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

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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).

see the prospect of mandatory arbitration through multiple relationships in our daily lives. These agreements involve cell phone and Internet companies, credit card issuers, banks and lenders, brokerage houses, health care plans, and insurance carriers. Employers, too, can be added to the list, as the National Academy of Arbitrators knows well.

Employment law also is witnessing a great upsurge in class action filings for wages and hours, for discrimination, and for other claims. One tabulation reported that wage and hour class actions in the federal courts doubled between 2001 and 2006.[4] For current figures, a nationally prominent management-side law firm surveyed public data from federal and state courts.[5] The law firm's study revealed that in the six months from October 2007 through March 2008, there were 1,655 employment law class actions (1,147 federal and 508 state), almost three-quarters in the wage and hour field. In California, reversing the national trend, most of the class actions were filed in state court (407 out of 544 cases). Again, however, a majority raised wage and hour claims. Florida ran just behind California in the total filings (with 533). In reporting the results, the firm commented that due to gaps in state court records, the numbers are understated, and likely somewhat higher overall.

With this as the background, it is not surprising that some employers (and banks, insurers, and other service providers) believe that arbitration could be a better alternative to high-stakes class action litigation. But the road toward arbitration displacing class actions has not been smooth. At present, the law concerning class action waivers is in considerable flux, with court decisions expressing divergent views.[6] Class action proponents, especially within the plaintiffs' bar, are mounting sustained attacks in U.S. federal and state courts. Although mandatory arbitration continues to be questioned, the limited prospect of a legislative ban

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[4]Business Week, *Wage Wars*, (Oct. 1, 2007). The article is available at: http://www.businessweek.com/magazine/content/07_40/b4052001.htm?chan=top+news_top+news+index_top+story.

[5]Littler Mendelson, *Total Wage and Hour Compliance: An Initiative to End the Wage and Hour Class Action War* (2008), p. 1. Available online: http://www.littler.com/collateral/18822.pdf. Another management-side law firm prepares a weekly online report on class action filings in California that tracks the high level of employment- and labor-related class action filings in federal and state courts: http://classactiondefense.jmbm.com/10class_actions_in_the_news/.

[6]Compare e.g., Discover Bank v. Superior Court, 36 Cal.4th 148(2005) and Kinkel v. Cingular Wireless, supra, 223 Ill.2d 1 (2006), with Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004) and Jenkins v. First American Cash Advance of Georgia, 400 F.3d 868 (11th Cir. 2005).

makes mandatory arbitration an uncertain candidate for extinction. A change could be in the works with pending U.S. legislation titled the Arbitration Fairness Act, yet a Democratic majority in Congress secured in the 2008 election cycle may not be sizeable enough to stop a filibuster by Senate opponents.[7]

Some attempts to regulate in the area of class action waivers already have been made, as when parties to a mandatory agreement specify a provider of alternative dispute resolution (ADR) services. Over the past decade, the rules of ADR organizations such as the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) have spelled out due process protections for fair hearings, fee allocations, and impartial arbitrators. Deficiencies in mandatory arbitration have not been eliminated, but progress is evident over the past 15 years.[8]

However, efforts to regulate class action waivers through such forums have had only partial success. The AAA, for example, accepts the legitimacy of an express class action contractual waiver, absent a judicial determination to the contrary.[9] If an arbitration agreement is silent on class actions, the AAA defers a decision on the subject to the arbitrator appointed to hear the matter. For JAMS, the class action rules it promulgated leave a decision about the arbitrability of a class action to the arbitrator in construing the relevant agreement, but the JAMS rules expressly caution that they should not be deemed to indicate a preference in favor of or against class arbitration.[10]

In several respects, class action waivers challenge basic tenets underlying adhesion agreements that form the backdrop for mandatory arbitration proceedings. As commercial law evolved in the last century, adhesion contracts became accepted features of the legal environment as a price to be paid for a modern industrial society in which suppliers of goods and services (and employment) seek to facilitate their market participation and to minimize risk.[11]

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[7]Arbitration Fairness Act of 2007 (SB 1782).

[8]Surveys of recent developments can be found in Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 Emp. Rts. and Emp. Pol'y J. 101 (2007); Harding, *The Limits of the Due Process Protocols*, 19 Ohio St. Disp. Resol. 369 (2004).

[9]The AAA position is set forth in its "Policy on Class Arbitrations," issued July 14, 2005.

[10]Rule 2, JAMS Class Action Procedures (Feb. 2005).

[11]*See, e.g.*, Metro East Center v. Qwest Communications, 294 F.3d 924 (7th Cir. 2002); *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817-818 (1981).

By definition, however, adhesion contracts are deemed to be procedurally unconscionable because they are imposed by an unquestionably dominant party to a transaction as a condition of making an agreement.[12] Adhesion agreements also can be substantively unconscionable; that is, improperly utilizing legal rules and standards that afford the dominant party greater advantage. For example, as a substantive concern, an adhesion agreement that permits the dominant party to unilaterally select an arbitrator to resolve a dispute would be unconscionable.[13] However, selection from a list of potential arbitrators provided by a neutral ADR organization can avoid this problem.

When judicial review determines that adhesion contract deficiencies are present, the offending provisions often are severed from the agreement so that the balance of the agreement remains enforceable. Alternatively, when the substantive provisions are inextricably linked to other contract terms, the agreement may be voided in its entirety.[14] In addition to calling into question basic principles regarding adhesion agreements, class action issues present unique public interest concerns. These concerns involve the effectiveness of arbitration as a substitute forum for the administration of civil rights laws compared with judicial efficiency in handling matters well-suited to class action status. The due process rights of absent class members, already a matter for judicial watchfulness, also could be subject to heightened concern in the more privatized context of arbitration.[15] With such interests at stake, the time may be right for more focused consideration to clarify how class action waivers should be treated. Before considering such options, however, U.S. Supreme Court precedent on the topic must be examined.

The Supreme Court Speaks, But Not Clearly

In *Green Tree Financial Corp. v. Bazzle*,[16] the U.S. Supreme Court, by plurality decision, remanded a dispute for an arbitrator to

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[12]Armendariz v. Foundation Pyschare, 24 Cal.4th 83 (2000); Little v. Auto Stiegler, Inc., 29 Cal.4th 1064 (2003).

[13]Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); McMullen & Meijer, Inc., 355 F.3d 485 (6th Cir. 2004); Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005).

[14]Compare Armendariz v. Foundation Psychcare, supra 24 Cal.4th 83 (2000) with Kristian v. Comcast Corp., 446 F.3d 251 (1st Cir.).

[15]*See, generally*, Caro, *Common Sense About Common Claims*, 25 Hofstra Lab. & Emp. L.J. 33 (2007).

[16]539 U.S. 444 (2003).

determine whether an arbitration agreement permitted or prohibited class action relief. The class actions in *Bazzle* were filed on behalf of borrowers alleging that customer loan forms used by the company failed to include appropriate advisory language required by South Carolina law. If liable, the lender would be subject to a monetary penalty for a contract deficiency.

After protracted trial and appellate proceedings in South Carolina, the state's high court concluded that the arbitration agreements were silent on whether class actions were barred under the lending agreement, and, for this reason, a class action result was authorized. Ultimately, after two class action arbitrations were conducted, before the same arbitrator in each instance, liability was found. As the remedy, upheld by the South Carolina Supreme Court, the arbitrator awarded more than $21 million to be paid by the lender, along with attorneys' fees for class counsel.[17]

The Supreme Court vacated the state court judgment. Four justices (Breyer, Scalia, Souter, and Ginsburg) found that the decision about class action authorization was not a question for judicial determination, but was a disputed issue of contract interpretation for the arbitrator to resolve under the broad language of the contract's dispute resolution text and the FAA. According to these justices, *Bazzle* did not deal with the validity and scope of the overall arbitration and whether the class action question was a so-called gateway issue of arbitrability reserved to the courts under Supreme Court precedent.[18] Instead, for the four judges, this case presented an issue about the meaning of the arbitration procedure itself. As such, the plurality opinion saw it as a matter of interpretation for the third-party decisionmaker under the text of the agreement; that is, the arbitrator, not the state court. Based on this reasoning, the dispute was remanded for an arbitrator's determination.

Justice Stevens concurred in the judgment only.[19] He would have affirmed the state court decision as he viewed class action arbitration as permissible under the agreement. However, Justice Stevens concurred in order to have a controlling judgment, and because Justice Breyer's opinion expressed views close to his.

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[17] 351 S.C. 244 (2002).

[18] *Id.*, 539 U.S. at 452, citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002). *See also* Buckeye Check Cashing, Inc., v. Cardegna, 546 U.S. 440 (2006); PacifiCare Health Systems v. Book, 538 U.S. 401 (2003).

[19] *Id.*, 539 U.S. at 455-456.

Three dissenting justices (Rehnquist, O'Connor, and Kennedy) believed the issue of whether a class action was proper was for a court to decide, not an arbitrator, and that the contract precluded class relief when properly construed consistent with the preemptive force of the FAA.[20] The dissent acknowledged that the contract was silent about class actions. Despite this silence, the contract as a whole, as read by the dissenters, gave the lender the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members and this right was denied when the same arbitrator was foisted upon the company to resolve those claims as well.[20] Because arbitration is a matter of consent, not coercion, the dissenters would have reversed the state court judgment.

As for Justice Thomas, he restated his long-standing position that the FAA does not apply to state court proceedings.[21] He would have left the judgment standing.

What can we foresee about this mix of views? By sending the case back to arbitration, one wonders whether an arbitrator will decide on an expansive jurisdiction in construing a silent agreement. Although some courts have puzzled about what to make of *Bazzle*, certain key issues were left open. These include whether a class action waiver is unconscionable under state law, regardless of an arbitrator's view, and whether, for that or for other reasons, such a waiver is unenforceable. Under Section 2 of the FAA, enforcement can be denied upon such grounds as exist at law or in equity for the revocation of any contract.[22] Issues related to unconscionability fall within the scope of this proviso, and have provided a principal avenue for objections to mandatory arbitration since the Supreme Court's crucial decisions of the 1980s and 1990s.[23]

What Proponents Say

Proponents of class action waivers in mandatory arbitration agreements offer the following points to support their position.[24] They see a green light in *Green Tree* that these issues should be answered by the underlying contract. Arbitration, they argue, is embodied in private agreements reflecting the intent of the parties

[20] *Id.*, 539 U.S. at 457-458.
[21] *d.*, 539 U.S. at 460.
[22] 9 U.S.C. §2.
[23] *See, e.g.*, Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002), *cert. den.* 535 U.S. 1112 (2002).
[24] *See, generally, Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreement*, 60 Bus. Law 775 (2005).

and should be enforced, as required by well-developed Supreme Court precedent under the FAA. In a leading employment case upholding a mandatory arbitration provision, *Gilmer v. Johnson/ Interstate Lane*,[25] the Supreme Court briefly addressed the issue, reasoning that a class action ban did not, standing alone, bar reliance on the agreement in dispute because, under the securities law, individual resolutions were feasible.

Class actions, in the view of arbitration advocates, are procedural devices of relatively recent vintage, not long-cherished substantive rights, and, in any event, the Federal Rules of Civil Procedure typically do not apply in arbitration. Proponents wonder why, if jury trials can be waived by a private arbitration agreement, the same result should be precluded for class action waivers. To underscore this protection, clients are advised to use clear, plain language banning class actions, believing that these should be upheld by arbitrators and courts under a broad reading of *Bazzle*.[26]

Apart from contract language as the basis for a ruling, proponents urge that a key question is whether there is a statutory bar to a class action waiver, or other clear evidence of legislative intent to prohibit waivers. It is argued that, if such intent is neither express nor fairly implied in public law, this reinforces the lesson that an agreement containing a class action waiver should be controlling.

Adding weight to this perspective, arbitration proponents observe that litigation is designed for individuals or small groups, and that class actions are a specialized procedural device that departs from the customary forms of our judicial system. Moreover, they claim, class actions are infused with procedural and substantive complexity, and are not well-suited for arbitration, where discovery usually is limited and the decisionmaker often lacks the skills and experience to handle this kind of dispute. Beyond these concerns, proponents urge that an element of the benefit of the bargain in arbitration is an agreement that the parties retain the highly valued right to select an individual arbitrator to hear their individual case. This benefit would be lost if, as noted by the dissent in *Bazzle*, a single arbitrator heard the case of non-party

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[25]Gilmer v. Johnson/Interstate Lane, 500 U.S. 20 (1991).

[26]Drafting suggestions include use of singular pronouns, confidentially assurances, and other terms to demonstrate that only individual adjudication is appropriate. (P. Christine Deruelle and Robert Clayton Roesch, *Gaming the Rigged Class Action Game : How We Got Here and Where We Go Now* (Weil, Gotshal & Manges, LLP 2007), *available at* www.metrocorpcounsel.com (search articles).

individuals, and required that they be subject to an arbitration agreement with different procedures and selection mechanisms.

What Opponents Say

Opponents say that enforcement of class action waivers should not be automatic, and that *Bazzle*, with its four divergent opinions, leaves many questions unanswered.[27] These critics maintain that there are important contract law principles and public policy reasons that should guide rulings in this area. They emphasize that the premise underlying the Supreme Court's reliance on the FAA to authorize mandatory arbitration is that claimants are subject to a change in forum, not a change in the rights they seek to protect and enforce.

Opponents urge that class actions play a significant and favored role in protecting the public's interest in full enforcement of important statutes for the benefit of employees, consumers, borrowers, and others.[28] Without class action status, opponents ask "How else can competent counsel be attracted to represent hundreds, if not thousands, of individual litigants?"[29]

Those who oppose waivers contend that class action claims, whether based on statute or contract, typically are too small and too numerous for effective vindication of substantive rights in individual cases, which is one of the reasons class actions were developed for our modern judicial system. Given this, opponents view class action waivers in a series of individual arbitration agreements as a means of avoiding the consequences of unlawful or improper business practices by thwarting a cost-efficient method to correct wrongdoing.[30]

Opponents maintain that class action waivers, in effect, provide defendants with a pre-dispute immunity from the deterrent and corrective goals of protective legislation, while also reducing if not eliminating large-scale exposure to damages and to litigation costs. Opponents view this approach as contrary to public

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[27] *See, generally*, Sternlight and Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 Law & Contemp. Probs. 75 (2005).

[28] Vasquez v. Superior Court, 4 Cal.3d 800, 808 (1971); Linder v. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997). Thrifty Oil, 23 Cal.4th 429, 445 (2000).

[29] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).

[30] In this respect, those opposing class action waivers believe such limits compound the shortcomings present in mandatory arbitration systems generally. For a comprehensive overview of research in this field, see Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, Emp. Rts. & Emp. Pol'y J. 405 (2007).

policy, as an arbitration agreement with a class action waiver could exempt a contracting party from responsibility for fraud or other willful misconduct.[31]

Although there are some situations in which administrative agencies such as the Equal Employment Opportunity Commission are not parties to the arbitration agreement, and retain an independent right to pursue class actions, opponents note that these agencies have limited resources to seek such relief.[32] In this respect, class actions also provide a means for employees, consumers, and others to secure their rights and, in the process, to reduce fears of reprisal if a matter were to be pursued individually.

At a minimum, critics of class action waivers contend that class action proceedings can go forward in arbitration by consolidating related individual claims, even if a waiver of the procedure applies to court actions.[33] Today, arbitrators often are experienced professionals and retired judges who can handle class-wide proceedings efficiently. Class action proponents observe that many jurisdictions permit consolidation of actions, and the Uniform Arbitration Act also supports this potential outcome.[34] In this context, the due process interests of absent class members can be protected by arbitrators and, to the extent necessary, the proceedings will remain subject to continuing judicial oversight before and after class certification.[35]

What Next?

What are the options for resolving class action waiver issues? One option is to let arbitrators decide on the availability of class action relief based on contract and statutory language in individual cases, notably when the agreement is silent. This is the plurality view in *Bazzle*. Another option is to uphold a clear contract ban on

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[31]Discover Bank v. Superior Court, 36 Cal.4th 148 (2005) (citing California Civil Code Sec. 1668). Advocates for plaintiffs have gone one step further, suing a group of credit card companies with antitrust allegations that the companies combined to stifle market competition by utilizing mandatory arbitration and class action waivers in their consumer agreements. (Ross v. Bank of America, 524 F.3d 217 (2d Cir. 2008).)

[32]EEOC v. Waffle House, 534 U.S. 279 (2002).

[33]Keating v. Superior Court, 31 Cal.3d 584, 613-614 (1982) overruled on other grounds in Southland Corp. v. Keating, *supra*, 465 U.S. 1 (1984); Sanders v. Kinko's, Inc., 99 Cal.App.4th 1106 (2002). *See also* California Code of Civil Procedure, Section 1281.3 (consolidation of claims in arbitration).

[34]Section 10, Revised Uniform Arbitration Act (2000). Consolidation, however, is subject to the terms of an agreement under Section 4(a) of the revised act, provided the term is valid under applicable law.

[35]Keating v. Superior Court, supra, 31 Cal.3d at 613.

class action proceedings. Several courts already have so ruled, and a majority on the Supreme Court may evolve in this direction.

A third option is to conclude that, as a rule, class action waivers in arbitration agreements are unconscionable in cases with limited recoveries available for individual claimants. Such a blanket approach may lead to Supreme Court review based on a theory of FAA preemption as arbitration agreements are being singled out for treatment that differs from contracts generally. However, to date, the Court has denied certiorari in two recent cases that rejected class action waivers.[36] A fourth option is to pursue legislative reform to clarify that certain statutes in the public interest authorize class action relief in court, which cannot be waived by private agreement.

Assuming differences in judicial views on unconscionability, and assuming, too, that legislative action at the federal level falls short of a full ban on class action waivers, a fifth option is present. This option would permit class actions to go forward in arbitration, with waivers being severed from the remaining portions of the agreements that otherwise withstand challenges that the agreements are unconscionable.[37]

The *Gentry* Decision

An example of a decision pointing the way toward class action arbitration is the California Supreme Court's approach in late 2007 in the *Gentry* case.[38] In that decision, the court considered a class action waiver in a mandatory arbitration provision used by Circuit City Stores. The specific dispute at issue was whether the plaintiffs could pursue in class action litigation allegations that they were misclassified as employees exempt from overtime laws under California's Labor Code. The court drew upon reasoning in the *Discover Bank*[39] consumer case, but provided a different two-part analysis that took into consideration the employment law setting.

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[36]T-Mobile USA, Inc. v. Laster, 252 Fed. App. 777 (9th Cir. 2008, unpublished). cert. den. 128 S. Ct. 2500 (2008); Gentry v. Superior Court, 42 Cal. 4th 433 (2007), cert. den. 128 S. Ct. 1743 (2008).

[37]*See, e.g.*, Anderson v. Comcast Corp., 500 F. 30 66 (1st Cir. 2007); Skirchek v. Dynamics Research, 508 F.3d 49 (1st Cir. 2007). In one case, after the appellate court rejected a class action ban in an action to compel arbitration, the company decided to litigate rather than have a class action in arbitration. (Kristian v. Comcast Corp., 469 F. Supp. 2d 1 (D. Mass. 2006).)

[38]Gentry v. Superior Court, 42 Cal. 4th 443 (2007).

[39]Discover Bank v. Superior Court, 36 Cal.4th 148 (2005).

In the first part of the decision, the *Gentry* court observed that an employee's statutory wage rights in California touch on non-waivable public policy interests for which a class action would be appropriate because the amount at issue usually is modest. As the court noted, protecting those rights, individually or by securing competent counsel, likely would be impractical. According to the court, banning a class action not only might undermine those non-waivable rights, but also could raise the prospect of employer retaliation or non-enforcement if claimants were compelled to pursue only individual arbitration proceedings to secure relief. The dispute was remanded, in part, to consider whether the court's concerns about the limited potential for individualized relief in arbitration applied to the claims and to the procedure established by the employer.

In the second part of the *Gentry* decision, the court turned to an analysis of unconscionability principles, while accepting as a starting premise that adhesion contracts can be upheld. The employer had distributed the arbitration agreement in a summary format, along with a full-length document, for employee review. Workers had 30 days to opt out of the agreement. If the workers did not opt out, then the agreement would apply to future claims by barring court actions. Before *Gentry,* two decisions by the Ninth Circuit upheld the employer's opt-out arbitration agreements against an unconscionability attack.[40] The California Supreme Court did not.

In the court's view, the summary description given to employees was procedurally unconscionable because it did not offer fair notice to employees of the reasons that the agreement might be unfavorable to them, including a shortened limitations period, restrictions on economic and punitive damages, and a potential shifting of arbitration fees and costs to the employee. These limitations deviated, at least in part, from California precedent in *Armendariz* and other cases establishing minimum conditions if mandatory arbitration is to be deemed acceptable. The court in *Gentry* also wondered whether an employee would freely exercise a right to opt out if, as a practical matter, an employee would feel pressured to go along with the agreement, notwithstanding

[40]Circuit City Stores v. Najd, 294 F.3d 1104 (9th Cir. 2002); Circuit City Stores v. Ahmed, 283 F.3d 1198(9th Cir. 2002). In another Circuit City case, without an opt-out provision, the Ninth Circuit found that the company's class action waiver, along with other provisions, rendered the agreement unconscionable. (Ingle v. Circuit City Stores, Inc., 328 F.3d 1165(9th Cir. 2003)).

the opt-out proviso.[41] As such, the court concluded that the agreement might be unconscionable. The dispute was remanded to make that determination, and, if not unconscionable as a whole, to determine if the class action waiver could be severed, thereby permitting the case to go forward as a class action arbitration.

Practical Aspects of Class Action Arbitration

The two-part approach in *Gentry* leads directly to the prospect of greater arbitrator involvement in class actions. This is the case not only in California, with nearly 15 percent of the U.S. population, but in other jurisdictions where the court's analysis might be adopted. If this option is pursued, arbitrators will be asked to address a host of issues. The balance of this presentation will identify some of the practical elements of class action cases that we will need to consider.[42]

Among the issues that often arise in the precertification phase of class action proceedings, the following should be noted. At the outset, we can ask: Who will be in charge when there are multiple attorneys dealing with multiple claims? Because counsel in class action proceedings have a heightened professional duty that extends to potential class members, not just to those who are identified as named claimants, the decision about who will serve as lead counsel can have great significance. A related topic is how to coordinate multiple class action filings, with or without ongoing judicial oversight. A third consideration for those cases touching on labor-management relations is whether the plaintiff's counsel has a preclusive conflict of interest if the same attorney or law firm represents a union with an organizing goal involving the putative class.[43]

Another area of concern to an arbitrator will be disclosure requests by class counsel for names and contact information of those in the proposed class.[44] This information often is subject to an individual employee having an opportunity to request that personal information be withheld after notice has been forwarded. In

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[41] *Gentry*, supra, 42 Cal.4th at 471.

[42] An excellent introductory resource for publications and other materials regarding class actions is the Federal Judicial Center. (www.fjc.gov.)

[43] Sharp v. Next Entertainment, Inc., 163 Cal.App.4th 410 (2008) (rejecting absolute ban on representation).

[44] A right to disclosure was affirmed in *Pioneer Electronics (USA), Inc., v. Superior Court*, 40 Cal.4th 360 (2007).

striking a balance, this type of discovery is important, ultimately, in assessing whether certification of a class action will be justified based on information secured from employee interviews.

Other precertification questions involve the scope of discovery. Although discovery initially will focus on the narrower question of class action certification, rather than on the merits of the case, this is a distinction that is often difficult to maintain in practice. The validity of a single employment policy might provide a class-wide basis for a class action determination in some instances, but many cases turn on whether there is a pattern or practice by a respondent giving rise to class action elements. In this regard, frequently the most effective way to determine whether there is a pattern or practice is to engage in what amounts to class-wide discovery bearing on the merits of the dispute.

In the precertification phase, there also may be questions concerning the validity and enforceability of releases secured by a respondent employer, usually before a lawsuit has been filed. Whether these prelitigation releases were accompanied by adequate disclosure when they were secured, or whether they were the result of coercive influence, are issues that may be argued before an arbitrator.

Dispositive motions also may be presented to an arbitrator in the precertification period. Not only is it possible to have an entire class action dismissed on a motion for summary judgment, particularly if liability turns on a straight forward legal question, there are other situations in which some, but not all, of the potential class claims might be dismissed, depending on the variety of causes of action advanced by claimant's counsel.

At the certification phase, an initial question to consider is whether a court has retained jurisdiction over the litigation in order to rule on certification itself. A court could believe that is uniquely positioned to ensure due process and fair treatment for the class, and, ultimately, to approve the res judicata effect of a class action in barring future claims. However, to the extent an arbitrator is involved in the certification phase, the standard questions provided by Rule 23 of the Federal Rules of Civil Procedure, or its state law analog, would govern the determination. Is the class ascertainable in terms of the definition that will apply? Do common questions of law and fact predominate? Is the class representative typical of those alleged to have been adversely affected? Is a class action a superior means for securing relief? The rules

developed by the AAA and JAMS, for example, spell out the main considerations that apply.[45]

At times, when the litigation has demonstrated a variety of employee job positions, and contrasting or conflicting employee interests, subclasses may be proposed when a certification motion is filed or in opposition to such a motion. In some instances, subclasses more accurately reflect the alleged harm that has taken place; for example, subclasses may involve those presently in the work force, as well as those previously separated or retired. Other subclasses can reflect differences in job titles and functions, as well as varying time periods before and after a change in employer policy, with all distinctions possibly affecting damage calculations. If unable to defeat certification entirely, then an employer might seek to narrow its reach in terms of the class definition or by creating subclasses, some of which may be entitled to more limited relief.

As an aspect of the certification process, several questions emerge with respect to the kinds and timing of notice to be sent to class members to permit them to exercise the option of seeking individual relief outside the confines of a class action. Related questions concern how the certification process will be administered, and whether the certification procedure will fall apart if an excessive number of individuals opt out.

In this period, an arbitrator also might encounter objections from others in the class, or from intervening counsel, raising questions about the adequacy of the procedure, particularly if stipulations have been reached on procedures to be used. Concerns about proper treatment of the class also can be present when an arbitrator is called upon to approve a settlement, and to conduct a fairness hearing at which objections can be presented. Other difficult issues that objections and challenges can touch upon include the extent of a defendant's interest in a reversion of unclaimed payments that might not be sufficiently beneficial to the plaintiff class, or the use of a fluid recovery (or, *cy pres*) funding design to maximize distribution of unclaimed settlement funds.[46]

Turning to the postcertification phase, leading up to and at trial, special issues are present in class action proceedings. For example, what plan will be adopted for trial in terms of statistical

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[45]Rule 2, AAA Supplementatry Rules for Class Arbitrations (Oct. 8, 2003); Rule 3, JAMS Class Action Procedures (Feb. 2005).

[46]*See, e.g.*, Six Mexican Workers v. Arizona Citrus Growers, 904 F2d 1301 (9th Cir. 1990); California Code of Civil Procedure, Section 384.

sampling or other types of evidence that can streamline a case, and yet are sufficiently probative on the merits? Is "simple" random sampling, or "stratified" sampling, or "cluster" sampling, the best model to secure reliable, representative results? These questions can arise because employer records might be incomplete or inaccurate, and once plaintiffs have raised inferences of violations, the burden of producing evidence may shift to the employer.[47]

Another issue is the extent to which live witness testimony will be utilized, given the near impossibility in large-scale class actions of examination and cross-examination of everyone within a class. Cost and timing concerns can be paramount in dealing with the trial phase of a class action.

A final area for consideration concerns post-trial activity. Whether it is in the period after certification and before trial, or after trial, motions to decertify the class, or a portion of the class, can be made based on the evidence presented. Another question to be resolved by an arbitrator involves the appropriate award of attorneys' fees and costs to prevailing counsel, as many of the claims presented in class actions carry with them statutory awards of fees and costs when a claimant prevails.

After a class determination, there also are issues of judicial review of an arbitration ruling. Will statutory principles be fully applied, or will the traditional approach of a narrow review of arbitration decisions be followed? At least one appellate decision has confirmed that judicial review will be narrow.[48] In that proceeding, an arbitrator applied the AAA's class action rules to authorize an "opt-out" certification process in a case alleging violation of the Fair Labor Standards Act, rejecting the "opt-in" method preferred under that statute. The court ruled that the variation from statutory law was acceptable under the applicable arbitration rules.

This discussion is not intended to offer an exhaustive list of the issues faced by arbitrators in class actions, but to suggest that, as a professional body of decisionmakers, arbitrators in the Academy have substantial work to do in preparing for increased arbitration activity in the class action field. How we go about that task is a subject we can and should address in the years to come.

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[47]Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946); Bell v. Farmers Ins. Exchange, 115 Cal. App. 4th 715, 746–751 (2004).

[48]Long John Silver's Restaurants, Inc. v. Cole, 514 F.3d 345 (4th Cir. 2008).