Chapter 3

CLASS ACTIONS IN EMPLOYMENT ARBITRATION

I. Class Action Waivers in Arbitration Agreements: The Chaotic State of the Law*

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A very common provision in standard form employment and consumer arbitration agreements restricts the claimant to bringing an individual action only. Such provisions expressly purport to waive the claimant's right to bring a class action or even to join his or her claim with that of another claimant. There is evidence that a primary motive for imposing arbitration agreements is to eliminate exposure to class action liability.[1]

Although massive Title VII class actions, such as the nationwide sex discrimination class action against Wal-Mart,[2] grab headlines, the more common class actions arise under such statutes as the Employee Retirement Income Security Act (ERISA), the Fair Labor Standards Act (FLSA), and related state wage and hour laws. The typical ERISA breach of fiduciary duty claim seeks to enforce a legal duty owed to a large class of individuals, plan participants, and beneficiaries, and thus lends itself to class action treatment. Similarly, some of the most common claims arising under the FLSA, claims that employees have been improperly classified as exempt and claims of a failure to pay for "donning and doffing" time, typically affect a large group of employees in a common way. Moreover, FLSA claims are brought as collective actions and need

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[1] *See* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 427 & n.21 (2006).

[2] Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214 (9th Cir. 2007).

not meet all of the requirements that Rule 23 of the Federal Rules of Civil Procedure imposes on class action plaintiffs.

Regardless of the basis for the claim, claimants seeking to proceed on a class or collective basis who are covered by arbitration agreements are likely also covered by class and collective action waivers. When those claimants attack the validity of such waivers, they run into a chaotic sea of conflicting rulings spurred on by a series of Supreme Court decisions that have eschewed establishing bright-line rules for enforcement of employment and consumer arbitration agreements. Most of the reported decisions dealing with class action waivers have arisen out of consumer cases. This is not surprising. Although bringing an FLSA claim for misclassification resulting in a wrongful failure to pay overtime will get a major boost from certification as a collective action, even the individual claim will appear huge compared with the typical consumer claim against a credit card issuer or cell phone company. As has been said of the typical consumer claim, "only a lunatic or a fanatic sues for $30.00."[3] Courts, however, rely on consumer and employment arbitration cases interchangeably, and so I will treat them together.

This paper examines the Supreme Court's recent arbitration jurisprudence that has sown the seeds for the confused state of the law of class action waivers. It shows how that jurisprudence has evolved into a mess of contradictory approaches and results in class action waiver cases in the lower courts.

What Hath *Green Trees* Wrought?

Perhaps no entity has contributed more to the current state of the law governing the enforceability of class action waivers and other features of employment and consumer arbitration agreements than Green Tree Financial Corporation. The company prevailed in two major cases before the Supreme Court.

The first decision was *Green Tree Financial Corp. v. Randolph.*[4] In *Randolph,* the plaintiff financed her purchase of a mobile home through Green Tree, whose financing agreement required arbitration for all disputes related to the agreement.[5] Randolph sued

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[3]Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88, 100 (N.J. 2006) (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

[4]531 U.S. 79 (2000).

[5]*See id.* at 82–83 & n.1.

Green Tree alleging violations of the Truth in Lending Act (TILA)[6] and the Equal Credit Opportunity Act.[7] Green Tree moved to compel arbitration and the district court agreed. However, the Eleventh Circuit reversed, observing that the arbitration agreement failed to specify which party would be responsible for the arbitrator's fees and related costs of the proceeding. Relying on employment arbitration precedent, the court held the agreement unenforceable because it subjected the plaintiff to an unreasonable risk of steep arbitration costs that would undermine her ability to effectively vindicate her statutory rights.[8]

By a five-to-four vote, the Supreme Court reversed. The majority wrote:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.[9]

The Court premised its analysis on the strong federal policy favoring arbitration. It analogized to the presumption that claims under a particular statute are arbitrable unless the party resisting arbitration shows that Congress intended that claims under the statute not be arbitrated. The Court placed a similar burden on a party resisting arbitration on the ground that excessive costs would impede her ability to vindicate her claims in the arbitral forum. The Court majority wrote:

> [T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing

[6] 15 U.S.C. §§1601–1667(f) (2000).
[7] 15 U.S.C. §§1691–1691(f) (2000).
[8] *See Randolph*, 531 U.S. at 92.
[9] *Id.* at 90–91 (citation and footnote omitted).

> the likelihood of incurring such costs. Randolph did not meet that burden.[10]

The decision in *Randolph* requires case-by-case adjudication of the effects of the costs of the arbitral forum on a plaintiff's ability to vindicate statutory rights. This is in marked contrast to the bright-line rule that the employer (or in *Randolph*, the creditor) must pay all arbitral fees above an amount equal to a federal court filing fee, first recognized by the D.C. Circuit in *Cole v. Burns International Security Services*.[11] The decision in *Cole* told employers to provide that employees pay only a nominal amount of forum costs if they want their arbitration agreements enforced. *Cole*'s rule thus was largely self-enforcing as employers had to provide in their plans for employees to pay only nominal fees. In contrast, *Randolph* effectively mandates pre-arbitration litigation over fee allocation. Moreover, as will be developed below, the *Randolph* analysis has not been confined to issues of who pays the arbitrator's fee.

Green Tree Financial Corporation's second contribution to the confused state of the law came a few years later in *Green Tree Financial Corp. v. Bazzle*.[12] In *Bazzle*, the plaintiffs brought class actions in state court alleging that Green Tree violated a state consumer protection statute by failing to provide them with a required form. The South Carolina Supreme Court held that the plaintiffs' contracts with Green Tree were silent as to whether class actions in arbitration were permitted and concluded that under South Carolina law the contracts permitted arbitral class actions. The court compelled arbitration. The Supreme Court reversed, holding that whether class actions in arbitration were allowed was an issue for the arbitrator rather than the court.

The Court reasoned that most issues related to the contract are for the arbitrator to decide. It recognized what it characterized as a "narrow exception" for "certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."[13] In the Court's view, the availability of a class action in arbitration did not fall within the exception.[14]

Bazzle was sandwiched between two other Court decisions dealing with the division of authority between arbitrator and court.

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[10] *Id.* at 91–92 (citations omitted).
[11] 105 F.3d 1465 (D.C. Cir. 1997).
[12] 539 U.S. 444 (2003).
[13] *Id.* at 452.
[14] *Id.*

PacifiCare Health Systems v. Book[15] preceded *Bazzle* by just more than two months. In *PacifiCare*, a group of physicians sued several managed care organizations, alleging that the managed care organizations violated, inter alia, the Racketeer Influenced and Corrupt Organizations Act (RICO).[16] The managed care organizations moved to compel arbitration. Their contracts with the physicians required arbitration but also provided, "punitive damages shall not be awarded," or "[t]he arbitrators . . . shall have no authority to award any punitive or exemplary damages," or "[t]he arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages."[17] The lower courts refused to enforce the arbitration agreements because they precluded the plaintiffs from being awarded treble damages, as provided for in RICO. The Supreme Court reversed.

The Court observed that it had on several occasions commented that statutory treble damages in general, and RICO's treble damage provision in particular, serve remedial as well as punitive functions.[18] It characterized the contracts' limitations on the arbitrator's remedial authority as "ambiguous," and reasoned, "[W]e should not on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved."[19] The Court held that the lower courts should have compelled arbitration.[20]

To resolve the issue of arbitral remedial authority, the arbitrator will, of necessity, have to decide whether RICO treble damages are punitive or compensatory. Significantly, the Court did not hold that RICO treble damages are not punitive in nature. It merely observed that in prior decisions, it had characterized various statutory treble damage provisions as serving remedial as well as punitive functions.[21] Thus, the Court left it to the arbitrator in *PacifiCare* to interpret RICO in the context of the arbitration agreements' limitations on arbitral remedial authority. Furthermore, if the arbitrator determined that the agreement precluded an award of treble damages, the arbitrator would have to decide

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[15] 538 U.S. 401 (2003).
[16] 18 U.S.C. §§1961–1968 (2000).
[17] *PacifiCare*, 538 U.S. at 405.
[18] *Id.* at 405–06.
[19] *Id.* at 406–07.
[20] *Id.* at 407.
[21] *Id.* at 405–07.

whether such a prospective waiver of treble damages is allowed under RICO.

Bazzle was followed by *Buckeye Check Cashing, Inc. v. Cardegna*,[22] where the Supreme Court held that the question of whether a contract containing an arbitration clause was void under state law was an issue for the arbitrator and not the court. The Court found the case controlled by its decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[23] which held that issues of fraud in the inducement of the contract were issues for the arbitrator, in contrast to issues of fraud in the inducement of the arbitration clause, which were issues for the court. The Court rejected the distinction established in contract law between void and voidable contracts as irrelevant, and interpreted the word "contract," as used in section 2 of the Federal Arbitration Act (FAA) to include contracts that are later held to be void.[24] Thus, the Court again deferred interpretation and application of the public law to the privately selected and privately accountable arbitrator.

The message of these recent Supreme Court decisions to the lower courts is clear. They are to avoid deciding most issues concerning the validity of the arbitration provision and instead refer those issues to the arbitrator. Furthermore, whether the apparent impediments in the arbitration provision will deny the plaintiff a forum in which to effectively vindicate his or her statutory rights is speculative until the arbitrator rules. Consequently, under *Randolph*, the plaintiff cannot sustain the burden of proof on this issue. This message was not lost on then Circuit Judge, now Chief Justice, Roberts who, considering *Randolph* and *PacifiCare*, opined:

> We take from these recent cases two basic propositions: *first*, that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and *second*, that this burden cannot be carried by "mere speculation" about how an arbitrator "might" interpret or apply the agreement.[25]

Judicial Policing of Class Action Waivers

Courts have two primary tools for policing arbitration agreements in general and class action waivers in particular. The first

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[22] 546 U.S. 440 (2006).
[23] 388 U.S. 395 (1967).
[24] *Buckeye Check Cashing*, 546 U.S. at 447–49.
[25] Booker v. Robert Half Int'l, Inc. 413 F.3d 77, 81 (D.C. Cir. 2005).

derives from the Supreme Court's rationale for enforcing pre-dispute agreements to arbitrate public law claims. For example, in *Gilmer v. Interstate Johnson/Lane Corp.*,[26] the Court compelled an employee to arbitrate his claim under the Age Discrimination in Employment Act (ADEA), reasoning that the agreement did not diminish the employee's statutory rights but only substituted the arbitral forum for the judicial. The Court endorsed arbitration so long as the arbitral forum allows the employee to effectively vindicate his or her statutory claim.[27] The Court's rationale dissipates if the arbitral forum does not meet minimum standards of procedural justice. Thus, as a matter of federal law, courts may refuse to enforce a pre-dispute agreement to arbitrate to the extent that the agreement does not enable the employee to effectively vindicate his or her public law rights.

The second policing tool is the state contract law doctrine of unconscionability. The FAA provides that written agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[28] Unconscionabilty is one such ground and, accordingly, courts may reform or refuse to enforce arbitration agreements that they find to be unconscionable.

Policing Class Action Waivers to Ensure that the Arbitral Forum Allows Effective Vindication of Public Law Rights

Plaintiffs attacking the validity of class action waivers on the ground that the waivers preclude the effective vindication of their statutory rights run headlong into the effects of both *Green Tree* decisions. *Randolph* teaches that the plaintiff bears a heavy burden to prove with particular specificity that the inability to bring a class action precludes that plaintiff from vindicating the rights at issue in the arbitral forum. *Bazzle* holds that the availability of a class action is not a gateway issue for a court to decide but rather should be left for the arbitrator to decide. Read in combination, the two *Green Trees*, along with *PacifiCare* and *Buckeye Check Cashing*, arguably suggest that, until the arbitrator rules, whether the arbitral forum precludes plaintiff from vindicating the public law rights at issue is too speculative to meet the plaintiff's burden.

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[26]500 U.S. 20 (1991).
[27]*Id.* at 28.
[28]9 U.S.C. §2 (2000).

An employment plaintiff attacking a class action waiver under this route runs smack into dicta in *Gilmer*. One of the grounds on which Gilmer attacked the arbitration agreement was his inability to bring a class or collective action in arbitration, in contrast to federal court. The *Gilmer* Court rejected the argument, observing that the New York Stock Exchange arbitration rules allowed for collective actions, but continued, in dicta, "But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing collective actions does not mean that individual attempts at conciliation were intended to be barred."[29] The Fifth Circuit has read this dicta as mandating enforcement of class action prohibitions in employment arbitration agreements.[30]

The Fourth Circuit, in an FLSA case, did not feel a need to cite to the *Gilmer* dicta. Once it found that the plaintiff failed to carry his burden under *Randolph* to prove that he could not vindicate his rights in the arbitral forum, the court simply enforced the class action waiver and compelled arbitration on an individual basis, observing, "His inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum."[31] The Seventh Circuit held similarly in a consumer TILA case.[32] Other courts, noting the availability of attorney fees for prevailing plaintiffs, have held that plaintiffs failed to meet their burdens of proving that the class action waivers precluded them from effectively vindicating their statutory rights in the arbitral forum even where the individual claims were of relatively low value.[33]

The lengths to which plaintiffs must go to meet the *Randolph* burden is exemplified by *Kristian v. Comcast Corp.*[34] In *Kristian*, the First Circuit invalidated (and severed) a provision in Comcast's

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[29]Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 32 (1991) (internal quotations, brackets, and citation omitted).

[30]Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004).

[31]Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002).

[32]Livingston v. Associates Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003) (saying that court is "obliged to enforce the type of arbitration to which these parties agreed," which precluded class actions).

[33]*See, e.g.*, Snowden v. Checkpoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Ornelas v. Sonic-Denver T, Inc., No. 06-cv-00253-PSF-MJW, 2007 WL 274738 (D. Colo. Jan. 29, 2007); Strand v. U.S. Bank Nat'l Ass'n, 693 N.W.2d 918 (N.D. 2005). In *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), the Third Circuit enforced a class action waiver in an arbitration agreement as applied to a TILA claim, in part because of the availability of attorneys' fees in an individual action. In *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), the court extended its holding to the Credit Repair Organizations Act.

[34]446 F.3d 25 (1st Cir. 2006).

contracts with its cable television customers that prohibited class actions as applied to the consumers' antitrust claims. The court relied on expert testimony that the value of individual claims ranged from a few hundred to at most a few thousand dollars and the cost of litigation, particularly attorney time and expert witness fees and expenses, would be several million dollars. The court concluded that no rational attorney would take the case if it could not be brought as a class action.[35] The court noted that the availability of an award of attorney fees to a prevailing plaintiff did not change its conclusion because "[i]n any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court."[36]

The most prominent case invalidating an arbitration agreement's class action waiver on the grounds that it impedes effective enforcement of statutory rights is the California Supreme Court's decision in *Gentry v. Superior Court*.[37] The court concluded that in the context of Gentry's claim for violation of the overtime provisions of the state's Labor Code, the class action waiver "would lead to a de facto waiver [of substantive statutory rights] and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws."[38] The court reasoned that wage and hour awards tend to be modest, particularly in light of the practical difficulties and length of time involved in adjudicating them.[39] The court rejected Circuit City's argument that the availability of attorneys' fees to a prevailing plaintiff balanced the disadvantages of being limited to an individual action.[40] The court also opined that class actions may be necessary to protect the statutory rights of employees other than the individual plaintiff because incumbent employees may fear retaliation if

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[35] *Id.* at 58–59.

[36] *Id.* at 59 n.21. On remand, Comcast withdrew its motion to compel arbitration and instead proceeded with the class action in U.S. district court. Kristian v. Comcast Corp., 469 F. Supp. 2d 1 (D. Mass. 2006). At least for Comcast, the class action ban and the arbitration forum were linked. Apparently, Comcast did not want to arbitrate a class action. With the consent of the plaintiff, the class action proceeded in litigation rather than arbitration.

[37] 165 P.3d 556 (Cal. 2007), *cert. denied sub nom.* Circuit City Stores, Inc. v. Gentry, 128 S. Ct. 1743 (2008).

[38] *Id.* at 563–64.

[39] *Id.* at 564.

[40] *Id.* at 565.

they bring individual claims,[41] and because many claimants may be unaware of their rights.[42]

The *Gentry* court's analysis is intriguing in several respects. First, the court invalidated the class action waiver as violative of the state Labor Code, not on a ground of state general contract law. In its certiorari petition to the Supreme Court, Circuit City argued that such analysis was preempted by the FAA because the court was not enforcing the arbitration agreement "save upon such grounds as exist at law or in equity for the revocation of any contract."[43] Circuit City's argument misconstrued the court's holding. The court did not refuse to enforce the arbitration agreement on the ground that it conflicted with the state Labor Code. It merely refused to enforce the class action waiver because of the conflict with the Labor Code. The court recognized that it could refuse enforcement of the arbitration agreement only if the agreement, not just the class action waiver, was unconscionable (i.e., on a ground for not enforcing any contract), and that otherwise, the case would be allowed to proceed as a class action in arbitration.[44]

Second, *Gentry* premised its holding that the class action waiver was invalid in part on the effect of the waiver on the rights of employees other than Gentry. In so doing, the *Gentry* court expanded the scope of the inquiry beyond *Randolph*'s inquiry as to whether the particular party had proved that the offensive provision impeded that party's ability to effectively vindicate the statutory rights at issue. This expansion was not lost on Justice Baxter, who argued in dissent, "Unless Gentry's contract to arbitrate individually constitutes a de facto waiver of *his own* statutory rights, he should not be allowed to act, contrary to his agreement, as a representative plaintiff."[45]

Third, and most significantly, the court in *Gentry* refused to hold class action waivers in employment agreements per se unenforceable, even in wage and hour actions.[46] In this regard, *Gentry* is consistent with *Randolph*'s requirement that whether provisions in arbitration agreements preclude effective vindication of statutory rights must be determined in each case with the burden of proof on the party resisting the agreement provision. *Gentry* sim-

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[41] *Id.* at 565–66.
[42] *Id.* at 566–67.
[43] 9 U.S.C. §2 (2000).
[44] Gentry v. Superior Court, 165 P.3d 556, 569–70 (Cal. 2007), *cert. denied sub nom.* Circuit City Stores, Inc. v. Gentry, 128 S. Ct. 1743 (2008)..
[45] *Id.* at 579 (Baxter, J., dissenting) (emphasis in original).
[46] *Id.* at 567–68.

ply takes a more employee-protective view of where to draw the line between meeting and not meeting that burden. It still refuses to adopt bright-line rules and compels case-by-case adjudication.

Unconscionability as a Tool to Police Class Action Waivers

Most litigation attacking class action waivers in consumer arbitration agreements has relied on the contract law doctrine of unconscionability. State supreme courts in California,[47] Illinois,[48] New Jersey,[49] North Carolina,[50] and Washington[51] have held consumer arbitration agreements containing class action waivers unconscionable. The courts couple a finding of substantive unconscionability on the ground that the small dollar value of the plaintiffs' claims preclude enforcement on an individual basis with a finding of procedural unconscionability based on the adhesive nature of the contracts, or dispense with the need to find procedural unconscionability. The First Circuit, applying Massachusetts law, appears to have held a class action waiver in an employment contract as applied to an FLSA claim to be unconscionable solely on procedural grounds. In *Skirchak v. Dynamics Research Corp.*,[52] the employer sent an e-mail to all employees two days before Thanksgiving advising them of its new dispute resolution program. The program itself, including the class action waiver, was in an attachment to the e-mail, but the waiver was not in a memo introducing and describing the program, which was also attached to the e-mail. The court found that the format of the presentation, its timing, and its language obscured the waiver of class rights. It contrasted the employer's approach to the arbitration agreement with its approach to other new personnel policies, which included face-to-face training sessions, mailings to employees' homes, and announcements at company-wide meetings.

Unconscionability analysis, however, is not a panacea for opponents of class action waivers. Most jurisdictions require a showing of procedural and substantive unconscionability to deny

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[47]Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005). On remand, however, the California Court of Appeal enforced the ban on class actions because the ban was enforceable under Delaware law and the contract expressly provided that it would be governed by Delaware law. Discover Bank v. Superior Court, 36 Cal. Rptr. 456 (Cal. App. 2006).

[48]Kinkle v. Cingular Wireless, LLC, 857 N.E.2d 250 (Ill. 2006).

[49]Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88 (N.J. 2006).

[50]Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C. 2008).

[51]Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007). The Ninth Circuit applied *Scott* in Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008).

[52]508 F.3d 49 (1st Cir. 2007).

enforcement to a contract provision. Many have rejected claims of procedural unconscionability even though the contracts were adhesive in nature. These courts reason that if the terms were not hidden or the plaintiff had the option of seeking the same services elsewhere, the plaintiff voluntarily agreed to the class action waiver.[53] Although *Clark v. DaimlerChrysler Corp.*[54] did not involve an arbitration agreement, it illustrates this alternative approach to procedural unconscionability. *Clark* involved an agreement by the employee that any claim arising out of employment would be brought within six months, regardless of whether the claim had a longer statute of limitations. The limitations provision was contained in the plaintiff's job application as the eighth numbered paragraph under a bold capitalized admonition to "read carefully before signing."[55] Clark signed the document five months before he was hired.[56] The Michigan Court of Appeals held that the provision was not unconscionable. It found no procedural unconscionability because "plaintiff did not present any evidence that he had no realistic alternatives to employment with defendant. Therefore, while plaintiff's bargaining power may have been unequal to that of defendant, we cannot say that plaintiff lacked any meaningful choice but to accept employment under the terms dictated by the defendant."[57] The Seventh Circuit articulated the rationale against finding adhesive contracts procedurally unconscionable as follows:

> Winiecki does not deny that the arbitration clause is supported by consideration—her salary. Oblix paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution. It is hard to see how the arbitration clause is any more suspect, or any less enforceable, than the others—or, for that matter, her salary. A person who accepts a "non-negotiable" offer of $50,000 salary would be laughed out of court if she filed suit for an extra $10,000, contending that the employer's refusal to negotiate made the deal "unconscionable" and entitled her to better terms. Well, arbitration was as much a part of this deal as Winiecki's salary and commissions,

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[53] *See, e.g.*, O'Shea v. Direct Fin. Solutions, LLC, No. 07-1881, 2007 U.S. Dist. LEXIS 90079 (E.D. Pa. Dec. 5, 2007); Schreiner v. Credit Advisors, Inc., No. 8:07CV78, 2007 U.S. Dist. LEXIS 74014 (D. Neb. Oct. 2, 2007); Fiser v. Dell Computer Corp., 165 P.3d 328 (N.M. App. 2007); Sprague v. Quality Rest. Nw., Inc., 162 P.3d 331 (Or. App. 2007).

[54] 706 N.W.2d 471 (Mich. App. 2005).

[55] *See id.* at 478 (Neff, P.J., dissenting).

[56] *Id.* at 478.

[57] *Id.* at 475.

the rules about handling trade secrets, and other terms. All stand or fall together.[58]

Intuitively, the case for procedural unconscionability may appear stronger where an employer imposes the arbitration agreement on an incumbent employee. Such an employee's only choices are to accept the agreement or terminate the relationship and thereby sacrifice what can be a considerable investment of human capital. The option to quit and start over looking for another job would not appear to be a meaningful one for most workers. Nevertheless, the Texas Supreme Court has rejected such an analysis and held that the imposition of an arbitration agreement on an incumbent employee is not procedurally unconscionable. The court reasoned, "Because an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, to premise continued employment on acceptance of new or additional terms."[59]

Other courts have rejected claims of substantive unconscionability, applying a much narrower substantive unconscionability standard than those that have struck class action waivers as unconscionable. These courts tend to hold that as long as claimants are able to pursue their individual claims in arbitration, the class action waiver is not so substantively one-sided as to shock the conscience.[60]

Even in jurisdictions that take a liberal approach to unconscionability, an employer, merchant, or lender may be able to avoid such policing by inserting a choice-of-law clause providing for the contract to be governed by the law of a jurisdiction more favorable

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[58]Oblix, Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004); *see also* Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 761 (Wash. 2004) (holding non-negotiable arbitration provision in employment agreement not procedurally unconscionable where provision was not hidden in fine print and employee had 15 days to consider it before accepting).

[59]In re Halliburton Co., 80 S.W.3d 566, 572 (Tex. 2004); *but see* Davis v. O'Melveny & Myers, 485 F.3d 1066, 1073–74 (9th Cir. 2007) (holding arbitration agreement imposed on incumbent employee procedurally unconscionable even though employee given three months' notice before agreement took effect and employee could have looked for another job during that period).

[60]*See, e.g.,* Gay v. Creditinform, 511 F.3d 369 (3d Cir. 2007) (applying Virginia law); March v. Tysinger Motor Co., No. 3:076-CV-508, 2007 U.S. Dist. LEXIS 91202 (E.D. Va. Dec. 12, 2007) (reasoning that a party may freely bargain away a procedural right such as the right to bring a class action); O'Shea v. Direct Fin. Solutions, LLC, No. 07-1881, 2007 U.S. Dist. LEXIS 90079 (E.D. Pa. Dec. 5, 2007) (applying Pennsylvania law and holding that $300 claim not so small that it could not be pursued individually where defendant was willing to pay all arbitrator fees).

to them.[61] *Homa v. American Express Co.*[62] graphically illustrates the impact of a choice of law clause. The plaintiff, a New Jersey resident, brought a class action against American Express alleging that it misrepresented the terms of its credit card rewards program. The credit card agreement required arbitration, prohibited class actions, and contained a Utah choice of law clause. Although the New Jersey Supreme Court had ruled that such class action waivers were unconscionable,[63] the court gave effect to the Utah choice of law clause. This proved to be critical, because Utah statutes expressly authorized class action waivers in credit card agreements.[64]

Plaintiffs relying on unconscionability attacks on class action waivers face a potential dilemma. If they attack only the class action waiver, rather than the arbitration provision itself, they are subject to a very strong argument that the issue should be resolved by the arbitrator rather than the court. Under *Buckeye Check Cashing* and *Prima Paint*, the only gateway unconscionability issue to be resolved by a court is whether the arbitration provision itself is unconscionable. Under *Bazzle*, whether the case should proceed as a class action in arbitration is a procedural issue for the arbitrator to resolve. Therefore, it is not surprising that many courts have held that attacks on class action waivers are for the arbitrator, rather than the court, to resolve.[65]

On the other hand, if opponents of class action waivers argue that the waiver mandates a finding that the arbitration clause itself is unconscionable, they risk their attack being character-

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[61] *See* Gay v. Creditinform, 511 F.3d 369 (3d Cir. 2007) (enforcing provision that contract would be governed by Virginia law even though Pennsylvania authorities had held class action waivers in arbitration agreements to be unconscionable); Discover Bank v. Superior Court, 36 Cal. Rptr. 456 (Cal. App. 2006) (enforcing Delaware choice-of-law clause and applying Delaware law to enforce ban on class actions in arbitration agreement), *on remand from* 113 P.3d 1100, 1117–18 (Cal. 2005) (remanding to trial court to determine whether to enforce choice-of-law clause in credit card agreement with California resident adopting Delaware law); Fiser v. Dell Computer Corp., 165 P.3d 328 (N.M. App. 2007) (enforcing Texas choice-of-law clause); Strand v. U.S. Bank National Ass'n, 693 N.W.2d 918 (N.D. 2005) (unconscionability of arbitration provision in credit card agreement with Oregon resident evaluated under North Dakota law due to choice-of-law clause).

[62] 496 F. Supp. 2d 440 (D.N.J. 2007).

[63] Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88 (N.J. 2006).

[64] *See Homa*, 496 F. Supp. 2d at 449.

[65] *See, e.g.*, Anderson v. Comcast Corp., 500 F.3d 66 (1st Cir. 2007); Davis v. ECPI Coll. of Tech., LC, 227 Fed. Appx. 250 (4th Cir. 2007); Johnson v. Long John Silver's Rests., Inc., 320 F. Supp. 2d 656 (M.D. Tenn. 2004), *aff'd*, 414 F.3d 583 (6th Cir. 2005). In *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007), the court indicated that it would normally leave the issue of a class action waiver's unconscionability to the arbitrator but proceeded to decide the issue because both parties agreed to judicial resolution.

ized as claiming special rules for arbitration agreements and preempted under *Doctor's Associates, Inc. v. Casarotto*.[66] In *Casarotto*, the Supreme Court held that the FAA preempted a Montana statute that required that notice that a contract is subject to arbitration be typed in underlined capital letters on the first page of the contract. The Court drew a line between "generally applicable contract defenses, such as fraud, duress, or unconscionability, [which] may be applied to invalidate arbitration agreements,"[67] and "state laws applicable only to arbitration provisions,"[68] which may not because they are preempted by the FAA.

Thus, the unconscionability urged must be a generally applicable contract defense for it to survive preemption attack. If the class action waiver is attacked as unconscionable, then the plaintiff is contending that regardless of whether it is coupled with an arbitration agreement, it must be struck down. Such an analysis sticks to general contact defenses and clearly survives a preemption attack.

On the other hand, if the attack is on the arbitration clause itself because the clause contains a class action waiver, the preemption issue becomes more problematic. Although the Ninth Circuit has expressly rejected the argument that such an attack is attacking arbitration because it is arbitration,[69] the Third Circuit has accepted it and held that Pennsylvania case authority finding arbitration agreements with class action waivers unconscionable to be preempted:

> Overall, it is perfectly obvious that Gay relies on the uniqueness of the arbitration provision in framing her unconscionability argument. Nothing could be clearer because her argument is not predicated on a contention that Intersections misled her as to the Agreement's terms or forced her by some unlawful coercion to enter into it and accept the arbitration provision. Nor can she even fairly contend that she was under any compulsion to enter into the Agreement which she clearly views as having been essentially worthless to her. Quite to the contrary she contends that the provision is unconscionable because of what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis. Thus, with all due respect to the Pennsylvania Superior Court, we will not apply state law…and thereby interfere with the appropriate application of

[66]517 U.S. 681 (1996).
[67]*Id.* at 687.
[68]*Id.*
[69]Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1221 n.3 (9th Cir. 2008).

the FAA. The Commerce and Supremacy Clauses of the United States Constitution are implicated here.[70]

If the Class Action Waiver Is Struck, What Happens Next?

The case law governing the enforceability of class action waivers in arbitration agreements is in a massive state of confusion with no clear resolution in sight. Even in those jurisdictions that deny enforcement, the question arises as to the consequences. As the court recognized in *Gentry*, invalidation of the class action waiver does not necessarily invalidate the arbitration agreement. Rather, it results in the claimants pursuing their class action in arbitration.[71] Claimants will stay in court where, as in *Gentry*, the arbitration agreement itself is invalidated, or where the agreement does not allow the court to sever the class action waiver from the arbitration provision,[72] or where the parties agree that the class action will proceed in court rather than in arbitration.[73]

Consequently, we can reasonably predict that what awaits us will be another round of litigation. *Long John Silver's Restaurants, Inc. v. Cole*[74] provides a taste of what is to come. *Cole* involved a class action FLSA claim pursued in arbitration. Although Rule 23 opt-out class actions are not available under the FLSA, which provides instead for opt-in collective actions, the arbitrator, interpreting and applying AAA class arbitration rules, handled the case as an opt-out class action. The Fourth Circuit held that the arbitrator did not display a manifest disregard for the law and refused to vacate the award.

Undoubtedly, we will see much more litigation over the degree to which courts will police class action arbitral procedures. Indeed, one issue that we can expect to generate considerable controversy is the degree to which courts must police arbitrators and parties to protect the interests of absent class members. It is open to debate whether arbitrators, privately selected by the immediate parties, are institutionally competent to safeguard the interests of absent class members, particularly where those interests may conflict with

[70] Gay v. Creditinform, 511 F.3d 369, 394 (3d Cir. 2007).
[71] *See, e.g.*, Skirchak v. Dynamics Research Corp., 508 F.3d 49 (1st Cir. 2007); Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88 (N.J. 2006).
[72] *See, e.g.*, Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976 (9th Cir. 2007); Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007).
[73] *See* Kristian v. Comcast Corp., 469 F. Supp. 2d 1 (D. Mass. 2006).
[74] 514 F.3d 345 (4th Cir. 2008).

those of the parties immediately before the arbitrator. Stay tuned to see how this next phase of litigation develops.

II. An Introduction to Mandatory Arbitration and Class Action Waivers

Barry Winograd*

The Setting

A growing debate in the field of arbitration concerns mandatory arbitration agreements that condition an employment or consumer relationship on a waiver of class action proceedings by aggrieved individuals. When upheld, these waivers apply in arbitration (and in court) as a pre-dispute bar to individuals initiating actions as class representatives, or being members of a covered class in cases brought by others who are not subject to class action waivers. The movement to enforce such waivers relies on the expanded use of mandatory arbitration after a series of U.S. Supreme Court decisions in the 1980s and 1990s affirming the broad, preemptive reach of the Federal Arbitration Act (FAA).[1]

When effective, class action waivers can blunt, if not entirely eliminate, an instrument for social improvement often used by organizations and attorneys representing individuals.[2] Potentially, millions of dollars are at stake in sprawling class action cases, some involving the largest corporations in the United States and the world.[3] To gain a sense of the potential impact of the issue, take a look in your wallet or pockets, or your file of bills to be paid, to

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[1]The FAA is codified at 9 U.S.C. §1, *et seq.* Several cases affirming FAA preemption are evidence of the direction taken by the Supreme Court. *See, e.g.*, Doctors Associates, Inc. v. Casarotto, 517 U.S. 681 (1996); Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Perry v. Thomas, 482 U.S. 483 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 60 U.S. 1 (1983).

[2]A separate question beyond the scope of this paper is protection potentially afforded employees under Scction 7 of the National Labor Relations Act (29 U.S.C. 157) for concerted activity in the form of a class action to enforce wage or other protective labor legislation (*see* Salt River Valley Water Users' Assn. v. Nat'l Labor Relations Bd., 206 F. 2d 325 (9th Cir 1953); Harco Trucking, 344 NLRB 56 (2005); 52nd St. Hotel Assocs., 321 NLRB 93 (1966); Trinity Trucking & Materials Corp., 221 NLRB 364 (1975)).

[3]*See, e.g.*, Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003); Kinkel v. Cingular Wireless, 223 Ill. 2d 1 (2006).