception of sound policy" and exceeded its authority in finding that the sophisticated commercial parties involved in the action intended by

⁸⁹ Supplementary Rules for Class Arbitrations, AMERICAN ARBITRATION ASSOCIATION (2010), <http://www.adr.org/sp.asp?id=21936>.

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

⁹¹ *Stolt-Nielsen S.A.*, 130 S. Ct. 1758.

⁹² *Id.* at 1765-67.

⁹³ *Id.* at 1769 n.7.

⁹⁴ *Id.* at 1766-67 (Justice Sotomayer taking no part in the decision).

⁹⁵ *Id.* at 1776-77.

their silence to allow for class arbitration.⁹⁶ Instead, Justice Alito opined that class proceedings would dramatically alter the nature of arbitration by hindering efficiency and secrecy of the process.⁹⁷ In doing so, his opinion reversed presumed allowance for class arbitration proceedings and announced federal substantive law precluding class relief unless parties show clear intent for its allowance.

The opinion left unanswered questions regarding the viability of the “manifest disregard of the law” standard for vacating arbitration awards. It also called into question the *Bazze* plurality opinion’s designation of arbitrators to determine whether agreements allow for class arbitration.⁹⁸ In addition, Justice Alito’s opinion also left open whether an arbitration agreement that is silent with respect to class arbitration may nonetheless allow for class proceedings in contexts not addressed in this case.⁹⁹ Furthermore, courts have struggled post-*Stolt Nielsen* in deciding the extent to which they may use state contract law or public policy to interpret or strike class arbitration waivers, let alone sever the waivers to order arbitration.¹⁰⁰

⁹⁶ *Stolt-Nielsen S.A.*, 130 S. Ct. at 1769-77.

⁹⁷ *Id.* at 1776-77. Justice Alito seems to assume that bilateral arbitrations are confidential, but that is only true to the extent that the parties agree to confidentiality standards in their arbitration contract. See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212-30 (2007) (discussing distinctions between privacy and confidentiality in arbitration).

⁹⁸ *Stolt-Nielsen S. A.*, 130 S. Ct. at 1768-72 (declining to decide if the “manifest disregard” exists and a non-statutory ground for vacating arbitration awards, and explaining that the *Bazze* opinion finding that the arbitrator and not the court should determine whether an arbitration agreement allows for class arbitration was merely a plurality opinion).

⁹⁹ *Id.*

¹⁰⁰ See *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 132-39 (2d Cir. 2010) (holding that *Stolt-Nielsen* did not preclude the court from holding the class waiver unconscionable, but it did bar the court from severing the waiver to enforce arbitration because the parties have not expressly agreed to arbitration); *Mathias v. Rent-A-Ctr., Inc.*, 2010 WL 3715059, at *5 (E.D. Cal. Sept. 15, 2010) (holding that *Stolt-Nielsen* did not require that the FAA preempts state contract interpretation principles derived from policy); *Fisher v. Gen. Steel Domestic Sales, LLC*, 2010 WL 3791181, at *1-4 (D. Colo. Sept. 22, 2010) (holding an arbitrator can determine whether a contract allows for class arbitration, but finding that the inquiry under *Stolt-Nielsen* must focus on whether the contract expressly or impliedly authorizes class claims).

Accordingly, *Stolt-Nielsen's* arguably pro-arbitration opinion is likely to foster inefficient litigation about arbitration. The opinion also has led some courts to strike arbitration clauses entirely where they otherwise may have severed offending class waivers to nonetheless order arbitration.¹⁰¹ Furthermore, the Court's opinion in *AT&T Mobility L.L.C. v. Concepcion* could have a significant impact on the future of class-wide arbitration. As noted above, the Court will soon provide its opinion on whether the FAA preempts a state court from using unconscionability to condition enforcement of an arbitration clause on preserving consumers' ability to join together in class-wide arbitration proceedings.¹⁰²

b. Rent-A-Center's Enhancement of Arbitrators' Power

Pursuant to *First Options of Chicago, Inc. v. Kaplan* and its progeny, a court must consider parties' claims going to the scope or validity of an arbitration agreement unless the parties "clearly and unmistakably" delegate those questions to the arbitrators.¹⁰³ This means that courts presumptively consider parties' contract defenses to enforcement of arbitration agreements. These defenses are generally "gateway" questions of arbitrability for the court, as opposed to questions directed to the underlying contract as a whole.¹⁰⁴

In *Rent-A-Center v. Jackson*, however, the Supreme Court opened the doors to reversing that presumption by endorsing enforcement of delegation clauses.¹⁰⁵ In that case, an employee sought to assert his discrimination claims against Rent-A-Center in court despite an arbitration agreement that gave the arbitrator "authority to resolve any dispute relating to the interpretation,

¹⁰¹ See *Fenterstock*, 611 F.3d at 132-39 (striking entire arbitration clause); *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 18-24 (Mo. 2010) (finding that *Stolt-Nielsen* requires courts to strike arbitration clauses entirely and allow parties to proceed to litigation where courts find a class waiver unenforceable under contract law).

¹⁰² See *AT&T Mobility, L.L.C. v. Concepcion*, No. 09-893 (U.S. filed Jan. 25, 2010).

¹⁰³ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

¹⁰⁴ *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-78 (2010).

¹⁰⁵ *Id.* at 2776-85.

applicability, enforceability or formation” of the agreement. He claimed that the arbitration agreement was unconscionable because it was adhesive and contained an onerous fee-sharing provision, and that this unconscionability claim was a gateway question of arbitrability for the court.¹⁰⁶ The Ninth Circuit Court of Appeals agreed, but the United States Supreme Court reversed that determination.

In a five to four decision, the Court held that the unconscionability challenge was for the arbitrator to determine under the provision in the parties’ arbitration agreement that delegated authority to the arbitrator to determine questions of the arbitration agreement’s enforceability.¹⁰⁷ Writing for the Court, Justice Scalia opined that this delegation narrowed courts’ authority to only consider challenges to that delegation, and not arguments directed toward the arbitration provision as a whole. The employee therefore had to assert his unconscionability challenge in arbitration, thereby allowing the arbitrator to determine his or her own power to decide the discrimination claims.¹⁰⁸

This decision has made it difficult for parties to get a judicial determination of their arbitration agreement challenges. It has now become routine for companies to include delegation provisions such as that in *Rent-A-Center* in their standard arbitration clauses, and it requires creative lawyering to craft challenges that strike at the delegation provision instead of the arbitration clause as a whole.¹⁰⁹ Furthermore, the Court’s endorsement of such delegation clauses triggers deferential review of the arbitrator’s determination of arbitrability challenges.¹¹⁰ This adds an extra layer of insulation for companies’ use of arbitration, and may hinder consumers’ impetus to even attempt to challenge onerous arbitration provisions.

¹⁰⁶ *Id.* at 2776-78.

¹⁰⁷ *Id.* at 2776-81.

¹⁰⁸ *Id.* at 2778-81.

¹⁰⁹ *Muhammad v. Advanced Servs., Inc.*, 2010 WL 3853230 (W.D. Tenn. Aug. 24, 2010) (holding that employee’s challenge to the arbitration agreement went to the arbitrator under a delegation provision contained in that agreement).

¹¹⁰ *Amway Global v. Woodward*, 2010 WL 3927661 (E.D. Mich. Sept. 30, 2010).

What's more, the opinion's pro-delegation stance conflicts with *Stolt-Nielsen* to the extent the Court in that case took away the arbitrator's power by overriding the arbitrator's determination allowing for class proceedings. The two opinions are nonetheless consistent to the extent they reach pro-business results. *Rent-A-Center* stopped consumers from challenging enforcement of the arbitration agreement in court; *Stolt-Nielsen* stopped the shipping customers from joining forces to assert their statutory claims as a class.

III. AMBUSH ON ARBITRATION OF CONSUMER CLAIMS

Initially, private means for resolving claims were en vogue even in consumer and employment contexts. Private dispute resolution was touted as allowing for amicable, efficient and relatively inexpensive access to remedies and claim settlement. In the current public/private power polemic, however, there has been an about-face, and new legislative initiatives target enforcement of arbitration agreements in these uneven bargaining contexts. Furthermore, these initiatives indicate a policy pushback to the Supreme Court's pro-arbitration jurisprudence.

A. *Early Push for Private Dispute Resolution*

Consumer activism became a means for political protest as abolitionists boycotted slave-made goods during the Civil War period, and protestors acted collectively in refusing to purchase Japanese silk during World War II.¹¹¹ Activism was a public act, and consumers advocated for change through public actions. As warranty and consumer protection laws developed, however, individuals' disputes became private concerns. Individual consumers shifted their focus from public protesting, to using consumer protection legislation in bringing private claims

¹¹¹ LAWRENCE B. GLICKMAN, *BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA* 31-33, 187-245 (2009) (chronicling the history and development of consumer activism in the United States).

against sellers and manufacturers. Consumer concerns focused on simply obtaining remedies for their own accord, and private dispute resolution offered attractive avenues for such endeavors.

Meanwhile, arbitration gained a positive reputation as a chief private dispute resolution mechanism capable of easing court congestion and allowing for less costly and more efficient claims resolution.¹¹² By the 1960s, some states implemented compulsory arbitration of small claims. For example, Pennsylvania adopted a system for requiring arbitration to settle all claims under \$2,000, which led to monetary and time savings for consumers and courts.¹¹³

In the 1970s, President Jimmy Carter proposed consumer protection legislation that included a consumer protection agency similar to that now to be constituted under Dodd Frank.¹¹⁴ These proposals included arbitration or other alternative dispute resolution programs as means for consumers to cheaply and efficiently obtain remedies without clogging the courts. Furthermore, these initiatives reflected a positive attitude toward such private resolution of consumers' B2C disputes. Although the proposals never became law, they passed the House or Senate five times in seven years.¹¹⁵ Dodd-Frank now gives life to the consumer

¹¹² Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 183-87 (1965) (emphasizing the benefits of arbitration and discussing the Pennsylvania program in particular).

¹¹³ *Id.*

¹¹⁴ See, e.g., Consumer Protection Act, H.R. 6437, 95th Cong. (1977); Consumer Protection Act, H.R. 6118, 95th Cong. (1977); Consumer Protection Act, H.R. 702, 95th Cong. (1977); Consumer Protection Agency Act, H.R. 2709, 94th Cong. (1975); Consumer Protection Act, H.R. 1266, 94th Cong. (1975); Consumer Protection Act, H.R. 1183, 94th Cong. (1975); Consumer Protection Act, H.R. 13163, 93d Cong. (1974); Consumer Protection Act, H.R. 2336, 93d Cong. (1973); Consumer Protection Act, H.R. 564, 93d Cong. (1973); Consumer Protection Act, H.R. 21, 93d Cong. (1973); Consumer Protection Agency Act, H.R. 14, 93d Cong. (1973) (all exemplifying bills with respect to these consumer protection initiatives).

¹¹⁵ See Mark Green, *How the Business Lobby Beat the Consumer Protection Bill*, CHI. TRIB., Mar. 5, 1978, at B1, available at <http://pqasb.pqarchiver.com/chicagotribune/access/618806242.html?FMT=ABS&FMTS=ABS:AI&type=historic&date=Mar+5%2C+1978&author=Mark+Green&pub=Chicago+Tribune+%281963->

agency, but targets instead of supports increased use of arbitration for resolution of consumers' claims.

B. Growing Concerns Leading to Proposed Changes

From 1970 to present, the discussions regarding arbitration have changed and debate has escalated about the propriety of enforcing pre-dispute arbitration clauses in B2C contracts. Proponents of strict arbitration enforcement advance arbitration as a means for fostering efficiency by saving parties and courts time and money in resolving disputes. Furthermore, they argue that companies contain dispute resolution costs by using pre-dispute arbitration clauses in their contracts, and pass this savings to individuals through lower prices and better products. Studies also indicate that individuals fare quite well in arbitration proceedings, and some arbitration administering institutions require companies to abide by protocols or rules that seek to protect procedural fairness for consumers and employees who must arbitrate their claims under the companies' contracts.¹¹⁶

Commentators and policymakers seeking to ban pre-dispute arbitration clauses in B2C contexts argue that these clauses rob consumers of their rights to judicial recourse, and unfairly advantage corporate "repeat players" who routinely include arbitration clauses in their form consumer contracts.¹¹⁷ They add that

Current+file%29&edition=&startpage=B1&desc=How+the+business+lobby+beat+the+consumer+protection+bill (last visited Apr. 20, 2011).

¹¹⁶ See *JAMS Consumer Arbitration Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness*, JAMS, July 15, 2009, <http://www.jamsadr.com/consumer-arbitration/> [hereinafter JAMS Fairness Standards] (last visited Apr. 27, 2011); *Statement of Ethical Principles for American Arbitration Association, an ADR Provider Organization*, AMERICAN ARBITRATION ASSOCIATION, <http://www.adr.org/sp.asp?id=22036> (last visited May 3, 2007) [hereinafter AAA Statement of Ethical Principles]; See also W. Mark C. Weidemaier, *Arbitration and the Inviduation Critique*, 49 ARIZONA L. REV. 69, 87-91 (2007) (discussing how providers may insist that companies abide by their due process protocols or rules).

¹¹⁷ 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, 637 (1996) (critiquing companies' use of arbitration clauses in contracts with consumers and

companies use these clauses to evade statutory regulations, bar class actions, and shield the public from information regarding corporate improprieties. Critics of arbitration emphasize that arbitration clauses are especially problematic when consumers' claims involve statutory violations such as those dealing with health or safety.¹¹⁸ Moreover, these arbitration clauses usually bind consumers who rarely read the clauses, let alone understand what the clauses mean or how the clauses may hinder consumer claims.¹¹⁹

These adhesive realities of consumer arbitration led the AAA to create a National Consumer Disputes Advisory Committee (Advisory Committee), which promulgated the 1998 Consumer Due Process Protocol (Protocol).¹²⁰ Drafters of the Protocol expected that companies and arbitration providers would voluntarily follow the Protocol's "shoulds," which include clear notice of arbitration clauses, provision of information regarding the arbitration process, preservation of consumers' access to small claims court, and measures ensuring reasonable costs and hearing locations for consumers.¹²¹ Many arbitration providers have

employees); Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 633 (2001) (critiquing arbitration of employment claims); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1410-14 (1996) (critiquing industries' use of arbitration provisions); Teri J. Dobbins, *The Hidden Costs of Contracting: Barriers to Justice in the Law of Contracts*, 7 J. L. SOC'Y 116, 116-18 (2005) (discussing lower-income individuals' disadvantages in bargaining and seeking contract remedies).

¹¹⁸ See Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225 (1998) (suggesting legislative regulation of consumer, employment, and franchise arbitration); see also Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 704, 704-712, 754 (1999) (discussing how "arbitration privatizes the creation of law"); see also Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 313-15, 371 (2005) (discussing form arbitration agreements' potential to privatize dispute resolution).

¹¹⁹ See Charles L. Knapp, *Opting Out or Copping Out? An Argument for strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, at 101-18 (2006) (recognizing lack of true assent and the dominance of form documents in consumer contracts).

¹²⁰ *Consumer Due Process Protocol*, NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE, April 17, 1998, <http://www.adr.org/sp.asp?id=22019> [hereinafter Protocol].

¹²¹ *Id.*

promulgated procedural fairness standards or special rules for consumer arbitration that comply with the Protocol's "shoulds."¹²² Furthermore, some attorneys have encouraged companies to comply with such standards in adopting arbitration provisions in their consumer contracts.¹²³

Nonetheless, not all companies have implemented these Protocols and criticisms of consumer arbitration have escalated. In 2009, arbitration providers such as the AAA were so concerned with complaints regarding arbitration of consumer debt collection actions that they ended or suspended their administration of this type of arbitration.¹²⁴ Furthermore, fairness concerns regarding arbitration clauses in uneven bargaining contexts led Congress to bar enforcement of arbitration requirements in active duty military members' consumer credit contracts and in motor vehicle franchise contracts.¹²⁵ Congressional concerns about

¹²² See JAMS Fairness Standards, *supra* note 116 (noting fairness rules JAMS follows); AAA Statement of Ethical Principles, *supra* note 116 (also providing for fairness standards).

¹²³ Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, in 12th Annual Consumer Financial Services Institute 51-52 (PLI Corp. Law & Practice Course, Handbook Series No. 1165, 2007), WL 1591 PLI/Corp 35 ("My message to clients: Draft a fair clause!"); Christian Bruce, *Consumer Credit – Arbitration: Neutrality of Arbitrators Needs Scrutiny, Attorney says, Calling for More Discovery*, 68 U.S. L. WK. 2095 (1999) (noting Kaplinsky's advice that clients adopt balanced arbitration provisions and allow consumers to choose the administrator in order to ward off repeat-player bias claims).

¹²⁴ See *Notice on Consumer Debt Collection Arbitrations*, American Arbitration Association, <http://www.adr.org.sp.asp?id=36427> (last accessed Aug. 24, 2010); *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debt*, Hearing Before the Domestic Policy Subcomm. of the Oversight and Gov't Reform Comm., 111th Cong. 6 (2009), available at <http://judiciary.house.gov/hearings/pdf/Naimark071025.pdf> (testimony of Richard W. Naimark on behalf of the AAA stating AAA's moratorium and offering suggestions for improving fairness of consumer arbitration).

¹²⁵ National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a) (codified at 10 U.S.C. §987 (2006)) (making arbitration clauses unlawful in consumer credit contracts with military); Motor Vehicle Franchise Contract Act, § 11028, Pub. L. No. 107-273, 116 Stat. 1758 (codified at 15 U.S.C. § 1226 (2002)) (limiting enforcement of agreements to arbitrate motor vehicle franchise disputes to post dispute, written contracts, and requiring written explanations for any arbitration awards).

consumer arbitration also prompted hearings questioning the fairness of consumer arbitration.¹²⁶

At the same time, reports of companies' abuses of arbitration clauses has led to continual reintroduction in Congress of the Arbitration Fairness Act ("AFA"), which would amend the FAA to bar enforcement of pre-dispute arbitration agreements in consumer, employment, and franchise contracts, and any disputes arising under a statute protecting civil rights.¹²⁷ The AFA also would reverse the United States Supreme Court's "separability" ruling, which directs courts to consider only questions going to the validity or scope of an arbitration clause itself. The AFA would therefore require that courts determine arbitration agreement challenges regardless of whether a challenge specifically targets the arbitration provision.¹²⁸

¹²⁶ *The Subcommittee on Commercial and Administrative Law, Hearing on "Mandatory Binding Arbitration Agreements: Are They Fair for Consumers,"* 110th Cong. 69 (2007), available at <http://judiciary.house.gov/hearings/printers/110th/36018.PDF>; see also Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCI. MONITOR, July 16, 2007, <http://www.csmonitor.com/2007/0716/p13s01-wmgn.html> (discussing lack of consent and onerous terms in consumer arbitration clauses and Congressional hearings regarding the fairness of arbitration).

¹²⁷ The AFA of 2009, H.R. 1020, 111th Cong. (2009). Rep. Johnson recently reintroduced the bill in the House of Representatives with more than 35 cosponsors. *Rep. Johnson Seeks to Strengthen Consumer, Employee Rights*, Feb. 12, 2009, available at http://www.house.gov/apps/list/press/ga04_johnson/2009_02_12_arbitration_fairness_drop_s.html (noting optimism for passage of the bill due to momentum and 35 original cosponsors) (last visited Feb. 14, 2009). Campaigns for its passage have begun. See, e.g., Pete Mackey, *The Arbitration Fairness Act of 2009 – Get Behind It*, Feb. 10, 2009, INJURY BOARD BLOG NETWORK <http://mobile.injuryboard.com/miscellaneous/the-arbitration-fairness-act-of-2009-get-behind-it.aspx?googleid=256974>. *But see* Matt Masich, *Arbitration Changes Brewing in Congress*, 7 LAW WEEK COLORADO, at 12 (April 4, 2009) (quoting and citing comments by Amy Schmitz to the reporter regarding the AFA, including a comment that Congress may not focus on the AFA this year due to "bigger fish to fry.").

¹²⁸ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). *But see*, *Developments in the Law— Access to Courts, Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1151, 1170-81 (2009) [hereinafter *Access to Courts*] (discussing the Act and critiquing its blanket approach); The Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th Cong. (2007) (primarily sponsored by Sen. Russ Feingold (D-WI) and Rep. Hank Johnson (D-GA), but never passed).

Proposals for the AFA are accompanied by a rote list of “findings” that “most” consumers have no choice but to accept arbitration clauses when they make purchases and that arbitration undermines public law.¹²⁹ The AFA findings also state that arbitration providers “are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business,” and arbitrators are given “near complete freedom to ignore the law and even their own rules.”¹³⁰ The findings add that companies impose arbitration provisions “that deliberately tilt the systems against individuals” by eliminating statutory remedies, banning class actions, and requiring individual to arbitrate far from their homes. The findings also denounce courts for upholding “egregiously unfair mandatory arbitration clauses.”¹³¹ These findings are not accompanied by empirical evidence or other evidentiary support.

C. *Possible Demise of Arbitration Under the Dodd-Frank Act*

The 884-page Dodd-Frank Act will “streamline nearly every aspect of the American financial industry,” and has been touted as “the largest financial industry reform package” since the Securities Exchange Act of 1934.¹³² The Act generally adds oversight provisions and other regulations to existing laws such as the TILA and Securities Exchange Act of 1934, and creates the new CFPB.¹³³ It also establishes a wide array of rules and regulatory powers that impact nearly every aspect of financial products or instruments that affect consumers.

¹²⁹ The Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (stating findings in Section 2).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Cody Vitello, *The Wall Street Reform Act of 2010 and What it Means for Joe & Jane Consumer*, 23 *Loy. CONSUMER L. REV.* 99, 100 (2010) (giving summary of changes to existing agencies).

¹³³ *Id.* See also, Linda Singer, et al., *Breaking Down Financial Reform*, 14 *J. CONSUMER & COM. L.* 2 (2010) (parsing Dodd-Frank’s provisions).

This Article will not discuss all of these provisions, many of which have garnered media attention because they address financial institution mistakes that led to the near economic meltdown. Instead, this Article focuses only on the often-overlooked provisions that target arbitration clauses. The Article also proceeds with caution in its discussion of Dodd-Frank in light of recent calls by Republican leaders and financial industry lobbyists to repeal the Act. Some opponents of the Act also plan to challenge the law as an unconstitutional delegation of power to regulators not subject to proper judicial review.¹³⁴

Nonetheless, Dodd-Frank already has had immediate impact with no need for further regulations with respect to arbitration provisions in mortgage contracts.¹³⁵ The Act amended the TILA to ban pre-dispute arbitration provisions in mortgages, reflecting the previously mentioned distrust of arbitration for debt related disputes.¹³⁶ This also carves out a class of TILA claims that otherwise may be arbitrated in accordance with the Supreme Court's holdings.¹³⁷ Dodd-Frank also bars enforcement of pre-dispute arbitration agreements with respect to claims under the whistle-blower provisions of the Act.¹³⁸

The remainder of Dodd-Frank provisions impacting arbitration relies on further agency action. The first is the provision giving the CFPB's broad responsibility to conduct studies, hold hearings, and establish regulations limiting or barring enforcement of pre-dispute arbitration clauses in contracts between consumers and financial product or service providers.¹³⁹ That said, it is unclear if and when the CFPB will take action with respect to pre-dispute arbitration clauses.

¹³⁴ See Clarke & Roberts, *supra* note 7 (highlighting challenges against the Act as unconstitutional and calls for its repeal).

¹³⁵ Dodd-Frank Act § 1414, to be codified at 15 U.S.C. §1639(c) .

¹³⁶ See *supra* note 124 and accompanying text (discussing the AAA moratorium on consumer debt collection arbitrations).

¹³⁷ *Supra* note 40 and accompanying text (noting the Court's holding).

¹³⁸ Dodd-Frank § 1414. The provision amends TILA and is to be codified at 15 U.S.C. § 1639(c) (effective July 22, 2010, for provisions that do not call for regulations).

¹³⁹ Dodd-Frank Act § 1028.

This is due to not only calls for Dodd-Frank's repeal but also the especially heated challenges to the naming of a director to head the Bureau.¹⁴⁰

As of this Article's completion, no CFPB director has yet been named, and some have voiced concern that there will still be no director in place by July, 2011, when several federal agencies are scheduled to transfer powers to the new Bureau.¹⁴¹ The problem is that the CFPB cannot issue any new regulations with respect to arbitration until after a director is confirmed and the necessary powers are transferred to the Bureau.¹⁴² Furthermore, once a director is in place, the Bureau is expected to focus on more pressing concerns than arbitration such as establishing tougher consumer lending disclosure requirements.¹⁴³

At the same time, the CFPB will have to take cautioned steps in promulgating any preclusion or regulation of pre-dispute arbitration clauses in consumer financial contracts. First, the Bureau must conduct a formal study of arbitration involving these consumer contracts and report the findings to Congress.¹⁴⁴ The CFPB then may create the regulations "in the public interest and for the protection of consumers, and may not restrict consumers' rights to agree to arbitration post-dispute."¹⁴⁵ Furthermore, these regulations will be subject to the usual Administrative Procedures Act ("APA") public comment rules and may

¹⁴⁰ See Clarke & Roberts, *supra* note 7 (noting challenges for the CFPB).

¹⁴¹ See Protes, *supra* note 8 (noting challenges Republicans and financial industry lobbyists plan to launch against the CFPB and whomever President Obama nominates to head the bureau); Damian Paletta & Victoria McGrane, *U.S. Seeks Chief for Financial Consumer Agency*, Wall. St. J., Dec. 30, 2010, available at <http://online.wsj.com/article/SB10001424052970204204004576050120167058068.html> (last visited Jan. 10, 2011) (noting concerns and difficulties in naming a director).

¹⁴² See Singer *supra* note 133, at 2-10 (noting powers and steps to be taken for it to begin making rules and regulations); Paletta & McGrane, *supra* note 141 (noting need for director to issue certain new rules).

¹⁴³ See Paletta & McGrane, *supra* note 141 (discussing the CFPB's priorities, which will include creation of simplified credit card and mortgage disclosures); Dave Clarke, *Analysis: Consumer Chief Delay Could Hobble New Agency*, REUTERS, Sept. 7, 2010, available at <http://www.reuters.com/article/2010/09/07/us-financial-regulation-consumer-analysis-idUSTRE6864BC20100907> (reporting on the delay to name a CFPB Director).

¹⁴⁴ Dodd-Frank Act § 1028(a) (failing to clarify who must conduct the study, how it must be done, or the scope of what it must cover).

¹⁴⁵ *Id.* at § 1028(b). (leaving unclear what these standards mean).

apply only to new contracts entered into 180 days after their effective date.¹⁴⁶ It would therefore be surprising, if not impossible, for any arbitration regulations to have real impact before 2012 or 2013.

Finally, the Dodd-Frank Act also amends the Securities Exchange Act of 1934 to give the SEC power to “prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.”¹⁴⁷ This is somewhat of a sleeping giant, in that it has not received publicity but it could have serious impact on how investors resolve disputes with brokers and dealers.

Under this provision the SEC has power to put an end to the now universal use of pre-dispute contract clauses that require investors and anyone working or dealing in the securities industry to assert their claims in binding arbitration proceedings.¹⁴⁸ The Financial Industry Regulatory Authority (“FINRA”), which regulates securities firms doing business in the United States, generally administers all of these arbitrations.¹⁴⁹ FINRA has a roster of nearly 7,000 arbitrators and arbitrates cases in 72 locations throughout the United States, and in London and Puerto Rico. It also is quasi-public to the extent that it is subject to SEC oversight.¹⁵⁰ Accordingly, SEC arbitration clause exclusions or other regulations

¹⁴⁶ *Id.* at § 1028(c).

¹⁴⁷ *Id.* at § 921(a) (amending 15 U.S.C. § 78(o) (1934)).

¹⁴⁸ See Rew Robert Goodenow, *Securities Arbitration- - The Supreme Court Resolves the Issue of Enforceability of Mandatory Arbitration Clauses in Broker-Investor Contracts: Shearson/American Express, Inc. v. McMahon*, 73 IOWA L. REV. 449, 449 (1988).

¹⁴⁹ Financial Industry Regulatory Authority, *Arbitration & Mediation*, About FINRA Dispute Resolution, <http://www.finra.org/ArbitrationMediation/AboutFINRADR/Overview> (last visited Jan. 5, 2011); FINRA, *About the Financial Industry Regulatory Authority*, <http://www.finra.org/About> (last visited Jan. 5, 2011).

¹⁵⁰ *About the FINRA Dispute Resolution*, *supra* note 149.

pursuant Dodd-Frank would impact not only all those involved in the securities industry, but also the mammoth FINRA arbitration program.

IV. ADDRESSING CLASHING POLICIES THROUGH MEASURED REGULATIONS

The Supreme Court and Congress have been pursuing clashing policies with respect to consumer arbitration: The Court is reinforcing a pro-enforcement agenda while Congress is considering regulations and legislation barring enforcement of pre-dispute arbitration clauses in B2C contexts. The Court also seems to support pro-business conclusions while Congress has become more sympathetic to pro-consumer proposals for limitations on arbitration. This has instigated a polemic regarding consumer protections with arbitration caught in the crossfire. It is time to call a truce to prevent an unwarranted ambush against arbitration agreements.

The use of pre-dispute arbitration clauses in B2C contracts is not all bad or all good. There are valid concerns about consumer arbitration and some companies do abuse use of pre-dispute arbitration clauses. As noted above, some companies use these clauses to hide their transgressions and impede consumers' access to remedies on their statutory and other claims. This has generated consumers' negative attitudes toward companies' heavy-handed use of arbitration clauses and form contracts. Consumers' angry postings on Internet "blogs" further augment this distrust of companies' contracts and reveal frustrations with form terms.¹⁵¹

Such negativity suggests reason for concern. Furthermore, it harms consumer confidence and the overall market regardless of whether it is

¹⁵¹ See Consumer Focus Group Notes, conducted by Amy J. Schmitz, Denver, Colo., Nov. 18, 2006 (notes on file with author) [*hereinafter* Consumer Focus Group] See (recounting instances when salespersons said terms were not subject to any alteration); Victoria Pynchon, *The Fine Print: Sprint's Arbitration Clause*, Negotiation Blog, <http://www.negotiationlawblog.com/arbitration/the-fine-print-sprints-arbitration-clause> posted on July 7, 2007 (last visited Jul. 31, 2007) (reporting company's representative's response to a request to see the contract terms).

warranted.¹⁵² This negativity, combined with courts' uncertain applications of contract defenses to void arbitration provisions, instigates consumers' continual challenges of arbitration provisions. This litigation then clogs the courts and hinders arbitration's purported efficiency benefits.¹⁵³

However, it is unwise to ambush arbitration clauses by barring them under the AFA or through all-or-nothing regulations promulgated by the CFPB and SEC. Reports of arbitration's negative impacts on consumers may be flawed. Instead, evidence suggests that consumers may fare better in arbitration than in litigation.¹⁵⁴ For example, a 2009 study of AAA consumer arbitrations found that consumers were successful in 53.3% out of 301 arbitrations studied and recovered an average of \$19,255, or 52.1% of the damages they sought in those arbitrations.¹⁵⁵ There is need for more comparison statistics for B2C litigation, but the data overall nonetheless suggests that consumers generally attain satisfactory results in arbitration proceedings.¹⁵⁶

¹⁵² Consumers lament general distrust and helplessness against companies' form contracts and arbitration clauses. See Consumer Focus Group, *supra* note 151. But see Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 204-215 (2006) (highlighting conflicting evidence regarding arbitration's "lawlessness").

¹⁵³ See *Rent-A-Ctr, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-80 (2010); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *Walton v. Rose Mobile Homes, L.L.C.*, 298 F.3d 470, 478 (5th Cir. 2002) (each discussing courts' unpredictable application of contract defenses and other challenges of arbitration clauses).

¹⁵⁴ See Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1054-75 (2009) (questioning Public Citizen's report concluding that arbitration is bad for consumers); Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster than Litigation – Conducted for U.S. Chamber Inst. For Legal Reform*, Apr. 2005, at 6, available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf> (last visited May 22, 2009) (indicating that among those who lost, 40% still said they were moderately to highly satisfied with the process).

¹⁵⁵ Searle Civil Justice Inst. Task Force on Consumer Arbitration, *Consumer Arbitration Before the American Arbitration Assoc. Preliminary Report*, SEARLE CIVIL JUSTICE INST/SEARLE CIVIL JUSTICE INST., at 68-87 (Mar. 2009) (reporting findings). Although the study also found that business claimants succeeded in 83.6% of their cases, this does not necessarily indicate bias for companies because their claims were straight-forward nonpayment claims while consumers usually assert more murky warranty claims.

¹⁵⁶ See *The Federal Arbitration Act: Is the Credit Card industry Using it to Quash Legal Claims? Hearings Before the Subcommittee on Commercial and Administrative Law of the*

In addition, many companies draft arbitration clauses for their consumer contracts that comply with the Protocol, and providers often promulgate rules safeguarding fairness in consumer proceedings.¹⁵⁷ The AAA's consumer rules, for example, cap arbitrator fees for claims of \$75,000 or less at \$250 for Desk Arbitration or Telephone Hearing and \$750 per day for In Person Hearings.¹⁵⁸ Furthermore, the AAA rules cap consumers' arbitrator fees at \$125 for claims that do not exceed \$10,000 and \$375 for claims exceeding \$10,000 but not \$75,000.¹⁵⁹

Opponents of pre-dispute arbitration clauses respond to this evidence with arguments that parties can enjoy arbitration's cost savings and efficiency benefits through simply using post-dispute arbitration agreements. However, post-dispute agreements are rare in consumer cases, and companies cannot rely on cost savings based on hopes consumers will agree to arbitrate post-dispute.¹⁶⁰ This impedes companies from pricing products or otherwise passing along cost savings from arbitration programs. Moreover, most companies have no interest in pursuing post-dispute arbitration in B2C contexts. The AFA and possible regulations barring arbitration in consumer financial product contracts would therefore lead to elimination of B2C arbitration proceedings and their potential benefits for many individuals and companies.

Still, the Supreme Court has been unduly heavy-handed in its strict enforcement of arbitration agreements. The Court's pro-enforcement and lasses

House Committee on the Judiciary, 111th Cong., 1st Sess. (2009) (testimony of Christopher Drahozal) (acknowledging need for comparison statistics for B2C litigation).

¹⁵⁷ Searle, *supra* note 155, at 70-87.

¹⁵⁸ Am. Arb. Ass'n, *Consumer Arbitration Costs*, <http://www.adr.org/sp.asp?id=22039> (last visited Mar. 19, 2011) (rules effective Sept. 15, 2005; fees effective Jan. 1, 2010).

¹⁵⁹ *Id.* The AAA consumer rules also shift payment of administrative fees to companies, and cap these fees for claims not exceeding \$75,000.

¹⁶⁰ Others also have argued that the AFA approach of barring enforcement of pre-dispute arbitration clauses in broad and ill-defined categories was over- and under-inclusive, and that it may be more beneficial to legislate procedural reforms. *See, e.g., Recent Proposed Legislation, Arbitration – Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees – Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007), 121 HARV. L. REV. 2262, 2267-68 (2008) (critiquing the Act's broad scope and approach).

faire attitude has failed to acknowledge lack of consent and sometimes flawed procedural fairness in arbitration where uneven bargaining contexts are involved. Furthermore, uncertainty in the case law has left consumers and companies wondering when arbitration programs will be enforceable.¹⁶¹

The Supreme Court and Congress both seem to be going too far – in opposite directions. Instead, arbitration policies should allow for pre-dispute arbitration clauses in consumer contracts, but condition their use on compliance with procedural fairness rules. This more measured regulatory approach should clarify and build on the “shoulds” the Protocol now suggests. In particular, regulations should include requirements with respect to the following:¹⁶²

- *Notice*: Companies should adequately alert consumers about a required arbitration process, and provide transparency by clearly and concisely stating in their contracts how consumers can file claims and where they can find further resources. This should include contact information for the designated arbitration providers, and list any fees a consumer must pay in order to file claims.

- *Balanced Arbitrator Selection*: The FAA requires a baseline degree of arbitrator neutrality. However, regulations should go beyond this baseline to ensure consumers have an equal voice in arbitrator selection, instead of the mere veto power that they often have under companies’ B2C contracts. Consumers should have power to choose an arbitrator from a list or database of arbitrators who have received an accreditation after completion of training and compliance with strict disclosure requirements.

- *Contained Costs*: Although the overall cost differential of arbitration versus litigation is unclear, some companies’ arbitration clauses may impose high front-end filing and administration costs that hinder individuals from bringing claims. Mandatory

¹⁶¹ *See id.* (also noting how courts lack resources to address technological issues underlying many enforcement issues regarding e-contracts).

¹⁶² These suggestions are discussed in greater detail in Schmitz, *Regulation Rash*, *supra* note 12, at 16-35 (discussing my proposal for a “top ten” for procedural regulations applicable to consumer arbitration in lieu of the AFA’s proposed ban on enforcement of pre-dispute arbitration clauses in consumer contracts).

fairness regulations should preclude this, and establish filing fee caps similar to those under the AAA's consumer arbitration rules discussed above.¹⁶³

- *Adequate Discovery*: Lack of adequate discovery can be especially problematic in consumer warranty cases involving statutory violations. For example, a consumer's warranty case may depend on company interoffice memoranda to prove company management's knowledge regarding a defective product, but limited or uncertain discovery in arbitration may hinder the consumer's ability to obtain such memoranda. Arbitration regulations should therefore give arbitrators clear authority to order necessary depositions and document production, and sanction parties for not complying with such discovery orders. Nonetheless, these regulations should preserve arbitrators' discretion to set relevancy limits on this exchange of information, and allow for consideration of affidavits in order to minimize need for travel and expensive depositions.

- *Hearings in Consumers' Home Locations*: Regulations should give consumers the option of requiring that any B2C arbitration hearings be conducted in the consumers' home location. Regulations also should foster efficiency by allowing for expanded use of expedited, telephonic, video, and other hearing options that eliminate need for expensive and time-consuming travel.¹⁶⁴ Moreover, regulations should encourage and perhaps fund pilot programs for online dispute resolution ("ODR"). ODR has emerged as a means for minimizing travel, easing scheduling hassles, saving time, and reducing overall dispute resolution costs.¹⁶⁵ In addition, face-to-face hearings may be less important when consumers simply seek monetary remedies and do not hope to maintain continued relations with the business.

- *Timely Decisions and Compliance with Awards*: Time limits benefit companies and consumers. They foster arbitration's speed and efficiency, which are considered its key benefits. These limits also can be especially beneficial for consumers in

¹⁶³ See Am. Arb. Ass'n, *supra* note 158, and accompanying text (discussing the AAA's fee schedule for consumer claims).

¹⁶⁴ See Protocol, *supra* note 120, at Principle 6(a) (calling providers to develop "programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay").

¹⁶⁵ See Amy J. Schmitz, "Drive-Thru" Arbitration in the Digital Age: Empowering Consumers through Regulated ODR, 62 BAYLOR L. REV. 178 (2010) (discussing pros and cons of using online arbitration to resolve consumers' B2C claims).

order to prevent companies from strategically delaying the process to avoid responsibility for consumers' claims and paying any damages. Regulations should therefore specify time periods for each step in the arbitration process and for compliance with arbitration awards. Remedies have little value if consumers are unable or must unduly struggle to obtain them.

- *Preservation of Statutory Remedies:* Regulations should bar limits on statutory remedies in arbitration unless the parties agree to limits after disputes arise. This recognizes that B2C contracting generally lacks the robust contractual freedom that supports pre-dispute contract remedy limits in business and other contexts. Furthermore, statutory rights deserve special protection in private arbitration proceedings to further their public interests. For example, statutes such as the TILA rely on individuals' prosecutions of these claims to serve public interests in curbing illegal company conduct.

- *Public Disclosure of Awards Involving Statutory Claims:* Although privacy has been a hallmark of arbitration and generally deserves preservation, it should not prevent public exposure of company improprieties.¹⁶⁶ Arbitration regulations therefore should require disclosure regarding proceedings involving statutory claims to the extent necessary to foster the statutes' public functions and preclude companies from using arbitration's privacy to escape liability or otherwise hide statutory violations.¹⁶⁷

- *Access to Small Claims Court:* Legislative regulations should clearly protect consumers' access to small claims court for asserting claims seeking damages under a specified amount, such as \$10,000.¹⁶⁸ Although many companies already carve out small claims from their arbitration clauses, many do not and this access is important for consumers because these court processes are often less costly and time consuming than regular litigation or arbitration, and consumers often may represent themselves in these

¹⁶⁶ See Schmitz, *supra* note 97, at 1212–18 (considering benefits and drawbacks of privacy in arbitration).

¹⁶⁷ See *id.* at 1230–34 (highlighting dangers of secrecy in arbitration).

¹⁶⁸ See Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000) (section 17(c)(11) of proposed rules requiring that parties have the right to opt out of arbitration for small claims).

truncated court processes.¹⁶⁹ Filing fees may be as low as \$10 or \$15, and parties do not pay for the judges' time as they generally must do in arbitration.¹⁷⁰

- *Allowance for Class Relief, Consolidation, or Joinder:* B2C arbitration provisions have become notorious in certain industries for curbing or chilling consumers' claims through class action waivers buried in arbitration clauses. Class action waivers hinder consumer claims and protect companies from the public exposure of large class actions, which companies are especially eager to avoid regarding statutory claims. Nonetheless, companies also include these waivers due to legitimate concerns regarding costly class actions that may force them into unwarranted or unfair settlements. At the same time, the *Stolt Nielsen* decision has led to courts' confusion in deciding the extent to which they may use state contract law or public policy to interpret or strike class arbitration waivers or sever the waivers to order arbitration.¹⁷¹ Accordingly, regulations may be necessary to clarify when waivers are enforceable. For example, regulations could preserve class arbitration or class actions with respect to consumer claims for less than \$10,000. This would protect consumers' ability to join forces in asserting small dollar claims they otherwise would not assert due to the costs of launching individual arbitration proceedings. At the same time, small claims court access and increased use of ODR and caps on consumers' arbitration costs per the above suggestions may ease consumers' incentives to seek class relief by making it more economical to assert claims individually. This is not a perfect solution, in that the dollar limit is somewhat arbitrary and many companies specify

¹⁶⁹ See, e.g., CAL. CIV. PROC. CODE § 116.530(a) (West 2007) (precluding presence of attorneys in small claims court); ARIZ. REV. STAT. ANN. § 22-512(c) (2007) (allowing attorneys only if all parties agree to it).

¹⁷⁰ See, e.g., TEX. GOV'T CODE ANN. §§ 28.003–28.004 (Vernon 2004) (stating \$10 filing fee for all cases up to \$5,000, but charging additional fees if jury trial is requested); ARIZ. REV. STAT. ANN. §§ 22-281, 22-501–524 (2011) (charging \$23 filing fee for small claims); N.Y. CITY CIV. CT. ACT § 1803(a) (Gould 2004) (assessing \$15 filing fee for claims up to \$1,000).

¹⁷¹ See *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 132-39 (2d Cir. 2010) (holding that *Stolt-Nielsen* did not preclude the court from holding the class waiver unconscionable, but it did bar the court from severing the waiver to enforce arbitration because the parties have not expressly agreed to arbitration); *Mathias v. Rent-A-Ctr, Inc.*, 2010 WL 3715059, at 145 (E.D. Cal. 2010) (holding that *Stolt-Nielsen* did not require that the FAA preempts state contract interpretation principles derived from policy); *Fisher v. Gen. Steel Domestic Sales, LLC*, 2010 WL 3791181, at 6-7 (D. Colo. 2010) (holding an arbitrator can determine whether a contract allows for class arbitration, but finding that the inquiry under *Stolt-Nielsen* must focus on whether the contract expressly or impliedly authorizes class claims).

in their contracts that they will not arbitrate if a class waiver is held unenforceable.¹⁷² Nonetheless, it at least provides a starting point for regulations aimed to protect consumers without overly impeding freedom of contract.

V. CONCLUSION

The debate has escalated regarding the proper role of government in regulating contracts and protecting consumers. This debate has captured questions regarding the propriety of enforcing pre-dispute arbitration clauses in consumer contexts. At the same time, the Supreme Court and Congress are approaching these questions in different ways: The Court is reinforcing arbitration enforcement; Congress and regulatory agencies are considering arbitration limitations or abolishment. Congress and the agencies carrying out its charge now hold the power to determine the outcome, and override the Court's pronouncements through adoption of the AFA and/or regulations promulgated under Dodd-Frank.

Despite concerns regarding some companies' abuse of arbitration provisions, an ambush on B2C arbitration would be unwise. Arbitration can benefit both consumers and companies when properly administered. The focus of regulations therefore should be on ensuring fair procedures and practices with respect to consumer arbitration instead of simply barring enforcement of pre-dispute arbitration clauses. Moreover, clarifying regulations are necessary to quell the flood of inefficient and expensive litigation about arbitration. Accordingly, it is time for policymakers to rescue and revive arbitration from ambush by adopting carefully considered reforms that protect consumers without overly impeding beneficial use of arbitration.

¹⁷² Cooper v. QC Fin. Servs., Inc., 503 F. Supp. 2d 1266, 1274–76 (D. Ariz. 2007) (addressing class action waivers).