Ballard Spahr
Andrews & Ingersoll, LLP

THE USE OF PRE-DISPUTE ARBITRATION AGREEMENTS BY CONSUMER FINANCIAL SERVICES PROVIDERS

By: Alan S. Kaplinsky
Senior Partner and Chair
Consumer Financial Services Group
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone No.: (215) 864-8544
Fax No.: (215) 864-9488
E-mail: kaplinsky@ballardspahr.com

This outline was last revised on July 20, 2009

I. My Background

A. Practiced law for 38 years, mostly as a banking lawyer specializing in consumer financial services law.

1. General Counsel of Teachers Service Organization (today called Advanta) from 1976-1979.

2. Senior Partner and Chair of the Consumer Financial Services Group at Wolf, Block, Schorr and Solis-Cohen from 1979-1994.

3. Senior Partner and Chair of the Consumer Financial Services Group at Ballard Spahr Andrews & Ingersoll, LLP from 1994-present.

4. Former Chair of the Committee on Consumer Financial Services of the American Bar Association.

5. First President of the American College of Consumer Financial Service Lawyers.

B. During the past decade, my practice has focused to a great extent on defending banks and other consumer financial services providers in class action litigation and individual lawsuits filed in hostile state courts like California, Illinois, Alabama, Mississippi and Texas. I also focus to a great extent on things that banks should do in order to avoid becoming a target of litigation.

C. Has counseled numerous banks and other consumer financial services providers to implement pre-dispute arbitration agreements in connection with their loan and deposit products.

D. Has defended numerous banks and other consumer financial services providers in class action and other litigation and has successfully gotten courts to compel arbitration. I was co-counsel in the most recent arbitration opinion decided by the U.S. Supreme Court (Green Tree Fin. Corp. v. Bazzle) in which the Court vacated an almost $30 million judgment against Green Tree which had been earlier affirmed by the South Carolina Supreme Court. I am attaching as an Appendix a list of important arbitration victories in which our firm was involved.

E. On September 26, 2002, I led a workshop for the Payment Cards Center of the Federal Reserve Bank of Philadelphia regarding the use of mandatory arbitration clauses in credit card agreements between issuers and consumers. A discussion paper of this workshop appears on the website of the Federal Reserve Bank at http://www.phil.frb.org/pcc/workshops/workshop12.pdf.

II. Why Banks and Consumer Financial Services Providers Have Implemented Arbitration Programs

A. Reduce costs of resolving complex litigation which has been filed against the industry. The number of such lawsuits has proliferated in the past 10 years.

1. Increase in number of plaintiffs' lawyers. Retooling of lawyers who formerly handled only securities, antitrust and products liability cases.

2. Cases typically involve legal issues rather than fact issues and therefore can be brought without having to invest a lot of resources.

3. Educational resources.

   a. NCLC multi-volume treatise is a road map.

   b. NACA.

4. Ease of finding clients.

   a. Use of internet

   b. Advertising

5. Take advantage of bad press to which industry has been subjected.

6. Very large settlements whet their appetite.

7. Obvious operational glitches.

8. Aggressive advertising which is often misleading.

9. Complex and increasing number of laws to which banks are subjected (e.g., Gramm-Leach-Bliley).

10. Overlay of federal, state and sometimes municipal ordinances.

11. Heavy involvement of third parties (e.g., retailers, brokers, telemarketers, servicers and collection agencies) who are not under bank's control and who often give scant attention to compliance.

12. Effect of state UDAP ("unfair or deceptive acts and practices") laws which can be used as a very effective weapon to deal with a practice that does not pass the "smell test" even if the practice is otherwise in complete conformity with all federal and state consumer protection laws.

B. Level the Playing Field – The court system (particularly, the state court system) is clearly skewed in favor of consumers and plaintiffs' attorneys and allows them free reign to take advantage of banks.

1. The Alabama Experience (sometimes pejoratively referred to as the "Alabama Lottery").

    a. Elected judges financed by plaintiffs' trial lawyers.

    b. Runaway juries.

    c. Cottage industry of consumers who make a living out of being professional plaintiffs.

2. The Mississippi Experience.

3. Madison County, Illinois; Jefferson County, Texas; Palm Beach County, Florida.

4. California.

5. Bogus Class Actions.

    a. Plaintiffs' lawyers representing consumers with marginal or completely bogus claims bring nationwide class actions in state court hoping for a quick settlement which will enrich them but provide very little benefit to consumers. These settlement costs inevitably get passed on to future customers in the form of higher prices and/or less innovative products and services.

    b. Abuses are rampant.

        i. Filing a class action as a way to extort a large individual settlement.

        ii. Filing nationwide class action in a state court that will all too often pay lip service to the requirements for certifying a class (e.g., "drive-by" class certification orders).

        iii. Coupon and other valueless settlements where plaintiffs' attorneys reap large cash payday for doing very little work.

        iv. No need for class action to deter bad corporate conduct or to redress consumer injury because federal and state government enforcement agencies are much better suited than class actions to achieve these goals.

            – no conflict of interest with consumers.

            – more dollars returned to consumers without payment of counsel fees.

- better positioned to prioritize investigations and prosecutions (not motivated by self-interest).

- elimination of bounty-hunting.

- media impact.

- better tools for getting relief than in class action.

- no need to comply with class action requirements.

- ability of federal banking agencies to enforce § 5 of FTC Act (which prohibits unfair or deceptive acts or practices) and state consumer protection laws (e.g., OCC consent agreement with Providian). See Chairman Greenspan's recent letter to Rep. LaFalce regarding the Federal Reserve Board's authority to enforce § 5 of FTC Act with respect to state-chartered non-member banks.

c. The enactment of Class Action Fairness Act of 2005 ("CAFA") on February 18, 2005 is no panacea. In enacting CAFA, Congress noted that abuses of the class action device have harmed class members with legitimate claims by limiting their recovery while awarding counsel large fees, harmed defendants that have acted responsibly, adversely affected interstate commerce, and undermined public respect for the judicial system. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005).

   i. Could lead to more (not less) class action litigation as plaintiffs' attorneys file a multitude of statewide class actions in order to preclude removal.

   ii. Class actions will become more (not less) difficult to settle since coupon settlements will hardly ever work. Courts may also be less willing to approve claims procedures with reverters to defendants

   iii. Defendants will also lose their ability to negotiate with the plaintiff's attorney of choice in competing nationwide class actions since they will all be removed to Federal District Court and then sent by the Multi-District Litigation Panel to one Federal Court.

III. Advantages of Using Arbitration

A. Saving of substantial legal fees and costs to resolve disputes, leading to greater control over legal budget.

B. Speed – resolution of disputes in months rather than years.

C. Elimination of irrational, biased jury verdicts and elected state court judges who may be beholden to plaintiffs' bar.

D. Tempering of punitive damages claims.

E. Uniformity of arbitration procedures and forms nationwide, as opposed to 50 different state codes, federal district and appellate court rules and countless local procedures. Some banks, most notably Bank One, use arbitration for collection lawsuits.

F. Possibility of curtailment of class action lawsuits since class actions generally will not be heard by an arbitrator and most courts are unlikely to consider certifying classes if named plaintiffs' claims are being arbitrated.

G. Limited discovery.

H. Limited right of appeal.

IV. Drawbacks of Arbitration

A. Filing fees and hearing costs are higher than court costs (although this is counter - balanced by savings of attorneys' fees and the arbitration organization's recent adoption of reduced fees applicable to consumer "small claims" arbitrations).

B. Litigation may occur over preliminary legal issues such as enforceability of the arbitration clause (plaintiffs' attorneys often try to persuade a court to block an arbitration by claiming that the clause is "unconscionable" or that they were defrauded into agreeing to it, etc., etc.).

C. Plaintiffs' attorneys or consumer groups may try to portray the company as overbearing because it is forcing consumers to sign away their legal rights through a form non-negotiable contract.

D. While the vast majority of the courts have held that class actions are not permitted in arbitration, some state courts (mostly in California) have held that the arbitration may proceed as a class action.

E. Arbitrators sometimes "split the baby".

F. No legal precedent.

G. Start-up costs.

H. Risk of class-wide arbitration.

I. It has become politically unpopular as a result of pressure applied by the plaintiffs' class action bar. The National Arbitration Forum recently signed a consent decree with the Minnesota Attorney General in which it agreed to exit the business as of July 24, 2009.

V. Arbitration is not a Ticket to Ignore Compliance Responsibilities, but Rather an Essential Component of a Sound Compliance Program

A. Cannot invoke arbitration against federal enforcement and regulatory agencies, even when those agencies are seeking victim-specific relief based on statutory authority to seek such relief.

B. Compliance with the law just makes good business sense.

C. It must be done as a defensive measure particularly if the bank's competitors all use arbitration; otherwise, the bank will become a bigger target.

VI. Amenability of Certain Claims to Arbitration

A. Banking Products are generally very suitable for arbitration.

1. Credit cards (both new and existing accounts).

2. Mortgage loans.

a. Fannie Mae, Freddie Mac problem.

b. Existing home equity lines of credit.

3. Auto loans and leases.

4. Unsecured installment and revolving loans.

5. Deposit products.

B. Types of Claims which may be covered.

1. Breach of contract.

2. Torts, such as fraud.

3. Statutory claims, including claims under Truth-in-Lending Act, Truth-in-Savings Act, HOEPA, RESPA, Fair Credit Reporting Act, Fair Credit Billing Act, Equal Credit Opportunity Act, Fair Debt Collection Practices Act, state statutory claims. Unclear whether Magnusson-Moss Warranty Act or credit insurance claims may be covered as a result of McCarran-Ferguson Act.

4. Claims for injunctive relief.

C. Retroactive application to claims predating arbitration agreement effective date.

1. Already pending class actions.

VII. Primer on Federal Arbitration Act ("FAA")

A. Enacted in 1925, but consumer arbitration dormant until early 1990's.

B. U.S. Supreme Court decided two cases (Allied-Bruce Terminex v. Dobson in 1995 and Doctor's Associates v. Casarotto in 1996) which federalized the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause and held that the FAA is binding in state courts and preempts inconsistent state laws and statutes. These cases caused something of a sea-change in consumer arbitration and had real, practical consequences (e.g., Alabama has a state statute that expressly prohibits the enforcement of pre-dispute arbitration clauses. Alabama used to be the most anti-arbitration state in the country, but after these cases came down, the Alabama Supreme Court did a complete about-face).

C. The fundamental premise of FAA: parties may agree by contract to arbitrate their claims before or after a dispute arises.

D. While the contract may set forth all of the details of the arbitration (e.g., what claims are covered, what claims are excluded, who the arbitrator shall be, who shall pay the costs, etc.), the FAA provides that the arbitration clause may be invalidated on any legal theory that can be used to invalidate any other type of contract (e.g., lack of capacity to enter into a contract, duress, lack of consideration, and unconscionability).

E. States may not enact a law that singles out arbitration for special treatment, Allied-Bruce Terminex invalidated Alabama state law prohibiting use of pre-dispute arbitration agreements. Doctor's Associates case invalidated Montana statute requiring a special large type disclosure on the front of a franchise agreement if it contains an arbitration clause. Thus, the state statutes and local ordinances which prohibit (or provide for special disclosures relating to) mandatory arbitration clauses are preempted by the FAA.

F. A state may not even be able to enact a law which appears even-handed if it does not apply to all contracts, e.g., plain language statute applicable only to consumer contracts.

G. FAA applies in both state and federal court.

H. Two ways to enforce an arbitration agreement:

1. Motion to Compel Arbitration in an embedded case.

2. Separate lawsuit seeking to enforce arbitration in the state where arbitration is to be held. There must be federal court jurisdiction (either a federal question or diversity) apart from the FAA. The Circuits are split on whether federal question jurisdiction may be derived from the underlying dispute. On March 17, 2008 the U.S. Supreme Court in Discover Bank v. Vaden granted certiorari where the Fourth Circuit held that the court should look to the nature of the underlying dispute in assessing whether there is federal question jurisdiction. The Eleventh Circuit Court of Appeals recently granted rehearing *en banc* in Community State Bank v. Strong where the panel reached the same conclusion as the Fourth Circuit.

I. What does a court decide?

1. Does FAA apply? The FAA applies to all agreements to arbitrate contained in "a contract evidencing a transaction involving commerce." See FAA, 9 U.S.C. § 2. The FAA unquestionably applied to agreements regarding credit cards, which are used to make purchases throughout the United States. See Citizens Bank v. Alafabco, Inc., 2003 WL 21251583, *3 (U.S. June 2, 2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce' – words of art that ordinarily signal the broadest permissible exercise of Congress Commerce Clause power… [I]t is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce" – that this, "within the flow of interstate commerce."); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 & n.7 (1967) (noting "that a contract for the purchase of a single can of paint may evidence a transaction in interstate commerce").

2. Does the FAA apply to a contractual obligation to engage in non-binding mediation or arbitration? The answer to this question could be very important if Congress enacts a law banning the use of pre-dispute binding arbitration contracts.

3. Because of the reverse preemptive effect of the McCarran-Ferguson Act, the FAA does not apply to state laws and regulations that regulate the "business of insurance."

4. In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), the Supreme Court made it clear that, consistent with the general notion of freedom of contract, parties could agree ahead of time to allow the arbitrator to resolve arbitrability disputes. In the absence of "clear and unmistakable evidence" that the parties desire the arbitrator to decide arbitrability, the issue is for the Court.

5. Is there an agreement to arbitrate?

6. Is the claim covered by the arbitration agreement?

7. Is there any basis for invalidating the arbitration agreement? Some courts have even concluded that the parties may by contract delegate this issue to the arbitrator. Even in the absence of such a delegation, the existence of a severability clause has prompted some courts to conclude that an attack on part of an arbitration agreement should be decided by the arbitrator. There are even some cases holding that the validity and effect of a class action waiver is an issue for the arbitrator in the aftermath of Green Tree Fin. Corp. v. Bazzle, No. 02-634, 2003 U.S. LEXIS 4798 (June 23, 2003). But a Federal District Court held that the validity of a class action waiver is for the court and not the arbitrator to decide. See Gipson v. Cross Country Bank, Civil Action No. 2:03cv269-A, 2005 U.S. Dist. LEXIS 1400 (M.D. Ala. Jan. 28, 2005). The court in that case invalidated the November 12, 2004 policy adopted by JAMS in which JAMS concluded that class action waivers are invalid and will not be enforced, thus permitting class-wide arbitration. (JAMS subsequently retracted this policy.)

8. The court is not supposed to consider whether there is any basis for attacking the contract as a whole. That is for the arbitrator to decide. The U.S. Supreme Court recently reversed a Florida Supreme Court opinion which erroneously held that it is for the Court and not the arbitrator to resolve a claim asserting that the contract as a whole is void ab initio. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. 2005), rev'd, 126 S.Ct. 1204 (2006). The U.S. Supreme Court previously held in Prima Paint that only an arbitrator shall resolve whether the contract as a whole is voidable.

9. Heavy presumption in favor of enforcing arbitration agreements. The U.S. Supreme Court has stated that it is good for consumers as well as private industry.

J. Limited right to appeal.

1. Arbitrator bias, misconduct or exceeding power.

2. Manifest disregard of the law. May not exist anymore in light of U.S. Supreme Court opinion in Hall Street Associates, LLC v. Mattel, 128 S. Ct. 1396 (2008).

K. If FAA does not apply, then the state version of the Uniform Arbitration Act or the Revised Uniform Arbitration Act will apply in 49 states (except Alabama). Those statutes are similar to the FAA, except that some states, like New York and Georgia, prohibit consumer arbitration agreements.

Right to Appeal. Under the FAA, an order denying a motion to compel arbitration is immediately appealable. However, an order granting a motion to compel arbitration in an "embedded" case (i.e., one where the lawsuit deals with a subject other than arbitration) is only appealable when the case gets dismissed and not when the case gets stayed pending the outcome of arbitration. If a court compels classwide arbitration, is that order appealable? Although one would think that such an order is tantamount to an order denying arbitration, it is not clear whether such an order would be appealable. See Augustea Impb Et. Salvataggi v. Mitsubishi Corporation, 26 F.3d 95 (2d Cir. 1997) (no appellate jurisdiction to appeal order compelling arbitration in New York when movant sought order compelling arbitration in London). Contra, Spelle v. Labelle, No. W2003-00821 2004 WL 892534 (Ct. App. Tenn. April 22, 2004) (appellate jurisdiction exists.) It is unclear whether the FAA's rules pertaining to appealability apply in state court. This issue is currently pending before the Third Circuit in two cases involving Advance America where the District Court issued orders which state: "Plaintiffs shall submit their claims to arbitration on an individual basis, unless the arbitrator determines otherwise." King v. Advance America, No. 07-237 (E.D. Pa), Third Circuit Nos. 08-2212 and 08-8039. Johnson v. Advance America, No. 07-3142 (E.D. Pa.), Third Circuit Nos. 08-2213, 08-8035.

VIII. Who is Using Arbitration?

A. All major credit card issuers, e.g., Citibank, Chase, AMEX, Discover Card, Bank of America, Capital One, GE Capital.

B. Mortgage lenders for loans not sold to Fannie or Freddie.

C. Auto finance companies, e.g., Toyota, Nissan.

IX. Who are the Arbitration Administrators?

A. American Arbitration Association.

B. JAMS.

C. National Arbitration Forum.

X. What is Track Record?

A. Working well in practically all federal courts.

B. Working well in most state courts with notable exception being California. Other problematic states include Arkansas, Florida, Louisiana, Massachusetts, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, West Virginia, Washington and Wisconsin.

C. Most federal circuit courts of appeals that have addressed the issue (including Third, Fourth and Seventh Circuits) have held that a consumer does not have a non-waivable right to bring a class action based on a federal consumer protection statute and that a court may require a plaintiff to arbitrate his or her individual claim even if it means the end of the class action. The First, Second and Ninth Circuits are problematic (at least for antitrust cases) and the result in the Eleventh Circuit may turn on whether the arbitration contract or statute contains fee-shifting language. The Third Circuit has invalidated a class action waiver under New Jersey law, but has found that the FAA preempts Pennsylvania law which invalidated such waivers. Many state appellate courts have also upheld the validity of class action waivers, including Colorado, Delaware, the District of Columbia, Hawaii, Kansas, Maryland, New Mexico, New York, North Dakota, Ohio, Tennessee, Texas and Washington. Utah has enacted a statute validating class action waivers; Mississippi and Virginia do not permit class actions in their state courts. A few states (Maine, Minnesota and New York) have prohibited the use of class action waivers in either tax refund anticipation loans or payday loans.

D. Not working well in California where the state Supreme Court in the Discover Bank case has held that it is unconscionable to prohibit class actions with respect to a small dollar consumer claim. But even the California courts may enforce a choice-of-law clause calling for the application of another state's law which has upheld the validity of class action waivers. Also, California courts may validate class action waivers if the consumer is given the unfettered right to reject it.

E. It is deterring lawsuits that are meritless. Consider adding language saying, in substance: "If, either party fails to submit to arbitration following a proper demand to do so, that party shall bear all costs and expenses, including reasonable attorney's fees, incurred by the party compelling arbitration." This language has been enforced in Salvadori v. Option One Mortgage Corp., No. 05-4974 (FLW), 2006 WL 680535 (D. N.J. March 16, 2006) and Kahn v. Option One Mortgage Corporation, 2006 WL 156942 (E.D. Pa. Jan. 18, 2006)

XI. Typical Attacks on Arbitration Clauses

A. Violates a federal or state statute which either authorizes a consumer to go to court or to bring a class action or provides the consumer with some other non-waivable right, such as the right to receive counsel fees if he or she prevails.

B. Lack of Mutuality (e.g., a carve-out for collection lawsuits).

C. Unconscionability.

1. Fees are too high.

2. Arbitration administrator is biased in favor of company ("frequent user" argument).

3. No class action.

4. Retroactive feature.

5. Discovery limitations.

6. Limitation on relief.

7. Inconvenient forum.

8. Private nature of proceeding.

D. Constitutional challenge based on a waiver of a right to jury trial.

E. No or Illusory Agreement.

1. Typically is raised when the arbitration agreement is added through a change-in-terms notice or "bill stuffer." (Badie v. Bank of America case). Changes made to an arbitration agreement should be applied only to disputes arising after the change.

2. "I never received the notice" defense.

F. My message to clients: Draft a fair clause!

1. Comply with consumer due process protocols of AAA, JAMS and NAF.

2. Mutuality.

3. Small claims court carve-out.

4. Agree to pay all arbitration fees other than what the consumer would pay as a filing fee in court and other than what is waived by the arbitration administrator.

5. Consider giving the borrower the right to reject the arbitration provision since that should avoid any holding that the arbitration provision or any part of it is unconscionable. In most of the opinions invalidating class action waivers, the courts held that there was some degree of procedural unconscionability as well as substantive unconscionability under state law. Many companies now give consumers and employees the unconditional right to opt out of or reject the arbitration provision without it having any adverse repercussions. Courts in states that require that there be both procedural as well as substantive unconscionability in order to invalidate a

contract based on unconscionability have validated class action waivers and other arbitration features that they considered substantively unconscionable when an opt-out right was provided to the consumer or employee. See, e.g., Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002); Providian National Bank v. Screws, 894 So. 2d 625 (Ala. Oct. 3, 2003); Tsadilas v. Providian Nat'l Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (1st Dep't. 2004); Marley v. Macy's South, No. CV 405-227, 2007 WL 1745619, at *3 (S.D. Ga. June 18, 2007) (court enforced arbitration clause in employment agreement because "[w]hile Ms. Marley states that she did not have a choice to enter the arbitration process because she was 'in jeopardy of losing [her] job' if she did not, the record indicates that each employee was mailed an election form to opt-out of the program at their home address"). Pivoris v. TCF Financial Corporation, No. 07-C 2673, 2007 U.S. Dist. LEXIS 90562 (N.D. Ill. Dec. 7, 2007); SDS Autos, Inc. v. Chrzanowski, Case No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) (Invalidates class action waiver for holders of small claims under Florida Deceptive and Unfair Trade Practices Act whose attorney's fees are limited by the amount of their actual damages.) (arbitration agreement with class action waiver not procedurally unconscionable where "[p]laintiff had the absolute right to reject the arbitration provision without affecting her account contract or the status of her account"); Honig v. Comcast of Georgia, LLC, Civil Action No. 1:07-cv-1839-TCB, 537 F.Supp. 2d 1277 (N.D. Ga. Jan. 31, 2007) ("Finally, and most importantly …, Honig was free to reject the terms of the arbitration provision without a single adverse consequence. Specifically, the arbitration provision gave her the right to opt out within thirty days without adversely affecting her cable service, but she never exercised that right. Honig's ability to opt out of the arbitration provision dilutes her unconscionability argument because the provision was not offered on a take-it-or-leave-it basis. Courts have stressed the importance of such opt-out provisions in enforcing class action waivers in arbitration agreements."); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J-33HTS (M.D. Fla. Jan. 14, 2008) (class action waiver provision was not unconscionable where arbitration provision allowed subscribers to opt out); Davidson v. Cingular Wireless, LLC, No. 2:06-cv- 00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007) (class action waiver in contract for cell phone service not unconscionable where plaintiff failed to opt out);); Martin v. Delaware Title Loans, Inc., No. 08-3322, 2008 WL 444302 (E.D. Pa. Oct. 1, 2008) (finding plaintiff could not establish procedural unconscionability under PA law in light of 15 day opt-out right); Columbia Credit Services, Inc. v. Billingslea, No. B190776, 2007 WL 1982721 (Cal. Ct. App. July 10, 2007) (court affirmed lower court's confirmation of arbitration award after rejecting unconscionability challenge based in part on the fact that cardholder was given the right to opt out of the arbitration provision and failed to do so); Eaves-Leanos v.

Assurant, Inc., No. 07-18, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008) (finding arbitration agreement with class waiver not unconscionable as plaintiff had opportunity to opt out); Enderlin v. XM Satellite Radio Holdings, Inc., No. 06-0032, 2008 WL 830262 (E.D. ark. March 25, 2008)(finding plaintiff could not establish procedural unconscionability in light of opt-out right); Crandall v. AT&T Mobility, LLC, No. 07-750, 2008 WL 2796752 (S.D. Ill. July 18, 2008) (class action waiver in cell phone service contract not unconscionable where plaintiff failed to opt out); Webb v. ALC of West Cleveland, Inc., No. 90843, 2008 WL 4358554 (Ohio Ct. App., 8th App. Dist. Sept. 25, 2008) (citing *Ahmed supra*, the buyer in an automobile retail installment contract "could not demonstrate that the arbitration clause was unconscionable because the contract gave her the right to reject the arbitration clause"); Wright v. Circuit City Stores, Inc., Case No. CV 97-B-0776-5 (N.D. Ala. Feb. 5, 2001) (employment arbitration provision with opt-out right is enforced); Guadagno v. E*Trade Bank, No. CV 08-03628 SJO (JCX), 2008 WL 5479062 (C.D. Calif. Dec. 29, 2008) (Class action waiver does not violate fundamental policy of California because of opt-out right: "Here, Guadagno had a meaningful opportunity to opt out of the Arbitration clause, which contained the class action waiver, by notifying E*Trade in writing within 60 days of receiving the Agreement. The Agreement highlighted the Arbitration clause, and the introduction to the Arbitration clause highlighted the opt-out term. Because the Arbitration clause containing the waiver was not presented on a take-it-or-leave-it basis, but gave Guadagno sixty days to opt out, it was not unconscionable. Thus, application of Virginia law does not contradict California's fundamental policy against enforcing unconscionable consumer class action waivers."); Magee v. Advance America Servicing of Ark, Inc., No 6:08-CV-6105, 2009 WL 890991 (W.D. Ark. April 1, 2009) (Court enforces class action waiver after noting that the arbitration agreement was clearly set off from the rest of the contract and provided the consumers with a 30-day opt-out period – a period which was actually longer than the term of the loan); Fluke v. CashCall, No. 08-05776 (E.D. PA. May 21, 2009)(Court enforces class action waiver under Pennsylvania law: "We predict that the Pennsylvania Supreme Court would agree with the reasoning of the district courts in Guadagno and Honig. An opt-out provision, like the one in Fluke's agreement with FBD, seriously undermines a consumer's contention that the arbitration agreement is unconscionable. Fluke was given the option to say "no" to the arbitration provision and he was given a full 60 days to do so. In that way, he had complete control over the terms of the agreement and it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave-it basis. Furthermore, like the agreements in Guadagno and Honig, the FBD loan agreement requires that FBD pay the filing fee and any costs and fees charged by the arbitrator regardless of which party initiated the arbitration. Moreover, under § 503 of the Loan Interest and Protection Law, a borrower or debtor who

prevails in an action "shall" recover a reasonable attorneys' fee. 41 Pa. Cons. Stat. § 503. This should alleviate any concern regarding the availability and willingness of counsel to represent him. Accordingly, this case differs materially from Thibodeau and is more analogous to Guadagno and Honig. We predict that the Pennsylvania Supreme Court would hold that the arbitration provision in the loan agreement in issue is not unconscionable and is enforceable."); Credit Acceptance Corporation v. Davisson, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009) (in rejecting Davisson's argument that the arbitration provision violated the Ohio Consumer Sales Practice Act since it purported to waive access to the court for vindicating a claim under it, the Court noted that Credit Acceptance Corporation did not "waive her recourse to the courts" because of the opt-out feature)

6. Consider bifurcated pricing under which the consumer will pay a lower interest rate or lower fees if he or she does not opt out of the arbitration provision. See, e.g., Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410 (1998) (unconscionability challenge is rejected where credit card issuer gave the cardholder the right to reject the arbitration provision and those who opted out had their 2% APR reduction in interest rate reinstated to its previous rate: "Stiles was given a clear choice in this case; he could take the arbitration provision or leave it")

7. In light of the U.S. Supreme Court's opinion in Bazzle, consider creating an exception to the language that issues pertaining to arbitrability, validity and enforceability of the arbitration provision shall be for the arbitrator. That exception would cover the validity and effect of the class action waiver.

8. In light of opinions invalidating class action waivers and then compelling arbitration, consider creating an exception to the severability clause for the class action waiver so that if a court invalidates the class action waiver, subject to appealing that holding, the arbitration provision will be null and void (the "blow-up" provision). That should be helpful in avoiding class-wide arbitration. Also, provide that only the court, and not an arbitrator, may determine validity of the "blow-up" provision. The risk of class-wide arbitration is exemplified by Long John Silver's Restaurants, Inc. v. Cole, 469 F. Supp. 2d 682 (D.S.C. 2006) in which the District Court refused to vacate an AAA arbitrator's certification of an opt-out class under the Fair Labor Standards Act which requires an opt-in procedure.

9. If possible, include a choice-of-law clause calling for the application of a state's law to the effect that state law is relevant under Section 2 of the FAA in assessing the validity of the arbitration agreement if such state law upholds class action waivers.

10. Include a provision giving the consumer the right to obtain reasonable attorneys fees if he or she prevails in the arbitration proceeding. This is prudent because of Dale v. Comcast Corporation, No. 06-15516, 2007 WL 2471222 (11th Cir. Sept. 4, 2007).

11. Include a provision that gives the consumer a minimum award (a "bump-up" or "premium") equal to the small claims court jurisdictional limit if the arbitrator awards the consumer more than the amount of the company's last settlement award and less than the jurisdictional limit of the small claims court. Under the same circumstances, the company will pay the consumer's attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses that the attorney reasonably incurs for investigating, preparing and pursuing the consumer's claim. This provision is being used by AT&T Mobility (formerly Cingular Wireless).[1]

---

[1] The clause states, in relevant part:

(4) If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is:

- equal to or less than the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address; and greater than the value of AT&T's last written settlement offer made before an arbitrator was selected:

then AT&T will:

- pay you the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address ("the premium") instead of the arbitrator's award; and

- pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium").

If AT&T did not make a written offer to settle the dispute before an arbitrator was selected, you and your attorney will be entitled to receive the premium and the attorney premium, respectively, if the arbitrator awards you any relief on the merits. The arbitrator may make rulings and resolve disputes as to the payment and reimbursement of fees, expenses, and the premium and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the arbitrator's ruling on the merits.

(5) The right to attorneys' fees and expenses discussed in paragraph (4) supplements any right to attorneys' fees and expenses you may have under applicable law. Thus, if you would be entitled to a larger amount under the applicable law, this provision does not

(continued...)

So far, the courts have given a mixed response to AT&T's new provision. Compare Stern v. AT&T Mobility Corp., No. CV-05-8842, 2008 WL 4382796, at *12 (C.D. Cal. Aug. 22, 2008) (comparing a version of the class action waiver without the "bump-up" to a version with a "bump-up" and finding that "[t]he likelihood that this new, limited provision would make it worthwhile for customers to pursue individual claims is altogether improbable"); Stiener v. Apple Computer, Inc., 556 F.Supp.2d 1016 (N.D. Cal. 2008) (explaining that a "bump-up" provision (i) does not make arbitration a "fair substitute for a class action," (ii) offers "incentives [that] are entirely illusory," and (iii) provides "insufficient inducement for individuals to pursue arbitration") (on appeal to Ninth Circuit, No. 08-15612); Laster v. T-Mobile, Inc., No. 05 cv 1167 DMS (AJB), 2008 WL 5216255 (S.D. Calif. Aug. 11, 2008) (while the court believes that the AT&T arbitration provision is an adequate substitute for class actions insofar as an individual customer is concerned, it holds that it is not an adequate substitute for class actions insofar as deterring wrongful conduct and, therefore, fails the Discover Bank test); Hall v. AT&T Mobility, LLC, civil Action No. 07-5325 (JLL), __ WL _____ (D.N.J. March 30, 2009) (invalidates class action waiver under California law after following Stiener v. Apple Computer, Inc., supra; with Cruz v. Cingular Wireless, LLC, No. 2:07-cv-714, 2008 WL 4279690, at *4 (M.D. Fla. Sept. 15, 2008) (holding that an arbitration clause with a "bump-up" provision did not violate public policy in part because of the various consumer-friendly features of the arbitration clause) (on appeal to 11th Circuit); Davidson v. Cingular Wireless, LLC, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007) (same); Strawn v. AT&T Mobility, Civil Action No. 2:06-0988 (S.D. W.Va. Jan. 20, 2009) ("Strawn and Staton also assert the premium provision is illusory because, inasmuch as the jurisdictional maximum of the magistrate court is $5,000, a prevailing customer would receive no more than $5,000 as a premium if the award exceeds the last settlement offer from AT&T. The argument misses the point of the premium. The $5,000, together with the doubling of the attorney fees, is best described as the outer limit of a potential windfall that further protects the customer from malfeasance by the superiorly positioned party. It would be inappropriate to use this unusually customer-centered provision to invalidate the arbitration provision on unconscionability grounds."); Francis v. AT&T Mobility, LLC, Case No. 07-CV-14921, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009) ("AT&T's dispute resolution process provides a significant incentive for Francis, aided by an attorney, to pursue

---

(...continued)

preclude the arbitrator from awarding you that amount. However, you may not recover duplicative awards of attorneys' fees or costs. Although under some laws AT&T may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, AT&T agrees that it will not seek such an award.

the $1,143.60 MCPA claim in private arbitration. Francis' assertion that AT&T's right to make the final pre-arbitration settlement offer renders the premium recovery of a minimum of $5,000 and double attorney fees illusory ignores the goal of informally resolving billing disputes before they reach arbitration.")

XII. Myths About Arbitration

A. It strips the consumer of his or her right to vindicate a claim that could be asserted in court.

1. The consumer due process protocols and rules of AAA, JAMS and the NAF require the arbitrator to follow the law.

2. Most consumer arbitration agreements require arbitrators to follow the law.

B. If it is such a good thing for consumers, then why not let consumers agree to arbitrate after the dispute arises.

1. Too hard to institutionalize.

2. Many lawsuits get filed (particularly class actions) before the bank even recognizes that there is a dispute. Plaintiffs' attorneys will never agree to arbitrate, since it is not good for them. Indeed, consumers do not even need lawyers in arbitration.

3. In order to effectively reduce overall costs and to benefit most consumers, arbitration cannot be used after a dispute arises since consumers then will only elect arbitration for small claims where they could not find (or afford to pay) an attorney to represent them in court. In these cases, the banks would refuse to arbitrate since they will have the leverage. The truth is that pre-dispute arbitration allows such individuals to resolve their claims in arbitration since they do not need lawyers.

C. Without the ability to bring class actions, consumers will never be able to vindicate their rights involving small claims.

1. Small claims court carve-out.

2. Statutory attorneys fees.

3. Government enforcement.

D. As a result of arbitration fees paid to the administrator and arbitrators, arbitration is too expensive, particularly compared to court filing fees.

1. Each of the arbitration administrators limits the fees that must be paid by the consumer.

    a. Under the AAA's Supplementary Procedures for Consumer-Related Disputes (effective July 1, 2003), the consumer need only pay $125 for a claim up to $10,000 and $375 for a claim above $10,000 up to $75,000.

    b. Under JAMS' Minimum Standards for Procedure Fairness, the consumer need only pay $125.

    c. Under the NAF's rules, a consumer need only a filing fee ranging from $25 (for a claim of $5,000 or less) up to $240 (for a claim above $50,000 and less than $75,000) and, if an in-person hearing is desired, a participatory hearing fee ranging from $75 (for a claim of $5,000 or less) up to $250 (for a claim above $15,000 and less than $75,000).

2. Each of the arbitration administrators will waive fees if the consumer has a financial hardship.

    a. Rule 45 of the NAF Code of Procedure.

    b. Rule R-49 of AAA Commercial Arbitration Rules.

    c. Rule 28(f) of the JAMS Financial Services Arbitration Rules & Procedures.

3. The arbitration agreements used by most companies typically provide that the consumer will not need to pay any fees in excess of the equivalent of a court filing fee.

E. Consumers do much better in court than they do in arbitration because arbitrators are biased in favor of companies (who use them frequently) and against consumers.

1. All of the available data show that consumers fare at least as well in arbitration as they do in the court system. Researchers have found that individual parties receive more of what they ask for in arbitration versus the court system. Many of these studies are summarized in K. Jensen, Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration, 60 Cons. Fin. Law Quarterly Report 631 (No. 4) (Winter 2006).

    a. The NAF has indicated that consumers win 80% of the arbitrations initiated against companies. See National Arbitration Forum, Millenial Issues Regarding Arbitration Fairness: An Administrator's Views, at 3, appearing in www.arb-

forum.com/arbitration/NAF/forms/millenial/Article.pdf (Jan. 7, 2000).

b. One study dealing with AAA employment arbitration found that employees won 73% of the arbitrations they initiated and 64% of all employment arbitrations (including those initiated by employers). See Lisa B. Bingham, Is There a Bias in Arbitration of Nonunion Employment Disputes? An analysis of Active Cases and Outcomes, 6 Int'l J. Conflict Management 369, 378 (1995).

c. Lewis Maltby also conducted a study in which he compared the results in employment arbitration with the results in federal court during the same period of time, finding that 63% of employees won in arbitration compared to 15% of employees who won in federal court. Awards to employees in arbitration were on average 18% of the amount demanded versus 10.4% of the amount demanded in court. The study also demonstrated that while arbitration awards to employees are on average lower than judgments to employees in court, the outcome for employees is still better in arbitration because of their higher win-rates of arbitration and the shorter duration of arbitration compared to court proceedings. See Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rights L. Rev. 29, 46-48 (1998).

d. In yet another study, it was reported that employees won 51% of arbitrations, while the EEOC won 24% of cases in federal court. See George W. Baxter, Arbitration in Litigation for Employment Civil Rights?, 2 Vol. of Individual Employee Rights 19 (1993-94).

e. Another study reported that employees won 68% of the time before the AAA as contrasted with only 28% of the time in litigation. See William M. Howard, Arbitrating Claims of Employment Discrimination, Disp. Res. J. Oct-Dec 1995, at 40-43.

f. See Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure, California Dispute Resolution Institute (August 2004). The report appears at HTTP://www.mediate.com/cdri/cdri_print_Aug_6.pdf. The report concluded that consumers prevailed 71% of the time.

g. In December 2004, Ernst & Young issued a study (called "Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases") examining the outcomes of contractual arbitration in lending-related, consumer-initiated cases. The report appears at: http://adrinstitute.com/edit/Feb_05/022105EYPressReleaseADRht

m. The study, based on consumer arbitration data from January 2000 to January 2004 from the NAF, observed that:

i. Consumers prevailed more often than businesses in cases that went to an arbitration hearing, with 55% of the cases that faced an arbitration decision being resolved in favor of the consumer. This is the exact same win-rate for consumers as exists in state court. See Contract Trials and Verdicts in Large Counties, 1996, p.5 (April, 2000), Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/pub/pdf/ctvlc96.pdf.

ii. Consumers obtained favorable results in 79% of the cases that were reviewed. Favorable results include results from arbitration decisions, as well as settlements satisfactory to the consumer and cases that were dismissed at the claimant's request.

iii. 40% of consumers who brought claims actually got their "day in court" to tell their stories (see p.9 table 3. 97 of 226 cases resulted in an arbitration decision). Compare this to the fact that only 2.8% of cases in state court ever reach trial. Examining the Work of State Courts, p.29 (1999-2000), National Center for State Courts. http://www.ncsonline.org/D_Research/csp/1999-2000_Files/1999-2000_Tort-Contract_Section.pdf.

iv. 69% of consumers surveyed indicated that they were very satisfied with the arbitration process.

h. In April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by the Institute for Legal Reform at the U.S. Chamber of Commerce. The survey results appear at: http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf. The survey was conducted online among 609 adults who participated in a binding arbitration case (voluntarily, due to contract language or with strong urging by the Court, but not a court order) that reached a decision. The major findings were:

i. Arbitration is widely seen as faster (74%), simpler (63%), and cheaper (51%) than going to court.

ii. Two-thirds (66%) of participants say they would be likely to use arbitration again with nearly half (48%) saying they are extremely likely.

(a) Even among those who lost, one-third say they are at least somewhat likely to use arbitration again.

iii. Most participants are very satisfied with the arbitrator's performance, the confidentiality of the process and its length.

iv. Predictably, winners found the process and outcome very fair and the losers found the outcome much less fair. However, 40% of those who lost were moderately to highly satisfied with the fairness of the process and 21% were moderately to highly satisfied with the outcome.

v. While one in five of the participants were required by contract to go to arbitration, the remainder were voluntary – suggested by one of the parties, one of the lawyers, or the court.

vi. Two-thirds of the participants were represented by lawyers.

i. Lisa B. Bingham and Shimon Sarraf, Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference in Alternative Dispute Resolution in the Employment Arena. Proceedings at New York University's 53rd Annual Conference on Labor 303 (Samuel Estreicher & David Sherwyn eds. 2004). The report found no support for arbitrator bias.

j. Theodore Eisenberg and Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, Disp. Resol. J. Nov. 2003 – Jan 2004, at 44. Higher-compensated employees (i.e., those with annual incomes of $60,000 or more) obtained slightly higher awards in arbitration before the AAA than in court. There was insufficient court data to make a similar comparison for employees with less than $60,000 of annual income, thus proving that such employees have difficulty finding lawyers who will represent them in court.

k. Michael Delikat and Morris M. Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, Disp. Resol. J. Nov. 2003 – Jan. 2004, at 56. The study compared the results of employment discrimination cases filed and resolved between 1997 and 2001 in the S.D. N.Y. versus with the NASD and NYSE. Employees prevailed 33.6% of the time in court versus 46% of the time in arbitration. The median damages award was $95,554 in court versus $100,000 in

arbitration. The median attorneys' fees awarded was $69,338 in court versus $76,684 in arbitration. The median duration was 25 months in court versus 16½ months in arbitration. They also found that of over 3,000 cases filed in court, only 125 (2.8%) went to trial, thus undermining the perceived importance that consumer advocates place on the right to trial by jury.

l. Elizabeth Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 Ohio St. J. at Disp. Resol. 777 (2003).

m. RoperASW, 2003 Legal Dispute Study (Apr. 2003), available at http://www.adrinstitute.org/adri_lds2.pdf. The survey concluded that 64% of individuals would choose arbitration over court litigation, 67% believe court litigation takes too long and 32% believe court litigation costs too much.

n. Samuel Estreicher and Matt Ballard, Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiad on the "Costs of Arbitration," Disp. Resol. J. Nov. 2002 – Jan 2003, at 8. Public Citizen had released a report in which it asserted that the costs of arbitration for individuals is almost always higher than the costs of litigating a claim in court. The authors severely criticize the report for failing to factor in the costs of an attorney, which is the most significant expense of litigation.

o. Gary Tidwell, et al., Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations (Aug 1999), available at http://www.nasd.com/wcb/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf. In surveying individual participants in NASD-sponsored arbitration for 1997 to 1999, over 93% agreed that their claims were handled "fairly and without bias."

p. Lisa B. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, 29 McGeorge L. Rev 223 (1998). Employees arbitrating under a personnel handbook win a smaller percentage of cases than employees arbitrating under a negotiated agreement. While some critics of employment arbitration have interpreted Bingham's study as establishing the existence of a "repeat player effect" which favors employers, it more likely establishes that at-will employees lose arbitrations more frequently than employees with employment contracts. See, e.g., David Sherwyn et al., Assessing the Case for Employment Arbitration: A New Path for Empirical Research, 57 Stan. L. Rev. 1557 (2005).

q. Lisa B. Bingham, Is there a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes, 6 Int'l J. of Conflict Mgmt. 369 (1995). In a study of 171 employment arbitration cases filed with the AAA in 1992, Bingham concluded that "employee claimants are more likely than employer claimants to recover a larger proportion of the amount of damages claimed when the arbitrator is paid a fee, recovering almost fourfold what employers recover . . . ." She concluded that her results "contradict the theory that employment arbitrators will be biased against individual employees . . . ." She opined that arbitrators want to "be acceptable to other parties, not just the repeat player involved in that case."

r. William Howard, Arbitrating Claims of Employment Discrimination, Disp. Resol. J. Oct.-Dec., 1995, 42-43. A study comparing win rates and award amounts for litigation and arbitration in the securities industry from 1992-94 showed that employees won 28% of non-jury trials, 38% of jury trials, and 48% of arbitrations. Employees won a mean non-jury verdict of $167,450, a mean jury verdict of $417,178, and a mean arbitration award of $83,518.

s. Michael H. LeRoy and Peter Feuille, Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future, 18 Ohio St. J. Disp. Resol. 249. In a study of 152 employment arbitration rulings between 1977 and 2003, the employer win rate was 50.7%; employees partially prevailed in 19.7% of the awards and entirely won in 29.6% of the awards.

t. Most Americans have become skeptical of class actions. A March 2003 survey found that "67% of Americans believe that lawyers benefit most from the current class action system while 61% think that consumers (32%) and class members (29%) benefit least from the current system." Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, Polling on the Class Action System: National Results, available at http://instituteforlegalreform.com/resources/classification.pdf.

u. The U.S. Institute for Legal Reform of the U.S. Chamber of Commerce conducted a poll which found that 71% of likely voters oppose efforts by Congress to remove arbitration agreements from consumer contracts and 82% prefer arbitration to litigation as a means to settle a serious dispute with a company.

v. The U.S. Institute for Legal Reform of the U.S. Chamber of Commerce released a detailed analysis of Public Citizen report cited by opponents of arbitration. Professor Peter "Bo" Rutledge

of Catholic University Columbus School of Law conducted the analysis, concluding that the study is wrong both on the facts and in its ultimate conclusion. Contrary to the Public Citizen study, Rutledge said that "arbitration improves access to justice, enhances the likelihood of recovery, achieves speedier results and is a superior option to the courts."

w. On July 15, 2008, Navigant Consulting announced the results of certain analyses it performed with respect to NAF data disclosed pursuant to California Code of Civil Procedure 1281.96. See http://www.instituteforlegalreform.com/issues/docload.cfw?docIQ=1212. These analyses focused on disposition statistics of NAF cases and make use of data also used by Public Citizen in its paper "The Arbitration Trap: How Credit Card Companies Ensnare Consumers," published in September 2007. The new analysis looked at nearly 34,000 California debt collection arbitration cases. It found that 32% of the consumer debtors named in the cases that did not settle prevailed in their cases – either winning their arbitration outright or having the claims against them dismissed. In another 16% of the cases that did not settle, the study found that consumer debtors had the claims against them reduced by a median of almost $825. Public Citizen, on the other hand, distorted the same data and concluded that the consumer never won any NAF collection arbitrations in California. It reached this result by ignoring the vast number of cases that were dismissed. See http://www.citizen.org/documents/Final-wcover.pdf. Consumers fare much more poorly when facing debt collection lawsuits than they do in arbitration. For example, a study released last fall by the Urban Justice Center found that less than 8% of consumers facing debt collection lawsuits in New York City courts prevailed by having their cases dismissed – a rate four times worse than that of arbitration. See http://urbanjustice.org/pdf/publications/CDP_Debt_weight.pdf.

x. On March 12, 2009, the Searle Civil Justice Institute of Northwestern University School of Law released the first in-depth study of consumer arbitrations administered by the AAA: http://www.searlearbitration.org/report. The study, which was based on a review of 301 consumer arbitrations that were closed by award between April and December 2007, reached the following conclusions:

i. The upfront cost of arbitration for consumer claimants is quite low (an average of $96 for claims less than $10,000 and $219 for claims between $10,000 and $75,000). These amounts are below the levels specified in the AAA fee

schedule for low-cost arbitrations, and are the result of arbitrators reallocating consumer costs to businesses.

ii. AAA consumer arbitration is an expeditious way to resolve disputes (an average 6.9 months).

iii. Consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed).

iv. No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business. (Consumers won some relief in 51.8% of cases against repeat businesses vs. 55.3% against non-repeat businesses.)

v. Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was $14,574.

vi. A substantial majority of consumer arbitration clauses (76.6%) fully complied with the AAA Due Process Protocol.

vii. AAA's review of arbitration clauses for Protocol compliance was effective (98.2% of the time) at identifying and responding to clauses with Protocol violations.

viii. AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses. In 2007, AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its case load) because the business failed to comply with the Protocol.

ix. As a result of AAA's Protocol compliance review, some businesses either waive problematic provisions or revise arbitration clauses to remove provisions that violate the Protocol.

y. On April 1, 2009, the Maine Bureau of Consumer Protection of the Department of Professional and Financial Regulation issued its report to the Maine Legislature pursuant to PL 2007, Chapter 250, titled "An Act to Enhance Fairness in Arbitration" which required the Bureau to compile and report information regarding consumer arbitrations during 2008 involving Maine consumers. Available at http://www.maine.gov/pfr/consumercredit/events.htm. The findings were as follows:

i. The AAA, JAMS and the NAF along with eight individual arbitrators provided information to the Bureau.

ii. Nearly 100% of the cases involved credit card debts.

iii. A total of 2,500 Maine cases were reported.

iv. In the majority of cases the creditor prevailed, although a number of cases were dismissed without disposition for reasons unreported.

v. In the small number of cases in which consumers advanced defenses, arbitrators showed a willingness to rule in the consumers' favor.

vi. Consumers were represented by attorneys in less than 1% of the cases.

vii. The total awarded in all cases in 2008 was approximately $5 million, representing about 25% of the more than $20 million sought by creditors.

viii. "[I]t is important to keep in mind that although credit card banks and assignees prevail in most arbitrations, this fact alone does not necessarily indicate unfairness to consumers. The fact is that the primary alternative to arbitration (a civil action in court) also most commonly results in judgment for the plaintiff. Although certainly there are cases in which a consumer has a valid defense to the action, it is also correct to say that most credit card cases result from a valid debt and a subsequent inability of the consumer to pay that debt. In fact, most cases (both in arbitration and in court) are decided not after a balanced review of the bank's allegations and the consumer's defenses, but rather by "default," meaning that the consumers have not responded in any manner after being notified that the claims against them are being pursued.

ix. "[G]iven the fact that no proof of disparate treatment of consumers has been associated with the arbitration proceedings compared to parallel approaches such as civil litigation, and given the fact that no trend of consumer complaint has come to attention of regulators or to the Legislature, the Bureau does not recommend that it be required to provide further reports at this time."

F. Arbitration is unfair to consumers because it does not permit discovery and consumers (as opposed to companies) need discovery in order to prevail.

1. The rules of each of the administrators gives arbitrators the discretion to allow discovery.

G. Arbitration is unfair because proceedings are private and third parties are unable to determine who has prevailed.

1. Often, individuals want the proceedings to be private.

2. It is the nature of arbitration. It is different than litigation.

3. The outcome of the arbitration will become public when the award is entered in court.

H. Arbitration is unfair because there is no right of appeal.

1. Under Section 16 of the FAA, there is a right of appeal. It is true that a simple error of law is not enough to overturn an arbitrator's decisions.

I. Arbitration must be unfair since neither Fannie Mae nor Freddie Mac permit it in connection with loans originated or serviced for it.

1. It is purely a political decision.

2. Fannie Mae/Freddie Mac Uniform Instruments already provide protection against class actions since they require mortgagors to give notice to the mortgagee and an opportunity to respond to any claims before the mortgagors may prosecute such claims in court.

J. A Federal District Court observed: "As articulated by the U.S. Supreme Court in a similar context, it is likely that consumers actually benefit in the form of less expensive computers reflecting Dell's savings from inclusion of the arbitration provision in its contact. See, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) ('[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.') Similarly, one of Congress' express purposes behind the Class Action Fairness Act was to 'benefit society by encouraging innovation and lowering consumer prices.' Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005)." Provencher v. Dell, Inc., Case No. SA CV 05-878 CJC, 2006 WL 9626 (C.D. Calif. Jan. 3, 2006).

XIII. Future Key Issues

A. Courts

1. Discover Bank v. Superior Court of Los Angeles, No. S113725, 2005 WL 1500866 (Calif. Supreme Court June 27, 2005) (class action waiver in a consumer contract of adhesion is unconscionable if California law applies when the dispute involves small amounts of damages and is not preempted by the FAA; case remanded to determine whether Delaware choice-of-law clause should be enforced). Upon remand, the Court of Appeal, Second District, Division One, applied Delaware law and enforced the class action waiver (No. B161305, 2005 WL 3304153 Dec. 7, 2005).

2. Green Tree Fin. Corp. v. Bazzle, No. 02-634, 2003 U.S. LEXIS 549 (cert. granted U.S. Jan. 10, 2003). The United States Supreme Court agreed to decide the question whether the Federal Arbitration Act ("FAA") prohibits class action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration. In Bazzle, the South Carolina Supreme Court held that class-wide arbitration may be ordered when the arbitration clause is silent on that issue if it would serve efficiency and equity and not result in prejudice. See Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002). Green Tree argued that because the FAA requires arbitration agreements to be rigorously enforced in accordance with their terms, the parties' silence on the class action issue precludes the imposition of class-wide arbitration. The Supreme Court vacated the order of the South Carolina Supreme Court and the plurality of the Court and Justice Stevens (who joined in the judgment but not the reasoning) determined that only the arbitrator and not the court could decide whether Green Tree's clause authorized classwide arbitration. There is no precedent established by the plurality opinion in Bazzle. See I. Szalai, The New ADR; Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle, 41 Calif. Western L. Rev. 1 (Nol. 2004) and D. Clancy, Re-evaluating Bazzle: The Supreme Court's Celebrated 2003 Decision Says Much Less About Class Action Arbitration Than Many Assume, 7 BNA Class Action Litigation Reporter No. 8 (Sept. 22, 2006). Contrast Employers Insurance Company of Wassau v. Century Indemnity Company, No. 05-3437, 2006 U.S. App. LEXIS 8070 (2nd Cir. April 4, 2006) (Bazzle not precedential) with Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc., 343 F.3d 355 (5th Cir. 2003) (Bazzle is precedential) and Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489, F.3d 580 3d Cir 2007) (Bazzle is precedential)

3. The U.S. Supreme Court on March 25, 2008 held that the parties may not by contract expand the grounds upon which a court may review an arbitration award. Hall Street Associates, L.L.C. v. Mattel, Inc., No. 06-989.

4. The U.S. Supreme Court also still needs to decide whether the FAA preempts any state law holding that a class action waiver is invalid.

a. Class action waivers have been upheld in the Third, Fourth, Sixth, Seventh and Eighth Federal Circuits and, with some exceptions, in the Second and Eleventh Circuits. In one case, the Third Circuit held that the FAA preempts Pennsylvania law invalidating class action waivers.

b. In the Ninth Circuit, it depends on the type of claim. In the First and Second Circuits, antitrust claims are exempt from the waiver.

c. Recently, the Third Circuit held that a class action waiver violates a fundamental policy of New Jersey and found no FAA preemption.

d. Class action waivers have been upheld in 14 states: CO, DE, DC, HA, KS, MD, MS, ND, NY, OH, TN, TX, UT and VA.

e. Class action waivers have been invalidated in 18 states, but in each case except CA, MA, NJ, MO, NM and WA, that was because of the existence of other unfair features: AL, IL, LA, NC, OH, OK, OR, PA and WV; but only AL, CA, IL, NJ, NC, OK, WA and WV involved decisions of the state's highest court. A Pennsylvania Supreme Court opinion has cast considerable doubt on the continued viability of the earlier intermediate appellate court opinions in other cases which invalidated class action waivers. And, the opinion of the Third Circuit in Gay v. CreditInform, 511 F.3d 369(2007) held that the FAA preempts the Pennsylvania cases. However, a different panel of the Third Circuit, in Homa v. American Express, 558 F.3d 225 (3d Cir 2009), concluded that the FAA preemption discussion in Gay was "probably dicta." Several Federal District Courts in Alabama and Illinois have validated class action waivers after distinguishing opinions of the Alabama and Illinois Supreme Courts.

f. There are conflicting rulings in Florida.

g. There are essentially four defenses that should be raised in cases where the plaintiff challenges an arbitration agreement based on its inclusion of a class action waiver: (1) that there is no unwaivable right to bring a class action under a federal statute because a class action is just a procedural device; (2) that it is not necessary to vindicate federal statutory rights for the plaintiff to maintain a class action in court or in arbitration; (3) that even if the class action waiver is invalid under the state law where the action is pending a court should uphold the validity of the waiver by enforcing a choice-of-law clause calling for the application of a state which enforces class action waivers; and (4) that the FAA preempts any state law which invalidates a class action waiver. There are two

sources for such preemption. First, while Section 2 of the FAA defers to state law in determining the enforceability of an arbitration agreement the state law must apply to ALL contracts (not just some species of contracts, e.g., consumer contracts) within the state. The United States Court of Appeals for the Ninth Circuit has held that the FAA preempts the class action anti-waiver language in the CLRA because the CLRA only applies to consumer contracts. The only state law preserved from preemption by Section 2 of the FAA are state laws which apply to all contracts within the State of California. See Ting v. AT&T, 319 F.3d 1126, 1147-48 (9th Cir. 2003), cert. denied, 540 U.S. 811 (2003); Provencher v. Dell, Inc., Case No. SA CV 05-878 CJC, 2006 WL 9626 (C.D. Cal. Jan. 3, 2006), (follows Ting); Vannier v. Gateway Companies, Inc., No. B79663, 2006 WL 121962 (Cal. Ct. App., 2nd Dist. Jan 18, 2006) (follows Ting); Accord Bradley v. Harris Research, Inc., 275 F.3d 884, 892 (9th Cir. 2001) (holding that the FAA preempted Cal. Bus. & Prof. Code Section 20040.5 because it "is not a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements."). See also KKW Enters. Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42 (1st Cir. 1999); OPE Int'l LP v. Chet Morrison Contractors, Inc., 258 F.3d 443 (5th Cir. 2001); Doctor's Assocs. Inc. v. Hamilton, 150 F.3d 157, 163 (2d Cir. 1998), Management Recruiters Int'l, Inc. v. Bloor, 129 F.3d 851, 856 (6th Cir. 1997); Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc., 840 F. Supp. 708 (D. Ariz. 1993); Michael v. NAP Consumer Elecs. Corp., 574 F. Supp. 68 (D.P.R. 1983); Battle v. Nissan Motor Acceptance Corporation, Case No. 05-C-0669 (E.D. Wis. March 9, 2006) (to the extent the Wisconsin Consumer Act creates a non-waivable right to sue in court, it is preempted by the FAA both because the FAA 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 and because the Wisconsin Consumer Act applies only to consumer issues and not contracts generally). None of the states have held that class action waivers are invalid per se. Such states have held that class action waivers are invalid only as applied to small dollar consumer claims. As such, the FAA should preempt such holdings since they run afoul of Section 2 of the FAA which allows an arbitration agreement to be invalidated only on a basis that applied to all contracts); Davisson v. Credit Acceptance Corporation, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009). Second, the most fundamental principle underlying the FAA is that contracts must be enforced in accordance with their terms. There is no exception in the FAA for class action lawsuits. In other words, the FAA does not say that a party who has signed an arbitration agreement can

avoid it by bringing a class action. Or, put in another way, the FAA does not say to a party desiring arbitration that it can only have classwide arbitration (or no arbitration at all). The Third Circuit opinion in Gay v. CreditInform, 511 F.3d 369 (3d. Cir. 2007) supports that argument. There is also an argument, which is as yet untested, that an arbitration provision may not be invalidated based on substantive unconscionability. This argument is predicated on the language in Section 2 of the FAA saying that an arbitration agreement is "valid, irrevocable and enforceable" except "upon such grounds as exist in law or equity for the revocation of any contract." A good argument can be made that this exception was intended to encompass only procedural unconscionability or state law grounds dealing with contract formation (*e.g.*, fraud, duress). Several law review articles strongly support FAA preemption of class action waivers based, in part, on the legislative history of the FAA. D. Clancy and M. Stein, An Uninvited Guest: "Class Arbitration and the Federal Arbitration Act's Legislative History," 63 The Business Lawyer 55 (Nov. 2007); I. Szalai, "Aggregate Dispute Resolution: Class and Labor Arbitration," 13 Harv. Negotiation L. Rev. 399 (Spring 2008).

h. The validity of a class action waiver should be tested on an ex ante (i.e., at the time the arbitration agreement is entered into) rather than an ex parte (i.e., at the time that the class action waiver is challenged) basis. In doing that it is very unlikely that a plaintiff will be able to demonstrate that he and members of the putative class did not derive real benefits from the arbitration agreement (in the form of lower prices or higher wages and the ability to vindicate claims in arbitration which could never be vindicated in court because of the inability to hire counsel on a contingent fee basis). All of the state courts that have invalidated class action waivers have done so by evaluating unconscionability at the time the dispute arose which is typically not the time when such courts evaluate the unconscionability of non-arbitration contracts. By singling out arbitration contracts for special treatment, these holdings run afoul of the FAA.

i. The existence of fee-shifting statutes and governmental agency enforcement makes it unnecessary to employ a class action in order to vindicate a wrongdoing.

j. Is the validity of a class action waiver a gateway issue for the court or an issue for the arbitrator? According to Gipson v. Cross Country Bank, Civil Action No. 2:03cv269-A, 2005 U.S. Dist. LEXIS 1400 (M.D. Ala. Jan. 28, 2005), the answer is that challenges to the validity of class action waivers are gateway

issues for the court to decide. The court in that case invalidated the November 12, 2004 policy adopted by JAMS in which JAMS concluded that class action waivers are invalid and will not be enforced, thus permitting class-wide arbitration. (JAMS subsequently retracted this policy.)

k. If a court invalidates a class action waiver, there is a risk that the court may sever it from the rest of the arbitration provision and then order class-wide arbitration. Although the conventional wisdom is that this is a significant risk in California, I disagree. The California Supreme Court, in Keating v. Superior Court, 31 Cal. 3d 584, 613-14 (1982), has made it fairly clear that class-wide arbitration may not be ordered over the objection of the company:

> "Whether such an order [*i.e.*, an order dealing with class-wide arbitration] would be justified in a case of this sort is a question appropriately left to the discretion of the trial court. In making that determination, the trial court would be called upon to consider, not only the factors normally relevant to class certification, but the special characteristics of arbitration as well, including the impact upon an arbitration proceeding of whatever court supervision might be required, and the availability of consolidation as an alternative means of assuring fairness. Whether class-wide proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement must also be considered, and that party should be given the option of remaining in court." (Emphasis added.)

Bear in mind that the arbitration provision in Keating was silent on whether class-wide arbitration would be permitted. In other words, it did not contain a class action waiver. Most arbitration provisions today contain class action waivers and there is no question that the interest of those companies would be severely prejudiced by an order compelling class-wide arbitration, particularly if the arbitration provision specifies that the class action waiver may not be severed from the rest of the arbitration provision if the class action waiver is invalidated. Also note that the California Supreme Court in the Boehr opinion acknowledged that there could not be class-wide arbitration in light of Discover Bank's objection to it (although the Court also noted that Boehr (the real party in

interest) was not seeking it and it is unclear whether the Court considered that to be important). A number of recent unpublished opinions by the California Court of Appeal also hold that class-wide arbitration will not be ordered if either party does not consent to it. See, Meoli v. AT&T Wireless Services, Inc., Nos. A106061, A106340 and A106341 , 2005 Cal. App. Unpub. LEXIS 8994 (Calif. Ct. App., 1st App. Dist, Div. 5 Sept. 30, 2005); Bucy v. AT&T Wireless Services, Inc., A105910, 2005 Cal. App. Unpub. LEXIS 8993 (Calif. Ct. App., 1st app. Dist, Div. 5 Sept. 30, 2005); Wing v. Cingular Wireless, LLC, No. A105906 , 2005 Cal. App. Unpub. LEXIS 9005 (Calif. Ct. App., 1st App. Dist, Div. 5 Oct. 3, 2005).

l. The U.S. Supreme Court recently granted certiorari in a case which may very well determine, once and for all, whether the FAA preempts state law invalidating class action waivers. Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., No. 08-1198 (June 15, 2009). In Stolt-Nielsen, the Supreme Court accepted review of the question whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the FAA. Stolt-Nielsen arose out of a class arbitration before the American Arbitration Association ("AAA") in which the arbitrators ruled that an arbitration agreement that is silent on the issue of class-wide arbitration could be interpreted to permit class arbitration. The U.S. District Court for the Southern District of New York vacated that award on the ground that it was made in manifest disregard of the law. 435 F. Supp. 2d 382 (S.D.N.Y. 2006). On appeal, the U.S. Court of Appeals for the Second Circuit reversed, upholding the arbitrators' ruling and rejecting Stolt-Nielsen's argument that the FAA itself precludes the imposition of class-wide procedures unless they are expressly provided for in the arbitration agreement. 548 F.3d 85, 100-01 (2d Cir. 2008). While most well-drafted arbitration agreements today condition express class action waivers and Stolt-Nielsen involves an arbitration clause that is silent on the issue of class actions, the overarching question in both cases is whether the FAA preempts the imposition of class action procedures where the arbitration agreement does not expressly permit such procedures. In cases where the arbitration agreement contains a class action waiver, the company often argues that the FAA preempts state law decisions holding that express class action waivers in consumer arbitration agreements are unconscionable. The petitioners in Stolt-Nielsen argue that the FAA preempts state law decisions which would otherwise permit the imposition of class-wide arbitration when the arbitration agreement is silent on that subject. (Petition for Certiorari, pp. 9-11, 14-15, 17-22). In both situations, it is argued that under the FAA arbitration agreements must be enforced as written and cannot be reformed to

impose class action procedures to which the parties did not expressly agree. (Petition for Certiorari, pp. 1-2, 9-11, 17-18). If the Supreme Court rules in favor of the petitioners in Stolt-Nielsen and holds that under the FAA a silent arbitration agreement must be read as precluding class-wide arbitration, then *a fortiori* an arbitration agreement that contains an express class action waiver should also be valid and enforceable under the FAA.

5. Flores v. Transamerica Home First, Inc., 93 Cal. App. 4th 846, 113 Cal. Rptr. 2d 376 (2001). The Court invalidated an arbitration clause in a mortgage because of a carve-out for judicial and non-judicial foreclosures. The possible way around this problem is to (a) exclude self-help remedies from the definition of a "Claim" and let the borrower go to court to enjoin the use of the self-help remedy and (b) require arbitration of a judicial foreclosure if it can be done without significantly impairing rights and remedies of mortgagor and mortgagee. Also exclude self-help repossession from definition of "Claim" in an auto finance arbitration provision.

6. If a court determines that an arbitrator must resolve whether the arbitration provision allows or precludes class-wide arbitration (as it may under the U.S. Supreme Court opinion in Greentree Fin. Corp. v. Bazzle), there are still many arguments to be made as to why a "silent" arbitration provision (i.e., one which contains no class action waiver) does not permit class-wide arbitration. See Cheng v. Oxford Health Plans, Inc., Index No. 604083/2001, N.Y. Supreme Court, IAS Part 3 (Nov. 28, 2006) where the court vacated an AAA Clause Construction Award and adopted the opinion of the dissenting arbitrator who interpreted a "silent" clause as not permitting class-wide arbitration), rev'd, 45 A.D.3d 356, 846 N.Y.S.2d 16 (N.Y. Sup. Ct. 2007).

7. What is the legal and practical effect of the decision by the NAF to exit the business?

B. State Legislatures. Maine, Minnesota and New York, without mentioning arbitration agreements, have enacted laws prohibiting class action waivers for certain types of loans (*e.g.*, payday loans and refund anticipation loans). These statutes should be preempted by the FAA.

C. Congress. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, Section 670(a), to be codified at 10 U.S.C. Chap. 49, by adding § 987 (Oct. 17, 2006). Effective October 1, 2007, it shall be unlawful for any creditor to extend consumer credit to an active duty member of the military or his or her dependent which requires him or her to submit to arbitration. (Section 987(e)(3)). It also provides that no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against such persons. (Section 987(f)(4))

D. Under the Motor Vehicle Franchise Contract Arbitration Act, enacted in 2002, arbitration provisions in motor vehicle franchise agreements are enforceable "to resolve a controversy arising out of or relating to such contract . . . only if after such controversy arises all parties to such controversy consent in writing to settle such controversy." 15 U.S.C. § 1226(a)(2)

E. Section 210(e) of the Food, Conservation, and Energy Act of 2008 prohibits "any action that has the intent or effect of limiting the ability of a producer or grower to freely make a choice" regarding arbitration. This provision effectively nullifies pre-dispute arbitration clauses in livestock contracts agreed to by livestock and poultry growers.

F. The above-referenced statutes are a dangerous step down a slippery slope and establish a dangerous anti-arbitration precedent.

G. The 111th Congress is presently considering three bills which, if enacted, would prohibit the use of arbitration in a wide array of other types of contracts.

1. HR 1020 would bar pre-dispute binding arbitration clauses in certain consumer, employment and franchise contracts.

2. HR 991 would bar pre-dispute mandatory arbitration in consumer contracts.

3. HR 1237 would bar pre-dispute arbitration clauses in nursing home contracts.

4. HR 1214 would bar from a payday loan contract a mandatory arbitration clause that is unfair, unconscionable, or substantially in derogation of the rights of consumers.

5. HR 1738 would bar from a residential mortgage loan and open-end loan agreements secured by a mortgage against the principal dwelling of the consumer a pre-dispute mandatory arbitration provision.

6. HR 3126, Subtitle B, Section 921. The Obama Administration recently proposed that Congress create a Consumer Financial Protection Agency which would be given the authority to ban or regulate arbitration agreements in consumer financial services contracts.

XIV. Bibliography

A. Outline prepared by Alan S. Kaplinsky ("Kaplinsky") entitled "Arbitration and Class Actions: A Contradiction in Terms."

B. Outline prepared by Kaplinsky and Mark J. Levin ("Levin") entitled "Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered By A Consumer Lender."

C. Outline prepared by Kaplinsky entitled "A Scorecard on Where Federal and State Appellate Courts and Statutes Stand on Enforcing Class Action Waivers in Pre-Dispute Consumer Arbitration Agreements."

D. Kaplinsky and Levin, Alternative to Litigation Attracting Consumer Financial Services Companies, 1 Cons. Fin. Serv. L. Rep. 1 (June 27, 1997).

E. Kaplinsky and Levin, Drafting and Implementing of a Consumer Loan Arbitration Clause, 51 Cons. Fin. Law Quarterly Report 295 (No. 4) (Fall 1997).

F. Kaplinsky and Levin, Banks Use Arbitration Clauses as a Defense to Class Actions, 7 Business Law Today No. 5, at 24 (May/June 1998).

G. Kaplinsky and Levin, Consumer Financial Services Arbitration: Current Trends and Developments, 53 The Business Lawyer No. 3 at 1075 (May 1998).

H. Kaplinsky and Levin, Consumer Financial Services Arbitration: Last Year's Trend Has Become This Year's Mainstay, 54 The Business Lawyer No. 3 at 1405 (May 1999).

I. Kaplinsky and Levin, The Consumer Arbitration Train is Roaring Down the Track, in Arbitration Clauses in Consumer Financial Services: Samples, Strategies and Cases 14 (LRP Publications ed. 1999).

J. Kaplinsky and Levin, Consumer Financial Services Arbitration. A Panacea or a Pandora's Box, 55 The Business Lawyer No. 3 at 1427 (May 2000).

K. Kaplinsky and Levin, Consumer Financial Services Arbitration: The Millennium Edition, 56 The Business Lawyer No. 3 at 1219 (May 2001).

L. Kaplinsky and Levin, 2001: An Arbitration Odyssey, 57 The Business Lawyer 1287 No. 3 (May 2002).

M. Kaplinsky and Levin, The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements, 58 The Business Lawyer 1289 No. 3 (May 2003).

N. Kaplinsky and Levin, Arbitration Update: Green Tree Financial Corp. v. Bazzle – Dazzle for Green Tree, Fizzle for Practitioners, 59 The Business Lawyer 1265 (May 2004).

O. Kaplinsky and Levin, Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements, 60 The Business Lawyer 775 (February 2005).

P. Kaplinsky and Levin, Is JAMS in a JAM Over Its Policy Regarding Class Waivers in Consumer Arbitration Agreements?, 61 The Business Lawyer 923 (February 2006).

Q. Kaplinsky and Levin, Class Action Waivers Gain Legislative and Judicial Traction, 62 The Business Lawyer (February 2007).

R. Kaplinsky, Utah Enacts Unprecedented Statute Validating Class Action Waivers, 60 Cons. Fin. Law Quarterly Report 700 (No. 4) (Winter 2006).

S. Kaplinsky and Levin, Consumer Arbitration: If the FAA "Ain't Broke," Don't Fix It, 63 The Business Lawyer 907 (May 2008).

T. Kaplinsky, Levin and Bryce, Consumer Arbitration: The Tug of War Between Federal and State Courts Intensifies, to be published in 64 The Business Lawyer 627 (February 2009)

Appendix A

U.S. Supreme Court

- Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402 (U.S. Jan. 10, 2003). The United States Supreme Court had before it the question whether the Federal Arbitration Act ("FAA") prohibits class action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration. In Bazzle, the South Carolina Supreme Court held that class-wide arbitration may be ordered when the arbitration clause is silent on that issue if it would serve efficiency and equity and not result in prejudice. See Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002). Green Tree argued that because the FAA requires arbitration agreements to be rigorously enforced in accordance with their terms, the parties' silence on the class action issue precludes the imposition of class-wide arbitration. The Supreme Court decided the case on procedural grounds, holding that the arbitrator, not the South Carolina courts, should have determined whether Green Tree's arbitration clause permits classwide arbitration, and it vacated the $30 million judgment that had been entered against Green Tree.

U.S. Court of Appeals

- Harris v. Green Tree Financial Corp., 183 F.3d 173 (3rd Cir. 1999), where the Third Circuit upheld the validity of a residential mortgage lender's self-administered arbitration clause program despite the exclusion of collection proceedings and foreclosures from the program and the placement of the arbitration clause on the reverse side of a standard form document.

- Household Bank v. The JFS Group, et al., 320 F.3d 1249 (11th Cir. Feb. 7, 2003). We represented Household in this declaratory judgment action against 672 Alabama RAL borrowers who had opted-out of a class action settlement. The Complaint sought a declaratory judgment that the arbitration clauses in the borrowers' contracts were enforceable. The Court of Appeals held that federal subject matter jurisdiction existed over the case, because at the time the Complaint was filed the borrowers possessed potential federal claims against Household.

- Baron v. Best Buy Co., Inc., and Beneficial National Bank USA, 260 F.3d 625, No. 99-14028 (11th Cir. July 9, 2001), where the Eleventh Circuit reversed the District Court's order denying the defendants' motion to compel arbitration and held that the District Court improperly found that the defendants failed to demonstrate that the National Arbitration Forum was an acceptable forum. The Eleventh Circuit further held that nothing in TILA makes an arbitration clause unenforceable, even if class actions are not maintainable under the clause. Finally, the Court held that the defendants' concession that, under ordinary principles of contract interpretation, the arbitration clause must be read to permit the award of attorneys fees to a prevailing consumer under TILA should be honored, notwithstanding language in the clause which provided that each party would bear his or its own attorneys fees.

- Large v. Conseco Finance Servicing Corp., 292 F.3d 49 (1st Cir. 2002), where the First Circuit affirmed a District Court order compelling arbitration of a TILA and HOEPA claim after rejecting the plaintiffs' argument that their notice of rescission under TILA invalidated all provisions of the mortgage contract, including the arbitration clause. The court ruled that the validity of the rescission notice was for the arbitrator, and not the court, to decide. The court also rejected the plaintiffs' discovery request regarding costs of arbitration since Conseco had agreed to pay those costs.

- Cappalli v. National Bank of the Great Lakes, 281 F.3d 219, No. 00-2741 (3d Cir. 2001), where the Court affirmed the trial court's order No. 99-CV-6214 (E.D. Pa. Aug. 22, 2000), compelling arbitration of claims against Saks' credit card bank which were brought under Sections 85-86 of the National Bank Act.

- Providian Fin. Corp. v. Coleman, No. 02-60943 (5th Cir. May 21, 2003) (per curiam), where Providian brought a declaratory judgment action in federal district court seeking to compel arbitration of anticipated claims by cardholders who had previously opted out of a class action against Providian and were threatening to commence new actions, the district court abstained and dismissed Providian's action, and the Fifth Circuit reversed, holding that the district court should not have abstained given the presence of important federal law issues arising under the Federal Arbitration Act.

- Jenkins v. First American Cash Advance of Georgia, Inc., 400 F.3d 868 (11th Cir. 2005), cert. denied, 126 S. Ct. 1457 (2006) where the court reversed the decision of the district court, which had denied the defendants' motion to compel arbitration on the grounds that the arbitration agreement was unconscionable under Georgia law because it contained an express class action waiver and a clause allowing the parties to assert claims in a small claims court without them being subject to arbitration.

- Discover Bank v. Vaden, 396 F.3d 366 (4th Cir. 2005). We represented Discover in this action brought under section 4 of the Federal Arbitration Act. In the District Court, Discover filed a petition to compel the individual arbitration of claims brought against it in a state court class action counterclaim. Subject matter jurisdiction was premised upon federal question jurisdiction because the underlying state law claims sought to be arbitrated were completely preempted by the Federal Deposit Insurance Act. The District Court granted Discover's petition to compel arbitration without considering subject matter jurisdiction which had not been challenged by the defendant. On appeal, the defendant challenged subject matter jurisdiction relying upon a line of cases emanating from the Second Circuit. These decisions from the Second, Sixth and Seventh Circuits hold that because federal question jurisdiction must be determined from the face of the complaint, a section 4 petition can never be predicated upon federal question jurisdiction. The Fourth Circuit, which did not reach the merits of the appeal, rejected the defendant's argument and refused to follow the Second, Sixth and Seventh Circuits. The Fourth Circuit concluded that the plain language of section 4 "directs courts to look through the arbitration agreement so as to assess questions of subject matter jurisdiction." Therefore, "a district court has subject matter jurisdiction of a case when the underlying dispute between the parties raises a federal question." The Fourth Circuit remanded for further consideration of the merits. The District Court determined that it had

subject matter jurisdiction and again compelled arbitration. 409 F. Supp. 2d 632 (D. Md. 2006)

- Delta Funding Corp. v. Harris, __ F.3d ___, 2006 WL 2806870 (3d Cir. Oct. 3, 2006) After obtaining an answer to the question that the Third Circuit certified to the New Jersey Supreme Court (which concluded that Delta Funding's carve-out for foreclosures, arbitration cost provision, the limited discovery and confidentiality in arbitration and class action waiver were not unconscionable under New Jersey law), the Third Circuit affirmed the order of the District Court compelling arbitration.

- Discover Bank v. Vaden, 489 F.3d 594 (4th Cir. 2007) (reaffirming subject matter jurisdiction to hear Section 4 petition and affirming district court's ruling that cardholder received arbitration agreement and agreed to arbitrate her disputes). Although the U.S. Supreme Court reversed, 120 S. Ct. 1262 (2009) because the federal claim did not appear in the complaint in state court, the Supreme Court agreed with Discover Bank's position that a court should look through the Section 4 petition pertaining to the underlying dispute to determine whether a federal question exists.

U.S. District Courts

- Shubert v. Wells Fargo Auto Finance, Inc., Civil No. 08-3754 (NLH), 2008 WL 5451021 D. N.J. Dec. 31, 2008 (Court compelled individual arbitration of $578.79 amount owed for excess wear and tear on an auto lease after holding that the class action waiver is valid; court holds that under the Third Circuit's opinion in Gay v. CreditInform, 511 F.3d 369 (2007), the FAA preempts the New Jersey Supreme Court's opinion in Muhammad v. County Bank of Rehoboth Beach, Del., 189 N.J. 1 (2006).

- Discover Bank v. Vaden, 409 F. Supp. 2d 632 (D. Md. 2006). Upon remand from the Fourth Circuit, the Court determined that Section 27 of the Federal Deposit Insurance Act completely preempted the cardholders' counterclaims which alleged that the Bank charged late fees and interest rates not permitted by Maryland law. The Court also concluded that the cardholder became subject to the arbitration clause that the Bank added to the cardholder agreement, at least as of the time that she used her upgraded credit card.

- Forness v. Cross Country Bank, 2006 U.S. Dist. LEXIS 3423 (S.D. Ill. Jan. 13, 2006). The Court denied the motion of the plaintiff to remand the case to state court based on its holding that Section 27 of the Federal Deposit Insurance Act completely preempts the state law claim that the late fees charged were unconscionable.

- Forness v. Cross Country Bank, 2006 U.S. Dist. LEXIS 11906 (S.D. Ill. March 20, 2006). The Court compelled arbitration after upholding the validity of the class action waiver based on the Delaware choice-of-law clause in the cardholder agreement. The court also determined that the waiver is valid under Illinois law.

- Discover Bank v. Cook, No. 2:05-cv-19-F, 2005 WL 1514034 (M.D. Ala. June 27, 2005) (where the Court enforced Discover's class action waiver after holding that it was for the court, and not the arbitrator, to decide this issue.

- Shales v. Discover Card Services, Inc., Civil Action Nos. 02-80, 02-801, 02-802, 2002 WL 2022596 (E.D. La. Aug. 30, 2002), where the Court granted Discover's motion to compel arbitration holding that (1) the class action waiver language is fully enforceable; (2) the carve-out for cases brought in small claims court does not preclude a motion to compel arbitration after the case is removed to federal court; and (3) Discover had not waived its right to seek arbitration by answering the complaints and not moving immediately to compel arbitration.

- Arriaga v. Cross Country Bank, 163 F.Supp.2d 1189 (S.D. Calif. July 5, 2001), where the court compelled arbitration of the claims of the named-plaintiff in a class action lawsuit filed against our client, Cross Country Bank, alleging violations of TILA, the California Consumer Legal Remedies Act, California Civil Code Section 1750, Section 17200 of the California Business & Professions Code and California common law. In reaching its conclusion, the Court rejected the plaintiff's arguments that (1) the arbitration clause should not apply to allegations of wrongdoing which allegedly occurred prior to the plaintiff becoming a cardholder; (2) its fraudulent inducement claim was for the Court and not the arbitrator even though the plaintiff had argued that the use of arbitration was part of the fraudulent inducement; (3) the clause was procedurally unconscionable because it was offered on a "take it or leave it" basis, the arbitration clause was not mentioned in the credit card application and was hidden in the fine print of the cardholder agreement, and the NAF Rules were not provided to cardholders at the time they received their cardholder agreements; (4) the arbitration clause was substantively unconscionable because it denies the plaintiff the ability to pursue class actions and vindicate small claims; and (5) the arbitration clause may not, in any event, be enforced with respect to the claims seeking restitution and a public injunction under Section 17200. With respect to the latter point, the Court refused to follow the California Supreme Court's recent opinion in Broughton v. Cigna HealthPlans which held that a claim seeking a public injunction under the California Consumer Legal Remedies Act may not be sent to arbitration and several California Court of Appeal's opinions reaching the same conclusion with respect to Section 17200 and a very recent Federal Court opinion in the C.D. of Calif. (Gray v. Conseco) which followed these erroneously decided California appellate court opinions. The Court also entered a stay which makes the case presently non-appealable under the FAA.

- Perrone v. Household Bank (SB), N.A., No. L20010020 (D. Mass. June 26, 2001), where the court ordered the named-plaintiff to arbitration and dismissed the class action lawsuit.

- Household Bank v. Allen, 2001 U.S. Dist. LEXIS 8796 (S.D. Miss. May 25, 2001), affirmed 66 Fed. Appx. 524, 2003 U.S. App. LEXIS 8923 (5th Cir. April 10, 2003) where we represented Household Bank in this federal court declaratory judgment action against 2,100 Mississippi residents who opted-out of a class action settlement in Chicago involving tax refund anticipation loans ("RALs"). Despite the fact that they had each signed agreements requiring arbitration of their disputes with Household, they opted-out of the class action settlement for the purpose of filing lawsuits against Household. Before they did so, we filed a federal court declaratory judgment action against all of them en masse seeking a declaration that any claims they had were subject to arbitration. The defendants filed numerous motions to dismiss, which were denied. The Court held that there was federal question jurisdiction, because earlier RAL cases against Household had been brought under federal statutes. The

Court also held that there was an "actual controversy" between the parties under the Declaratory Judgment Act. In addition, the Court ruled that the joinder of all 2,100 defendants in the case was permissible under Rule 20 of the Federal Rules of Civil Procedure.

- Household Bank, f.s.b. v. Allen, No. 4:00CV-142LN (S.D. Miss. Jan. 28, 2002), where the Court granted summary judgment in favor of Household with respect to the enforceability of its arbitration clause in the borrowers' tax refund anticipation loan agreements.

- Household Bank v. JFS Group, et al., No. 01-CV-1405 (M.D. Ala. Oct 14, 2004), where the court granted summary judgment in favor of Household with respect to the enforceability of its arbitration clause in the tax refund anticipation loan agreements in this declaratory judgment action brought against 672 Alabama RAL borrowers.

- Dougherty v. FleetBoston Financial Corporation, No. 8:01-CV-450-T-30MSS (M.D. Fla. June 26, 2001), where the court dismissed with prejudice a class action complaint challenging Fleet's implementation of its arbitration clause through a change-in-terms notice sent to its credit cardholders.

- Green Tree Consumer Discount Co. v. Jarvis, No. 01-2479 (E.D. Pa.), where the defendant instituted a putative class action before both the Pennsylvania Human Relations Commission ("PHRC") and the United States Department of Housing and Urban Development ("HUD") contending that she and the members of the putative class were victims of "housing discrimination" with respect to the loans they obtained from Green Tree. The defendant's note, however, specifically required her to arbitrate "[a]ll disputes, claims or controversies arising from or relating to this Agreement or the relationships which result from this Agreement." On May 18, 2001, Green Tree filed suit against defendant in the United States District Court for the Eastern District of Pennsylvania under Section 4 of the Federal Arbitration Act. Green Tree sought an order compelling arbitration and enjoining defendant from prosecuting her claims in any other forum including HUD and the PHRC. On June 4, 2001, the Court granted Green Tree's petition to compel arbitration and so enjoined defendant.

- Turpin v. Cross Country Bank, Case No. 00-2089-L (W.D. Ok. 2001), where the court granted motion to compel arbitration of the named-plaintiff's claims, thus eliminating the class action.

- Cutshall v. Cross Country Bank, et al., Case No. 00-8670-CV-RYSKAMP (S.D. Fla. 2001), where the court granted motion to compel arbitration of the named plaintiff's claims, thus eliminating the class action.

- Turner v. Chevy Chase Bank, et al., Civil Action No. 00-3260 (D.N.J. 2001), where the court granted motion to compel arbitration of a consumer claim against a mortgage lender.

- Kennedy v. Conseco, No. 00-CV-04399 (N.D. Ill. Jan. 11, 2001), where the court held that evidence submitted by a credit card issuer and the presumption of receipt were sufficient to establish that a change in terms notice, adding an arbitration clause, was delivered to the

consumer, notwithstanding the consumer's claimed inability to recall having received any such notice. In an earlier opinion in the same case, 2000 U.S. Dist. LEXIS 17704 (Nov. 29, 2000), the Court rejected all of the plaintiff's legal defenses to arbitration, including arguments that the clause was unenforceable because: (1) arbitration would interfere with her statutory rights under TILA; (2) arbitration was too expensive; (3) arbitration was inconsistent with a class action proceeding; and (4) the change in terms notice did not comply with TILA.

- Waldron v. Greenwood Trust Company, No. CIV-99-1378-L (W.D. Okla. Aug. 31, 2000), where the court dismissed a class action challenging Discover Card's implementation of an arbitration program through a change-in-terms notice.

- Wirdzek v. Monetary Management of California, Inc., No. CV-F-99-5415, 1999 U.S. Dist. LEXIS 8455 (E.D. Cal. May 25, 1999), where the court applied an arbitration clause retroactively to loan agreements that did not contain an arbitration clause and upheld the validity of the clause even though the administrative costs of arbitration might exceed the amount of the consumer's claim.

- Zawikowski v. Beneficial National Bank, No. 98 C 2178, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999), where the court applied an arbitration clause retroactively to disputes arising under loan agreements that did not contain an arbitration clause and compelled arbitration of the named-plaintiff's TILA claim, notwithstanding that it would disable the plaintiff from obtaining classwide relief.

- Pick v. Discover Fin. Servs., Inc., 2001 U.S. Dist. LEXIS 15777 (D.Del. Sept. 28, 2001), where the court granted Discover's motion to compel arbitration.

- Wolfe v. Conseco Finance Servicing Corp., C.A. No. 01-290ML (D.R.I. May 9, 2002); Swider v. Conseco Finance Servicing Corp., C.A. No. 01-275ML (D.R.I. May 9, 2002), where the District Court compelled arbitration of TILA and HOEPA claims based on its earlier ruling in Large v. Conseco Finance Servicing Corp., 167 F.Supp.2d 203 (D.R.I. 2001), aff'd, 292 F.3d 49 (1st Cir. 2002). In both Wolfe and Swider, in which the plaintiffs made arguments identical to the arguments in Large, the Court held that plaintiffs' notice of rescission under TILA did not invalidate the arbitration provision but that the validity of the rescission notice was for the arbitrator, and not the court, to decide. The Court also held that plaintiffs were not entitled to discovery regarding the costs of arbitration since Conseco had agreed to pay these costs. Finally, the Court rejected plaintiff's claim that the arbitration forum would be biased as premature, since the arbitration clause did not specify any particular forum.

- Hogan v. Conseco Finance Servicing Corp., C.A. No. 00-483-T (D.R.I. March 15, 2002), where the District Court compelled arbitration of TILA claims and rejected plaintiffs' argument that the Note containing arbitration agreement was the product of undue influence or fraud as well as the plaintiffs' effort to avoid arbitration based on their notice of rescission under TILA. The Court held that plaintiffs' claims of undue influence and fraud, as well as the issue of validity of the rescission notice, were for the arbitrator, and not the Court, to decide. The Court also rejected plaintiffs' argument that arbitration would conflict with TILA

by precluding classwide relief, noting that numerous decisions have held that TILA claims are arbitrable and that TILA itself does not specifically create a right to bring a class action.

- Dorsey v. Cross Country Bank, Civil No. WMN-02-557 (D. Md. April 5, 2002), where the court granted the Bank's motion to compel arbitration and stayed all proceedings pending completion of arbitration in a debt collection harassment case.

- Dorsey v. Wells Fargo, Civil Action No. 01-CV-5572 (E.D. Pa. April 29, 2002), where the court granted our motion to compel arbitration and stay proceedings pending completion of arbitration.

- Gipson v. Cross-Country Bank, Civil Action No. 03-A-269-N (M.D. Ala. Nov. 26, 2003), where the court compelled arbitration of plaintiff's individual claims, dismissed plaintiff's class action allegations arising under the Fair Credit Billing Act and rejected plaintiff's contention that the arbitration clause was unconscionable under Alabama law.

- Gipson v. Cross Country Bank, Civil Action No. 2:03cv269-A, 2005 U.S. Dist. LEXIS 1400 (M.D. Ala. 01/28/05), where the court held that the court — not an arbitrator — has the authority to decide the "gateway" issue of whether an express class action waiver in a consumer arbitration agreement is valid and enforceable and that a court is authorized by Section 4 of the Federal Arbitration Act to intervene in an arbitration for the purpose of enforcing the express terms of the parties' arbitration agreement.

- Schuetz v. SLM Financial Corp., No. 1:03-CV-1842 (N.D. Ga. Sept. 26, 2003), where the court compelled arbitration of plaintiff's individual Truth in Lending Act claims and enforced no-class action clause in arbitration agreement.

- Berkery v. Cross Country Bank, 256 F. Supp.2d 359 (E.D. Pa. 2003). The Court compelled arbitration of the plaintiff's claims brought under the federal Fair Credit Reporting Act and claims for libel, breach of contract and intentional infliction of emotional distress. The Court rejected the plaintiff's argument that the arbitration clause did not apply because the conduct on which his claims were premised occurred after the termination of his account.

- In re Currency Conversion Fee Antitrust Litigation (Ross v. Bank of America), No. 05 Civ. 7116, 2006 WL 2685082 (S.D. N.Y. Sept. 20, 2006), appeal pending, in which the federal district dismissed a class action alleging that general purpose credit card issuers (including our client Washington Mutual Bank) conspired to include mandatory arbitration clauses in cardholder agreements in violation of the Sherman Act. The court held that plaintiffs lacked Article III standing to bring this action because the challenged arbitration clauses were not invoked against them when they commenced this litigation, and thus they failed to allege any injury-in-fact as a result of the alleged conspiracy.

- Hughes v. Delta Funding Corp., Civil No. 05-0395 (Bankr. E.D. Pa. Nov. 23, 2005). After we prevailed on plaintiffs' TILA claims in arbitration, the plaintiffs brought nearly identical claims in Pennsylvania state court and in Bankruptcy Court. Both the state court and the Bankruptcy Court dismissed those claims on the basis of the arbitration decision.

- Kaneff v. Delaware Title Loans, Inc., Civil Action No. 06-4703 (E.D. Pa. March 6, 2007) (Court compelled arbitration of $845.64 claim of named-plaintiff in a putative class action after holding that the class action waiver was not unconscionable under Pennsylvania law; the Court distinguished Thibodeau v. Comcast Corp., 912 A.2d 874, on the basis that the claim in that case – $9.60 per month – was nominal compared to the claim of $845.64 in the Kaneff case). This case is on appeal to the Third Circuit.

- Herrington v. Wells Fargo Bank, N.A., 374 B.R. 133 (Bankr. E.D. Pa. 2007) (compelling arbitration and rejecting various arguments as to unconscionability including argument that arbitration agreement unconscionably one-sided).

- Pivoris v. TCF Fin. Corp., No. 07 C 2673, 2007 U.S. Dist. LEXIS 90562, at *12 (N.D. Ill. Dec. 7, 2007) (arbitration agreement with class action waiver not procedurally unconscionable where "[p]laintiff had the absolute right to reject the arbitration provision without affecting her account contract or the status of her account").

- Martin v. Delaware Title Loans, Inc., No. 08-3322, 2008 WL 444302 (E.D. Pa. Oct. 1, 2008) (finding plaintiff could not establish procedural unconscionability under PA law in light of 15 day opt-out right).

- Cronin v. Citifinancial Services, Inc., 2008 WL 2944869 (E.D. Pa 2008) where court granted motion to compel individual arbitration and stayed class action. This case is on appeal to Third Circuit.

- In re Herrington, 374 B.R. 133 (Bankr. E.D. PA. 2007) where court compelled arbitration of federal and state law claims against mortgage lender.

State Appellate Courts

- Discover Bank v. The Superior Court of Los Angeles County, No. B161305 (Calif. Ct. App., Second Appellate District, Division One Dec. 7, 2005) where the Court upheld the validity of the class action waiver in Discover's cardholder agreement after enforcing its Delaware choice-of-law provision.

- Rosen v. Saks Inc., 2003 Ill. App. LEXIS 1252 (Ct. App., 1st Dist. Oct. 8, 2003), review denied, 2004 Ill. LEXIS 142 (Ill. Jan. 28, 2004), where the plaintiff brought a class action lawsuit against Saks contending that the company violated the Illinois Consumer Fraud Act by charging tax on clothing alterations, Saks moved to compel arbitration pursuant to an arbitration agreement that contained a "no class action" clause, the trial court denied the motion on the ground that the no class action clause was unconscionable under Illinois law and against Illinois public policy, and the Court of Appeals reversed, holding that such a clause is neither unconscionable nor against public policy, even though plaintiff's claims were small.

- Providian National Bank v. Screws, 2003 Ala. LEXIS 298 (Ala. Sup. Ct. Oct. 3, 2003), where the Alabama Supreme Court held that Providian's arbitration provision was not unconscionable because, inter alia, cardholders were given the right to reject it without

affecting the status of their accounts. Plaintiffs, holders of a credit card issued by Providian, had sued Providian for allegedly violating the credit card agreement. Before filing their action, plaintiffs had been putative members of a national class action that alleged similar claims against Providian, but had opted out of the national class action to pursue their separate suit against Providian. Before plaintiffs had opted out of the national class, Providian had notified its cardholders, including plaintiffs, that it was amending its credit card agreement to add an arbitration provision. Cardholders were given an unfettered right to reject the arbitration amendment by sending a rejection letter to Providian. None of the plaintiffs had sent such a rejection letter. Providian had moved to compel arbitration of plaintiffs' claims. The trial court had denied the motion.

- Tsadilas v. Providian National Bank, No. 4948N, 2004 WL 2903518 (N.Y. App. Div. Dec. 16, 2004), where the court affirmed the lower court's order compelling arbitration of plaintiff's individual claims arising under New York law and rejected the plaintiff's contention that the no-class action clause in the arbitration agreement was unconscionable and that the arbitration provision could not be added to the cardholder agreement through a change-in-terms notice. The New York Court of Appeals denied review on June 19, 2005.

- Delta Funding Corp. v. Harris, __N.J. __, 2006 WL 2277984 (Aug. 9, 2006). In this case, we represented Delta Funding both before the New Jersey Supreme Court and the Third Circuit which certified to the New Jersey Supreme Court the question of whether the parties' arbitration agreement was enforceable. The New Jersey Supreme Court's decision was handed down the same day as its decision in Muhammad v. County Bank of Rehoboth Beach, __ N.J. __, 2006 WL 2273448 (Aug. 9, 2006). Both cases involved the validity of class action waivers although the Harris matter was on a certified question from the Third Circuit. While the New Jersey Supreme Court found that class action waivers are not unconscionable per se, it found the class action waiver in Muhammad to be unconscionable. However, the Court found the class action waiver in Harris was not unconscionable stating that "Harris has adequate incentive to bring her claim as an individual action." Harris, unlike Muhammad, also involved a number of additional challenges to the arbitration agreement each one of which the Supreme Court rejected. Specifically, following the majority of decisions from other jurisdictions, the Supreme Court rejected Harris's arguments that the arbitration agreement was unconscionable because it exempted foreclosure actions from arbitration. The Court concluded that Harris's other attacks on arbitration, including the limited discovery afforded in arbitration, were nothing more than "generalized attack[s] on arbitration as a method of dispute resolution" that had to be rejected. Finally, the Supreme Court held that the interpretation of the cost provisions of the arbitration agreement are for the arbitrator and even if the arbitrator was to interpret them in an unconscionable manner, they would be severable so that the arbitration agreement remained enforceable. The Third Circuit subsequently applied the holding of the Supreme Court of New Jersey and enforced the parties' arbitration agreement. Delta Funding Corp. v. Harris, __ F.3d __, 2006 WL 2806870 (3d Cir. Oct. 3, 2006).

- Webb v. ALC of West Cleveland, No. 90843, 2008 WL 4358554 (Ohio App. 2008) where the Ohio Court of Appeals held that the arbitration agreement contained in an auto finance contract was not unconscionable and was enforceable under the Federal Arbitration Act. In reaching this conclusion, the Court determined that the arbitration provision was not

procedurally unconscionable because the buyer was given a right to opt out of the arbitration provision.

State Trial Courts

- VanKoppen v. Chevy Chase Bank, F.S.B., Docket No. Mon-L-1672-00 (N.J. Super. Ct., Monmouth County Aug. 7, 2000), where the court compelled arbitration of a claim related to home improvement financing.

- Montano v. Chase Manhattan Mortgage Corporation, Docket No. L-7805-99 (Super. Ct. of NJ Law Div., Camden Cty. May 26, 2000), where the court compelled arbitration of New Jersey Consumer Fraud Act and common law claims relating to defendant's bi-weekly mortgage payment program and rejected a claim of unconscionability based on: (1) the alleged high AAA administrative and arbitrator fees; (2) a provision requiring the loser to pay the other party's counsel fees; and (3) the fact that compelling arbitration of the named-plaintiff's claim would preclude the plaintiff from obtaining classwide relief. Upon remand to determine the impact of an intervening New Jersey Supreme Court decision, Garfinkel v. Morristown Obstetrics & Gynecology Associates, 168 N.J. 124 (2002) (setting forth certain requirements for arbitration agreements under the New Jersey Law Against Discrimination), the Law Division again dismissed the complaint on the basis of the arbitration provision, finding that the arbitration provision was enforceable under the Federal Arbitration Act, and that the Supreme Court's decision regarding arbitration provisions under the Law Against Discrimination did not apply to an arbitration provision under the Consumer Fraud Act.

- Christine Williams v. Direct Cable TV, et al., No. CV-97-009, 1997 WL 579156 (Henry Co. Ala. 1997) and Gloria Perry v. Beneficial National Bank USA, et al., No. CV-97-218, 1998 WL 279174 (Macon Co. Ala. May 18, 1998), where the state courts upheld the right of a bank to add an arbitration clause to its cardholder agreements through a "change-in-terms" procedure and to compel arbitration of consumer fraud claims (including class action claims).

- Citibank (South Dakota), N.A. and Citicorp Credit Services, Inc. (USA) v. Consumer Arbitration Forum, Case No. 02-6495, 191st Judicial District, Dallas County, Texas (July 24, 2002) where the court temporarily enjoined the Consumer Arbitration Forum from (i) conducting any arbitration proceedings involving Citibank, (ii) issuing any "award" involving Citibank, (iii) issuing, publishing and/or otherwise disseminating any forms to modify agreements to include arbitration provisions, any arbitration demands, arbitration "awards" and any instructions regarding them, and (iv) accepting money from Citibank's cardholders for such documents, instructions and "awards."

- Wilson v. Green Tree Financial Corporation (July 19, 2001), where the arbitrator denied the claimant's class certification motion, holding that in the absence of express language contemplating class-wide arbitration contained in the parties' arbitration clause, class-wide arbitration under the Federal Arbitration Act may not be ordered.

- In re: PNC Vehicle Leasing LLC, No. 2004-00362-29-1 (Court of Common Pleas of Bucks County, PA Oct. 29, 2004), where the court compelled arbitration of plaintiff's individual claims relating to the early termination fees on consumer leases (common law and state

unfair and deceptive acts and practices statutes) and upheld the validity of the no-class action provision in the arbitration clause contained in PNC's lease agreement.

- Wells Fargo Bank, N.A. v. Goodley, Civil No. 001520 (Pa. Phila. C.P. May 5, 2006), where the court compelled arbitration of a counterclaim asserted in response to a foreclosure action.

- Cronin v. Citifinancial, Inc., 2008 WL 2944869 (E.D. Pa. 2008) ("Cronin I") and 2009 WL 1033613 (E.D. Pa. 2009) ("Cronin II"). In Cronin I, the Court compelled the individual arbitration of this putative class action. In doing so, the Court rejected the plaintiff's arguments as to the alleged bias of the arbitration administrator and as to the alleged unconscionability of the arbitration agreement. With respect to the plaintiff's unconscionability argument, the Court concluded that the plaintiff had established neither procedural nor substantive unconscionability. In Cronin II, the Court confirmed the award of the arbitrator in the individual arbitration previously ordered by the Court. The arbitrator ruled in favor of Citifinancial both on Cronin's claims and on CitiFinancial's counterclaim.

- Webb v. Credit Acceptance Corp., 2008 WL 4358554 (Ohio App. 2008). In Webb, the Court upheld the validity of Credit Acceptance's arbitration agreement. The Court of Appeals concluded that the plaintiff's claims of fraudulent inducement were for the arbitrator and further concluded that the plaintiff could not establish procedural unconscionability as she had had the right to opt out of the arbitration agreement.

- Credit Acceptance Corp. v. Davisson, No. 08-107 (N.D. Ohio 2009). In Davisson, the Court granted Credit Acceptance's petition brought under section 4 of the Federal Arbitration Act and compelled the individual arbitration of the underlying putative class action which remained pending in state court. As an initial matter, the Court concluded that the Supreme Court's recent decision in Vaden v. Discover Bank, 129 S. Ct. 1262 (2009) did not deprive it of subject matter jurisdiction even though the state court class action was brought as a counterclaim. The Court reached this conclusion primarily because the action before it was predicated upon diversity jurisdiction and Vaden has no application outside of federal question jurisdiction. On the merits, the Court rejected a plethora of public policy and unconscionability arguments concluding, among other things, that the class action waiver was enforceable under Ohio law.

- Feeney v. Dell Inc., 454 Mass. 192, 908 N.E.2d 753 (Mass. 2009) (language in arbitration provision saying that the arbitration "will be limited solely to the dispute or controversy between customer and Dell" is contrary to fundamental public policy of state favoring class actions under G.L.C. 93A and refused to apply Texas choice-of-law clause; complaint, however, dismissed for failure to state a claim under C. 93A)