Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System

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MANDATORY ARBITRATION CLAUSES IN
CONSUMER CONTRACTS: CONSUMER
PROTECTION AND THE CIRCUMVENTION OF
THE JUDICIAL SYSTEM

INTRODUCTION

Under traditional consumer law, if a large corporation violates statutory consumer rights or subjects a consumer to an invalid contract under federal or state law, the consumer has the right to use federal and state judicial systems to recover damages against the corporation. However, under modern consumer law, many consumers are banned from using the judicial system and forced to submit their claims to alternative dispute resolution mechanisms because they unknowingly signed an agreement to arbitrate their disputes outside the judicial system.

Out of court arbitration was initially created so that parties, with equal bargaining power, could reduce the costs of litigation by agreeing to resolve their dispute through the use of a mutually acceptable arbitrator. In some instances, dispute arbitration relieves a burdened judicial system that would otherwise resolve the dispute in the courtroom. Unfortunately, in other instances, such benefits are not likely to accrue when powerful parties are able to mislead less powerful opponents into agreeing to arbitrate disputes, thereby waiving the right to use the judicial system. The less powerful party, consequently, may turn to the judicial system for relief from the imposed arbitration pro-

1. Consumer access to the judicial system, when a federal statute is violated, is a fundamental right guaranteed by the United States Constitution. Under the Seventh Amendment, consumers have the right to bring forth any claim worth twenty dollars or more before a jury for the violation of a consumer protection statute. See U.S. Const. amend. VII.

2. See infra note 7 (defining arbitration).

3. See NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE, Rules 1-2 (Sept. 1, 1999) (explaining that the code governs arbitration when parties have entered into an arbitration agreement which refers to the National Arbitration Forum).

4. See infra notes 278-305 and accompanying text.
procedure and seek to either void the arbitration clause or to appeal from the arbitration judgment.\textsuperscript{5}

When a consumer is forced to arbitrate a dispute with a company, the case often arises out of an adhesion contract\textsuperscript{6} that includes a mandatory arbitration clause. A mandatory arbitration clause is a contractual clause which stipulates that parties will arbitrate out of court, any disputes regarding the contract, and waive their rights to use the judicial system.\textsuperscript{7} Consumers are not often given the opportunity to bargain for the admission of an arbitration provision in an adhesion contract offered on a "take it or leave it" basis.\textsuperscript{8}

Arbitration clauses often appear in fine print on the back of an adhesion contract or are later added pursuant to a change-in-terms clause which allows a company to alter the terms of the original agreement at any time.\textsuperscript{9} Arbitration clauses are seldom discussed with consumers, especially in credit card agreements or other transactions that are conducted through the mail.\textsuperscript{10} Arbitration clauses are typically drafted by sophisticated attorneys, employed by large companies, and imposed without giving effective notice to consumers entering into the adhesion contracts. Normally, consumers do not seek legal advice before entering most adhesion contracts included in credit card agreements, loan or mortgage agreements, auto financing agreements, and product warranty or liability agreements. In addition, companies often require consumers to agree to the arbitration clauses in order for the company to do business with them.\textsuperscript{11}

\begin{itemize}
\item \textsuperscript{5} See infra notes 313-313 and accompanying text.
\item \textsuperscript{6} See infra note 335 (describing an adhesion contract as one offered on a "take it or leave it" basis for which the consumer did not bargain).
\item \textsuperscript{7} Thomas J. Stipanowich, Rethinking American Arbitration, 63 Ind. L.J. 425, 425 n.1 (1988) (stating that "[a]rbitration is a process whereby parties voluntarily submit their disputes for resolution by one or more impartial third persons, instead of by a judicial tribunal provided by law"). Arbitration is a creature of contract. Kenneth R. Davis, When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards, 45 Buff. L. Rev. 49, 55 (1997). Parties contractually agree to arbitrate their disputes privately in a process which is structured according to the agreement by the parties. Id. at 55-56. See also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (stating that "[a]rbitration is simply a matter of contract between the parties; it is a way to resolve . . . disputes"); MCI Telecommunications Corp. v. Exalon Industries, Inc., 138 F.3d 426, 428 (1st Cir. 1998) (stating that national policy favors arbitration, and that submission of disputes to arbitration depends upon the contract entered into by the parties, which embodies their private will).
\item \textsuperscript{8} See infra notes 335-338.
\item \textsuperscript{9} See infra notes 159-159 and accompanying text.
\item \textsuperscript{10} See infra notes 210-227 and accompanying text.
\item \textsuperscript{11} See infra notes 337-338 (explaining that a consumer had no meaningful choice in entering an arbitration agreement when the only way to avoid the agreement was to not do business with the company).
\end{itemize}
A typical arbitration clause from an adhesion contract might read as follows:

**IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.**

In 1925, Congress enacted the Federal Arbitration Act (FAA) in order to encourage the arbitration of private disputes. The FAA has been interpreted by the judiciary as requiring the courts to enforce arbitration clauses when they appear in contracts. While the FAA is an influential in courts’ decisions, the court will not disregard all

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12. Discover® Platinum Cardmember Agreement (1999) (explaining the new arbitration requirement included in the changes-in-terms clause credit card agreement that was sent out to Discover Platinum Card customers in August of 1999).


14. 9 U.S.C. §§ 1-15 (1925). Section 4 of the statute states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such an agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration of the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.


15. See Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681 (1996); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Perry v. Thomas, 482 U.S. 483, 493 (1987). See also Alan S. Kaplinsky & Mark J. Levin, *Alternative to Litigation Attracting Consumer Financial Services Companies, in Arbitration Clauses in Consumer Financial Services: Samples, Strategies and Cases* 4 (1999) (stating that the Supreme Court interpreted the FAA as requiring “both federal and state courts to enforce valid arbitration agreements by staying lawsuits involving claims that are subject to an arbitration agreement and/or compelling a party to arbitrate in accordance with an arbitration agreement”).

consumer challenges to arbitration clauses. Large corporations have successfully used the FAA to stay litigation when consumers unknowingly waived their rights to access the judicial system. A stay in litigation often amounts to a stay of the dispute altogether, because consumers are less willing to arbitrate disputes than have a jury decide the outcome. Nonetheless, consumers can still challenge arbitration clauses by arguing that they violate state contract law, congressional intent with respect to federal statutory claims, and rights guaranteed by the United States Constitution.

While out of court arbitration may be beneficial for parties with equal contractual bargaining power, it is inherently unfair in situations where the parties exhibit a substantial disparity in power. Congress
intended for citizens to benefit from the FAA's enactment, but large corporations have used their legal, financial, and political resources to turn the FAA into a shield against consumer lawsuits. Thus, consumers have been unprotected, denied the use of the judicial system, and deprived of effective weapons to fight companies when disputes arise.

Part II of this Comment will review the FAA and its influence on the enforcement of mandatory arbitration clauses in consumer contracts. In addition, this part will outline the development of case law which has addressed arbitration clauses since the enactment of the FAA. Supreme Court cases have addressed arbitration clauses in general, and lower court cases have addressed issues of notice and consent in the enforceability of arbitration agreements. Part III will analyze how the FAA can protect corporations that abuse consumers and the threat that mandatory arbitration poses to common law consumer protection. Part III will also examine the issue of consumers contractually waiving their rights to use the judicial system without being given adequate notice or knowledge and further explore the factors that courts consider in deciding whether adequate notice and consent exist. In addition, Part III will question the disparity in the procedural protection of consumers disputes resolved in arbitration and those resolved in the judicial system. Part IV will address the impact of mandatory arbitration clauses on remedies available to consumers, the deterrence of future harm to consumers by corporations, and the burden that mandatory arbitration clauses place on the judicial system. Further, Part IV will suggest methods that consumers can use to oppose the enforcement of mandatory arbitration clauses and propose that Congress create legislation to reduce the FAA's negative impact on consumer protection. Part V will conclude that con-

22. See infra notes 32-227 and accompanying text.
23. See infra notes 32-227 and accompanying text.
24. See infra notes 228-306 and accompanying text.
25. See infra notes 228-306 and accompanying text.
26. See infra notes 228-306 and accompanying text.
27. See infra notes 306-399 and accompanying text.
28. See infra notes 306-399 and accompanying text.
29. See infra notes 306-399 and accompanying text.
30. See infra notes 306-399 and accompanying text.
sumers are harmed when they unknowingly waive their rights to use the judicial system and that they should be protected from mandatory arbitration clauses.  

II. BACKGROUND

In deciding whether to enforce arbitration clauses in consumer contracts, courts take into consideration both the statutory mandate of the FAA and common consumer law precedent.

A. The Federal Arbitration Act

Before the founding of the United States, the English judiciary demonstrated a hostility toward out of court arbitration. This hostility carried over to the United States judiciary as evidenced by the judicial practice of failing to mandate specific performance of contractual agreements, arbitrate, or stay judicial proceedings so that the dispute may be arbitrated according to the contract. Lower federal courts have expressed a desire to enforce arbitration clauses, but have declined to do so because of strong precedent finding arbitration clauses unenforceable. Further, courts have expressed that they would not avoid precedent against enforcing arbitration clauses without legislative enactment.

In 1925, Congress reacted to the judiciary’s plea for legislation and passed the FAA in an attempt to counteract the traditional judicial hostility toward arbitration agreements. The congressional report for the FAA states in part:

[the courts have] felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule [that arbitration agreements should not be strictly enforced] and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

31. See infra notes 399-404 and accompanying text.
32. Kulukundis Shipping Co., S/A v. Amtorq Trading Corp., 126 F.2d 978, 982-88 (2d Cir. 1942) (explaining in detail the traditional judicial attitude toward the arbitration of disputes).
33. Id. at 984.
34. Id.
35. Id.
36. See Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20, 25 (1991) (stating that “[the FAA’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that has existed at English common law and had been adopted by American courts . . .”).
37. See Kulukundis Shipping Co., 126 F.2d at 985.
Thus, the FAA was created to place arbitration agreements on equal par with other contractual agreements.\textsuperscript{38} The FAA states in relevant part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.\textsuperscript{39}

The subsequent legislative history implies that the congressional intent behind the FAA was to insure that arbitration clauses, and other terms agreed to by private parties in written contracts, would be enforced in accordance with the parties' intentions.\textsuperscript{40} Legislative history also implies that, in enacting the FAA, Congress wanted to provide for the expeditious resolution of disputes and to relieve congestion in the courts.\textsuperscript{41} Nevertheless, legislative opinions have begun to reject this idea and have reaffirmed the notion that the overriding congressional intent behind the FAA was not to provide parties with an alternative to litigation, but rather to ensure judicial enforcement of private agreements.\textsuperscript{42}

The FAA implements a national policy favoring arbitration and withdraws a state's power to deny arbitration when the litigation involves interstate commerce and is brought under state court jurisdiction.\textsuperscript{43} Nevertheless, if contracts include a choice-of-law provision allowing disputes arising out of the contract to be decided under the

\textsuperscript{38} Id. (stating that the FAA was created to "place arbitration agreements upon the same footing as other contracts"); McMahon 482 U.S. at 226; Standard Magnesium Corp. v. Fuchs, 251 F.2d 455, 457 (10th Cir. 1957).


\textsuperscript{40} See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (stating that Congressional intent in enacting the FAA was the "desire to enforce agreements into which parties had entered"). See also First Options v. Kaplan, 514 U.S. 938, 947 (1995) (naming the basic objective in the area of commercial arbitration as not quick dispute resolution, but enforcement of arbitration agreements according to their terms and the intentions of the parties); Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Peoples Sec. Life Ins. Co. v. Monumental Life Inc. Co., 867 F.2d 809 (4th Cir. 1989); Germany v. River T. R. Co., 477 F.2d 546 (6th Cir. 1973); URS Company-Kansas City v. Titus County Hosp. Dist., 604 F. Supp. 423 (W.D. Mo. 1985).

\textsuperscript{41} O.R. Sec. v. Professional Assocs., 857 F.2d 742 (11th Cir. 1988); Germany, 477 F.2d at 546; United Nuclear Corp. v. General Atomic Co., 597 P.2d 290 (1979).

\textsuperscript{42} First Options, 514 U.S. at 945; Rush v. Oppenheimer & Co., 779 F.2d 885, 891 (2d Cir. 1985).

law of a particular state, then state law may not be pre-empted by the FAA. 44

B. Enforceability of Mandatory Arbitration Clauses in Common Law

Consumer plaintiffs argue that their particular agreement to arbitrate is not enforceable under the FAA. 45 Specific consumer claims of contract unenforceability have been brought in lower courts which remain split on several issues regarding the enforceability of arbitration clauses in particular circumstances. 46 However, the courts have used the FAA for support to stay litigation and compel arbitration in disputes regarding contracts that contained mandatory arbitration clauses. 47

I. The United States Supreme Court and the Enforceability of Arbitration Agreements Under the FAA


In 1953, the Supreme Court ruled on the enforceability of an arbitration clause. 48 In Wilko v. Swan, the plaintiff brought a suit in the Federal District Court for the Southern District of New York under the Securities Act of 1933 (Securities Act). 49 The defendant moved to stay the trial under the FAA because the terms of the contractual agreement between the parties included an arbitration clause that mandated arbitration at the request of either party. 50 The United States District Court for the Southern District of New York denied the motion to stay the trial and held that the arbitration agreement

44. See Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 474-77 (1989) (enforcing a contract under California law when the terms of the contract included a choice-of-law provision for California law and an arbitration clause).
45. See infra notes 131-227 and accompanying text.
46. See infra notes 159-227 and accompanying text.
47. See infra notes 48-61, 177-159 and accompanying text.
49. 15 U.S.C. §§ 77a-f (1933). The Securities Act of 1933 is a federal statute regulating the trade of securities in interstate commerce. Id.
50. Wilko v. Swan, 346 U.S. 427, 428-29 (1953) (deciding a claim under 15 U.S.C. § 77a-e). In Swan, the plaintiff was a customer of a security brokerage firm. Id. The plaintiff alleged that the defendants encouraged him to purchase corporate stock that would go up in value, while neglecting to tell the plaintiff that they knew that the director and counsel for the corporation were selling their own shares of stock. Id.
51. Id. at 429.
deprived the plaintiff of remedies under the Securities Act. The Second Circuit Court of Appeals reversed and held that the Securities Act “did not prohibit the agreement to refer future controversies to arbitration.”

The United States Supreme Court was confronted with the issue of whether the arbitration clause in the contract was a binding “condition, stipulation, or provision” in violation of the Act. Additionally, the Court considered whether arbitrators need to provide a written opinion and ultimately stated that since “the arbitrators, award may be without a complete record of their proceedings, the arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact,’ . . . cannot be examined.” The Court held that Congress intended to void any waiver of a judicial trial and held that the arbitration clause was invalid.

In reaching its decision, the Court examined the arbitrators’ role in the enforceability of mandatory arbitration clauses and recognized that, while arbitrators may base the parties’ award on legal requirements, statutes, or common law, the arbitration agreement “has no requirement that arbitrators follow the law.”

In 1987, the United States Supreme Court questioned whether the holding in Swan should be extended to invalidate arbitration clauses for claims brought under the Securities Exchange Act of 1934, which was substantively similar to the Securities Act. The critical decisions

52. Id. at 430.
53. Id.
54. Id. In deciding whether the arbitration clause effectively waived compliance with the Securities Act, the Court took into consideration a special right of the buyer created by the Act, which placed the burden of proof on the seller. Id. at 431. The Court implied that compliance with this special right could only be ensured in a judicial forum. Id. The Court also looked at the benefits a buyer of securities has in federal court, including a “wide choice of venue, nationwide service of process,” and the inapplicability of the “jurisdictional $3,000 requirement of diversity cases.” Id.
55. Id. at 436 (citations omitted).
56. Swan, 346 U.S. at 431-34. The Court determined that the congressional intent behind the creation of the Securities Act was “to put buyers of securities covered by that Act on a different basis from other purchasers.” Id. at 435. The Court continued to state that “[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions.” Id. at 437-38. The Court stated that “the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, [and] it seems to us that Congress must have intended the language in the Act declaring void any terms that waive compliance with the Act], to apply to waiver of judicial trial and review.” Id. at 437.
57. Id. at 434.
58. See McMahon, 482 U.S. at 220 (addressing the issue of whether compulsory arbitration under an arbitration agreement arising out of the Securities Act should also be used when the
in Shearson/American Express, Inc. v. McMahon and Rodriguez De Quijas v. Shearson/American Express, Inc. brought about the turning point, which eventually led to the abandonment of Swan.

In McMahon, the plaintiffs raised claims under the Securities Exchange Act of 1934 (Exchange Act), thereby inducing the Supreme Court to address the issue of whether congressional intent in passing the Exchange Act precluded the enforcement of a mandatory arbitration clause. In McMahon, the Court acknowledged that the Securities Act and the Exchange Act were similar in both language and substance, yet it did not follow its decision in Swan to invalidate the arbitration clause. The Court held that the arbitration clause was enforceable in light of congressional intent behind the Exchange Act and in light of changes that have occurred since Swan: "the mistrust of arbitration that formed the basis for the [Swan] opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that dispute arises out of the Securities Exchange Act of 1934. See also infra notes 63-68 and accompanying text.

61. Id. at 484-86.
62. 15 U.S.C. § 78j(b) (1933). The Securities Exchange Act of 1934 prohibits sellers of securities from engaging in fraud in trading stock for buyers and misrepresenting or omitting material facts in giving advice to buyers of securities. Id.
63. McMahon, 482 U.S. at 222. The plaintiffs also raised a claim under the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 (1994). Id. at 227. The Supreme Court held that congressional intent in passing RICO did not preclude the enforcement of a mandatory arbitration clause. Id. at 242. The Court found that "RICO's text and legislative history fail to reveal any intent to override the provisions of the Arbitration Act, [and] the McMahons must argue that there is an irreconcilable conflict between arbitration and RICO's underlying purposes." Id. at 239. The McMahons argued that an irreconcilable conflict existed between RICO and arbitration under several different theories, none of which the Court found compelling. Id. The Court's decision focused on three arguments made by the plaintiffs: (1) RICO claims are too complex for arbitration; (2) since RICO contains overlapping civil and criminal provisions, violations should not be arbitrated; and (3) it is against public interest to submit RICO claims to arbitration. Id. at 239-40. The Court rejected all of these arguments and relied on its decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. McMahon, 482 U.S. at 239-40. In Mitsubishi, the Court held that "nothing in the nature of the federal antitrust laws prohibits parties from agreeing to arbitrate antitrust claims arising out of international commercial transactions." Id. at 239 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985)). In comparing RICO with antitrust laws, the Court found that both types of laws were complex, both simultaneously include civil and criminal provisions, and both contain remedial and deterrent functions. Id. at 239-40 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985)). Due to these similarities between antitrust laws and RICO, the Court held that it must follow the decision it made in Mitsubishi, and enforce the mandatory arbitration clause in McMahon. Id. at 241-42.
64. Id. at 227-37.
65. Id.
time." The Court further justified its decision by interpreting the Swan holding to bar "waiver[s] of judicial forum . . . only where arbitration is inadequate to protect substantive rights at issue." Thus, the Court held that arbitration was a suitable forum to protect substantive rights under the Exchange Act.

Two years after McMahon, the Court once again addressed the issue of whether the Swan decision was considered good law. In Rodriguez De Quijas v. Shearson/American Express, Inc., the plaintiffs, pleaded violations of both the Securities Act and the Exchange Act, thus forcing the Court to decide whether to enforce or to invalidate an arbitration clause that they had signed. The Court found that the "right to select the judicial forum and the wider choice of courts are not . . . so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers." The Court directly overturned Swan and stated, "we now conclude that Swan was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions" and held that the arbitration clause was enforceable for both claims under the Exchange Act and the Securities Act.

66. McMahon, 482 U.S. at 233. The Court also looked at its prior decision in Scherk v. Alberto-Culver Co. Id. at 229 (citing Scherk v. Alberto-Culver Co., 417 U.S. 806 (1974)). "In Scherk, the Court upheld enforcement of a predispute agreement to arbitrate Exchange Act claims by parties to an international contract." Id. (emphasis added). The Court in Scherk reasoned that arbitration was an adequate substitute for judicial resolution of disputes arising out of international contracts. Id. The Court in McMahon took this reasoning one step further to find that arbitration was an adequate substitute in the judicial forum in the resolution of any claim arising under the Exchange Act. Id. at 232-38.

67. Id. at 239.
68. McMahon, 482 U.S. at 232.
70. Id. 490 U.S. at 478-79 (stating the claims raised by the plaintiff). Following the Swan decision, the Court would have had to invalidate the arbitration clause for the Securities Act claim and enforce the arbitration clause for the Exchange Act claim. See supra notes 48-57 and accompanying text. Since the two Acts were so similar, the Court was placed in the precarious position of either splitting the claims, sending one to arbitration and one to a judicial trial, or sending both claims to the same forum for resolution, which it could accomplish only by overturning one of its prior decisions.
71. Rodriguez, 490 U.S. at 481.
72. Id. at 484. The Court also stated:

[it] also would be undesirable for the decisions in [Swan] and McMahon to continue to exist side by side . . . . [T]he inconsistency between [Swan] and McMahon undermines the essential rationale for a harmonious construction of the two statutes, which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another. For all of these reasons, therefore, we overrule the decision in [Swan].

Id. at 484-85 (emphasis added).
73. Id. at 482-85.
b. *Perry v. Thomas*

In *Perry v. Thomas*, the United States Supreme Court decided whether the FAA, coupled with a contractual agreement to arbitrate all disputes, pre-empted state law which guaranteed judicial resolution of certain disputes. In *Perry*, the plaintiff sued his former employer and two former co-employees for securities sales commissions. The plaintiff executed an agreement to arbitrate all disputes with his employer as part of his employment contract. The plaintiff contended that he was entitled to litigate his dispute under the California Labor Code, which provided that private agreements to arbitrate claims do not preclude any action for wage collection. The defendant, citing the arbitration agreement, filed a motion to compel arbitration. The Court held that under the Supremacy Clause of the United States Constitution, the FAA pre-empted the California state law which guaranteed a trial for employee compensation claims.

c. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*

In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, the United States Supreme Court addressed the issue of whether a California state law was pre-empted by the FAA. In *Volt*, Stanford University brought suit against Volt for

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75. Id.
76. Id. at 483.
77. Id.
78. CAL. LAB. CODE ANN. § 229 (West 1971).
79. *Perry*, 482 U.S. at 484. “[T]he California Labor Code . . . provides that actions for the collection of wages may be maintained ‘without regard to the existence of any private agreement to arbitrate.’” Id.
80. Id. at 485.
81. U.S. CONST., art. VI, cl. 2 (stating that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).
82. *Perry*, 482 U.S. at 483. The Court relied on its previous decision in *Southland Corp. v. Keating*, which held that the FAA pre-empted a California Franchise Investment Law which required judicial review of claims under that law. Id. at 489. In *Keating*, the Court stated that in enacting the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” Id.
84. Id. The dispute arose from a contract entered into by both parties containing a choice of law provision for California law to govern disputes arising out of that contract. Id. at 470. The issue was whether to apply the California Arbitration Act or the FAA in enforcing an arbitration clause in the agreement. Id. (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).
fraud and breach of contract and sought indemnity from two other parties with which it contracted in a construction project. Volt motioned to compel arbitration under an arbitration agreement in the construction contract and Stanford motioned to stay arbitration pending the resolution of the dispute between Stanford and the other two defendants, who were not parties to the arbitration agreement. An additional clause in the construction contract provided the choice of law by stating “[t]he Contract shall be governed by the law of the place where the Project is located.”

The Court found that the choice of law provision allowed the dispute to be arbitrated under the California Arbitration Act even though the contract involved interstate commerce. Under the California Arbitration Act, a court is allowed to stay arbitration until all related litigation not subject to the arbitration agreement is resolved. The Court held that the “FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that ‘arbitration proceed in the manner provided for in [the parties’] agreement.’” Since the contract included a choice of law provision, and the FAA requires the enforcement of the contract as agreed to by both parties, the arbitration clause was subject to California law; therefore, the California Arbitration Act applied, allowing for a stay of arbitration pending related disputes.

d. Gilmer v. Interstate/Johnson Lane Corporation

In Gilmer v. Interstate/Johnson Lane Corporation, the plaintiff claimed that the defendant violated his rights under the Age Discrimi-
nation in Employment Act of 1967 (ADEA). The defendant moved to compel arbitration of the dispute under an agreement that Gilmer signed with the New York Stock Exchange (NYSE) which provided that any disagreement arising out of termination of employment between a member organization and a securities representative must be arbitrated. In examining the issues, the Court acknowledged that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA" and recognized that an exception to compel arbitration of statutory rights under the FAA existed when Congress intended "to preclude waiver of judicial remedies" in enacting the statute.

The Court stated two reasons for rejecting Gilmer's argument that the compelled arbitration would undermine the enforcement of the ADEA. First, the Court recognized that the employee could file a claim with the Equal Employment Opportunity Commission (EEOC), even if the dispute were subject to compelled arbitration. Second, the EEOC could combat age discrimination, even if the employee did not file a charge. The Court found that "Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, even if the employer did not file a charge."

95. Gilmer, 500 U.S. at 20. The burden is placed on the party opposing arbitration to prove congressional intent to preclude waiver of judicial forum for ADEA disputes. Id. at 26. The Court justified placing the burden of proof on Gilmer as support for its policy on holding parties to agreements to arbitrate for what they bargained. Id. The limit that the Court put on this policy was what Congress itself intended to prohibit waiver of a judicial remedy of particular statutory rights. Id. Under the ADEA, an employee must first file a charge with the Equal Employment Opportunity Commission (EEOC), and wait sixty days before filing a claim under the ADEA. Id. at 27 (citing 29 U.S.C. § 626(d)). Before the EEOC can sue the employer, it must afford the employer a chance to voluntarily comply with the ADEA. Id. at 27 (citing 29 U.S.C. §§ 626(b)). If the EEOC institutes a lawsuit within the sixty day period, then the individual's right to sue is eliminated. Gilmer, 500 U.S. at 27.
96. Id. at 24. Gilmer was required to register as a securities representative as a condition of his employment. Id. The agreement in question was an application for registration with the New York Stock Exchange. Id.
97. Id. at 23. The registration agreement stated that disputes must be arbitrated under the rules of the organization with which a party registered. Id. at 23. Since Gilmer was registering with the NYSE, the NYSE rules on arbitration applied. Gilmer, 500 U.S. at 23. The Court identified the relevant rule and stated that "NYSE Rule 347 provides for arbitration of '[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.'" Id. (quoting App. to Brief for Respondent 1) (alteration in original).
98. Id. at 26.
99. Id.
100. Id. at 28.
101. Gilmer, 500 U.S. at 28. The Court pointed out the fact that Gilmer filed a charge with the EEOC in the present case. Id.
102. Id. The EEOC may investigate age discrimination pursuant to information that it receives from any source. Id.
even in its recent amendments to the ADEA.\textsuperscript{103} Thus, out of court arbitration of disputes were consistent with congressional intent of the ADEA because the requirement of attempting to resolve disputes, using the EEOC, was directed at pursuing informal methods of dispute resolution.\textsuperscript{104} Furthermore the Court rejected Gilmer’s argument that arbitration stifles the development of law, by not requiring the arbitrator to issue a written opinion, because the NYSE rules do require the arbitrator to reduce awards to writing.\textsuperscript{105} The Court rejected the argument that Gilmer had unequal bargaining power against the employer in arbitrating the dispute,\textsuperscript{106} thus stating that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”\textsuperscript{107} The Court considered the fact that Gilmer was an experienced businessman but left open the issue as to whether a claim of unequal bargaining power should succeed in more specific cases.\textsuperscript{108} The Court concluded that Gilmer did not meet his burden of proof that the arbitration clause was contrary to congressional intent and affirmed the order compelling arbitration.\textsuperscript{109}

e. Allied-Bruce Terminix Companies, Inc. v. Dobson

The scope of the FAA was examined by the United States Supreme Court in Allied-Bruce Terminix Companies, Inc. v. Dobson.\textsuperscript{110} In Allied-Bruce, the dispute involved a contract for termite extermination

\textsuperscript{103} Id. at 29.

\textsuperscript{104} Id.

\textsuperscript{105} Gilmer, 500 U.S. at 31-32. The NYSE rules require that the arbitrator issue a written opinion which includes the awards, the parties’ names, and a summary of the issues. Id.

\textsuperscript{106} Id. at 32-33.

\textsuperscript{107} Id. at 33. The Court supported its position that unequal bargaining power is not enough to invalidate an arbitration clause with its decision in Rodriguez. Id. The Court drew a parallel between securities dealers and investors, such as the parties in Rodriguez, and employers and employees, such as in the instant case. Id. See also supra notes 70-70 and accompanying text.

\textsuperscript{108} Gilmer, 500 U.S. at 33.

\textsuperscript{109} Id. at 35. In his dissent, Justice John Paul Stevens argued that the FAA should not apply to employment contracts at all and that the registration agreement in the present case was essentially an employment contract. Id. at 40. (Stevens, J., dissenting). In making this argument, Justice Stevens cited a subcommittee of the Senate Judiciary Committee’s hearing on the proposed bill for the FAA. Id. at 39. Justice Stevens quoted the testimony from the hearing of the chairman of the American Bar Association committee which drafted the bill, stating that the bill “is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this.”

which included a clause requiring controversies to be arbitrated.\textsuperscript{111} The Alabama Supreme Court held that state law applied to the case, not the FAA.\textsuperscript{112} The lower court found that "the connection between the termite contract and interstate commerce was too slight" to fall under the FAA because the parties did not contemplate a transaction involving interstate commerce when entering into the agreement.\textsuperscript{113} The court examined the language of the FAA which stated that courts should enforce "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . ."\textsuperscript{114}

The United States Supreme Court reversed the lower court's findings and held that the "contemplation of the parties" interpretation of the contract is anomalous to the purpose of the FAA because litigating the ambiguity of what the parties "contemplated" defeats the purpose of the FAA.\textsuperscript{115} The Court found that the language of the FAA should be interpreted broadly to include within its scope the full reach of the Commerce Clause and any transaction affecting interstate commerce, rather than what the parties specifically contemplated.\textsuperscript{116}

\textsuperscript{111} Id. at 268. "The Plan's contract document provided in writing that 'any controversy or claim . . . arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration.'" Id. (quoting the record for the applicable contract language) (emphasis in original).

\textsuperscript{112} Id. at 269. A state statute invalidated predispute arbitration agreements. Id.

\textsuperscript{113} Id. at 273 (emphasis omitted).

\textsuperscript{114} Allied-Bruce, 513 U.S. at 269.

\textsuperscript{115} Id. at 278.

\textsuperscript{116} Id. at 274-77. The Court also addressed the fact that the FAA contains a provision restricting states from regulating arbitration clauses by themselves. Id. at 281. The provision requires any regulation of arbitration clauses to fall under regulation of contracts in general, so that arbitration clauses are on equal footing with other contract clauses. Id.

The Allied-Bruce holding was questioned by the Texas Courts of Appeals in L & L Kempwood Associated, L.P. v. Omega Builders, Inc., 972 S.W. 2d 819 (Tex. App. 1998). The court in Omega Builders tried to reconcile the Supreme Court's decision in Allied-Bruce, with its subsequent decision in U.S. v. Lopez. Id. at 821. The court cited the Allied-Bruce decision, which set forth a test that broadly interpreted the commerce clause, allowing Congress' power to regulate interstate commerce to be extended to anything affecting interstate commerce. Id. The court cited Lopez, which established a test for the reach of the commerce clause to extend only to the regulation of that which substantially affects interstate commerce. Id. The court in Omega Builders had trouble reconciling the two Supreme Court decisions. Id. Like Allied-Bruce, Omega Builders involved an arbitration clause in a contract, whereas Lopez involved a criminal statute. Id. at 821-22. The court in Omega Builders rejected the Allied-Bruce test and stated that "it seems to us unmistakable that the rule stated in Lopez does supplant Allied-Bruce, and we are bound to apply Lopez and its 'substantially affect' test." L & L Kempwood Associated, L.P., 972 S.W. 2d at 821.

The Allied-Bruce decision was criticized by the Alabama Supreme Court in Coastal Ford, Inc. v. Kidder, where the court explained that since the Supreme Court overturned the Alabama Supreme Court test of whether the parties contemplated interstate activity, it was obligated to
MANDATORY ARBITRATION CLAUSES

f. Doctor's Associates, Inc. v. Casarotto

In Doctor's Associates, Inc. v. Casarotto, involved the issue of whether a state law that required specific notice be given, when an arbitration clause is included in a contract, was inconsistent with the FAA. The petitioner's motion to compel arbitration under a mandatory arbitration clause was denied by the Montana Supreme Court because the contract did not meet the state's requirement that "[n]otice that [the] contract is subject to arbitration" must be "typed in underlined capital letters on the first page of the contract." The Montana Supreme Court found that the notice requirement did not undermine the goals of the FAA because it did not preclude arbitration agreements, but rather ensured that the agreement to arbitrate was entered into knowingly, before the agreement could be enforceable.

The United States Supreme Court declared that state law can only be used to invalidate arbitration clauses if state law applied to the whole contract, including claims of fraud, duress, or unconscionability. The Court stated that "[c]ourts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions." Therefore, since the notice requirement under Montana law only applied to arbitration agreements, the Court held that "[t]he FAA thus displace[d] the Montana statute with respect to arbitration agreements covered by the Act." The Montana law was held invalid under the FAA, and the arbitration clause was, consequently, enforceable under the FAA, without meeting the notice requirement.

apply the new Supreme Court test for interstate commerce "in fact" in order to determine whether the FAA was binding on those parties. 694 So. 2d 1285, 1287 (Ala. 1997).

118. Id. at 683.
119. Id. (quoting MONT. CODE ANN. § 27-5-114(4) (West 1995)) (alteration in original). The dispute in this case arose out of a franchise agreement which permitted the respondent to open a Subway sandwich shop. Id. "The franchise agreement stated, on page nine and in ordinary type: 'Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration . . . .'" Id. (citing the record for language in the disputed contract).
120. Id. at 685.
121. Doctor's Assocs., Inc., 517 U.S. at 686-87.
122. Id. at 687 (emphasis in original).
123. Id. at 687.
124. Id. at 687-89. Justice Thomas dissented, claiming that Section 2 of FAA, which prohibits states from singling out arbitration clauses in their contract law, does not apply when the proceedings are in state court. Id. at 689.
g. First Options of Chicago v. Kaplan

In First Options of Chicago v. Kaplan, the United States Supreme Court addressed the issue of whether a court or the arbitrator has the authority to decide whether parties must submit a dispute to arbitration pursuant to a contractual arbitration clause. The Court found that arbitration is a matter of contract between two parties and that a reviewing court must apply state laws governing the formation of contracts. The Court emphasized that a party should not be forced to submit to arbitration unless that party specifically agreed to arbitrate the disputed issues. Thus, determining whether the parties agreed to arbitrate, the Court stated that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” The Court held that arbitration was subject to independent review by the courts because Kaplan did not clearly agree to arbitrate due to the fact that he did not sign the arbitration agreement, and his only submission to arbitration was a memorandum objecting to the arbitrator’s decision.

h. Green Tree Financial Corporation v. Randolph

In Green Tree Financial Corporation v. Randolph, the United States Supreme Court addressed the issue of the enforceability of an arbitration clause in a consumer contract. In Green Tree, the plaintiff financed the purchase of her mobile home with a loan issued by Green Tree Financial Corporation. Randolph’s contract with Green Tree required that she purchase “Vendor’s Single Interest insurance,” to protect Green Tree’s interest in the event of a default. The contract also included an arbitration clause, which mandated that “all disputes arising from, or relating to, the contract, whether arising under case law or statutory law, would be resolved by binding arbitration.” Randolph filed a class action lawsuit, alleging that Green

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126. Id. at 942-43.
127. Id. at 944.
128. Id. at 945.
129. Id. at 944 (citing AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986)).
130. Id. at 946-47.
132. Id. at 517.
133. Id.
134. Id. at 517-18.
135. Id. at 518. The arbitration clause stated
All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or
Tree violated the Truth in Lending Act\(^{136}\) by failing to disclose the cost of the Vendor's Single Interest insurance as a finance charge for the loan.\(^{137}\) Randolph also alleged that Green Tree violated the Equal Credit Opportunity Act\(^{138}\) by forcing Randolph to arbitrate her statutory causes of action as a condition for the loan.\(^{139}\)

The District Court for the Middle District of Alabama granted Green Tree's motion to compel arbitration pursuant to the arbitration clause in the parties' contract.\(^{140}\) Randolph filed a motion for reconsideration and claimed that she may have to drop the lawsuit because she could not financially afford to arbitrate her claims.\(^{141}\) The court subsequently denied the motion.\(^{142}\) Thereafter, Randolph appealed\(^{143}\) to the United States Court of Appeals for the Eleventh Circuit, which held that it had jurisdiction to review the decision.\(^{144}\) The court relied on a provision in the FAA which allows for appeal from "a final decision with respect to an arbitration that is subject to [the FAA]."\(^{145}\)

The Eleventh Circuit Court of Appeals held that the arbitration clause was invalid under the Truth in Lending Act (TILA), since it failed to

\[\text{Id. at 518 n.1 (emphasis in original).}\]
\[\text{137. Green Tree, 121 S. Ct. at 518.}\]
\[\text{139. Green Tree, 121 S. Ct. at 518.}\]
\[\text{140. Id.}\]
\[\text{141. Id.}\]
\[\text{142. Id.}\]
\[\text{143. Randolph v. Green Tree Financial Corp., 178 F.3d 1149 (11th Cir. 1999).}\]
\[\text{144. Id. at 1156-57. The Eleventh Circuit Court of Appeals held that it had jurisdiction to review the lower court's decision rather than order mandatory arbitration of the matter, because the district court's order was a final decision. Id. at 1157. The Eleventh Circuit also held that the district court's order was final because it disposed of all issues and left nothing to be done but execute the order. Id. at 1156-57.}\]
\[\text{145. Id. at 1152-57.}\]
provide the statutory protections of the Act, including the disclosure of filing fees for the arbitration, the arbitrator’s costs, and any additional arbitration expenses which may prevent the plaintiff from enforcing her rights.\textsuperscript{146} Green Tree appealed.\textsuperscript{147}

The United States Supreme Court examined whether the Eleventh Circuit Court of Appeals had jurisdiction under the FAA to decide the issues.\textsuperscript{148} The Court recognized that the FAA preserves interlocutory appeal of any ‘‘final decision with respect to an arbitration,’ regardless of whether the decision is favorable or hostile to arbitration.’’\textsuperscript{149} The Court also recognized that the FAA failed to define a “final decision,” and held that the traditional definition of a final decision is “a decision that ‘ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.’”\textsuperscript{150} Therefore, the Court found that the Eleventh Circuit Court correctly held that it had jurisdiction to decide the appeal.\textsuperscript{151}

In addition the Court addressed whether the arbitration clause was unenforceable because it failed to disclose all of the costs of arbitration which Randolph would have to pay in order to seek relief under federal statutes.\textsuperscript{152} The Court offered a two part test to determine whether federal statutory claims may be resolved through arbitration.\textsuperscript{153} The Court determined that an arbitration clause is enforceable if the plaintiff claims that her statutory rights have been violated when: (1) the parties agreed to submit their disputes to arbitration and (2) there is no evidence that Congress intended “to preclude a waiver of judicial remedies for the statutory rights at issue.”\textsuperscript{154}

The Court found that the first part of the test was satisfied because it was undisputed that the parties agreed to arbitrate their disputes.\textsuperscript{155} Second, the Court held that Randolph did not claim that Congress intended to preclude a waiver of judicial remedies enacting TILA; rather, Randolph argued that, under the contract, she bore a risk that she would not be able to seek relief from Green Tree’s violations of the TILA since the costs of arbitration may have been too great for

\begin{thebibliography}{9}
\bibitem{146} Id. at 1157-58.
\bibitem{147} \textit{Green Tree}, 121 S. Ct. 513.
\bibitem{148} Id. at 519-521.
\bibitem{149} Id. at 519.
\bibitem{150} Id. (quoting Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 868, 867 (1994) and Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978)).
\bibitem{151} Id.
\bibitem{152} Id. at 521.
\bibitem{153} \textit{Green Tree}, 121 S. Ct. at 521.
\bibitem{154} Id.
\bibitem{155} Id. at 521-22.
\end{thebibliography}
MANDATORY ARBITRATION CLAUSES

however, the Court found that Randolph provided no evidence as to the actual costs of arbitration and whether those costs were actually prohibitive to her filing a dispute.\textsuperscript{157}

2. The Issue of Notice and Consent in the Enforceability of Arbitration Agreements Addressed by Lower Courts

While the Supreme Court has yet to address the issues of notice and consent regarding the enforceability of arbitration clauses, lower courts have addressed these issues in variety of different situations including: (a) arbitration clauses which were not included in the original contract, but later added pursuant to a change-in-terms clause in the original agreement; and (b) adequate consent or notice of the arbitration agreement by one party.

a. Arbitration Clauses Added Pursuant to a Change-in-Terms Clause in the Original Agreement

Lower courts in various jurisdictions are split on the issue of whether to enforce mandatory arbitration clauses that are added to a contract after the original date of execution pursuant to a change-in-terms clause.\textsuperscript{158} Three cases which have come down on different sides of this issue are \textit{Badie v. Bank of America},\textsuperscript{159} \textit{Stiles v. Home Cable Concepts, Inc.},\textsuperscript{160} and \textit{Powertel, Inc. v. Bexley}.\textsuperscript{161}

\begin{itemize}
\item \textsuperscript{156} \textit{Id.} at 522.
\item \textsuperscript{157} \textit{Id.} The Court recognized that Randolph’s motion claimed that the American Arbitration Association (AAA) charged a $500 filing fee for a claim under $10,000, plus an average of $700 per day in arbitrator’s fees. \textit{Id.} at 522 n.6. The Court criticized Randolph for failing to provide proof of the $500 fee and for only providing an article published by the Bureau of National Affairs which quotes a “stray statement” of an executive of the American Arbitration Association, as proof for the $700 in fees. \textit{Green Tree}, 121 S. Ct. at 522 n.6. The Court further criticized Randolph for using the AAA as an example of costs, without proving that the parties would actually use the AAA to arbitrate their dispute. \textit{Id.} The Court determined that the person seeking to invalidate an arbitration clause bears the burden of showing the likelihood of incurring costs of arbitration that would be prohibitively expensive. \textit{Id.} at 522. The Court held that Randolph failed to meet this burden. \textit{Id.} The Court stated that “[t]he ‘risk’ that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.” \textit{Id.}
\item \textsuperscript{158} A change-in-terms clause is a clause in the original agreement between the parties which gives one party the unilateral right to modify the agreement after it has been entered into. See \textit{Badie v. Bank of America}, 79 Cal. Rptr. 2d 273, 277 (Cal. Ct. App. 1998).
\item \textsuperscript{159} \textit{Id.} at 273.
\item \textsuperscript{160} 994 F. Supp. 1410 (M.D. Ala. 1998).
\item \textsuperscript{161} 743 So. 2d 570 (Ct. App. Fl. 1999).
\end{itemize}
i. Badie v. Bank of America

In Badie, the California Court of Appeal held that a mandatory arbitration clause sent through the mail to a customer pursuant to a change-in-terms agreement, included in the original contract was unenforceable. The bank in Badie sent the arbitration clause on a piece of paper, a “stuffer,” that was stuffed in the envelope with an account bill. The bank sent the stuffer to all of its customers of BankAmerica Visa, MasterCard, Visa Gold, Gold MasterCard, and Appolo Accounts. The stuffer stated that the arbitration process would “take the place of a trial before a judge and jury,” and that if the arbitration provision was new to an account, it would apply to all future and past transactions if the customer continued to use the account. The bank relied on the change-in-terms clause in sending and attempting to enforce the arbitration agreement.

The bank had created various change-in-terms agreement over time and for various different types of credit cards. One version of the change-in-terms clause permitted the bank to subsequently add terms to the agreement. However, the court explained that the provision allowing the bank to add terms was not in affect for any of the versions of the change-in-terms clauses at the time the stuffer was sent out.

Four individual customers and two consumer oriented groups sued the bank to enjoin implementation of the arbitration clause. The arbitration agreement on the stuffer read:

If you or we request, any controversy with us will be decided either by arbitration or reference. Controversies involving one account, or two or more accounts with at least one common owner, will be decided by arbitration under the Commercial Arbitration Rules of the American Arbitration Association. All other controversies will be decided by a reference under California Code of Civil Procedure Section 638 and related sections. A referee who is an active attorney or retired judge will be appointed by the court after selection by the American Arbitration Association using its procedures for selecting arbitrators. The arbitration or reference will take the place of a trial before a judge and jury. (This is a new provision for Cardmember and Apollo Account Agreements. If you continue to use your account, this new provision will apply to all past and future transactions.)

Badie, 79 Cal. Rptr. 2d at 277.
MANDATORY ARBITRATION CLAUSES

Superior Court for the City and County of San Francisco held that the arbitration clause was enforceable under the change-in-terms clause.170 The California Court of Appeal reversed and held that the arbitration clause was not enforceable because in receiving the change-of-terms provision the customers did not intentionally to waive their rights to a jury trial.171 In addition, the court reasoned that California's public policy to support Alternative Dispute Resolution Agreements is not so broad as to enforce an agreement that is entered into without consent from one of the parties.172

The court examined the scope of the change-in-terms agreement to determine whether it included the addition of the arbitration clause.173 The threshold question was whether the scope of the change-in-terms agreement included the unilateral right of the bank to add new terms to the agreement or whether the changes-in-terms agreement was limited to the terms of the original contract.174 The court concluded that "when the account agreements were entered into, the parties did not intend that the change of terms provision should allow the Bank to add completely new terms such as an Alternative Dispute Resolution (ADR) clause simply by sending out a notice."175 The court held that "absent a clear agreement to submit disputes to arbitration or some other form of ADR, we cannot infer that that right to a jury trial has been waived."176


In Stiles v. Home Cable Concepts, Inc.,177 the United States District Court for the Middle District of Alabama decided whether to enforce an arbitration clause that was added to a contract pursuant to a change-in-terms agreement.178 The plaintiff opened a charge account with the defendant in order to purchase a satellite television receiving

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170. Id. at 276.
171. Badie, 79 Cal. Rptr. 2d at 289-90.
172. Id. at 280. In analyzing the trial court's decision, the court stated:

Whether there is an agreement to submit disputes to arbitration or reference does not turn on the existence of a public policy favoring ADR, as the trial court apparently believed. That policy, whose existence we readily acknowledge, does not even come into play unless it is first determined that the Bank's customers agreed to use some form of ADR to resolve disputes regarding their deposit and credit card accounts . . . .

Id. (emphasis in original).
173. Id. at 280-81.
174. Id. at 285.
175. Id. at 289.
176. Badie, 79 Cal. Rptr. 2d at 290.
178. Id. at 1412-13.
Included in the original cardholder agreement was a change-in-terms agreement which granted the defendant the power to change the terms of the agreement from time to time, which would be applicable to the outstanding balance and future transactions. Approximately four years later, the defendant sent the plaintiff a document which stated the new terms of the contract, including a new mandatory arbitration clause, which waived both parties' rights to use the judicial system should a dispute arise. The plaintiff conceded that he received the change-in-terms agreement, which included the arbitration clause, but claimed that he was not aware of the rights that he was giving up until his attorney explained it to him after a dispute had arisen.

The plaintiff argued that the arbitration clause should not be enforced because he did not sign it, however, the court held that the FAA does not require an arbitration clause to be signed in order to be enforceable. The court reasoned that the plaintiff assented to the contract as a whole, which included a change-in-terms agreement, and consequently, the plaintiff assented to the arbitration clause that was added under the change-in-terms agreement. The court found no merit in the plaintiff's claim that he did not understand the arbitration clause because "[i]t is a principle of basic contract law that unilateral mistakes by a party do not invalidate the contract." Therefore, the...
court held that the arbitration clause was enforceable and the plaintiff was required to submit to arbitration. ¹⁸⁷

iii. *Powertel, Inc. v. Bexley*

In *Powertel*, Bexley signed a contract with Powertel in order to receive local telephone service.¹⁸⁸ The original contract did not contain an arbitration clause.¹⁸⁹ However, the contract included the following clause:

[Powertel] will provide you [the customer] with at least ten (10) days' prior notification of any changes or modification to these Terms and Conditions of Service or of any change to [Powertel's] rates. By your continued use of the Company's service following receipt of notice of such changes or modifications, you will be deemed to have accepted and agreed to them.¹⁹⁰

Bexley filed a class action lawsuit against Powertel because she was charged $4.50 in long distance fees for telephone calls that were local according to her contract.¹⁹¹ The day after Bexley filed the complaint, she received her monthly bill from Powertel in the mail.¹⁹² Along with the bill, Powertel sent a pamphlet that described terms and conditions of the company's service.¹⁹³ This pamphlet included an arbitration clause, which stated:

Any unresolved dispute, controversy or claim arising out of or relating to [Powertel's] service, including but not limited to a claim based on or arising from an alleged tort, shall be settled by arbitration administered by the American Arbitration Association under its Wireless Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof . . . .

The parties acknowledge that use of [Powertel's] service evidences a transaction in interstate commerce. The United States Arbitration Act and federal arbitration law shall govern the interpretation, enforcement and proceedings pursuant to this arbitration clause.¹⁹⁴

Powertel filed a motion to stay the litigation and to compel arbitration in accordance with the arbitration clause.¹⁹⁵ Powertel argued that even though Bexley received notice of the arbitration clause after she had filed the lawsuit, the court must compel arbitration because the

¹⁸⁷. *Id.*
¹⁸⁹. *Id.*
¹⁹⁰. *Id.*
¹⁹¹. *Id.*
¹⁹². *Id.*
¹⁹³. *Id.*
¹⁹⁴. *Powertel*, 743 So. 2d at 572.
¹⁹⁵. *Id.* at 573.
arbitration clause applied to pending lawsuits. The Florida State Circuit Court for Duval County denied Powertel's motion to compel arbitration and Powertel subsequently appealed.

The court stated that "[a]lthough the states may not impose special limitations on the use of arbitration clauses, the validity of an arbitration clause is nevertheless an issue of state contract law . . . . Thus, an arbitration clause can be defeated by any defense existing under the state law of contracts." In addition, the court held that the arbitration clause was procedurally unconscionable. In support of its holding, the court considered the following facts: Powertel drafted the agreement; the arbitration clause was offered on a “take it or leave it” basis; the consumer had no bargaining power regarding the arbitration clause; and the consumer had no power to reject the clause without canceling the contract and incurring costs with another company. The court also found that the notice of the clause was deficient because it was hidden in the pamphlet that was sent with the customers’ bills.

The court also held that the arbitration clause was substantively unconscionable. The court determined that the arbitration clause’s limitation on punitive damages only benefited Powertel and not the consumer. The court stated that “as a practical matter, it is difficult to imagine any situation in which a telephone company would have an action for punitive damages against its customers.” The court criticized the arbitration clause because it prohibited class action law-
suits: 

"Again, this is an advantage that inures only to Powertel. The arbitration clause precludes class litigation by either party, but it is difficult to envision a scenario in which that would work to Powertel’s detriment."

The court recognized that the limitation on damages conflicted with some of the remedies that could be given in court under state consumer protection law. Finally, the court held that if the arbitration clause was valid, it did not apply to the present dispute because Bexley had already filed the lawsuit before the clause became applicable.

b. Cases Addressing Issues of Consent and Notice in the Enforcement of Arbitration Agreements

i. Lawrence v. Walzer & Gabrielson

On several occasions, lower courts have considered the issues of adequate consent and notice in determining whether to enforce a mandatory arbitration agreement. In Lawrence v. Walzer & Gabrielson, the California Court of Appeals held that an arbitration agreement which included a retainer agreement between an attorney and client was unenforceable because the client was misled by its scope. The arbitration clause stated that “[i]n the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration.” The court interpreted the language “any other aspect” of the relationship to refer to the financial matters “regarding fees [and] costs” which is stated within the same phrase. The court rejected the defendant’s argument that “any other aspect” of the relationship included claims for malpractice.

205. Id. The court stated:

"[C]lass litigation provides the most economically feasible remedy for the kind of claim that has been asserted here. The potential claims are too small to litigate individually, but collectively they might amount to a large sum of money. The prospect of class litigation ordinarily has some deterrent effect on a manufacturer or service provider, but that is absent here."

206. Id.
207. Id. at 576-77.
208. Powertel, 743 So. 2d at 577.
210. Id. at 9-10. A paralegal who worked for the defendant handed the plaintiff the retainer agreement and told her to sign it. Id. at 7-8. The plaintiff stated that she “had no idea” that by signing the agreement, she would give up her right to sue the attorney. Id.
211. Id. at 9 (quoting the retainer agreement between the plaintiff and defendant).
212. Id. at 8-9.
213. Lawrence, 256 Cal. Rptr. at 9. The court interpreted the arbitration clause to only include financial matters because the arbitration clause “misleadingly appear[ed] to the client to
In reaching its decision, the court stated, “[a]bsent notification and at least some explanation, the [client] cannot be said to have exercised a ‘real choice’ in selecting arbitration over litigation.” The court also recognized that the United States Supreme Court does not support a waiver of civil jury trial rights where one party “unknowingly signed a document purporting to exact a waiver.” The court considered the fact that the arbitration agreement was not a product of negotiation and that the defendant drafted the agreement so as to cause uncertainty as to its scope.

ii. Broemmer v. Abortion Services of Phoenix, Ltd. and Sanchez v. Sirmons

Various lower courts have considered the enforceability of arbitration clauses in agreements between a doctor and a patient in the medical malpractice context. In Broemmer v. Abortion Services of Phoenix, Ltd., the Arizona Supreme Court held that an agreement to arbitrate was unenforceable when it was included within one of three forms that a woman was given to sign before undergoing an abortion. The court held that the contract was one of adhesion because it was offered to the consumer on a “take it or leave it” basis.

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214. Id.
215. Id. at 10.
216. Id.
217. Courts have addressed the issue of enforceability of mandatory arbitration clauses in medical malpractice cases. In Sosa v. Paulos, the Supreme Court of Utah held a mandatory arbitration clause was procedurally unconscionable where a patient was given the agreement to arbitrate all medical malpractice claims “minutes away” from surgery. 924 P.2d 357, 363-64 (Utah 1996). The court took into consideration the facts that the patient did not read the contract because she was nervous and anxious just before surgery; that the contract was an adhesion contract, since the doctor would not have performed the surgery without the signature and it was difficult for her to back out of the surgery at that late stage; and that the arbitration agreement was never explained to the patient by the doctor or a member of his staff. Id. at 363. The case was remanded to the trial court to decide if a revocation period existed and whether the patient was aware of an opportunity to revoke the arbitration agreement after the surgery. Id. at 365.

Similarly, in Ob/Gyn Wixted v. Pepper, the Supreme Court of Nevada held that a mandatory arbitration agreement was unenforceable when it was included in a form given to a patient at a clinic to sign before receiving treatment. 693 P.2d 1259, 1260-61 (Nev. 1985). The court considered the facts that the agreement was never explained to the patient and that the patient could not remember agreeing to the term. Id. at 1261.

219. Id. at 1014-15.
220. Id. at 1016 (stating the characteristics of adhesion which were present in the contract, including: (1) the fact that the drafter included a term that was advantageous to itself requiring the arbitrator to be a licensed medical doctor; (2) the contract was not negotiated; (3) the contract terms were offered as a condition of treatment; (4) the defendant never explained the terms
The court stated that an adhesion contract was unenforceable if the standard non-negotiated terms "[did] not fall within the reasonable expectations of the weaker or 'adhering' party."\(^{221}\) In reaching its decision that the plaintiff did not reasonably expect to waive her right to a jury trial by signing the form, the court took into consideration the fact that no one from the clinic explained the arbitration agreement to the plaintiff, she had only a high school education, was inexperienced in commercial matters, and was not sure "what arbitration [wa]s."\(^{222}\)

Similarly, in *Sanchez v. Sirmons*,\(^{223}\) the Supreme Court of New York held that an arbitration agreement was not enforceable where a patient did not knowingly consent to the agreement.\(^{224}\) The arbitration agreement was included on a form entitled "Consent to Abortion" which was given to the patient by the receptionist to sign.\(^{225}\) The court held that for a waiver of the constitutional right to a jury trial to be valid, the waiver must be given knowingly, voluntarily, and intelligently.\(^{226}\) The court found that the defendant had not satisfied these requirements because the arbitration clause was "concealed . . . in a form," the clause was not brought to the plaintiff's attention, and its meaning and effect were not explained to the plaintiff.\(^{227}\)

### III. Analysis

Courts often resolve the issue of enforceability of arbitration clauses in adhesion contracts in favor of the corporation. An alarming instance of judicial enforceability exists when consumers do not have adequate notice of the arbitration clause which is of particular importance to consumer law. Therefore, the presence of the arbitration clauses in contracts, limiting consumers' ability to sue corporations in the judicial system, can lead to an abuse of customers and threats to consumer protection laws.

\(^{221}\) Id.

\(^{222}\) Id. at 1017.


\(^{224}\) Id. at 757.

\(^{225}\) Id. at 758. The plaintiff claimed that she thought that by signing the form she was only consenting to submitting to the abortion. *Id.* at 759. The defendant admitted that neither he, nor anyone else in his office, explained to the plaintiff that she would waive her rights to a trial by jury by signing the "Consent to Abortion" form. *Id.*

\(^{226}\) Id. at 760.

\(^{227}\) *Sanchez*, 467 N.Y.S.2d at 760. The court also briefly discussed its reservations about enforcing any "arbitration clause in a contract between physician and patient" which are signed shortly before surgery because the patient is usually afraid and anxious before surgery. *Id.* at 761.
A. The FAA is Used by Corporations to Abuse Consumers

Congress created the FAA to promote extra-judicial resolution of disputes for various public policy reasons, including the reduction in the cost of dispute resolution and the encouragement of adverse parties to salvage their relationships.228 The FAA supports the enforcement of mandatory arbitration clauses as valid waivers of the rights to access the judicial system, including the right to have a jury trial.229 The FAA’s mandated preference for out of court dispute resolution and enforcement of contractual arbitration clauses is reasonable when all of the parties of a contract have negotiated for the mandatory arbitration clause and have knowingly consented to the clause.230 However, problems may arise when the parties do not have equal bargaining power or when one party has not knowingly consented to waive his rights to access the judicial system under the Seventh and Fourteenth Amendments to the United States Constitution.231

Since Congress passed the FAA in 1925, the disparity in power between consumers and large corporations has widened. A consumer’s lack of power leaves him virtually defenseless in disputes with large corporations. This situation is only exacerbated when the consumer’s recourse in the courts is eliminated. Congress has recognized consumers’ relative lack of power and has created many statutes to protect consumer rights.232 However, in order to use the statutes to enforce


229. See 9 U.S.C § 4 (1933) (directing courts to compel arbitration in accordance with the terms of valid arbitration agreements). See also supra notes 32-44 and accompanying text.

230. According to one advocate of arbitration, parties choose arbitration because litigation: (1) is a burdensome process; (2) involves complex rules of evidence; (3) requires principles of substantive law to apply; (4) allows the loser to appeal. See Davis, supra note 7, at 54-55. The post-trial judicial process is deemed just as burdensome by arbitration advocates and described as

an arduous climb up the appellate ladder. The appellate court will reverse the trial court’s decision if the judge made a mistake or fact or law that may have affected the outcome of the case. Once this process is completed, the losing party may be entitled to, and in any event may seek, yet another appeal. The daunting consequence of a triumphant appeal may be a new trial.

Id. at 55.

231. See supra notes 125-227 and accompanying text (describing various cases where a weaker party claims to have not knowingly waived rights to access the judicial system).

their rights, consumers must turn to the judicial system to force large corporations to comply with the statutes. Nonetheless, large corporations have begun to use the FAA as a shield against the only weapon given to consumers, the judicial system. Thus, mandatory arbitration clauses create a circular problem for consumers who cannot access the judicial system to enforce their statutory rights that Congress specifically created to protect consumers from corporations.

On several occasions, the Supreme Court has enforced arbitration agreements under mandatory arbitration clauses between two parties and has used the FAA as support for its decision. In Allied-Bruce, the Court held that the FAA should be interpreted broadly in order to apply it to any contract involving interstate commerce, regardless of the contracting parties' contemplations. Similarly, in Doctor's Associates, the Court held that a state cannot mandate consumer protection through statutory notice requirements of arbitration clauses because the FAA precludes state law that prohibits the enforcement of arbitration clauses. In both of these decisions, the Supreme Court expressly supported a policy of using the FAA to enforce arbitration clauses; therefore, decisions such as Allied-Bruce and Doctor's Associates opened the floodgates and gave large corporations the ability to use arbitration clauses to protect themselves from consumer litigation under the FAA.

Large corporations began to include mandatory arbitration clauses in their contracts with consumers. As a result, by signing contracts in everyday transactions, many consumers have unknowingly waived their rights to use the judicial system to resolve disputes with corporations. This lack of knowledge or consent causes grand concern when consumers initiate legal action against corporations and subsequently are informed that they previously waived their right to the judicial system when they signed the contract. With the FAA and the Supreme Court supporting the enforcement of arbitration clauses,

(1975) (forcing companies to comply with implicit and explicit warranties of their products and services).

233. See infra note 232 (citing examples of federal statutes which provide for causes of actions against companies that violate the Acts).
234. See supra notes 62-70, 93-124, 131-158 and accompanying text.
237. See supra notes 110-124 and accompanying text.
238. See supra note 12 (quoting an example of an arbitration clause).
239. See supra notes 125-227 and accompanying text.
240. See supra note 131-227 and accompanying text.
corporations are able to effectively "trick" consumers into waiving their rights by signing contracts which have arbitration clauses buried within the text of the contract.

B. Mandatory Arbitration Threatens Common Law Consumer Protection

Mandatory arbitration effectively strips consumers of their rights to protect themselves from large corporations and jeopardizes the American judicial process of developing common law. Every citizen has the right to dispute any contract which violates public policy, however, arbitration clauses provide a road for large corporations to circumvent this right and effectively take it away from consumers.

Furthermore, in contrast to courts of law, arbitration does not have to follow common law, and at times arbitration does not have to follow statutory law that exists to protect consumers. For example, in Gilmer, the central issue was whether mandatory arbitration stifles the development of law by not allowing a written opinion. The Court decided that the issue was moot as applied to the specific facts because the arbitration forum mandated by the contract required a written opinion by the arbitrator. Unfortunately, many arbitration forums and contracts do not require written opinions and even go as far as requiring confidentiality of the arbitration altogether.

241. See Davis, supra note 7, at 84. "Judges issue written opinions shaping the law and lending predictability to it. People who understand the law can avert disputes. Since arbitrators often do not write opinions and since their decisions have no precedential effect, arbitration undermines the predictability of the law." Id.

242. Chief Judge Richard Posner of the Seventh Circuit for the United States Court of Appeals conceded:

[J]udges follow the law . . . [because] if they do not their decisions are corrected on appeal, while arbitrators, who often . . . are not lawyers and cannot be compelled to follow the law and their errors cannot be corrected on appeal, although there are some limitations on the power of arbitrators to flout the law.


243. The courts can use a subjective test of whether the arbitrator knowingly failed to apply the law in giving the award. DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997). If the arbitrator applied bad law, but not on purpose, the award may be upheld by the courts. Id. See supra note 242 and accompanying text.


246. For example, the National Arbitration Forum (NAF) requires confidentiality of awards as follows: "Arbitration proceedings are confidential, unless the Parties agree otherwise. A Party who improperly discloses confidential information shall be subject to sanctions. The Arbitrator, Director, and Forum shall not disclose confidential information." NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE, Rule 4 (Sept. 1, 1999).
quently, each time a dispute is arbitrated privately, the decision does not act as precedent for future decisions. Thus, out of court dispute arbitration is attractive to large corporations because, without precedent, it can continue engaging in harmful or unlawful practices without fearing lawsuits or bad publicity. This prevention of lawsuits may take weight off of the judicial system, but only at the expense of the consumer.

C. Stuffers as a “Waiver” of the Right to Sue

Stuffers are notices of change in the terms of a contract between a company and a consumer that are sent after the execution of the original contract. Companies argue that stuffers are legally valid notices of changes in contracts. On the other hand, consumer advocates contend that stuffers do not provide adequate notice to the consumer that the fundamental right to a trial or trial by jury is being waived by the consumer when doing business with a particular company. Unfortunately, courts are split on this issue of whether stuffers provide adequate notice to the consumer.

247. “[A]rbitrators' decisions are not intended to have precedential effect even in arbitration . . . let alone in the courts.” *IDS Life Insurance Company*, 136 F.3d at 543. Arbitrators’ decisions “are more like jury verdicts than like the decisions of courts, and jury verdicts are not given any weight as precedents.” *Id.* Arbitration is a more favorable alternative to court litigation for large companies, because the decisions are private and the risk of publicity tarnishing the company’s reputation or encouraging other consumers to sue the company is eliminated by arbitration. Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 271 (1995).

248. See, e.g., McMillen, supra note 21, at 35 (arguing that only a jury trial can deter a large corporation from harmful practices, listing examples of such harmful products removed from the market by a jury). See also supra note 21 and accompanying text (citing the example of the Pinto car that exploded).

249. Proponents of arbitration hail clauses that compel consumers to arbitrate claims they otherwise would have litigated. See Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?,* 21 IOWA J. CORP. L. 331, 360 (1996) (explaining that arbitration programs that have a high volume of participants are those that tend to be compulsory, while voluntary programs are underutilized).

250. See supra notes 162-208 and accompanying text.

251. See Badie v. Bank of America, 79 Cal. Rptr. 2d 273, 277 (1998) (describing Bank of America’s argument that it legitimately relied on a change-in-terms clause in an attempt to enforce a mandatory arbitration agreement printed on a stuffer); Stiles v. Home Cable Concepts, Inc., 994 F. Supp 1410, 1413 (1998) (enforcing an arbitration clause that was sent to a consumer four years after the date of the original contract pursuant to a change-in-terms agreement); Powertel, Inc. v. Bexley, 743 So. 2d 570, 575-76 (Fla. Dist. Ct. App. 1999) (describing Powertel’s argument that an arbitration clause sent to the customer with her bill was valid because the original contract allowed the company to make changes to the agreement with ten days’ notice).

252. Some advocates of arbitration clauses do not find the issue of notice to be persuasive because they believe that consumer intent or consent should not be a concern of the courts. Brafford, supra note 254, at 352-53. They argue that in a complex society, we must rely on standardized contracts and courts should not rely on the subjective intent to contract. *Id.*
For example, in Badie, the California Court of Appeal held that consent of the consumer to the arbitration clause on a stuffer was lacking.253 The court reasoned that the consumer agreed to the change-in-terms clause in the original contract, but that the change-in-terms clause is limited to the terms in the original contract and not new terms added to the contract.254 In contrast, a few months before Badie was decided, the United States District Court in Alabama in Stiles, decided that an arbitration clause added to a contract pursuant to a change-in-terms agreement was enforceable.255 In Stiles, the court held that the arbitration clause was enforceable because the consumer assented to the contract as a whole, including the change-in-terms agreement and any changes made pursuant to that agreement.256

Although the outcomes are different, the facts in these two cases are very similar. In both cases the purpose of the original contract was to issue credit to the consumer, the contracts contained a change-


One credit card company devised a method to avoid the limits of a change-in-terms agreement to terms that exist in the original contract. MBNA America Bank, N.A. recently sent out an “IMPORTANT NOTICE OF CHANGE-IN-TERMS” to its customers which effectively changes the terms of the “change-in-terms” clause. It reads:

Effective February 11, 2000, the following amendment will apply to your existing credit card agreement. This amendment will apply to the entire unpaid balance, including the balance existing before this amendment becomes effective. This amendment shall replace all provisions concerning changing the terms of your existing credit card agreement and the state law(s) that govern your existing credit card agreement. This amendment also changes the way in which Crestar may have amended or modified the terms of your account in the past. Any inconsistencies between this amendment and your existing credit card agreement shall be governed by this amendment. Please read this notice and keep it with your agreement.

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Amendment: We may amend your agreement by adding, deleting, or changing provisions in compliance with the applicable notification requirements of federal law and the laws of the State of Delaware. If an amendment gives you the opportunity to reject the change, and if you reject the change in the manner provided in such amendment, we may terminate your right to receive credit on this account and may ask you to return all credit devices as a condition of your rejection. The amended agreement (including any higher rate or other higher charges or fees) will apply to the entire unpaid balance, including the balance existing before the amendment became effective. We may replace your credit card with another credit card at any time.

Individualized BankCard Services, “Important Notice of Change-In-Terms,” © 2000 MBNA America Bank, N.A. (explaining the new changes in terms for credit card accounts that Crestar transferred to MBNA on a letter sent out to customers January, 2000) (emphasis added). This amendment changes the “change-in-terms” procedures to allow the credit card company to actually add new terms to the agreement in the future, such as an arbitration clause, even if that type of term does not currently exist. See id.

256. Id. at 1416.
MANDATORY ARBITRATION CLAUSES

in-terms clause, the defendants used the mail to send the consumer a mandatory arbitration clause on a stuffer, and the plaintiffs claimed that they were not aware that they waived their right to use the judicial system. Even though the facts are similar in Badie and Stiles, the holdings are at odds with each other.

The Stiles decision clearly protects the interests of the company by allowing a consumer to unknowingly waive a potentially unlimited number of rights by merely signing a contract that included a change-in-terms agreement. The court in Stiles was not concerned about whether the consumer consented to the waiver of the right to trial or whether the consumer had any notice or knowledge of the waiver. Thus, under the Stiles ruling, a company can avoid consumer lawsuits by using trickery. Further, the Stiles decision provides an incentive for companies to bury change-in-terms agreement within the fine print of the contract, and subsequently send the consumer “notice” in similar print describing how all disputes must be solved by arbitration. Under Stiles, this type of “notice” is sufficient to enforce the arbitration clause, regardless of whether the consumer ever read the contract. The Stiles decision is completely supported by the preference for arbitration and enforcement of mandatory arbitration clauses mandated by the FAA.

On the other hand, the Badie decision clearly protects the interest of consumers by recognizing the absurdity of the argument that a consumer can waive a fundamental right simply by receiving a piece of paper in the mail. The Badie court avoided the FAA roadblock by adopting a literal interpretation of “change-in-terms” and disallowed the destruction of consumer rights through the change-in-terms clause by prohibiting the company from actually adding terms to the contract without negotiation, consent, or knowledge of the consumer.

Similarly, in Powertel, the court recognized that there was a deficiency in notice to the consumer when the arbitration clause was sent

257. See supra notes 162-159 and accompanying text.
258. Stiles, 994 F. Supp at 1417 (dismissing the plaintiff's argument that the arbitration clause was invalid because he did not understand it by referring to basic contract law that a contract cannot be invalidated by a unilateral mistake of one party).
259. See infra note 325 (describing the Powertel court's opinion that most consumers probably throw stuffers away without reading them).
260. See supra notes 162-176 and accompanying text (explaining the limit placed on a change-in-terms clause by the court in Badie to change terms only which existed in the original contract and not add new terms not included in the original contract).
261. See supra notes 162-176 and accompanying text.
262. See supra notes 188-208 and accompanying text.
in a pamphlet stuffed in the envelope with her monthly bill. The court stated that the method used by Powertel to amend the original contract to include an arbitration clause “may have left many customers unaware of the new arbitration clause.”

D. Persuasive Factors Considered by Courts in Deciding Whether Adequate Notice and Consent Exist

Courts have found that adequate notice and consent to arbitration clauses is essential to the enforceability of the clause. The issue of whether arbitration clauses are drafted in a way that consumers should have known that a dispute would fall within the scope of the arbitration clause has been considered by courts. For example, in Lawrence, the California Court of Appeals examined the scope of the arbitration clause and considered the fact that in the attorney-client relationship the attorney had the power to draft the agreement, while the client had the written agreement from which to interpret the scope of the agreement to arbitrate. Since the attorney was the more powerful party and caused the uncertainty as to the scope of the agreement, the court decided to construe the interpretation of the agreement against the attorney and side in favor of the client’s interpretation of the agreement.

A similar disparity in power between two contracting parties can also be found in consumer contracts. In consumer contracts, one party in the transaction is always a company or organization who is likely to be financially powerful. The other party may be an indi-

264. See supra notes 162-176, 209-227 and accompanying text.
265. See Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6, 8-9 (1989). The court held that when specific examples are listed followed by “or any other” dispute language, the “or any other” language should be limited to disputes related to the examples provided. Id. at 9. The arbitration clause was construed against the drafter and the court questioned whether the plaintiff actually had knowledge of the arbitration clause or a choice in agreeing to it. Id. at 10.
266. Id.
267. Id. at 9-10.
269. See Wheeler v. St. Joseph Hospital, 133 Cal. Rptr. 775, 786 (Cal. Ct. App. 1977) (stating that “[a]bsent notification and at least some explanation, the patient cannot be said to have exercised a ‘real choice’ in selecting arbitration over litigation”); Ramirez v. Superior Court, 163 Cal. Rptr. 223, 229 (Cal. Ct. App. 1980) (stating that the Supreme Court has “in no way suggested that jury trial rights could be . . . taken away from one who unknowingly signed a document purporting to exact a waiver”); Lawrence, 256 Cal. Rptr. at 9-10 (holding that a client must be fully advised by his attorney of the consequences of an arbitration agreement between them); Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013, 1017 (Ariz. 1992) (stating “[i]t would be unreasonable to enforce such a critical term [an arbitration clause] against a plaintiff when it is not a negotiated term and defendant failed to explain it to [plaintiff] or call her atten-
MANDATORY ARBITRATION CLAUSES

individual consumer who may be uneducated, inexperienced in business, elderly, unable to read fine print due to deteriorating vision or illiteracy, or indigent and very desperate for money or consumer credit. When sending consumers credit offers or stuffer arbitration agreements, companies do not take into account the special needs of the individual consumers thus, making the consumers less powerful.

In addition, consumers are not involved in the drafting process of the arbitration clause and usually do not have an attorney at their disposal to interpret the scope of the agreement every time their credit card company sends them mail. Companies have the legal advantage of having attorneys draft arbitration clauses, hence the clauses are difficult for consumers to interpret without legal assistance.

Courts have also found that if the arbitration clause was not explained to the consumer, it may be held unenforceable. In Lawrence, Wheeler, Ramirez, Broemmer, and Sanchez, the courts found that in determining whether an arbitration clause was enforceable, the pivotal factors were whether the arbitration clause was brought to the plaintiff's attention and whether it was explained to the plaintiff. In most circumstances, large companies send contracts to consumers through the mail and the terms of the agreements, including arbitration clauses, are not explained to the consumers. Further, it is likely that consumers do not notice that an arbitration clause is included in the contract. Just as courts have decided that in the con-

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2. See supra notes 209-227 and accompanying text.
3. See infra note 325 (describing the Powertel court's opinion that many consumers throw stuffers away without reading them).
270. See supra notes 209-227 and accompanying text.
271. See infra note 325 (describing the Powertel court's opinion that many consumers throw stuffers away without reading them).
272. See supra notes 209-227 and accompanying text (explaining various instances where courts considered lack of explanation of an adhesion contract that is handed to a person for signature to be influential in determining whether that person even noticed or understood particular terms in the contract).
273. See Broemmer, 840 P.2d at 1015-16; Sanchez, 467 N.Y.S.2d at 760. An argument against courts' reliance on an adhesion doctrine is that adhesion alone is not a reason to invalidate a contract. While adhesion may be considered in determining whether the contract is unconscionable, the true issue is whether a contract is truly unconscionable, not whether it is adhesive. See Brafford, supra note 254, at 348-49. This argument is extended further to place the blame of consumer abuse by large corporations on the consumers themselves because they voluntarily assumed the risk of the adhesion contract by entering it, and “[j]udicial intervention into an adhesive contract would recast [those] risks . . . .” Id. This argument is only too persuasive to someone who does not believe that disparity in power between contracting parties should be considered in enforcing contracts. Many courts, however, do find disparity in power influential in determining whether a contract should be enforced. See Williams v. Walker-Thomas Furni-
text of attorney-client and doctor-patient relationships an explanation of the arbitration clause is necessary for it to be enforceable, courts should also begin to require an explanation to the consumer in the corporation-consumer relationship.

Another factor that has been influential in courts’ decisions to invalidate arbitration clauses is whether the clause was included in an adhesion contract. In Broemmer, the Arizona Supreme Court applied the standard of whether the non-negotiated terms “fell within the reasonable expectations of the weaker or ‘adhering’ party.” In consumer contracts, especially those sent through the mail, a consumer cannot reasonably expect to waive his or her fundamental rights to use the judicial system or a jury trial just by agreeing to do business with a company. Most consumers do not have the expertise to evaluate the legal ramifications of all of the clauses in fine print in the agreement.

For instance, credit agreements and similar consumer contracts are always considered adhesion contracts. Unless credit agreements conspicuously, and in plain language, spell out the arbitration clause, inform consumers of their rights and which of those rights the consumer is forfeiting, the arbitration clause cannot be said to fall within the consumer’s reasonable expectations. In reality, it is not until a consumer has a dispute with a company, that he will seek legal advice. It is usually only after the consumer has consulted an attorney and after a dispute has arisen, that the consumer is informed that the arbi-

cature Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (considering the fact that “when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms”).

274. Broemmer, 840 P.2d at 1016.

275. Assuming that an adhesion contract is a form contract that is offered on a “take-it-or-leave-it” basis, it would be logistically and economically impossible for large banks and credit card companies to extend credit to thousands of individual customers without using an adhesion contract. Advocates of arbitration clauses argue that consumers are benefited by the efficiency of standardized contracts, even when they did not subjectively consent to waive their rights to sue the company. See Brafford, supra note 254, at 351 (arguing that without standardized contracts, “individual negotiations would take time, the transaction costs would increase, and the business would pass those costs on to the consumer,” and “[b]y arbitrating disputes, the business saves litigation costs and can pass those savings on to the consumer”).

276. See Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410, 1414 (M.D. Ala. 1998) (explaining that the customer was not aware of the rights he gave up in signing an arbitration clause until the attorney he hired to sue the company explained those rights to him); Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6, 9-10 (Cal. Ct. App. 1989) (recognizing that a client did not understand she waived her right to sue her attorney for malpractice by signing a retainer that included an ambiguous arbitration agreement).
MANDATORY ARBITRATION CLAUSES

Arbitration includes many unfair advantages for powerful parties because it eliminates many complicated procedures inherent in the judicial system which were created to ensure a fair trial for less powerful parties. One unfair advantage is that arbitration clauses often specifically prohibit class action litigation. This presents a problem when many consumers have entered into identical adhesion contracts including arbitration clauses, and are ultimately harmed by the company. These consumers may be banned from joining together to resolve their dispute as a group. Class action litigation was created to help weak parties combine their efforts and resources to fight powerful parties, yet companies are able to avoid class actions and retain their excessive power by including arbitration clauses in their adhesion contracts. Additionally, the lack of the risk of a class action litigation, or binding precedent, acts as a disincentive for large corporations to change their practices after consumers have been damaged.

In addition, arbitration lacks safeguards inherent to the judicial system, such as discovery, which is designed to maximize the fairness of trial. Many arbitrators discourage and severely limit the discovery

277. See HOENIGER, supra note 19, § I.06 at 1-8 (listing three reasons for not arbitrating: “there is no discovery in arbitration, arbitrators tend to ‘split the baby,’ and there is no appeal”).
278. See supra note 12 and accompanying text. See also Paul Bland, Resisting Corporate Efforts to Impose Mandatory Arbitration on Consumers, 2 TEX. J. OF CONSUMER L. 94, 96 (1999) (stating that “no matter how small the dollar value of a plaintiff’s claim or how unlikely it is that a plaintiff would be able to pursue the claim on a class-wide basis, mandatory arbitration generally does away with class actions”).
279. See Powertel Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (stating that banning litigation as a class action reduces the consumers’ ability to seek relief when they, otherwise, “might join together to seek relief that would be impractical for any of them to obtain alone”).
280. Id. (noticing that the language of the arbitration clause effectively removed the defendant’s exposure to remedy on behalf of a class).
281. See supra note 244-247.
282. See supra note 248 and accompanying text.
283. See infra notes 285-284.
284. With no clear guidelines to follow in ordering discovery, each arbitrator can make up his own “rules” about the discovery process. For example, nothing in the AAA Commercial Rules deals directly with discovery. . . . There is no suggestion in the AAA Commercial Rules that a prehearing deposition may be ordered by the arbitrators. Some AAA arbitrators might thus be loath to order such deposi-
Such a practice disadvantages consumers since the large companies usually hold all of the necessary and relevant documentation of the dispute. In addition arbitration lacks the safeguards provided by the rules of evidence. Large corporations are often unfairly advantaged because the arbitrator is able to choose the evidence that is allowed in resolving the dispute, and the large corporations' attorneys are experts in the arbitration format. On the other hand, the consumers' attorneys are often inexperienced with the format in any given arbitration setting.

Finally, mandatory arbitration denies consumers the traditional elements of the judicial system, including written opinions, the benefit of electing and appointing public officials as judges over the proceeding, the option of having a jury as the decision maker, and a fair appellate process to guarantee justice. Arbitrators usually do not produce a written opinion explaining to parties the reasons for their decisions; hence, there is no check on the process to determine whether the decision was fair. It would be easy for defense attorneys to form relationships with arbitrators with whom they often work in situations, even if the need is compelling because such procedure is outside the norm of AAA practice.

See Hoeniger, supra note 19, § 6.11 at 6-34-35; Budnitz, supra note 247, at 283 (stating that the extent of discovery allowed in arbitration is “a far cry . . . from a party having at its disposal the wide array of discovery techniques such as interrogatories, motions to produce documents, depositions, etc.”). See also Michael F. Hoellering & Peter Goetz, Piercing the Veil: Document Discovery in Arbitration Hearings, 47 ARB. J. 59 (Sept. 1992).

285. The defendant large corporation often has the only existing records of product information, records of complaints about products or services of the company, profits the company makes while violating consumer rights, and prior lawsuits or arbitration on the same issue by the company. See Budnitz, supra note 247, at 283-84.

286. See Davis v. Prudential Securities, 59 F.3d 1186, 1190 (11th Cir. 1995) (stating that arbitrators are not bound by judicial rules of evidence). See also Bland, supra note 279, at 95 (stating that “[a]rbitrators need not follow rules of evidence and may consider hearsay evidence”).

287. “[M]any practicing attorneys, including many with substantial litigation experience, still know nothing about arbitration . . . .” See Stipanowich, supra note 7, at 452.

288. See supra note 246-247 and accompanying text.

289. By agreeing to arbitrate, parties waive their rights to a hearing presided over by an elected judge or a judge appointed by a public official. See Budnitz, supra note 247, at 283.

290. See supra note 246-248 and accompanying text.

291. “Courts typically will not pry into the factual or legal conclusions of arbitrators. Even when undertaken, judicial review is difficult because arbitrators' decisions seldom contain any supporting rationale . . . .” See Stipanowich, supra note 7, at 439.

292. An analogy can be drawn on this point between out of court arbitration in civil cases and plea bargaining in criminal cases. Both are instances where parties become accustomed to settling cases that would otherwise be tried. Just as defense attorneys in civil cases may become experts at using arbitration to gain favorable results, criminal defense attorneys become experts at plea bargaining and prefer to resolve criminal cases without ever going to trial. See Milton Heumann, Plea Bargaining 84-91 (1978). Heumann described the process that a criminal defense attorney goes through in adjusting to plea bargaining as follows:
resolving disputes, as well as to learn a developed pattern in which the arbitrator rules. Large corporations give arbitration organizations a lot of business which may implicitly pressure arbitrators to rule on the side of large corporations, due to the ever present threat that unsatisfied corporations could take their business to another arbitrator. It is important to have some type of protection for the consumer to guarantee that the arbitration organization is not influenced by outside pressures to keep the business of large corporations, and one of the primary ways to ensure the fairness of the dispute resolution is to look at the arbitrator's reasons for arriving at a particular resolution. However, without written opinions, this protective and evaluative tool does not exist.

He acts hesitantly at first and with greater confidence in succeeding cases. What is happening—almost unknown to him—is that he is sharpening his own plea bargaining negotiations, becoming more confident that his strategy and tactics in these negotiations, his informal adversary approach, if you will, is leading to excellent deals for his clients. 

Id. at 90. Similarly, civil defense attorneys develop strategies and tactics in arbitration that lead to "excellent deals" for their clients. Plaintiffs' attorneys may have less experience with arbitration and, consequently, less successful strategies and tactics.

293. Richard C. Reuben, The Dark Side of ADR, 14 Cal. Law. 53, 54 (1994) (stating that for-profit ADR providers have conflicts in interest between providing neutral arbitration and retaining repeat business from large companies); see Budnitz, supra note 247, at 321-22 (stating "[a] 'repeat player' such as a lender which determines the arbitration organization and uses arbitration frequently . . . has a decided advantage over the 'one shot' player such as the consumer").

294. The National Arbitration Forum, one of the country's largest arbitration organizations, specifically provides in its code of procedure that arbitrators are not to "include any reasons, findings of fact or conclusions of law" unless both parties request an opinion in writing before the proceeding. NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE, Part VI, Rule 37(G) (1991). The American Arbitration Association also encourages "arbitrators to limit their award to a statement of relief given and to avoid a lengthy explanation." See Stipanowich, supra note 7, at 439.

295. See Wilko v. Swan, 346 U.S. 427, 436 (1953) (recognizing that the FAA does not require written opinions); O.R. Sec., Inc. v. Professional Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988) (holding that the "manifest disregard" standard to prove that the arbitrator did not follow the law in the decision requires proof in the record that the arbitrator knowingly disregarded the law). Without any written record or opinion, an arbitrator has the opportunity to base decisions on outside influences and disregard the law, without the fear of judicial review.

Advocates for arbitration view the lack of a written opinion as a benefit that makes arbitration a more efficient process than litigation. See Stipanowich, supra note 7, at 439-40. These advocates may argue that "limitations on review are consistent with the notion that, for better or worse, the parties have bargained for arbitral justice without judicial intervention. They serve to put an effective end to dispute resolution, preventing a case from dragging on for months or years in the appeal stage." Id. at 440. See also Hoeniger, supra note 19, A3-25 (stating that certain "organizations and practitioners favor 'bare' awards without explanation of any sort, in the belief that such awards are the least likely to be challenged and overturned by a court").

296. In federal courts, a party may petition the court for a new judge, if the party believes that the assigned judge has a personal bias or prejudice towards one party to the proceeding, and another judge will be assigned to the case. 28 U.S.C. § 144 (1998).
Additional benefits offered by the American judicial system, but lacking in arbitration, are the process of choosing judges and the option of having a jury as the decision maker. Whether a judge is elected or appointed, all consumers have the opportunity through the power of voting to influence the choice of judges. Judges who are elected have to answer to the public when they rule against public policy in consumer law cases and the citizens have the right and the power to vote the judge out of office. For judges who are appointed by other public officials, the voting power of the public can act as an influence because the citizens are able to inform their elected representatives about their dissatisfaction with an appointed member of the judiciary.

On the contrary, arbitrators are neither elected nor appointed by public officials, and are often chosen by the large corporations. Even when the arbitrators are chosen at random, the consumer runs

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297. The Seventh Amendment to the United States Constitution states that “[I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.” U.S. CONST., amend. VII.

298. The Federal Rules of Civil Procedure also preserve the right to a jury trial: “The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.” FED. R. CIV. P. 38(a). The Rules also state that “[a]ny party may demand a trial by jury of any issue triable of right by a jury.” FED. R. CIV. P. 38(b).

Furthermore, a party has the right to select the jury after examining prospective jurors. FED. R. CIV. P. 47(a). A party may ask the court to excuse prospective jurors for good cause, if the party feels the jurors cannot be fair. FED. R. CIV. P. 47(c). If a juror is not excused for cause, each party to a civil action is entitled to strike at least three prospective jurors from the panel. 28 U.S.C. § 1870 (1948); FED. R. CIV. P. 47(b).

However, the political process of electing judges has been criticized. Former chief judge Abner Mikva explained that:

Citizens do have access to the political process through contact with their elected officials. But the judiciary is supposed to operate in a different manner, without outside influence and under accepted guidelines. Judges shouldn’t be glad-handing at ward meetings, and making themselves “accessible.” People who sit on the bench are supposed to be above the fray, so they can decide cases based on the law, not on the whims of politics, polls, or personal relationships.

Abner Mikva, Judges Should be Selected, Not Elected, distributed at Discussion by the A.B.A. Standing Committee on Judicial Independence, DePaul University College of Law (Aug. 31, 1999) (on file with the author).

299. Arbitration clauses often name the organization that will conduct the arbitration; therefore, the company as drafter of the adhesion contract chooses the arbitrator. Paul Bland, a consumer advocate, recognized that “[i]f an arbitrator rules against a corporate client too often, the company can easily take its business to another arbitrator.” See Bland, supra note 279, at 95.

300. Many problems arise when the arbitrator lacks the requisite knowledge and experience in dispute resolution, including the arbitrator’s inability to narrow issues of dispute, allowing the introduction of irrelevant evidence, and reaching a poor decision that is not based on the fundamental issues. See Stipanowich, supra note 7, at 449-50. “It is often charged that an arbitrator’s ignorance or inexperience leads to unjustifiable compromise in the award.” Id. at 450.
the risk of being subjected to the decisions of an unfair arbitrator with no recourse to prevent the arbitrator from presiding over future disputes.301 Unlike the judicial system, arbitration provides no method of weeding out bad arbitrators for consumers.302 The arbitrator does not only take the place of the judge in presiding over the process, but is also the substitute for the jury as the neutral decision maker. Therefore, the risk of bias is lower with a jury as the decision maker than with an arbitrator because a jury is comprised of several individuals and the prejudices of any one individual are not likely to be reflected in the decision of the entire group.303

Moreover, the appellate process for arbitrated disputes is severely restricted. Without the same discovery process that is allowed to citizens who resolve their disputes in court, the appellate court is limited in the factual finding on which it can base its decision.304 Without all of the facts that would otherwise be available to a consumer, an appeal of an arbitrated dispute will unfairly disadvantage the consumer who may lose the appeal, simply because the large corporation was allowed by the arbitrator to hide the material evidence necessary for the consumer to prevail.305 Also, without written opinions in arbitration, it is difficult for a consumer to prove on appeal that the arbitrator erred in judgment, since there is no proof of the reasons for the judgment.306

301. "Unfortunately AAA [American Arbitration Association] panelists vary considerably in experience and ability." Id. at 447. The AAA allows arbitrators to appoint themselves to the panel without required training or experience in arbitration. Id. at 447-48. Would-be arbitrators supply their own biographical information for review by the arbitrating parties and the AAA does not routinely verify the information. Id. at 448. AAA suggests that the parties perform their own investigations of potential arbitrators. Id. Such investigations can be very costly and time consuming. See Stipanowich, supra note 7, at 448.

302. See STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 3 (1984) (stating that "because the jury comprises a number of individuals, the prejudices of a single juror are not likely to destroy the capacity of the group to render a fair decision").

303. See infra notes 285-285 and accompanying text.

304. Consumer Financial Services Law Report, Controversy Surrounds Arbitration Clauses In Consumer Contracts, in ARBITRATION CLAUSES IN CONSUMER FINANCIAL SERVICES: SAMPLES STRATEGIES AND CASES 1, 2 (1999) (referring to a presentation by Barry A. Ragsdale of King, Ivey & Warren, in Birmingham, Ala.). "Still another problem with arbitration clauses ... is that courts often prohibit plaintiffs from engaging in substantial discovery ... [C]onsumers are disadvantaged, especially on appeal, when the pertinent documents are in the hands of the creditor and remain undiscoverable." Id.

305. See supra notes 246-248.

306. In a handbook which guides corporate lawyers in constructing arbitration clauses, the author encourages lawyers to draft their own "code of civil arbitration:

The fact that private parties can, to a very large extent, construct their own "code of civil arbitration" by contract, and that such "code" may contain provisions that might by deemed to be unfair, inefficient, wasteful, or otherwise socially undesirable, can create an obvious tension with the broad and fundamental public policy of securing "the
IV. IMPACT

A. Effects of Mandatory Arbitration on Remedies and Deterrence

In addition to losing consumer rights in arbitration, consumers lose the traditional remedies that are allowed by the judicial system. Many arbitration forums prohibit or limit punitive damages, statutory damages, emotional damages, and awards of attorneys' fees. The limited damages act not only as a disincentive for large companies to reform abusive practices, but also as a disincentive for consumers to dispute the abusive practices.

Arbitration is harmful to consumers, as a whole, for many reasons. For instance, punitive damages exist to create an incentive for large corporations to change their practices that hurt consumers. However, if a corporation can afford to pay the actual damages of its victims then it does not have any financial reason to stop the abusive or dangerous practices. However, when large punitive damages are awarded, a company is financially coerced into changing abusive and dangerous practices in order to avoid the risk of future punitive damages which may hurt the financial operations of the company.

just, speedy and inexpensive” resolution of civil disputes (Fed. R. Civ. P. 1). As arbitration displaces civil litigation to an ever greater extent, that tension will surface ever more frequently and ultimately require adjustment. It may well be that arbitration clauses in nonnegotiated form contracts . . . will ultimately have to conform to certain minimum standards and be barred from containing certain kinds of provisions . . . . That day has not arrived, however. Today, lawyers preparing or revising contracts for . . . companies that deal with the public under written contracts should certainly consider arbitration clauses that specifically preclude consolidation, class treatment, punitive damages, and other procedures and outcomes deemed undesirable by the client. See Hoening, supra note 19, § 1.07, at 1-13-1-14.

307. See Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999). In Powertel, an arbitration clause was found to be unconscionable where a telephone company limited its own liability in actual damages to consumer and punitive damages, because the customer lost remedies that would have otherwise been available in court, while the telephone company effectively lost no rights to remedies. Id.

308. See Budnitz, supra note 247, at 282. Avoidance of the possibility of punitive damages is an objective of financial institutions which requires consumers to arbitrate disputes. Id. “[R]emoving the threat of class action also removes the motivation for businesses to change and reform their practices since arbitration awards rarely include punitive damages, statutory damages or attorneys’ fees.” See Consumer Financial Services Law Report, Controversy Surrounds Arbitration Clauses in Consumer Contracts, in Arbitration Clauses in Consumer Financial Services: Samples, Strategies and Cases 1, 2 (1999).

309. See PowerTel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999). In PowerTel, an arbitration clause was found to be unconscionable where a telephone company limited its own liability in actual damages to consumer and punitive damages, because the customer lost remedies that would have otherwise been available in court, while the telephone company effectively lost no rights to remedies. Id.

310. Arbitration may actually be more expensive than litigation for either party since parties may be required to pay attorney’s fees, the arbitrators’ fees, institutional administration fees,
Without these large punitive awards, arbitration does not provide the same financial coercion to force companies to stop harmful practices in order to protect consumers.

Additionally, the prohibition of attorneys fees, common to most arbitration forums, acts as a roadblock for damaged consumers. Consumers who cannot afford to hire an attorney are effectively prevented from disputing any claim that would recover damages that would be less than the attorneys fees necessary to bring the dispute. Similarly, class action suits assist consumers who cannot afford to bring a suit alone, however, the prohibition of class actions in arbitration simply adds to the discrimination against the consumer who cannot afford arbitration but would have otherwise been able to financially afford litigation as a member of a class.

Arbitration is attractive to large corporations because it allows them to avoid the complicated and time-consuming procedure required by the judicial system. However, the same procedure that proves to annoy many corporations, exists to protect consumers. Therefore, by eliminating the procedural safeguards that are important to consumers, arbitration provides for resolutions favoring corporations.

B. Mandatory Arbitration Clauses are a Burden on the Judiciary System

Proponents of arbitration argue that the process relieves a burden on the over-congested judiciary system by resolving disputes that would have otherwise been litigated in court. This argument is not persuasive when it comes to mandatory arbitration clauses in consumer contracts because most consumers do not know that they have

and other miscellaneous arbitration expenses. See Stipanowich, supra note 7, at 452. Attorneys' fees for arbitration actually may be greater than for litigation since the time for both a hearing and preparation can be greater. Id.

311. See Bland, supra note 279, at 96 (stating that "[n]o court . . . has refused to enforce a mandatory arbitration clause on the grounds that it would eliminate the plaintiffs' ability to pursue their claims on a class action basis"). Several courts have actually compelled arbitration, pursuant to an arbitration clause, even when plaintiffs were prevented from seeking relief on a class-wide basis. Id.; Kelly v. UHC Management Co., 967 F. Supp. 1240, 1252 (N.D. Ala. 1997); Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410 (M.D. Ala. 1997); Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007 (M.D. Ala. 1997).

312. 9 U.S.C. § 3 (1988 & Supp. IV 1992) (stating that a party who is sued in court, even though a mandatory arbitration clause exists, may ask the court to stay the litigation and compel arbitration). The party who brought the suit can oppose the motion to stay by arguing that the arbitration clause is unenforceable. See Budnitz, supra note 247, at 282 (stating a hearing will be held by the court, not the arbitrator, to determine whether the arbitration clause is valid)). See also A/S Ganger Rolf v. Zeeland Transp., Ltd., 191 F. Supp. 359, 363 (S.D.N.Y. 1961).
waived their rights to litigate. Thus, when a dispute arises, consumers will likely attempt to invalidate the arbitration clause in court before submitting to the arbitration. As a result, mandatory arbitration clauses do not eliminate cases from the judiciary system, but rather add a cause of action in many cases as plaintiffs seek injunctions to hold the mandatory arbitration clause unenforceable. Moreover, the lack of class actions in arbitrations may potentially necessitate hundreds and thousands of separate suits to invalidate one adhesive arbitration clause. If the plaintiffs had simply formed a class in the first place, only one judicial action would have been necessary.

C. Methods for Consumers to Fight the Enforcement of Mandatory Arbitration Clauses

Consumers can fight the enforceability of mandatory arbitration clauses by using a variety of arguments based on contract law, congressional intent, and Constitutional law.

1. Mandatory Arbitration Clauses May Violate Contract Law

The Supreme Court has interpreted the purpose of the FAA as not to compel arbitration in every circumstance, but to compel arbitration in a manner provided for by contract when the parties mutually agree to arbitrate. The Supreme Court has held that “[a]rbitration is simply a matter of contract between parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” This interpretation of the FAA supports the need for the parties’ intentions to be determined by the court before a

313. Proponents of arbitration may argue that attorneys use motions to stay arbitration as a procedural tool to delay the arbitration process. See Stipanowich, supra note 7, at 451 (stating that “a party wishing to avoid arbitration of a dispute may successfully delay commencement of the process by resorting to the courts” and “[e]ven if the arbitration agreement is ultimately enforced, dispute resolution will have been postponed for months or years”). This argument is better suited for discussing defense’s counsel then plaintiff’s counsel, because the defendant generally would have a greater incentive to delay the process and temporarily avoid the possibility of a negative judgment. A consumer attorney, especially when working for a contingency fee, has an incentive to resolve the dispute quickly.

314. See supra notes 279-279 and accompanying text.

315. Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 474-75 (1989) (holding that arbitration should proceed in the manner provided for in the parties agreement). See supra notes 83-92 and accompanying text.


317. See MCI Telecommunications Corp. v. Exelon Indus., Inc., 138 F.3d 426, 428 (1st Cir. 1998) (interpreting the Supreme Court precedent on enforceability of arbitration contracts as “dependent on the private will of the parties as embodied in whatever contract they may have entered into”).
Mandatory arbitration clause can be enforced. This determination is particularly important in consumer contracts where the thrust of the dispute is focused on the issue of whether the consumers intended to waive their rights to the judicial system or agreed to the arbitration clauses. Since the company’s strongest argument in this type of case is that a written agreement to arbitrate exists, the strongest contract law defenses available to the consumer are those that would either invalidate the entire contract or the arbitration clause because of substantive and procedural unconscionability.

a. Substantive Unconscionability

Substantive unconscionability can be proven under the doctrine of reasonable expectations or by the standard that the contract is one-sided and unfairly oppresses or surprises an innocent party. The doctrines of reasonable expectation or unfair surprise are applied in cases where the contract is one of adhesion; thus, they are appropriate standards to apply in consumer contracts. The doctrine of reasonable expectation allows the courts to look at whether the drafter of an adhesion contract included terms that the less powerful party would not have reasonably expected to be in the contract, and failed to explain or point out these terms to the less powerful party. Consumers can argue that they did not expect to waive their rights to use the judicial system when entering into a common consumer contract and

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318. The Supreme Court set a standard that the arbitrability of a claim should not be decided until the court first determines whether a valid arbitration agreement exists. First Options of Chicago, Inc., 514 U.S. at 944-45.

319. "[S]tate law, whether of legislative or judicial origin, is applicable to deciding enforceability of arbitration clauses if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (refusing to determine whether an arbitration agreement was an unconscionable and unenforceable adhesion contract, but urging the issue to be considered on remand). See also 9 U.S.C. § 2 (1925) (mandating that an arbitration clause is not enforceable if it is invalid "upon such grounds as exist at law or in equity for the revocation of any contract").


321. See supra note 295 (defining an adhesion contract).

322. Sosa, 924 P.2d at 362. See also Broemmer v. Abortion Services of Phoenix, Ltd., 840 P.2d 1013, 1016 (Ariz. 1992) (stating that one judicial limitation imposed on the enforceability of arbitration clauses is "that such a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him").

323. This is evidenced by the number of consumers who consult consumer attorneys with the intent to file a lawsuit against companies when disputes arise, without knowing that they allegedly waived their rights to do so.
that they did not realize that they waived those rights even after a dispute had arisen.\(^\text{324}\)

Courts will consider whether the adhesion contract required consumers to give up legal remedies.\(^\text{325}\) It has been found that arbitration clauses that limit a company’s liability to actual damages, precluding punitive damages, are substantively unconscionable.\(^\text{326}\) Thus, consumers can argue that they did not expect to waive their rights to remedies offered by litigation.

Consumers can also argue oppression or unfair surprise by the corporations because the substitution of a judicial forum by arbitration for dispute resolution is inherently oppressive to consumers as a whole. For example, an arbitration clause which prohibits class action litigation is oppressive to consumers.\(^\text{327}\) Since it may be impractical for consumers with small claims to litigate their claims on an individual basis, the prohibition of class actions also prevents consumers from receiving any remedy for their claims.\(^\text{328}\) Arbitration clauses may harm large groups of consumers, when those consumers otherwise would have brought a class action in court.\(^\text{329}\)

In addition, arbitration oppresses consumers when it does not allow for adequate discovery in circumstances where the company holds much of the relevant and incriminating information.\(^\text{330}\) Another oppressive feature to arbitration is the lack of duty to follow or establish precedent.\(^\text{331}\) When consumers have identical contractual relationships with the same company, the judicial system enforces precedent against the company by construing the contract against the drafter, thereby protecting consumers who enter into similar contracts. Whereas in arbitration, consumers have to individually dispute the contract as though the issue had never been disputed before. Arbitration may not only result in a disparity of outcomes of identical disputes, but it also places an excessive burden on a consumer who has

\(^{324}\) Powertel, 743 So. 2d at 576 (stating that the contract prohibiting punitive damages removed a significant remedy that would be available in consumer litigation). In Powertel, the defendant company argued that the limit on punitive damages applies to both parties, but the court quickly pointed out that “it is difficult to imagine any situation in which a telephone company would have an action for punitive damages against its customers.” Id.

\(^{325}\) Id.

\(^{326}\) Id. (discussing that when consumer claims are too small to litigate individually, they may be litigated as a class-action, and by requiring arbitration, the defendant precluded the possibility for its customers to join together to seek relief that they could not practically seek alone).

\(^{327}\) Id.

\(^{328}\) Id.

\(^{329}\) See supra notes 284-285 and accompanying text.

\(^{330}\) See supra notes 241-241, 289-296 and accompanying text.

\(^{331}\) Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996).
been harmed by a powerful corporation, and adds to the oppressive relationship between the consumer and that entity.

The unfair surprise standard is a strong defense for consumers. When the arbitration clause is hidden in fine print in an adhesion contract, not discussed with the consumer, and not negotiated for by the parties, consumers may use the unfair surprise defense. If the consumer can show that he did not expect to waive his rights to access the judicial system as part of the agreement, he may prevail.

b. Procedural Unconscionability

"Procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties."\(^{332}\) Since procedural unconscionability is a state contract law claim, the factors considered by the courts vary between states. However, the Supreme Court of Utah laid out six common factors which it considers in deciding procedural unconscionability:

1. whether each party had a reasonable opportunity to understand the terms and conditions of the agreement;
2. whether there was a lack of opportunity for meaningful negotiation;
3. whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position;
4. whether the terms of the agreement were explained to the weaker party;
5. whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement; and
6. whether the stronger party employed deceptive practices to obscure key contractual provisions.\(^{333}\)

In applying the indicators that were laid out by the court to consumer contracts, all six of the factors indicate that a common consumer contract may be procedurally unconscionable. For example, arbitration clauses in consumer contracts are rarely explained to consumers, and those consumers who do read an arbitration clause are not aware that they can no longer sue the company if a dispute arises. Oftentimes, consumer arbitration clauses are sent to consumers via the mail and there is no proof that a consumer received notice of the arbitration clauses, much less that they actually read them. Consequently, consumers can argue that stuffers do not provide a reasona-

\(^{332}\) Id. (citations omitted).

\(^{333}\) In Powertel, the defendant used a stuffer to inform consumers of an arbitration clause, pursuant to a change-in-terms clause in the original consumer contract. Powertel, 743 So. 2d at 572. Since it can be argued that many consumers never read stuffers, it is possible that such stuffers do not provide a reasonable opportunity for consumers to understand the terms and conditions of the agreement.
ble opportunity to understand the terms and conditions of the agreement.\footnote{334}

Additionally, unfair bargaining power is implied when a consumer is not offered the opportunity to negotiate a contract that is offered on a "take it or leave it" basis.\footnote{335} Consumer contracts are typically drafted by the company, the significantly stronger party, on a boiler plate standardized form, thus indicating that they may be unconscionable. Another indication that a consumer contract may be unconscionable is the fact that the terms are rarely explained to the consumer, especially negative terms such as the arbitration clause, because most of the dealings between the parties are done via the mail.\footnote{336}

Furthermore, courts should examine whether consumers have a meaningful choice or whether they felt compelled to accept the terms of the contract, particularly credit agreements.\footnote{337} For example, consumers may feel that they have no meaningful choice in avoiding an arbitration clause, if it means canceling their contract and dealing with a different company, or forfeiting those services altogether.\footnote{338} Also, consumers who are desperate for money, but cannot obtain secured loans at reasonable interest rates, may feel compelled to accept the unfavorable interest rates and terms of unsecured credit cards or credit agreements, feeling as though they have no meaningful choice.

In addition, by hiding the arbitration clause in the contract's fine print, often on the back of the agreement, or by adding an arbitration clause to an existing agreement using a stuffer with a monthly bill, companies attempt to deceive the consumers by preventing meaning-

\footnote{334} In \textit{Powertel}, the court found the fact that the contract containing the arbitration clause was an adhesion contract to be a significant factor in its conclusion that the contract was procedurally unconscionable. \textit{Id.}

An adhesion contract offered to consumers on a "take-it-or-leave-it" basis does not afford the consumer "a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract." \textit{Wheeler v. St. Joseph Hosp.}, 133 Cal. Rptr. 775, 783 (1977) (citations omitted); \textit{see also} \textit{Broemmer v. Abortion Services of Phoenix, Ltd.}, 840 P.2d 1013, 1015 (Ariz. 1992).

\footnote{335} Even in many situations where the parties deal with each other face-to-face, the arbitration clause is not explained to the consumer. \textit{See supra} notes 210-227 and accompanying text (explaining cases in which arbitration clauses were in contracts that arose out of attorney-client and doctor-patient relationships).

\footnote{336} In \textit{Powertel}, the court found that the consumers had a lack of meaningful choice where they could only avoid the arbitration clause if they canceled their telephone service with the defendant and signed up with a new provider. \textit{Powertel}, 743 So. 2d at 574.

\footnote{337} \textit{Id.} \textit{See supra} notes 188-208 and accompanying text.

\footnote{338} \textit{See supra} notes 250-262 and accompanying text (discussing that stuffers do not provide adequate notice to consumers).
ful notice of the waiver of rights to the judicial system. Even though state contract law varies among states, these six elements are likely to be influential on any court in holding a contract unconscionable and void.

c. Other Contract Claims

Many other contract law claims can also be raised to invalidate the arbitration clause. The arbitration clauses often lack mutuality. Although an arbitration clause may appear to be a waiver of the corporation's rights to access the judicial system, there may be another clause in the contract claiming that the corporation will not waive its rights to use the judicial system to collect money owed by the consumer. The fact that contracts between large corporations and consumers are adhesion contracts supports a lack of mutual assent challenge.

Large corporations design contracts that are difficult to read, understand, and interpret, while they profit from the fact that consumers will not use the expertise of an attorney when entering into the agreements and, consequently, will not realize that their rights to use the judicial system have been waived. Consumers should be encouraged to explore the full range of their state's contract law to fight the enforceability of mandatory arbitration clauses because an arbitration clause may be held invalid if it, or the contract, is found to be unconscionable.

2. Mandatory Arbitration Clauses May Violate Congressional Intent

Even though the Supreme Court has a history of enforcing arbitration agreements under the FAA, it has left a window of opportunity to invalidate arbitration agreements. Regardless of arbitration clauses, parties may litigate disputes if Congress intended to preclude waiver of judicial remedies for violation of the statute under which the claim arises. The burden of proof of congressional intent is on the party

339. "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2 [of the FAA]." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).


who wishes to invalidate the arbitration agreement. The consumers’ best argument is that mandatory arbitration clauses in adhesion contracts do not provide real notice to, consent of, or bargaining by consumers who allegedly waive their rights to a judicial remedy of disputes.

Further, consumers may argue that arbitration is financially detrimental to them, because it is likely to be more costly than litigation for individual consumer claims. However, in Green Tree, the United States Supreme Court held that the potential costliness of arbitration alone is not enough to invalidate an arbitration clause. Consequently, before a consumer can successfully raise prohibitive cost as a reason to invalidate an arbitration clause, he must provide proof of which arbitration forum will be used, and the actual costs of that forum to the consumer.

In addition, consumers can argue that arbitration is harmful because it does not set precedent and arbitrators do not need to follow precedent of prior decisions in favor of consumers in identical circumstances. These inequalities of arbitration, compared to litigation, favor the company over the consumer, consequently violating Congress’ intent in enacting consumer protection statutes. Consumers may argue that Congress has enacted multiple statutes for the purpose of consumer protection, and that any interpretation of the FAA that is unfavorable to consumers would be at odds with congressional intent in enacting the consumer protection statutes.

Although the Supreme Court has expressed a willingness to consider congressional intent in invalidating arbitration clauses, it has been reluctant to invalidate arbitration clauses for that reason. For example, in Rodriguez De Quijas v. Shearson/American Express, Inc., the Court rejected the argument that Congress intended to protect the buyers of securities under the Securities Act of 1933 because the Act included language that prohibited waiver of compliance of any provision of the Act. The securities buyers argued that judicial remedy was required for compliance with the buyers’ protection under the Act because the judicial system inherently benefited consumer buyers by allowing them a wider selection of judicial forums.

342. See supra notes 131-161 and accompanying text.
343. See Green Tree, 121 S.Ct. at 521.
344. See id. at 521-22.
345. See supra notes 246-241 and accompanying text.
346. See supra note 341.
348. See Rodriguez 490 U.S. at 478.
349. See supra notes 70-70 and accompanying text.
from which to choose to settle their claims.\textsuperscript{350} The Court’s reason for rejecting this argument was that a wider choice of courts was not an essential feature of the Securities Act.\textsuperscript{351} The Court supported its decision by stating that substantive rights and remedies were not waived by an agreement to arbitration, and the arbitrator must follow statutory law.\textsuperscript{352} This decision implied that in order to succeed on a congressional intent claim, consumers must cite to specific language in the statute under which their claim arises that precludes the waiver of an element of judicial resolution which is not offered by the particular arbitration clause, such as punitive damages, class action disputes, adherence to judicial precedent, and written opinions. This can be difficult and nearly impossible for consumers to prove unless the statute proscribes a judicial forum for resolution of disputes arising under the statute.

While Supreme Court precedent does not seem favorable to this argument, consumers should continue to argue that the congressional intent in enacting consumer protection statutes cannot be reconciled with a waiver of rights to the judicial system. The argument should not focus on the substantive rights provided by the statute, but rather on the procedural rights guaranteed by the judicial system. The Court stated that “the right to select the judicial forum and the wider choice of courts are not . . . so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers.”\textsuperscript{353} This rationale can be taken a step further with consumer statutes where Congress’ intent was to place consumers on equal footing with companies within mandatory arbitration.

Consumers will need to prove the procedural disadvantages inherent in arbitration and that the disadvantages will harm consumers as a whole and obviate the congressional intent to statutorily protect consumers.\textsuperscript{354} Some examples of federal consumer protection statutes

\textsuperscript{350} Rodriguez, 490 U.S. at 483.
\textsuperscript{351} Id. at 481.
\textsuperscript{352} Id. at 481.
\textsuperscript{353} See supra notes 154-155 and accompanying text.
\textsuperscript{354} 15 U.S.C. §§ 1601-1667e (1994). The purpose of TILA to protect consumers is stated in the Act as follows:

\begin{quote}
It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so
that the consumer will be able to compare more readily the various credit terms available
to him and avoid the uninformed use of credit, and to protect the consumer against
inaccurate and unfair credit billing and credit card practices . . . . It is the purpose of
this subchapter to assure a meaningful disclosure of the terms of leases of personal
property for personal, family, or household purposes so as to enable the lessee to compare
more readily the various lease terms available to him, limit balloon payments in
that consumers can use to make this type of argument are the Truth in Lending Act (TILA), the Equal Credit Opportunity Act, the Magnuson-Moss Warranty Act, and the Fair Debt Collection Practices Act. Therefore, if a consumer can prove that Congress intended for consumers to be on equal footing with companies and that the procedural rules of the judicial system are necessary to facilitate this equal footing, then the consumer may succeed in invalidating the mandatory arbitration clause.

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consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements. 15 U.S.C § 1601 (1994).


The ECOA explicitly allows for civil liability of a creditor who violates the act on an individual or class-wide basis, as follows: “Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.” 15 U.S.C. § 1691e (a) (1994).

The ECOA also explicitly allows for a consumer to bring an action in a judicial district court or other court as follows: “[a]ny action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction.” 15 U.S.C. § 1691e (f) (1994).


In Alabama, consumers have succeeded in invalidating arbitration clauses under the Magnuson-Moss Warranty Act. In Southern Energy Homes, Inc. v. Lee, an Alabama court held that the Magnuson-Moss Warranty Act prohibited the enforcement of an arbitration clause that was included in a written warranty. 732 So. 2d 994, 1000 (Ala. 1999). See also Wilson v. Waverlec Homes, Inc., 127 F.3d 40 (11th Cir. 1997) (holding that under the Magnuson-Moss Warranty Act written warranties may not provide for binding arbitration); Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423 (M.D. Ala. 1997) (same).

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The Supremacy Clause of the United States Constitution deems it the supreme law of the land which cannot be violated by any other law. Id. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.
3. **Mandatory Arbitration Clauses May Violate the United States Constitution**

While Congress has few limits on the scope of its power in enacting a statute such as the FAA, it cannot violate the United States Constitution.\textsuperscript{360} Federal courts have struck down state statutes that require specific notice of arbitration clauses in contracts in order for the clauses to be enforceable.\textsuperscript{361} The courts use the FAA and federal policy favoring arbitration to support these decisions because the FAA mandates that any state law applicable to arbitration clauses must be applicable to contracts as a whole, and not specifically directed at arbitration clauses.\textsuperscript{362} Congress and the courts have neglected to address the issue of the constitutionally guaranteed rights of citizens to use the judicial system in civil disputes.

While rights guaranteed by the Constitution may be waived, individuals must have adequate notice that they are waiving their rights.\textsuperscript{363} Adhesion contracts containing hidden arbitration clauses do not meet the notice required for a waiver that have been established in cases concerning constitutionally guaranteed rights.\textsuperscript{364} By enacting statutes that guarantee notice of waiver, states are protecting rights guaranteed by the Federal Constitution.\textsuperscript{365} Congress' authority to govern contract law is limited by the Constitution; thus, it cannot enact statutes that favor the waiver of constitutionally guaranteed rights without adequate notice.

**D. Congress Should Amend the FAA to Protect Consumers**

Congress enacted the FAA to encourage dispute resolution outside of the judicial system in a more efficient, affordable, and quicker forum. Since the creation of the FAA, multiple issues have arisen that

\textsuperscript{360} See supra notes 75-92, 117-124 and accompanying text.

\textsuperscript{361} See supra notes 119-124 and accompanying text.

\textsuperscript{362} See Moran v. Burbine, 475 U.S. 412, 421 (1986) (finding that waiver of constitutional rights laid out in Miranda warnings cannot be waived without full awareness of the nature of the waived rights and the consequences of waiving those rights).

\textsuperscript{363} While an argument can be made that waiver of rights in criminal cases is more deserving of protection than in civil cases because criminal cases usually involve the defendant's personal liberty, it is interesting to note that the same arguments regarding the waiver of constitutional rights raised in criminal cases could be raised in civil cases. See Moran, 475 U.S. at 421 (holding that a waiver of defendant's rights is not valid if it is a product of deception); North Carolina v. Butler, 441 U.S. 369 (1979) (holding that in order for a suspect's constitutional rights to be waived, the suspect must understand his rights and waive them voluntarily); United States v. Connell, 869 F.2d 1349 (9th Cir. 1989) (holding that notice of waiver of the right to an attorney in a criminal case must not be misleading).

\textsuperscript{364} See supra notes 75-92, 117-124 and accompanying text.

\textsuperscript{365} See supra notes 278-306 and accompanying text.
were not contemplated by Congress in 1925. The most significant modern issue in the consumer law arena is the growing disparity of power between consumers and large corporations which carries over to dispute resolution and is significant in the private arbitration of disputes. The procedural rules of the judicial system are designed to protect the less powerful party in litigating disputes, however, many of these protections are eliminated in arbitration forums.

Consumers who are forced to arbitrate disputes with large companies are placed at an immediate disadvantage in their ability to access information relative to their dispute which is in the hands of their opponent. In the quest for efficiency, arbitration discourages the type of extensive discovery necessary to meet the burden of proof in some of the most persuasive consumer claims. In the quest for affordability, arbitration often requires each party to pay its own costs to arbitrate claims, which may actually harm consumers who would have otherwise: (1) brought a class action suit in court at no cost to themselves; (2) asked for court costs and attorneys fees as part of their damages in court; or (3) hired a lawyer on a contingency basis who would be reluctant to represent a consumer in arbitration where damages are often limited.

In its quest for a quicker process, arbitration has very limited appellate review which may harm consumers who feel that the arbitrators were biased or did not fairly resolve the dispute. Arbitration clauses may also take more of a consumer's time and money than the unrestricted use of the judicial system. For example, the consumer needs to participate in a separate hearing in court to fight the enforceability of the arbitration clause and, pursuant to the court's decision, proceed to arbitrate the claim or resolve the dispute in court. In light of these issues which are very prominent in modern consumer law, Congress should re-evaluate its purpose in enforcing the FAA.

Congress should amend the FAA to take consumer protection into account. Congress has enacted several statutes with the sole purpose of consumer protection. Thus, the time has come to allow the FAA to either become one of those statutes or become inapplicable to con-

366. See supra notes 278-306 and accompanying text.
367. See supra notes 285, 305 and accompanying text.
368. See supra notes 285, 305 and accompanying text.
369. See supra notes 310, 310 and accompanying text.
370. See supra notes 310, 312 and accompanying text.
371. See supra notes 292, 295-296 and accompanying text.
372. See supra notes 48-227 and accompanying text.
373. See supra note 232 and accompanying text.
MANDATORY ARBITRATION CLAUSES

As it currently stands, the FAA can be used as a tool for companies to weaken or water down the effect of consumer protection statutes by allowing a forum for the resolution of disputes. Congress could simply amend the FAA to not apply to consumer contracts. In addition, Congress could eliminate its ban under the FAA on state statutes that place stringent requirements on arbitration clauses in order for the clauses to be enforceable. Therefore, this would allow a state to protect consumers within its own jurisdiction and allow a local forum to debate the issue. If allowing a state to make the laws pertaining to arbitration clauses is too much delegation of power for Congress, it can simply make its own provisions requiring special notice of arbitration clauses in consumer contracts. Congress could also amend the statutes that it created for consumer protection to further include a provision specifically prohibiting waiver of the right to use the judicial system for claims arising under those statutes. Finally, Congress could amend the FAA to not apply to claims arising under specific consumer protection statutes.

The Wilko v. Swan decision dictated that the Securities Act was intended to protect buyers of securities and held that arbitration clauses were not enforceable under that Act because the arbitration forum was less favorable to buyers than the judicial forum, and in effect arbitration clauses violate Congressional intent in enacting the statute. The Swan decision was overturned, three and a half decades later. During that time, Congress did not elect to amend the FAA to enforce arbitration clauses in disputes arising under the Securities Act. This silent acquiescence to the Swan decision evidences that Congress did not intend for the FAA to have the hard-lined enforcement of all arbitration clauses that courts believed it to have. In Rodriguez, Justice Stevens implied in his dissent that the Court overstepped its judicial authority by overturning “an interpretation of an Act of Congress that has been settled for many years.” Congress should restore the balance between judicial and legislative authority and amend the FAA to restrict application to consumer con-

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374. See supra notes 75-92, 117-124 and accompanying text.
376. Id.
377. Id. at 438.
379. Id.
381. See supra note 64 and accompanying text.
tracts in order to prevent any future measures of judicial activism on the subject of arbitration.

Congress should take into consideration the difficulty the courts face in determining Congressional intent in the area of arbitration clauses in consumer contracts. Congress should also consider the harm imposed on consumers by large companies which are supported by the judicial system under the FAA, and amend the FAA to better protect consumers.

E. The Supreme Court Should Address the Issue of Notice and Consent in the Enforcement of Arbitration Clauses in Adhesion Contracts

Time and again the Supreme Court has interpreted Congressional intent in creating the FAA to support the enforcement of contracts as they are intended to be enforced by the parties.382 The parties' intent is then found in the language of the written agreement, and if the agreement included an arbitration clause, the Court would enforce it.383 The Court has never addressed problems that might arise when the written agreement does not reflect the intent of one of the contracting parties.384 In fact, in *Green Tree*, the Court had the opportunity to address the issue of notice of an arbitration clause in a consumer contract, but bypassed the issue by declaring that it was undisputed that the parties agreed to arbitrate their disputes.385 However, in *Green Tree*, there was evidence that the consumer did dispute the fact that she agreed to arbitrate the dispute because the reason she brought her claims to court was to invalidate the arbitration clause and she, subsequently, appealed the court's decision to enforce the clause.386

The problems relating to the lack of consumer intent to arbitrate disputes and the lack of notice to consumers about arbitration clauses in contracts occur where the drafting party is more sophisticated and more powerful than the consumer.387 Large companies have devised several methods to effectively "hide" certain clauses from the consumer, including arbitration clauses. The most common way to hide an arbitration clause is to simply place it on the back of a double sided

382. See supra note 70 and accompanying text.
383. Some lower courts have addressed issues relating to lack of consumer intent to arbitrate. See supra notes 159-227 and accompanying text.
384. See *Green Tree*, 121 S.Ct. at 518.
385. See id.
386. See supra notes 131-227 and accompanying text.
387. See supra notes 131-227 and accompanying text.
contract, in fine print, and in complicated language. Often with these
types of contracts, the consumer never realizes that the arbitration
clause was in the agreement.

If the consumer does read the arbitration clause, the consumer may
not be fully aware of the rights he is forfeiting by agreeing to the
clause because the company failed to explain the clause to him.\footnote{Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410, 1416 (M.D. Ala. 1998).} A
more creative way to hide an arbitration clause became the subject of
cluded a "change-in-terms" agreement in the original contracts with
the consumers.\footnote{Id. at 276; \textit{Stiles}, 994 F. Supp. at 1411.} At a later date, the companies mailed a stuffer to
the consumers inside the envelope with the consumers' monthly
bill.\footnote{Id. at 276; \textit{Stiles}, 994 F. Supp. at 1411.} The stuffers were the companies' method of changing the
terms of the agreements and, in both cases, the stuffers contained an
arbitration clause.\footnote{Badie, 79 Cal Rptr. 2d at 277; \textit{Stiles}, 994 F. Supp. at 1414.}

In \textit{Badie}, the California Court of Appeal found that "when the ac-
count agreements were entered into, the parties did not intend that
the change of terms provision [would] allow the Bank to add com-
pletely new terms such as an [alternative dispute resolution] clause
simply by sending out a notice."\footnote{Badie, 79 Cal Rptr. 2d at 277; \textit{Stiles}, 994 F. Supp. at 1414.} In \textit{Stiles}, a United States District
Court in Alabama held that the plaintiff "assented to the contract as a
whole" and the contract could be changed by a change-in-terms agree-
ment.\footnote{Id. at 276; \textit{Stiles}, 994 F. Supp. at 1411.} The court continued, "therefore, [the plaintiff] assented to
an arbitration clause [which was added to the contract as a change of
terms], even absent his signature."\footnote{Id. at 276; \textit{Stiles}, 994 F. Supp. at 1411.} These two courts were faced
with almost identical facts, yet their decisions were directly opposed to
one another.

The Supreme Court needs to address the question of whether the
intent of the consumer should be taken into account when invalidating
arbitration clauses, especially when companies use stuffers to add the
arbitration clause to the contract. Until this issue is resolved, the deci-
sions of the lower courts will be unpredictable and companies will
continue abusive practices. The Supreme Court should not assume
that consumers have notice of arbitration clauses in contracts, as it did

\begin{itemize}
\item \footnote{Badie, 79 Cal Rptr. 2d at 277; \textit{Stiles}, 994 F. Supp. at 1414.}
\item \footnote{Stiles, 994 F. Supp. at 1416.}
\end{itemize}
Rather, in light of its prior holdings that enforce contracts as they were intended to be enforced by the parties, the Supreme Court must examine whether consumers actually knew that they were forfeiting their rights to the judicial system, not simply whether they signed a contract that included an arbitration clause. Accordingly, consumer notice, or lack thereof, should always be a decisive factor in deciding whether to enforce an arbitration clause. Without notice of the waiver of their rights, it is hard to reason that the consumers intended to waive them.

In Rodriguez, the Court emphasized its own assessment that the "arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act." If this assessment is assumed to be true, consumer contracts with arbitration clauses will continue to threaten procedural rights of the consumers. The United States Supreme Court should take the next step and examine whether arbitration undermines any of the procedural rights afforded to the consumers by the judicial system. These procedural rights were created to place less powerful parties on a level playing field when resolving a dispute with a more powerful party. Until the Court resolves this issue, procedural securities of fairness afforded by the judicial system may be meaningless to many consumers who unknowingly entered an agreement to arbitrate their disputes.

V. Conclusion

The FAA allows corporations to force consumers to arbitrate disputes that would otherwise be resolved in the judicial system. Companies regularly take measures to conceal arbitration clauses from consumers by neglecting to explain them to the consumers, hiding them in fine print, and adding them to contracts using mailing stuffers and change-in-terms clauses. Courts regularly enforce arbitration clauses where consumers have little or no notice that they have waived their fundamental right to use the judicial system. The FAA, which once served to protect parties who entered into contracts, is today being used to harm consumers who have significantly less power than large companies with which they enter into agreements. The American judicial system includes many procedural safeguards

397. See supra notes 131-161 and accompanying text.
399. See supra notes 278-306 and accompanying text.
400. See supra notes 32-44 and accompanying text.
401. See supra notes 250-277 and accompanying text.
402. See supra notes 61, 177-159 and accompanying text.
that allow a person to have a fair forum for resolution of disputes, even when the person is fighting a party that is significantly more powerful outside of the courtroom. Most arbitration forums do not have such safeguards, thus explaining why they are more attractive to powerful parties. Until companies are prevented from enforcing mandatory arbitration clauses in adhesion contracts, consumers' fundamental rights to the judicial system will be trampled on, companies will be able to avoid setting unfavorable precedent in court, and consumer protection law will become superfluous.

Shelly Smith

403. See supra notes 185-306 and accompanying text.
404. See supra notes 185-306 and accompanying text.