Arbitration Law Review

Volume 12 Article 8

5-1-2020

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TOO BIG TO ARBITRATE? CLASS ACTION WAIVERS, ADHESIVE ARBITRATION, AND THEIR EFFECTS ON ANTITRUST LITIGATION

By
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I. INTRODUCTION

Access to arbitration provides a simple, expeditious, and "feasible form of fairness in adjudication."[1] In avoiding the typically tedious and strenuous litigation procedures, arbitration remains "a vital part of the litigation alternatives in the [United States] legal system."[2] However, what happens when one side, particularly the poorer and weaker party, unwillingly or unknowingly submits to an alternative legal path that hinders their chances of success, fairness, or justice?

Class action procedures allow courts to manage lawsuits that would otherwise be impossible or improbable if each class member were required to join as an individually named plaintiff.[3] The process "enables vindication of claims that otherwise could never be litigated, no matter how meritorious."[4] Antitrust lawsuits, for example, typically provide access to class actions for consumers or employees, and represent the primary way to compensate victims who suffer a loss, while subsequently providing a strong deterrent to future illicit behavior.[5] In the age of global marketing, communication, and access to information, "it is not uncommon for many individuals to be harmed in essentially identical ways by mass-produced products or standard corporate practices."[6] Class actions attempt to level the playing field for those groups otherwise economically disadvantaged or lacking access to the justice system.[7]

Over the years, however, large corporations have begun to routinely opt to use arbitration agreements to prevent class action lawsuits through class action "waivers"

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1 Thomas E. Carbonneau, ARBITRATION LAW IN A NUTSHELL 1 (4th ed. 2017).

2 *Id*. at 2.

3 Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, *in* DEBATES OVER GROUP LITIGATION IN COMPARATIVE PERSPECTIVE 1-2 (2000).

4 *Id.*

5 *See* Joshua Paul Davis, *Antitrust data reveals vital role of private actions, illustrates need to pass FAIR Act*, THE HILL (May 28, 2019, 10:45 AM), https://thehill.com/blogs/congress-blog/judicial/445695-antitrust-data-reveals-vital-role-of-private-actions-illustrates.

6 *Id.*

7 *See id.* ("[W]hen claims are brought together in class action form, the aggregate amount may be large enough to make it possible to engage the services of equally skilled counsel").

imbedded in their contractual agreements.[8] These waivers too often remain hidden or unseen to the final user of the product or employee of the company until after they have already agreed to the contract.[9] Accordingly, parties seeking a cause of action are not only forced to arbitrate any dispute, but also are prevented from certifying the lawsuit in a class action proceeding.[10]

This article discusses class action waivers in mandatory arbitration agreements and examines their possible impact on access to antitrust violation claims. Part II introduces the recent history of class action waivers and the United State Supreme Court's continued enforcement of such waivers. Part III addresses the impact of case law on antitrust laws and procedures. Finally, Part IV concludes with recent developments, and what the near future might look like for mandatory arbitration agreements and class action waivers.

II. THE SUPREME COURT AND CLASS ACTION WAIVERS

Arbitration settles legal disputes in a functional, flexible procedure, avoiding the unneeded expenses and delays of a common judiciary.[11] On a macro level, arbitration represents a justifiable avenue to not only avoid backing up the court system with claims, but also expediates the process for legitimate parties seeking relief.[12] From this perspective, the goals of arbitration inherently seek to support litigants who do not have the time or money to compete with a powerful opposition. However, as the Supreme Court, as well as the legislature, increasingly relies on the enforcement of arbitration agreements, the bigger, stronger parties strategically use customized adhesive arbitration contracts and class-action waivers as a protective shield to further benefit themselves and effectively limit any future liabilities.[13]

(a) The Federal Arbitration Act

In 1925, Congress enacted the Federal Arbitration Act ("FAA") "in response to widespread judicial hostility to arbitration agreements."[14] Originally proposed as "special

8 *See* Megan Leonhardt, *Lawmakers want to give Americans back their right to sue companies*, CNBC (Sept. 10, 2019, 5:32 PM), https://www.cnbc.com/2019/09/10/lawmakers-want-to-give-americans-back-their-right-to-sue-companies.html ("A recent academic study found that 81 of the biggest 100 companies in America have put legal clauses in the fine print of their customer agreements that bar consumers from suing them in federal court…").

9 *See id.*

10 *See id.*

11 *See* Carbonneau, *supra* note 1, at 5.

12 *See* Carbonneau, *supra* note 1, at 5-6.

13 *See* Carbonneau, *supra* note 1, at 12 (Noting that from the perspective of a business, "[they] see arbitration as a means of avoiding judicial procedures that favor the interest of the weaker party and . . . place special . . . burdens on business activities and resources").

interest legislation," the New York State Chamber of Commerce helped lobby the bill in an effort to secure federal legislation related to arbitration agreements and to support the recently enacted New York state arbitration laws.[15]

In its final form, the FAA validated agreements to arbitrate and solidified the notion that contractually submitting disputes to arbitration did not violate public policy.[16] Today, armed with the support of the Supreme Court, the FAA shields arbitration agreements at "every stage and aspect of the arbitral process."[17] Moreover, due to the federalization of arbitration law, the Supreme Court routinely uses the FAA to strike down state laws or state court decisions that do not support the enforceability of valid arbitration agreements.[18]

(b) Major Expansions in Adhesive Arbitration

Mandatory or adhesive arbitration represents the most controversial aspect of domestic arbitration law.[19] Over the years, the Supreme Court's continued validation of adhesive arbitration agreements and class action waivers has ignited public discontent.[20] Traditionally, the process pits commercial parties against the common individual.[21] Inherently, companies seek to avoid litigation, especially class action lawsuits, because of the unnecessary costs, time, and potential negative publicity.[22] On the other side of the aisle, advocates for class action believe the process remains essential to fairness and social justice.[23] Consequently, about a decade ago, the Supreme Court further solidified its position in favor of arbitrability, as well as the FAA's inherent power to pre-empt state laws concerning the invalidation of arbitration agreements.

In *AT&T Mobility v. Concepcion* ("*Concepcion*"), plaintiff consumers brought suit against AT&T in federal district court as part of a class action alleging AT&T engaged in

14 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

15 *See* Carbonneau, *supra* note 1, at 103.

16 *See* Carbonneau, *supra* note 1, at 104.

17 Carbonneau, *supra* note 1, at 63.

18 *See* Robert Marcelis, *US Supreme Court Tells Lower Courts to Enforce Arbitration Agreements*, JURIST (Feb. 16, 2013, 5:00 PM), https://www.jurist.org/commentary/2013/02/robert-marcelis-arbitration-agreement/ ("[Concepcion represents] the watershed case in the Court's repudiation of state laws that work to invalidate arbitration agreements).

19 *See id.*

20 *See id.* ("While plaintiffs in years past could use state laws to invalidate arbitration agreements, the US Supreme Court recently restricted the viability of these challenges").

21 *See* Carbonneau, *supra* note 1, at 73.

22 *See* Marcelis, *supra* note 18.

23 *See* Carbonneau, *supra* note 1, at 73.

false advertising and fraud.[24] The district court denied AT&T's motion to compel arbitration, citing the *Discover Bank* rule, which permitted voiding arbitral clauses that contained class action waivers in adhesive consumer transactions.[25] The district court further reasoned that because the class action waivers prevented consumers from pursuing their proper right to recover, the arbitration provision was unconscionable.[26] After the Ninth Circuit affirmed, the Supreme Court reversed.[27]

Led by Justice Scalia in the majority, the Supreme Court held that the FAA pre-empts any state law that goes against the intentions of the federal statute.[28] No matter how justified the state public policy, the Court reasoned that the California state law applied disproportionately to arbitration agreements.[29] In the eyes of the Court, and in their expansive interpretation of Section 2 of the FAA, the California law conflicted with the enforceability of arbitration agreements.[30]

Following *Concepcion*, the Supreme Court continued to support the exclusion of class action relief through adhesive class action waivers.[31] This time, the controversy pitted federal arbitration laws against federal antitrust laws.[32] In *American Express Co. v. Italian Colors Restaurant* ("*Italian Colors*"), the plaintiff merchants entered into an agreement with a subsidiary of American Express.[33] The contract included a class action waiver.[34]

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24 *See* Concepcion, 563 U.S. at 333.

25 *See* Discover Bank v. Superior Court, 36 Cal. 4th 148, 184-85 (2005) (holding class action arbitration waivers generally unenforceable in consumer contracts); *see* Concepcion, 563 U.S. at 333; *see also* Carbonneau, supra note 1, at 151 ("The so-called Discover Bank rule generally voided arbitral clauses that contained class action waivers in the setting of adhesive consumer transactions").

26 *See id*.

27 *See id.* at 334-35.

28 *See* Concepcion, 563 U.S. at 341 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA").

29 *See* Carbonneau, *supra* note 1, at 234 ("By voiding a long-standing California decisional approach on the matter . . . and upholding the class waiver provision, the Court reasserted the hegemony of the federal law and policy on arbitration and eliminated any doubt about the current direction of American arbitration law").

30 *See* Carbonneau, *supra* note 1, at 35. ("As a general rule, courts uphold arbitration agreements no matter what their deficiencies in formation might be").

31 *See* Am. Express Co. v. Italian Colors Rest. ("Italian Colors"), 570 U.S. 228, 228 (2013).

32 *See id.* at 231 ("According to respondents, American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards. This tying arrangement, respondents said, violated §1 of the Sherman Act. They [also seek] treble damages . . . under §4 of the Clayton Act").

33 *See id.*

34 *See id.*

Nonetheless, following a dispute, the plaintiffs filed a class action claiming defendant American Express violated Section 1 of the Sherman Antitrust Act and portions of the Clayton Act.[35] As part of their antitrust claim, the plaintiffs sought the applicable treble damages.[36] American Express moved to compel arbitration.[37] In response, the plaintiffs argued that the costs of individual arbitration greatly exceeded their total potential recoveries.[38]

After the district court granted the motion to compel arbitration and dismissed the lawsuits, the Second Circuit reversed, holding the class action waiver unenforceable because of the unbalanced costs directed onto the plaintiffs.[39] However, once again led by a Justice Scalia majority, the Supreme Court reversed.[40] The Court held that the FAA does not permit courts to invalidate a class arbitration waiver solely because of the costs involved in the process exceed the total potential recovery.[41] Moreover, the Court reasoned that the existing antitrust laws do provide any intention to preclude class action waivers such as the one in the plaintiffs' case.[42] For better or for worse, in the eyes of the Supreme Court, the FAA now not only ruled over state law and state courts, but also pre-empted otherwise legitimate recovery under federal antitrust laws.

(c) Epic Systems: Another Clash of Federal Laws

Finally, the most recent case that the Supreme Court heard regarding class action waivers in arbitration agreements followed a dispute within an employment contract.[43] In *Epic Systems Corp. v. Lewis* ("*Epic Systems"*), the plaintiff employees sued their employers regarding a wage-and-hour disputes in violation of the Fair Labor Standards Act.[44] The employment contracts contained class action waivers, and noted any dispute

35 *See* Italian Colors, 570 U.S. at 231.

36 *See id.* at 231-32.

37 *See id.*

38 *See id.*

39 *See* Italian Colors, 570 U.S. at 232. ("[B]ecause of the prohibitive costs respondents would face if they had to arbitrate, the class-action waiver was unenforceable and arbitration could not proceed").

40 *See id* at 239.

41 *See id.* ("The regime established by the Court of Appeals' decision would require . . . that a federal court determine . . . the legal requirements for success on the merits claim-by-claim and . . . the cost of developing that evidence. . . . Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure").

42 *See id.* at 232.

43 *See* Epic Systems Corp. v. Lewis ("Epic Systems"), 138 S. Ct. 1612, 1616 (2018).

44 *See id*.

must be arbitrated on an individual basis.[45] In response to the suit, the defendant employer filed a motion to compel arbitration.[46] The district court granted the motion, citing the superseding powers of the FAA.[47] The Ninth Circuit reversed, claiming the "savings clause" of the FAA allowed for an exception to such agreements.[48]

The Supreme Court consolidated this case with two other petitioned cases that created a circuit split in deciding how the FAA and National Labor Relations Act ("NLRA") interacted.[49] Upon granting certiorari, the Court reversed the Ninth Circuit's valiant effort to once again curb the enforceability of adhesive arbitration agreements.[50]

In a 5-4 decision, Justice Gorsuch led the majority in holding class action waivers enforceable under the FAA.[51] Balancing the language between the NLRA and FAA, the Court sided with the latter, reasoning that Section 7 of the NLRA does not require class action availability in any way.[52] The court also reasoned that the FAA's "savings clause" in Section 2 does not apply here, but rather arbitration agreements may only be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."[53]

Although the Court held in favor of upholding arbitration agreements and increasing the federal powers of the FAA, the Court concluded its opinion with an open invitation for Congress to clarify the confusion as it relates to the competing laws.[54] Until

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45 *See id.* at 1619.
46 *See* Epic Systems, 138 S. Ct. at 1620.

47 *See id.*

48 *See id.* at 1622 ("By its terms, the saving clause [in Section 2 of the FAA] allows courts to refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract'").

49 *See* Stephanie Greene and Christine Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements - #TimesUp on Workers' Rights*, 15 STAN. J.C.R. & C.L. 43, 45-46 (2019).

50 *See* Epic Systems, 138 S. Ct. at 1632.

51 *See id.* at 1632 ("The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written").

52 *See id.* at 1628 ("[T]his Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings").

53 *Id.* at 1622.

54 *See id.* at 1632 ("While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA — much less that it manifested a clear intention to displace the Arbitration Act").

then, the Court believed they could, at this moment, "easily read Congress' statutes to work in harmony…."[55]

(d) The Post-Epic Systems World

The *Epic Systems* decision reignited an already tense debate on the status of class action waivers and mandatory arbitration clauses, and their possible detrimental effects on the working public.[56] In the almost two years since the 2018 ruling, lower court decisions have just started to show the lasting impact of the Court's unwavering support for enforcing adhesive arbitration clauses.[57] Notably, the First, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuit Court of Appeals have already addressed the remnants of the Court's decision in *Epic Systems*.[58] As expected, early case decisions show strong, continued judicial support for the enforcement of class action waivers, even when class action proceedings result in a valid award for plaintiffs.[59] Though decidedly settled in the current judicial system, removal of access to class action remains a contentious issue in the debate around arbitration clauses, especially as it relates to existing federal antitrust laws.

III. THE ANTITRUST LANDSCAPE IN AN ADHESIVE ARBITRATION WORLD

(a) Land of the Free, Home of the Lawsuit

Much of the conversation around mandatory arbitration agreements and the inclusion of class action waivers has to do with the perceived fight between the strong and the weak.[60] David versus Goliath; the little consumer or employee versus the large corporation. As the Supreme Court continues to support the enforceability of adhesive

55 Epic Systems, 138 S. Ct. at 1632.

56 *See* Grace O'Malley, *Epic Systems Corp. v. Lewis: Singled Out by Corporations and a Textualist Supreme Court, American Workers Are Left to Fend For Themselves*, 78 MD. L. REV. 635, 658-68 (2019).

57 *See* Irma Reboso Solares, *Considerations for Use of Arbitration Agreements to Curtail Class Claims*, THE NATIONAL LAW REVIEW (July 21, 2019), https://www.natlawreview.com/article/considerations-use-arbitration-agreements-to-curtail-class-claims.

58 *See id.*

59 *See id.* (noting a Seventh Circuit case which reversed a district court's decision to strike down a waiver clause forbidding class arbitration, even though the resulting class litigation resulted in a $10 million arbitration award against the employer).

60 *See* Carbonneau, *supra* note 1, at 12 ("In consumer transactions (especially) and non-union employment relationships . . . the economically stronger and better-positioned party imposes the obligation to arbitrate on the weaker, less sophisticated 'co-contractant'").

arbitration agreements, concerns as to the rights of workers and consumers come front and center in the debate.[61]

Historically, Americans have always loved lawsuits.[62] Any one citizen's access to the court system provides for a sense of individual power, freedom, and the innate ability to right a wrong. Recently, however, the frequency of class action lawsuits has trended downward.[63] On the heels of *Epic Systems*, according to publicly available data, "2019 marked the first year in more than a decade that there were fewer federal class action lawsuits alleging unpaid wages, job discrimination, and mishandled retirement benefits."[64] Further, the Economic Policy Institute estimates that by 2024, around eighty-three percent of private sector workers, nearly ninety-five million people, will be forced to resolve disputes through adhesive arbitration agreements.[65]

Those in favor of adhesive arbitration agreements suggest that the pre-determined adjudication procedure brings "efficiency and economy to the marketplace for all its participants."[66] While it is true that arbitration allows for quicker processing and award determinations compared to lagging judicial procedures, the theory does not consider the elimination of access to the marketplace for some of those participants.[67] Similar to discouraged workers no longer factoring into a society's estimated unemployment rate, sometimes the elimination of previous market actors prevents us from seeing the forest for the trees.[68] Accordingly, this analogy is an apt comparison to the state of adhesive arbitration and its effects on antitrust laws and litigation.

(b) Mitsubishi and the Effective Vindication Doctrine

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61 *See* Stephanie Greene & Christine Nylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus*, 56 AM. BUS. L.J. 815, 816-22 (2019); Christopher Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 266-69 (2015).

62 *See* Alex Berezow, *Blame And Claim: Can We Fix America's Uniquely Litigious Culture?*, AMERICAN COUNCIL ON SCIENCE AND HEALTH (Dec 28, 2019), https://www.acsh.org/news/2019/12/27/blame-and-claim-can-we-fix-americas-uniquely-litigious-culture-14477 ("[T]he United States has more lawsuits per 100,000 people than similar countries").

63 *See* Andrew Keshner, *The number of workers suing their employers fell last year for the first time in 16 years — why you should be concerned*, MARKET WATCH (Jan 8, 2020, 11:43 AM), https://www.marketwatch.com/story/employees-arent-suing-their-workplaces-as-often-as-they-used-to-but-is-that-necessarily-a-good-thing-2020-01-07.

64 Keshner, *supra* note 63.

65 *See id.*

66 Carbonneau, *supra* note 1, at 236.

67 *See* Mark A. Lemley & Christopher R. Leslie, Article, *Antitrust Arbitration and Merger Approval*, 110 NW. U.L. REV. 1, 8-10 (2015).

68 *See* Will Kenton, *Discouraged Worker*, INVESTOPEDIA (Sept. 16, 2019), https://www.investopedia.com/terms/d/discouraged_worker.asp.

In 1985, the Supreme Court attempted to peacefully mediate the differences between the enforcement of arbitration laws and antitrust violations. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* (*"Mitsubishi*"), the Court held that claims under American antitrust laws, as they relate to international agreements, may be submitted to arbitration so long as the agreement includes a valid arbitration clause.[69] The Court reasoned that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[70] However, the Court also noted a plaintiff has the opportunity to show that the arbitral forum does not fully vindicate his or her rights, and upon that showing, a court may hold the arbitration agreement unenforceable and permit the plaintiff's pursuit of the claim in federal court.[71]

Following *Mitsubishi*, this "effective vindication doctrine" provided an out for antitrust claimants who believed their cases were not suited for an arbitral forum, whether or not they signed a mandatory and adhesive agreement.[72] Following this decision, for example, courts used the doctrine to invalidate class action waivers, as well as provisions that prevented an arbitrator from awarding the appropriate treble damages under an antitrust claim.[73] For nearly three decades, courts struck a harmonious balance between enforcing arbitration agreements under the FAA and allowing valid antitrust claims to proceed in federal court when necessary or otherwise "vindicated."[74] This balance, however, ultimately tipped well in favor of arbitration enforceability in *Italian Colors*.

As described above, *Italian Colors* held in favor of enforceability of arbitration agreements under the FAA, and that the federal laws do not support the invalidation of a class arbitration waiver solely because the costs involved in the process exceed the total potential recovery.[75] The plaintiffs' arguments included citing the effective vindication doctrine, claiming that the costs from mandatory individual arbitration proceedings, such as finding and preparing expert witness testimony, significantly prevented their rights to proper antitrust remedy in the form of class action adjudication.[76]

In dismissing these claims, the Court dismantled the credibility of the effective vindication doctrine, describing the doctrine as dictum.[77] Without this practical safeguard,

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69 *See* Mitsubishi Motors Corp. ("Mitsubishi") v. Soler Chrysler-Plymouth, 473 U.S. 614, 636-38 (1985).

70 *Id.* at 637.

71 *See id*. at 652 n.19.

72 *See* Lemley & Leslie, *supra* note 67, at 8-10.

73 *See* Lemley & Leslie, *supra* note 67, at 8-10.

74 *See* Lemley & Leslie, *supra* note 67, at 9-11.

75 *See* Italian Colors, 570 U.S. at 232.

76 *See id.* at 233-35.

scholars suggest the post-*Italian Colors* world leaves "potential antitrust defendants . . . more likely to use arbitration clauses to substantially reduce the probability of antitrust liability and the amount of damages recovered by successful antitrust plaintiffs."[78] Enforcing class action waivers in mandatory arbitration clauses prevents plaintiffs from accessing traditional antitrust litigation, and confers significant disadvantages to defendants.[79]

(c) The FAIR Act: A Viable Solution?

On September 6, 2019, the American Antitrust Institute ("AAI") submitted a letter to Congress in support of the Forced Arbitration Injustice Repeal ("FAIR") Act.[80] Joined by ten other organizations, the letter urged Congress to pass the bill aimed at invalidating contract provisions mandating individual arbitration in antitrust disputes.[81] While it is still uncertain if the bill will ever be signed into law, its backing from different institutional groups shows a strong message in support of the public's right to access class action litigation.[82] In the wake of the Supreme Court's continued support for the enforcement of arbitration agreements following *Concepcion*, *Italian Colors* and *Epic Systems*, corporations remain unregulated and free to violate antitrust laws while insulated from private lawsuits through forced class action waivers.[83] The FAIR Act attempts to combat these actions and "restores the ability of consumers, workers, and businesses to effectively vindicate their Sherman and Clayton Act rights."[84]

According to the 2018 Antitrust Annual Report, "private antitrust lawsuits settled in federal courts since 2013 have recovered $19.3 billion on behalf of victims of antitrust

77 *See id.* at 235 ("The 'effective vindication' exception to which respondents allude originated as dictum . . . where we expressed a willingness to invalidate . . . arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies'").

78 Lemley & Leslie, *supra* note 67, at 13.

79 *See* Lemley & Leslie, *supra* note 67, at 13.

80 *See* American Antitrust Institute, *AAI Leads Call for Congress to Restore Victims' Antitrust Rights by Ending Forced Arbitration*, (2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/09/Antitrust-FAIR-Act-Letter-9.6.19-.pdf.

81 *See* Davis, *supra* note 5.

82 *See* Alexia Fernandez Campbell, *The House just passed a bill that would give millions of workers the right to sue their boss*, VOX (Sept 20, 2019, 11:30am), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act ("Members of Congress have been trying for years to outlaw forced arbitration in various scenarios: for sexual harassment and discrimination claims and consumer complaints. None have ever gotten through the House, so passage of the FAIR Act is a major milestone").

83 *See* Davis, *supra* note 5.

84 *See* American Antitrust Institute, *supra* note 80.

violations…."[85] Compelling arbitration and encouraging the use of class action waivers provides for various serious harms to antitrust laws and potential plaintiffs, including: (1) diminishing the amount of class actions in general, which are necessary to the function of antitrust laws; (2) preventing antitrust plaintiffs from receiving certain procedural advantages; and (3) harming antitrust plaintiffs whose right to class actions are needed the most.[86]

First, class actions represent a significant portion of antitrust victims' lawsuits and facilitate the enforcement of antitrust laws.[87] Research conducted by the AAI shows that, over the two decades prior to *Italian Colors* in 2013, "private antitrust enforcement led to the recovery of at least $33.8 billion in damages…."[88] Private enforcement through class action not only provides for a major part of compensating the victims of antitrust violations, but also represents "the principal financial deterrent against future anticompetitive abuses."[89] Without the ability for victims to aggregate and seek relief for damages, violators of antitrust laws are therefore shielded from any responsibility or motivation to alter their practices.[90] As the AAI noted, without access to class action proceedings, "antitrust violations often will go uncompensated, under-deterred, or altogether un-remedied." [91]

Second, compelling arbitration prevents antitrust plaintiffs from seeking certain procedural advantages, such as treble damages, forum selection, limitations on appeals from the arbitrator, and possible attorney's fees.[92] Compared to arbitration proceedings, antitrust litigation includes extensive discovery, which is critical to the case's outcome.[93] Although this reduces costs in the end, the condensed discovery proceedings significantly benefit the defendants.[94]

Moreover, arbitration agreements often have pre-decided limits on remedies, usually buried in the arbitration clause at issue.[95] In antitrust litigation, however, the

85 Davis, *supra* note 5 (noting in 2018 alone, antitrust settlements totaled five billion dollars).
86 *See* American Antitrust Institute, *supra* note 80.

87 *See* American Antitrust Institute, *supra* note 80.

88 American Antitrust Institute, *supra* note 80.

89 American Antitrust Institute, *supra* note 80.

90 *See* Lemley & Leslie, *supra* note 67, at 37-38

91 American Antitrust Institute, *supra* note 80.

92 *See* Lemley & Leslie, *supra* note 67, at 13-14.

93 *See* Lemley & Leslie, *supra* note 67, at 15.

94 *See* Lemley & Leslie, *supra* note 67, at 15 ("[Given the advantages to employers using adhesive employment agreements], a corporate attorney arguably would commit malpractice if she failed to advise a client to employ class action waivers in such contracts").

95 *See* Lemley & Leslie, *supra* note 67, at 15-16.

plaintiff is entitled to treble damages and the judge has no discretion.[96] Trebling damages serves to deter antitrust violators, adequately remedy victims, and encourage private enforcement of antitrust laws.[97] Consequently, forced arbitration removes many of the advantages provided to antitrust plaintiffs in bringing their initial suit, and transfers powers over to both the arbitrator of the case and the drafters of the original arbitration clause.[98] This provides another significant advantage to the defendant and severely limits the effectiveness of federal antitrust laws, particularly in cases where the plaintiff may involuntarily or unknowingly agree to submit to arbitration.

Finally, mandatory arbitration and class action waivers remove antitrust rights from the individuals who may need it the most.[99] Since *Concepcion*, class action waivers imbedded into arbitration agreements have grown in popularity within consumer products and service contracts.[100] In the years after *Epic Systems*, the same can be argued with regard to non-compete or anti-competitive clauses in employer contracts.[101] The rise of class action waivers in these agreements ultimately destroys private antitrust rights for "the most vulnerable economic actors in the [United States]."[102] Because class action antitrust claims involve "high-volume, low-dollar frauds and price fixing" schemes, individual claims are small or invaluable in comparison to the costs of prosecuting an antitrust case.[103] Therefore, absent access to class action proceedings, individual claimants who do not have the resources to pursue a claim may avoid taking action all together.[104]

For example, if a worker or consumer is forced to arbitrate a claim against a company, the costs associated with travel, attorneys, and other expenses may not be worth the estimated recovery.[105] The individual's rights to a remedy are thus deprived because of the inability to aggregate the claim.[106] Moreover, in an employee-employer claim, the

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96 *See* Lemley & Leslie, *supra* note 67, at 22.

97 *See* Lemley & Leslie, *supra* note 67, at 22-24.

98 *See* Lemley & Leslie, *supra* note 67, at 22-24.

99 *See* American Antitrust Institute, *supra* note 80.

100 *See* American Antitrust Institute, *supra* note 80 (noting 39.5% of employers adopting mandatory employment arbitration did so following 5 years after *Concepcion*, and 41.1% of employees covered by adhesive arbitration also submit to class action waivers).

101 *See* American Antitrust Institute, *supra* note 80 (arguing corporate attorneys will have no option but to advice corporate clients to include class actions waivers for the protection of their business).

102 American Antitrust Institute, *supra* note 80.

103 American Antitrust Institute, *supra* note 80.

104 *See* American Antitrust Institute, *supra* note 80.

105 *See* American Antitrust Institute, *supra* note 80.

106 *See* American Antitrust Institute, *supra* note 80.

worker is not only ill-equipped to challenge the company individually, but also risks giving up benefits associated with his or her current employment status.[107] The last thing an employee may want to do in an employment dispute is bother or aggravate an employer through an individualized claim, putting their own reputation at risk if the lawsuit does not work out in their favor.[108]

In addition to up front costs of litigation without access to an aggregated claim, the risk of litigating against an employer may also harm crucial existing benefits to the employee, such as affordable health care or other essential family-related benefits covered by the employer.[109] As Justice Kagan noted in her dissent of *Italian Colors*, "[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands."[110] In the end, between the increased costs of litigation procedures and loss of potential employment benefits, the American worker remains arguably the "worst equipped of all to take on powerful firms without a claims aggregation device."[111]

Similarly, a small business relying on larger suppliers for goods may be reluctant to bring a claim on its own, without access to aggregating the claims.[112] The business risks involved with bringing an individual claim against a powerful supplier or manufacturer likely favors non-pursuit, especially if the business relies on the existing business relationship.[113] Without access to class action, the growth of waivers and support of mandatory arbitration agreements leaves antitrust violations open to an unchallenged market.[114] Not only does this harm the effectiveness of antitrust laws, but also enables

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107 *See* American Antitrust Institute, *supra* note 80 ("A lack of viable employment alternatives owing to labor-market concentration, exploitative employer practices involving non-compete requirements and no-poaching agreements, the high search costs . . . required to change jobs, lock-in created by healthcare and other essential employment benefits, or other barriers to mobility can encumber workers' individual antitrust claims with excessive personal and financial risk").

108 *See* American Antitrust Institute, *supra* note 80.

109 *See* American Antitrust Institute, *supra* note 80.

110 Italian Colors, 133 S. Ct. at 2316.

111 American Antitrust Institute, *supra* note 80.

112 *See* American Antitrust Institute, *supra* note 80.

113 American Antitrust Institute, *supra* note 80 ("When class proceedings are unavailable, many small business and worker antitrust claims are similarly negated by the practical realities of economic dependency. For obvious reasons, small businesses that rely on powerful customers or suppliers make for reluctant antitrust plaintiffs individually").

114 *See* American Antitrust Institute, *supra* note 80.

larger corporations to easily exploit loopholes in their tailored agreements of sale or employment contracts.[115]

IV. CONCLUSION: THE NEED FOR PUBLIC OR LEGISLATIVE SOLUTIONS

As we enter a new decade, the future of adhesive arbitration and access to class action litigation remains uncertain. On January 15, 2020, the Eastern District of New York revisited a portion of *Italian Colors*, because the lawsuit continues to move through the federal court system.[116] Here, this portion of the lawsuit "challenged non-discrimination provisions in American Express 'card acceptance agreements' that barred merchants from steering customers toward less costly payment methods, such as cash or cards that take a smaller cut of each transaction."[117] The defined class of plaintiffs included merchants that accept American Express cards at their businesses.[118] Unsurprisingly, the court sided with American Express and granted their motion to compel arbitration to the specified class of the merchant plaintiffs.[119] At this time, the court noted, there is simply "no way around *Italian Colors*."[120]

In further support of the Supreme Court's opinion in *Italian Colors*, the district court judge also rejected any arguments relating to the effective vindication doctrine, calling the argument "nonsensical."[121] The district court reasoned that any notion of a remedy of class-wide injunctive relief did not exist when the legislature enacted the Clayton Act.[122]

On one side, some suggest there "appears to be a tacit understanding between the Court and . . . Congress that arbitration falls within the Court's exclusive bailiwick."[123] On

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115 *See* American Antitrust Institute, *supra* note 80 ("If standard form contract terms that exculpate defendants for intentional antitrust violations are enforceable simply because they are embedded in arbitration clauses, then unconscionable contracts are not only being permitted but encouraged").

116 *See* Mike Leonard, *Amex Gets Anti-Steering Suit Partly Tossed, Partly Arbitrated*, BLOOMBERG LAW (Jan. 16, 2020, 1:57 PM), https://www.bloomberglaw.com/document/X4UO8T1G000000?bna_news_filter=mergers-and-antitrust&jcsearch=BNA%25200000016fafa6d036af6fefb6c4ee0001#jcite; *see also* Cravath, *AmEx Wins Motion to Compel Arbitration and Motion to Dismiss Putative Antitrust Class Action Suits*, CRAVATH, SWAINE & MOORE LLP (January 15, 2020), https://www.cravath.com/AmEx-Wins-Motion-to-Compel-Arbitration-and-Motion-to-Dismiss-Putative-Antitrust-Class-Action-Suits/.

117 Leonard, *supra* note 116.

118 *See* Leonard, *supra* note 116.

119 *See* Leonard, *supra* note 116.

120 Leonard, *supra* note 116.

121 *See* Leonard, *supra* note 116.

122 *See* Leonard, *supra* note 116.

123 Carbonneau, *supra* note 1, at 72.

the other, the Court in *Epic Systems* seemingly does the opposite, pointing out that Congress is "always free to amend this judgment."[124] Similar to two baseball players chasing down a fly ball, this "I got it, you take it" communication between branches prevents any real progress and encourages a stalemate for as long as no one takes notice. A bold assumption here would be that, at some point, one side will take responsibility for their inherent power to address public concerns. Unfortunately, the continuing deferral of authority implies a satisfaction with the status quo. Subsequently, until further notice, the situation remains strongly in favor of enforcing class action waivers as well as any and all valid arbitration agreements.

Notably, though, there remains a small light at the end of the tunnel. Recently, pushback from the public – as well as state legislatures – may play a roll in re-engaging the rights of consumers and employees.[125] Some companies, such as Google and Facebook, have even "bowed to employee pressure and dropped their arbitration clauses . . . in the case of sexual harassment claims."[126] Also, in the past year, California and Virginia joined New York and Washington as the handful of states banning forced arbitration agreements.[127] These prohibitions, in addition to the FAIR Act passing the House of Representatives, represent a good start to the decade for opponents of the current interpretation of the FAA.[128]

In an ideal world, the democratic pressures of consumers, workers, state legislatures, and even an open invite from a Supreme Court, could lead to real changes to the FAA. Reality, however, may have other plans. Between uncontrollable political factors within a shifting administration, Congress, and judiciary, we are all left to wait and see whether change is possible, or if those in power continue to drop the ball.

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124 Epic Systems Corp., 138 S. Ct. at 1632.

125 *See* Mark Schoeff Jr., *Virginia poised to ban mandatory arbitration clauses for state-registered advisers*, INVESTMENTNEWS (Sept. 9, 2019), https://www.investmentnews.com/virginia-poised-to-ban-mandatory-arbitration-clauses-for-state-registered-advisers-81227; *see also* Solares, *supra* note 57 ("Last year, several large law firms faced opposition from incoming law clerks who criticized the firms' arbitration policies in social media; this prompted a number of law schools to send letters to more than 300 law firms asking about their policies. Many law firms ultimately withdrew their mandatory arbitration agreements").

126 David Dayen, *Tech Companies' Big Reveal: Hardly Anyone Files Arbitration Claims*, THE AMERICAN PROSPECT (Nov. 26, 2019), https://prospect.org/power/tech-companies-hardly-anyone-files-arbitration-claims/.

127 *See* Alexia Fernandez Campbell, *Hollywood and Silicon Valley can no longer silence women with this contract clause*, VOX (Oct. 11, 2019, 12:40 PM), https://www.vox.com/identities/2019/10/11/20909589/california-forced-arbitration-bill-ab-51.

128 *See* David R. Golder et al., *Bill to Nullify Mandatory Predispute Arbitration Agreements Passes in U.S. House*, THE NATIONAL LAW REVIEW (Oct. 3, 2019), https://www.natlawreview.com/article/bill-to-nullify-mandatory-predispute-arbitration-agreements-passes-us-house.