"CORPORATION, n. An ingenious device for obtaining individual profit without individual responsibility."¹

"ACCOUNTABILITY, n. The mother of caution."²

INTRODUCTION

Should a cable television company be accountable to millions of customers for automatically charging unexplained fees for unnecessary services? Should an employer be liable for discriminating against an employee on the basis of her national origin? Should a nursing home corporation be responsible when an employee's negligence injures an elderly tenant? Should a fast food corporation be required to answer to hundreds of defrauded investors who had dreams of setting up their own restaurant franchises? The resounding answer to these rhetorical questions should be "yes." However, the law has elevated a mythical notion of contractual autonomy at the expense of corporate social accountability. With the law of corporations and of civil procedure both deferring to contract law, the arbitration trend has invited corporations to contract around process and, thus, accountability.

In the field of corporate law, the "nexus of contract" model is the dominant theoretical explanation of the law concerning the management of corporations.³

¹ AMBROSE BIERCE, THE DEVIL'S DICTIONARY 28 (Hill & Wang 1957) (1911), available at http://www.alcyone.com/max/lit/devils. Reference to these definitions is not intended as an endorsement of certain other definitions in The Devil's Dictionary that, written at the turn of the century, are racist, sexist and, in certain cases, just plain offensive.

² Id. at 5.

³ See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 199–200 (2002) ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts..."
Under this view, corporations are nothing more than a network of contracts between voluntary, private actors. Moreover, under the traditional, theoretical description of corporate law management, corporate managers are only accountable to the firm’s shareholders to maximize the return on their investments. Accordingly, corporations (really, their managers) owe no general responsibility to other constituencies affected by the firm’s activities. These constituencies, often referred to by corporate law theorists as “stakeholders,” include the firm’s employees, consumers, suppliers, and communities generally. Proponents of stakeholder theory argue that corporate management should have at least some generalized accountability to constituencies other than shareholders. However, proponents of the prevailing, traditional view of shareholder wealth maximization and the contractarian theorists of the firm, argue that, absent legislation, a corporation’s general obligations to stakeholders are defined only by its contracts with these constituencies.

Further, in the field of civil procedure, arbitration has taken a strong foothold. Since Congress enacted the Federal Arbitration Act in 1925, and the Supreme Court’s subsequent, repeated pronouncement of a “liberal federal policy favoring arbitration agreements,” corporations have used arbitration with increasing frequency. Under the FAA, arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Here, again, a body of law defers to contract. Indeed, Professor Judith Resnick notes that the trend in theory.);

6. The term “corporation” throughout this Article may, at times, loosely refer to any form of incorporated or unincorporated business entity, such as a limited liability company or partnership.
7. See Radin, supra note 5, at 375–77.
8. See id. at 381–84 (discussing the stakeholder view of a corporation).
9. Id.
10. See GREENFIELD, supra note 3, at 16–18. This model is a normative, theoretical construct; however, it has significantly affected the law’s evolution.
PRE-DISPUTE LIMITS ON PROCESS

civil procedure has been "the wholesale application of extant principles of contract law." It has even been suggested that pre-dispute arbitration clauses have been elevated to a status of "super contract" because of their "near-automatic enforcement by means of specific performance."

With procedural and corporate law so readily deferring to contract, it seems appropriate to consider what these contracts actually look like. This examination paints a troubling picture—one of corporations using the pre-dispute arbitration regime to contract around process in an attempt to insulate themselves from any potential responsibility they might otherwise take on by virtue of their contractual relationships with stakeholder constituencies. As an outgrowth of the trend toward arbitration, corporations have increasingly used standardized forms with provisions that expressly limit significant procedural rights of the other contracting parties—often, for example, franchisees, borrowers, consumers, employees, and insureds. This Article will focus on the express, pre-dispute procedural limitations of "collective action waivers."

15. See generally Judith Resnik, Procedure as Contract, 80 NOTRE DAME L. REV. 593, 598–99 (2005) (describing how changes in adjudicatory practice are shifting the focus of civil procedure from "due process procedure" to "contract procedure").


17. In this Article, "stakeholder" refers generally to those individuals or groups affected by the operations of a corporation, including, a corporation's employees, consumers, suppliers, franchisees, insureds, debtors, creditors, and communities generally. See Radin, supra note 5, at 381–88. This Article examines corporations' arbitration agreements with these constituencies. In the arbitration context, other scholars have used the term "consumer" liberally in much the same way. See Richard E. Speidel, Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?, 40 ARIZ. L. REV. 1069, 1072–74 (1998) (describing the "consumerization" of arbitration). A stakeholder could also be another business entity, or even a competitor. However, recent empirical studies show that corporations use mandatory arbitration provisions in less than 10% of their material nonconsumer and nonemployment contracts, compared to the use of mandatory arbitration in over 75% of their consumer contracts. Theodore Eisenberg et al., Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts 15 (Cornell Law School Legal Studies Research Paper Series), available at http://ssrn.com/abstract=1076968 (last visited Apr. 19, 2008).

18. The word "waiver" in this context is a misnomer. A waiver is a "voluntary [and] knowing relinquishment of a right." Green v. United States, 355 U.S. 184, 191 (1957) (""Waiver' is a vague term used for a great variety of purposes . . . . In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right."). Because the law has imported contractual standards of assent to arbitration clauses, a voluntary and knowing relinquishment is not required but, rather, some action (or inaction) that can be interpreted objectively as a manifestation of assent. See Taylor & Cliffe, supra note 16, at 1104 (discussing the term "waiver" as a misnomer in this context); discussion infra Part III.

19. The term is interchangeably described in case law and scholarship as "no class action waivers," "class action waivers," "collective action waivers," and "class action preclusion clauses." This Article borrows the term "collective action waiver" from Professor Myriam
discovery limitations, and shortened statutes of limitation. These express, pre-dispute limitations\(^{20}\) may, in effect, work to create a barrier to the enforcement of substantive laws concerning, for instance, consumer and employee protection, civil rights, and common law negligence.\(^{21}\) Thus, these contractual limitations have been aptly analogized to exculpatory clauses.\(^{22}\) Further, to the extent that pre-dispute limitations are inserted in arbitration clauses that are used by various industries in standard form agreements, they have effectively become the legislation governing contractual relationships of corporations. These pre-dispute procedural limitations have, in essence, provided an opportunity for corporations to flout legislative and social policy and "deregulate themselves"\(^{23}\) through contract.

Because the FAA defers to existing contract defenses, the enforceability of arbitration terms has largely been determined under the doctrine of

Gilles because, as she explains, these clauses waive any right to bring a class action or class arbitration or otherwise proceed collectively. Myriam Gilles, \textit{Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action}, 104 Mich. L. Rev. 373, 376 n.15 (2005).

20. This Article addresses the contractual terms that determine which characteristics of civil adjudication will or will not comprise part of the arbitration proceeding. Forum selection and choice of law clauses are generally beyond the scope of this discussion, but they are certainly at its periphery. See infra notes 267, 281–87 and accompanying text. These clauses are as problematic as pre-dispute arbitration agreements and, likewise, can have the effect of denying a party's vindication of substantive rights. See generally Linda S. Mullenix, \textit{Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction}, 27 Tex. Int'l L. J. 323, 325–27 (1992) (arguing that forum-selection clauses in consumer adhesion contracts are unconscionable); Linda S. Mullenix, \textit{Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court}, 57 Fordham L. Rev. 291, 295 (1988) (explaining how the doctrine of consensual adjudicatory procedure advances "purely prudential considerations" at the expense of "substantial litigation rights").

21. See generally Paul D. Carrington, \textit{The Dark Side of Contract Law}, 36 Trial 73, 73 (2000) ("The contemporary fashion is not to require the weaker party to surrender substantive rights, but to require him or her to surrender procedural rights needed if the substantive rights are to retain their value . . . ").


23. David S. Schwartz, \textit{Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration}, 1997 Wis. L. Rev. 33, 37 (1997) ("The enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to deregulate themselves."). Corporations seek to externalize risks and maximize profits for shareholders. Naturally, then, they readily use liability-limiting contract provisions. Therefore, a clear line should be drawn to articulate which terms in pre-dispute arbitration clauses will and will not be enforced.
unconscionability. This case-by-case treatment of problematic clauses has, as Professor Arthur Leff predicted forty years ago, "substituted a highly abstract word 'unconscionable' for the possibility of more concrete and particularized thinking about particular problems of social policy." Indeed, rather than stating a policy against such express, pre-dispute limitations, the use of the unconscionability doctrine has lead to a patchwork of irreconcilable decisions and unpredictability in contract drafting.

Many well-articulated and convincing critiques have been aimed at "mandatory" arbitration, and some equally strong counterarguments have also been made. Moreover, some scholars have criticized arbitration itself as an implicit "waiver" of procedural rights such as the right to have a dispute heard by a jury and the right to an appeal. Indeed, presently before Congress is

24. See discussion infra Part I.B.
26. See discussion infra Part III.
27. For example, compelling arguments have been made that the FAA was never intended to apply to consumer and employee contracts but, rather, was intended only to govern commercial relationships between business entities. See, e.g., Schwartz, supra note 23, at 75–81 (arguing that Congress did not intend the FAA to be given such broad interpretation by the courts). Furthermore, strong arguments have been made that the Supreme Court has misinterpreted the FAA as a statement of a liberal public policy favoring arbitration. See id. at 81–109; Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 WASH. U. L.Q. 637, 644–674 (1996). In the consumer and employment contexts, there have been numerous calls for reform. See generally, e.g., Richard M. Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform, 38 Hous. L. Rev. 1237 (2001) (focusing on the shortcomings of arbitration in consumer transactions); Senator Russell D. Feingold, Mandatory Arbitration: What Process is Due?, 39 HARV. J. ON LEGIS. 281, 281–82 (2002) (examining how "thousands of people... are being deprived of their rights to go to court by mandatory, binding arbitration clauses" within employment contracts, franchise agreements, and consumer credit agreements); Speidel, supra note 17 (discussing whether mandatory arbitration has outlived its usefulness in the areas of consumer transactions and employment contracts); Jean R. Sternlight, Mandatory Pre-Dispute Arbitration: Steps Need to be Taken to Prevent Unfairness to Employees, Consumers, Disp. Resol. Mag., Fall 1998, at 5 (observing that mandatory binding arbitration clauses "may permit a knowledgeable and powerful entity to trick or coerce individuals into effectively waiving their rights under federal or state law").
29. See Carole J. Buckner, Due Process in Class Arbitration, 58 FLA. L. REV. 185, 216
proposed legislation titled "the Arbitration Fairness Act of 2007," that would
bar pre-dispute arbitration clauses in the consumer, franchise, and employment
contexts.30 Maligned as the plaintiff bar's "pro-lawsuit legislation,"31 however,
the Arbitration Fairness Act is not predicted to pass. Consequently, across
varying industries, the pre-dispute arbitration regime endures unheedingly.
Thus, this Article sets aside the arguments aimed generally at pre-dispute
arbitration clauses and, instead, sets its sights on some of the terms that arise in
such clauses. More specifically, this Article focuses on the appended,
additional procedural limitations often contained32 within arbitration clauses.33

(2006) ("[C]ourts addressing this issue hold that, by agreeing to arbitration, parties effectively
waive the right to insist upon procedural due process and other constitutional rights that would
be required if a state actor were involved.") (citing Edward Brunet, Arbitration and
Constitutional Rights, 71 N.C.L. Rev. 81, 102 (1992) ("The orthodox view holds that parties
who consent by contract to arbitration expressly waive their constitutional rights.")); Paul H.
Dawes, Alternative Dispute Resolution, in SECURITIES LITIGATION 1999, at 599, 603 (PLI Corp.
Law & Practice Course, Handbook Series No. B0-00DM, 1999) ("The risks [of arbitration],
broadly speaking, can be grouped into three major concerns: lack of appeal rights, waiver of
other procedural and substantive rights and, ironically, a perception that like jurors, arbitrators
can be unpredictable, under-qualified and swayed by emotion."); Stephen J. Ware, Domain-
Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP, 61.
SMALL & EMERGING BUS. L. 129, 153 (2002) ("An arbitration agreement . . . is a waiver of many
of the procedural rights guaranteed in litigation."); see also Flores v. Evergreen at San Diego,
LLC, 55 Cal. Rptr. 3d 823, 832 (Cl. App. 2007) ("[A]rbitration agreements waive important
legal rights . . .").

(proposing to amend the Federal Arbitration Act to invalidate pre-dispute agreements to
arbitrate franchise, consumer and employment disputes); Arbitration Fairness Act of 2007, H.R.
3010, 110th Cong. § 3 (1st Sess. 2007) (proposing identical amendments as S. 1782).

31. Editorial, Party at Ralph's, WALL ST. J., Nov. 7, 2007, at A22; see also Joan
Claybrook, Editorial, Party at Joan's, WALL ST. J., Nov. 17, 2007, at A9 (clarifying that the
consumer group Public Citizen opposes mandatory, not voluntary, arbitration); Editorial, No
Lawyers, Please, WALL ST. J., April 5, 2008, at A8 (arguing against enactment of Arbitration
Fairness Act).

32. This Article is not based on an empirical analysis concerning the frequency with
which pre-dispute limitations are included or enforced. The plethora of cases that have arisen in
the past decade, however, suggests that the use of express pre-dispute limitations, or at least the
litigation of such clauses, is a growing trend.

33. Moreover, this discussion encapsulates procedural limitations contained outside of
arbitration clauses—though, in reality, they are overwhelmingly used in the context of
arbitration clauses. Drawing on the developments in arbitration practice, recent scholarship has
imagined a system of contractually modified litigation. See Elizabeth Thornburg, Designer
Litigation: The Case for Making Civil Procedure Negotiable, 75 GEO. WASH. L. REV. 461, 461
(arguing that customized litigation advances justice, promotes efficiency, and increases public
accessibility to civil trials to a greater degree than do current procedural rules); Henry S. Noyes,
If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in

HeinOnline -- 75 Tenn. L. Rev. 370 2007-2008
Part I of this Article provides a brief background of the rise of pre-dispute arbitration. Part II discusses the pre-dispute limitation devices of collective action waivers, discovery limitations, and shortened statutes of limitation. Part III explores some of the concerns raised by express, pre-dispute limitations on procedural rights. The use of the unconscionability doctrine to police these terms is discussed in each of the first three Parts. Finally, by analogy to the treatment of exculpatory clauses and to section 195 of the Restatement (Second) of Contracts, Part IV argues that federal legislative reform should specify that certain express limits on procedural rights contained in standardized form agreements are per se invalid. While perhaps facing an uphill political battle, the simplest way to accomplish this reform is by amending the FAA.

The ability of autonomous, private individuals and business entities to enter into contractual arrangements is a cornerstone of a stable and efficient market economy. Thus, contract law aims to foster the ability of parties to make arrangements for the future and to assess and allocate the risk of doing business. However, at the point where the exercise of private contractual self-regulation meets with abuses, the autonomy and efficiencies championed by the contractarian theorists of the corporation and the proponents of arbitration must give way to some palpable measure of public regulation.

The general policy favoring pre-dispute arbitration agreements has invited corporate abuse in the form of additional, pre-dispute limitations on the procedural rights of the stakeholder constituencies with whom they contract. A per se ban on certain pre-dispute limitations respects the idea of party autonomy to enter into arbitration agreements and, at the same time, allows a better balance of private rights, corporate social accountability, and fundamental procedural fairness.

significant advantages over arbitration: it is cheaper than arbitration; it includes a meaningful right to appellate review; it guarantees the appointment of a neutral, independent decision-maker; and it avoids problems with handling certain types of disputes... that may not be easily amenable to arbitration.”). In light of these recent articles, the position of this Article might seem to be a step backwards. However, the idea of using pre-dispute agreements to modify the Federal Rules of Civil Procedure proceeds upon a premise with which this Article disagrees: Modified procedures are valid in arbitration, so they are (or should be) valid in litigation as well.


35. See FARNSWORTH, supra note 34, § 5.1, at 313 (stating parties have freedom to contract until countervailing public interest outweighs contract enforcement).

36. Taylor & Cliffe, supra note 16, at 1087 (“[A]ny decision to enforce a [pre-litigation agreement] must balance private contractual autonomy and the attendant efficiencies of [pre-litigation agreements] against the desire to maintain an aura of fairness, which by necessity must be the hallmark of a system of public dispute resolution.”).
I. THE RISE OF PRE-DISPUTE ARBITRATION AGREEMENTS AND THE EMERGENCE OF UNCONSCIONABILITY

The history of pre-dispute arbitration is well-documented in the scholarship. At common law, a pre-dispute agreement to arbitrate was not enforceable because of concern that private contractual arrangements would be able to “oust the courts of jurisdiction conferred by law.” In 1925, as a response to this common law hostility, Congress passed the FAA, which statutorily recognized the enforcement of these agreements. Since the FAA’s enactment, the Supreme Court has consistently declared an “emphatic federal policy in favor of arbitral dispute resolution,” and arbitration is now ubiquitous across various industries and contractual relationships. The FAA applies rather broadly to any transaction involving interstate commerce and preempts any state law that would contradict a policy favoring arbitration. Section 2, the chief substantive provision of the FAA, provides:

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

Arbitration is, thus, a creature of contract, and courts have interpreted the FAA as putting arbitration agreements on “equal footing” with other contracts. Some of the perceived benefits of arbitration include its simplicity, informality and expedition relative to civil litigation. In light of these

37. See, e.g., Drahozal, supra note 28, at 700–05; Schwartz, supra note 23, at 81–109; Stempel, supra note 25, at 768–92.
39. See Schwartz, supra note 23, at 75 (“Dissatisfaction with these anti-arbitration doctrines among the business community, bench and bar led to a reform movement at the turn of the century, which in turn led to the adoption of the FAA.”).
42. See discussion infra Part II.
46. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 ("[B]y agreeing to arbitrate,
benefits, corporations often place pre-dispute agreements to arbitrate in their standardized form contracts. This has led many critics of pre-dispute arbitration agreements to describe them as "mandatory" or "compelled," because a contracting party is presented with a form agreement on a take-it-or-leave-it basis and likely does not read or consider its terms. Then, once a dispute arises, that party is compelled to arbitrate the dispute even though she would prefer to litigate in court.

Pre-dispute arbitration clauses have been used with increasing frequency in any situation where the parties’ relationship involves a contract—whether between two corporations, a corporation and a consumer, or a corporation and an employee. As explained in the following discussion, corporations have also attempted to use form arbitration clauses to exact limits on the other party’s procedural rights. Because the FAA defers to extant contract law, the policing of these terms is largely left to the unconscionability doctrine.

A. With the Rise of Arbitration, the Rise of Express Pre-Dispute Procedural Limitations

Arbitration has been described as an implicit waiver of rights. By agreeing to arbitrate, a party agrees to forego the judicial forum and, with that, the formal rules of evidence and procedure, the right to a jury trial, if applicable, and the right to take an appeal from the award. It is debatable,
however, whether a general agreement to arbitrate equates to an implicit
abdication of certain procedural mechanisms that are traits of civil adjudication.
By broadly agreeing to arbitrate, does a party implicitly waive the right to bring
a class action or class arbitration? Does that party implicitly waive the right to
take depositions? Increasingly, companies are reluctant to leave these questions
open to an arbitrator's interpretation and have instead expressly added
procedural limitations to their arbitration clauses.

After *Green Tree Financial Corp. v. Bazzle*, corporations have strong
incentive to add express procedural limitations to their arbitration clauses. In
*Bazzle*, a group of homeowners each signed mortgage contracts with the
defendant mortgage company that contained a substantially similar, general
clause agreeing to arbitrate any disputes arising out of the loan contracts. The
homeowners brought a putative class arbitration against the lender for
consumer protection violations. Although the arbitration clause was silent
concerning the homeowners' right to bring a class arbitration, the lender argued
that, by generally agreeing to arbitration, the homeowners implicitly waived the
right to seek class relief. The Supreme Court addressed the issue of *who*
should decide whether the arbitration clause permitted the homeowners to
proceed on a class basis—the arbitrator or the court? The Court held that,
when the contract contains a broad clause generally agreeing to arbitrate, the
arbitration, the parties waive their rights to factfinding by a jury of their peers . . . .
to a trial presented over by a judge who is an elected or appointed public official . . . . [and] to full-blown
discovery.

*Bennett, supra*, at 9.

55. *Id.* at 448–49.
56. *Id.*
57. *Id.* at 449–50.
58. *Id.* at 451–53.
arbitrator (and not the court) should interpret whether the clause permits the arbitration to proceed on a classwide basis.\textsuperscript{59}

In the wake of \textit{Bazzle}, businesses have not left these questions to implication by simply using broad agreements to arbitrate.\textsuperscript{60} Rather, with increasing frequency, corporations have expressly limited the right to proceed on a classwide basis.\textsuperscript{61} Additionally, they have attempted to use pre-dispute arbitration clauses to expressly limit the availability of discovery mechanisms and even to shorten the statute of limitations on potential claims.\textsuperscript{62}

\textbf{B. The Use of Unconscionability to Police Pre-Dispute Arbitration Agreements}

Because arbitration is a creature of contract, the first questions a court or arbitrator must ask are whether the parties agreed to arbitrate and whether the dispute is within the scope of that agreement.\textsuperscript{63} The question of whether the parties agreed to arbitrate is governed by general principles of contract interpretation, which look to the parties' apparent intentions.\textsuperscript{64} Whether the dispute is within the scope of arbitration is decided "by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement [under the FAA]'".\textsuperscript{65} The Supreme Court has interpreted the FAA as "establish[ing] that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."\textsuperscript{66} Who decides the threshold issue of arbitrability (the arbitrator or the court) depends upon whether there is evidence that the parties "clearly and unmistakably" agreed to submit the question of arbitrability itself to arbitration.\textsuperscript{67} If no such evidence exists, a

\textsuperscript{59} Id. at 453.

\textsuperscript{60} See Gilles, supra note 19, at 376–78; infra Part II.A. Indeed, this was Justice Stevens' prediction at the \textit{Bazzle} oral argument when he asked, "Does this case have any future significance, because isn't it fairly clear that all the arbitration agreements in the future will prohibit class actions?" Transcript of Oral Argument at 55, \textit{Bazzle}, 539 U.S. 444 (No. 02-634).

\textsuperscript{61} See Gilles, supra note 19, at 376–78; infra Part II.

\textsuperscript{62} See infra Part II (providing examples of express, pre-dispute limitations); see also Hans Smit, \textit{Class Actions and Their Waiver in Arbitration}, 15 AM. REV. INT'L ARB. 199, 200 (2004) ("[L]awyers [have] . . . turned their attention to the arbitration agreement and to the great freedom in the making of contracts traditionally fostered by the common law.").


\textsuperscript{64} 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15:11 (4th ed. 1997).

\textsuperscript{65} Mitsubishi Motors Corp., 473 U.S. at 626 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

\textsuperscript{66} Id. (citing \textit{Moses H. Cone Mem'l Hosp.}, 460 U.S. at 24–25).

presumption arises that the court (not the arbitrator) should decide arbitrability.\textsuperscript{68}

Assuming there is an arbitrable dispute, there still exists a question of clause construction: Did the parties provide any detail in their agreement concerning how the dispute would proceed? For example, after Bazzle, if the parties' contract contains only a general arbitration clause while remaining silent as to class relief, the arbitrator (and not the court) decides whether the clause permits arbitration to proceed on a classwide basis.\textsuperscript{69}

As discussed, however, rather than leaving these limitations to implication, companies are expressly stating such procedural limitations in their arbitration clauses.\textsuperscript{70} What happens, then, when an arbitration clause contains a procedural limitation, for example, expressly waiving the right to class arbitration or to take depositions? These additional procedural limitations within arbitration clauses are presumptively enforceable.\textsuperscript{71} They are only unenforceable "upon such grounds as exist at law or inequity for the revocation of any contract."\textsuperscript{72} In other words, the FAA determines the validity of arbitration provisions and the terms contained therein under extant, state contract law.

Therefore, an arbitration clause that is not tainted with fraud or duress is enforceable unless it is unconscionable or against public policy.\textsuperscript{73} Not surprisingly then, contracting parties claim unconscionability as a defense with increasing frequency in the context of arbitration.\textsuperscript{74} Litigants have aimed challenges either at the arbitration clause in its entirety,\textsuperscript{75} or more specifically at the express, procedural limitations contained within the clause.\textsuperscript{76}

\textsuperscript{68} First Options of Chi., Inc., 514 U.S. at 944–45.

\textsuperscript{69} See Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2003) (plurality opinion); see also AM. ARBITRATION ASSOC., SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS R. 3 (2003), available at http://www.adr.org/sp.asp?id=21936&printable=true ("The arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class . . . ").

\textsuperscript{70} See supra note 60 and accompanying text.


\textsuperscript{73} Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

\textsuperscript{74} See Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 BUFF. L. REV. 185, 194 (2004) ("[A]s the use of arbitration agreements has increased, claims of unconscionability have also increased . . . "); see also Stempel, supra note 25, at 761–62 ("Beginning in the 1990s, . . . courts[] began to take a harder look at arbitration agreements and their enforcement. Several courts began invoking concepts related to unconscionability in order to refuse enforcement of arbitration clauses. The phenomenon accelerated in the late 1990s.").

\textsuperscript{75} See Davis v. O'Melveny & Myers, 485 F.3d 1066, 1084 (9th Cir. 2007) (finding where the offending provisions are not merely ancillary to the agreement, but rather go to its heart, the agreement as a whole is unenforceable); Alexander v. Anthony Int'l, L.P., 341 F.3d
Such challenges raise another question: Should the court or arbitrator decide the merits of an unconscionability defense? Under the doctrine of separability, the answer depends upon whether the challenge is addressed to the contract in general or, more specifically, to the arbitration provision. Under *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 77 and more recently, according to *Buckeye Check Cashing, Inc. v. Cardegna*, 78 when the challenge is directed to the validity of the entire contract, an arbitrator decides the contract's enforceability. 79 However, if the challenge is directed specifically to the arbitration clause, but not the contract as a whole, the court determines the validity of the arbitration clause. 80

Another threshold inquiry concerning the validity of the terms of an arbitration clauses is which state's unconscionability law applies. 81 This choice of law analysis is critical because the elements necessary to prove unconscionability tend to vary from state to state. 82 Some states require a showing of both procedural and substantive unconscionability, 83 while others...
require a strong showing of only one or the other to invalidate a contract. In this regard, a choice of law clause can be extremely significant in determining the burden of proof to invalidate the arbitration clause or certain limitations contained therein—the choice of law may affect whether the party challenging the clause must show both procedural and substantive unconscionability. Nevertheless, a court may decline to enforce the parties’ choice of law clause if applying another state’s substantive law would violate the public policy of the state where the court is located. A court in State X could, for example, refuse to apply State Z’s unconscionability law on the theory that such application would allow a collective action waiver to be upheld in a situation that would undermine State X’s public policy favoring class relief.

The importance of the choice of law determination is more evident when considering the differences between procedural and substantive unconscionability. A showing of procedural unconscionability considers the expense.”) (footnote omitted).

84. See Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995) (allowing claim of unconscionability based on substantive unconscionability alone); Gillman v. Chase Manhattan Bank, N.A., 534 N.E.2d 824, 829 (N.Y. 1988) (“While determinations of unconscionability are ordinarily based on the court’s conclusion that both the procedural and substantive components are present, there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.”) (citations omitted); 8 WILLISTON & LORD, supra note 83, § 18:10, at 64–66. Professor Lord shrewdly questions the coupling of procedural and substantive unconscionability:

The distinction between procedural and substantive abuses, however, may become quite blurred; overwhelming bargaining strength or use of fine print or incomprehensible legalese may reflect procedural unfairness in that it takes advantage of or surprises the victim of the clause, yet the terms contained in the resulting contract—whether in fine print or legal “gobbledygook”—would hardly be of concern unless they were substantively harmful to the nondrafting party as well. Thus, the regularity of the bargaining procedure may be of less importance if it results in harsh or unreasonable substantive terms, or substantive unconscionability may be sufficient in itself even though procedural unconscionability is not.

85. The party challenging the arbitration clause (usually, the plaintiff) has the burden of showing that a provision is unconscionable and, thus, unenforceable. Scott v. Cingular Wireless, 161 P.3d 1000, 1005 (Wash. 2007).


87. See, e.g., Discover Bank, 113 P.3d at 1117; Am. Online, 108 Cal. Rptr. at 708. Moreover, the law remains unsettled concerning the effect of a choice of law clause on the rules applying to arbitration, adding yet another layer of complexity. For example, it is unclear whether a general choice of law clause should invoke state arbitration law and thereby “opt out” of the FAA. See Jennifer Trieshmann, Horizontal Uniformity and Vertical Chaos: State Choice of Law Clauses and Preemption under the Federal Arbitration Act, 2005 J. DISP. RESOL. 161, 169 (2005) (describing the majority and minority views by courts).
manner in which the parties entered into the contract. This analysis looks at "whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction." Thus, procedural unconscionability can exist where the agreement is a contract of adhesion—that is, a contract in which the party with superior bargaining power presents the weaker party with a non-negotiable ("take it or leave it") contract on a pre-printed, standardized form. Typical examples of adhesion contracts include cell phone service contracts and credit card agreements because there is no deal if the consumer does not agree to the terms of the standardized form. Despite their one-sidedness, contracts of adhesion are not per se unconscionable.

Substantive unconscionability focuses on the terms of the agreement and whether they favor the party with the superior bargaining position. When assessing whether an arbitration clause is substantively unconscionable, a good number of courts consider the "mutuality" of the provision—i.e., whether the burdens of the terms either expressly or effectively weigh on both parties equally. If there is a lack of mutuality, these courts have held that the terms are unconscionable.

Assuming there is a successful showing of unconscionability, there does not appear to be a clear trend in case law concerning the available remedy. A

88. See 8 WILLISTON & LORD, supra note 83, § 18.10, at 57–64.
89. See id. at 57.
91. 8 WILLISTON & LORD, supra note 83, § 18.10, at 62–64.
92. Id. at 57, 65–66.
94. For example, in Lytle v. CitiFinancial Services, Inc., 810 A.2d 643 (Pa. Super. Ct. 2002), the Pennsylvania Superior Court determined the enforceability of an arbitration provision that required the mortgagors to arbitrate all issues involving more than $15,000, while the mortgagee retained the right to enforce its repayment rights or commence foreclosure in the courts. Id. at 660. The court held that, "under Pennsylvania law, the reservation by CitiFinancial of access to the courts for itself to the exclusion of the consumer creates a presumption of unconscionability." Id. at 665. However, the Superior Court recognized that this holding conflicted with Harris v. Green Tree Financial Corp., 183 F.3d 173 (3d Cir. 1999). Id. at 665 n.13. In Harris, the Third Circuit assessed a similar arbitration provision and found that "the mere fact that [the mortgagee] retains the option to litigate some issues in court, while the [mortgagors] must arbitrate all claims does not make the arbitration agreement unenforceable." Harris, 183 F.3d at 177–78, 183. In light of conflicting decisions applying Pennsylvania law, the Third Circuit certified to the Pennsylvania Supreme Court the question of "whether an arbitration agreement, consummated in connection with a residential mortgage loan, which reserves judicial remedies related to foreclosure is presumptively unconscionable." Salley v. Option One Mortgage Corp., 925 A.2d 115, 116 (Pa. 2007). The Pennsylvania Supreme Court answered negatively, holding that "the exception from mandatory arbitration for foreclosure contained within the [lender's] arbitration agreement, in and of itself, does not render the agreement presumptively unconscionable under Pennsylvania law." Id. at 129.
court may prohibit the entire arbitration process or, instead, sever the unconscionable procedural limitations from the arbitration clause and otherwise allow the dispute to proceed in arbitration. This decision may depend, in part, upon the court’s determination of whether the unenforceable procedural limitations are severable. Severability may, in turn, depend upon whether the parties’ agreement contains a valid severability clause or if public policy supports severing the offending clause from the agreement. Thus, for example, a court could hold a collective action waiver unenforceable, sever it, and then allow the dispute to proceed in class arbitration. Alternatively, the same court could hold that, because the collective action waiver is unenforceable, the arbitration clause is likewise unenforceable, and the dispute should therefore proceed as a class action in court. As for other procedural limitations, it is certainly much simpler for a court to sever a discovery waiver or a shortened statute of limitations provision from an agreement, and then allow arbitration to otherwise proceed. However, when such clauses are present, courts have in some instances refused entirely to compel arbitration.

II. EXAMPLES OF PRE-DISPUTE PROCEDURAL LIMITATIONS AND THE APPLICATION OF THE UNCONSCIONABILITY DOCTRINE TO POLICE THEM

While arbitration shifts the proceeding to a private forum, the Supreme Court has time and again stated that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” The Supreme Court has further stated that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral


96. See Skirchak v. Dynamics Research Corp., 508 F.3d 49, 63 (1st Cir. 2007) (striking collective action waiver from employment agreement and otherwise compelling arbitration); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 278 (Ill. 2006) (finding class action waiver within an arbitration agreement both unconscionable and severable); Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 103 (N.J. 2006).

97. See, e.g., Riensche v. Cingular Wireless LLC, No. C06-1325Z, 2006 WL 3827477, at *13 (W.D. Wash. Dec. 27, 2006) (refusing to enforce entire arbitration clause because class action waiver was found to be unconscionable and because parties’ agreement provided that, if class action waiver is found to be unenforceable, the entire arbitration clause is null and void); Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 675 (Ct. App. 2004) (vacating, inter alia, order compelling arbitration and restoring case to litigation calendar); Scott v. Cingular Wireless, 161 P.3d 1000, 1009 (Wash. 2007) (finding entire arbitration agreement unenforceable due to the unconscionability and contractual inseverability of class action waiver provision).

98. See, e.g., Booker, 315 F. Supp. 2d at 109.

99. See, e.g., Martinez, 12 Cal. Rptr. 3d at 675.

forum, the statute will continue to serve both its remedial and deterrent function." An evident premise of the Supreme Court's jurisprudence is that moving the litigation to an arbitral forum is not intended to equate to an exculpation of the defendant from substantive liability. Nevertheless, after reviewing the cases that address express pre-dispute procedural limitations, a theme emerges: the potential to effect an exculpation of a corporation from substantive liability.

This Part considers three types of pre-dispute procedural limits: collective action waivers, limitations on discovery, and shortened statutes of limitation. For example, a clause that limits discovery might provide that the parties have the right to depose experts only. Alternatively, a provision requiring that an employee file a notice of arbitration within thirty days might effectively truncate a statute of limitations. Notably, these pre-dispute limitations might not be mentioned in the agreement but can nevertheless be incorporated by express reference to institutional rules that contain such limitations. This Part will address these examples in turn.

A. "Collective Action Waivers"

The collective action waiver first appeared in the late 1990s, when trade magazines advised franchisors and other business entities to add express limitations on class actions to their form agreements. Afterwards,

101. Id. at 637.

102. While this Part discusses each of these express limitations separately, it is important to note that they are not often used in isolation, as corporations may use them simultaneously. For example, an employment contract might contain both limitations on discovery and a shortened statute of limitations. See, e.g., Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 668–75 (Ct. App. 2004). When used together, a court might find the arbitration clause substantively unconscionable based on the totality of the circumstances—the restrictions, taken together, evince the one-sided nature of the arbitration clause. Id. at 673. Moreover, in addition to the limitations highlighted in this Article, a review of the case law reveals that numerous other restrictions have arisen in arbitration clauses. Common restrictions that are factored into the substantive unconscionability analysis include: prohibitively high arbitration costs to be paid by one party, limitations on remedies, curtailed judicial review, and excessive confidentiality. See, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007) (excessive confidentiality); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 216–17 (3d Cir. 2003) (prohibitively high arbitration costs for one party); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 670–71 (6th Cir. 2003) (limitations on remedies); Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998) (curtailed judicial review). By adding numerous restrictions, the arbitration clause is more likely to be found substantively unconscionable based on its one-sidedness.

103. See Gilles, supra note 19, at 408–13. The express collective action waiver grew in popularity after the Supreme Court's Bazzle decision in 2003. Id. at 410 (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (plurality opinion)). The Court remanded the case to an arbitrator to determine whether an arbitration clause, under which the parties agreed to submit to arbitration "all disputes, claims, or controversies arising from or relating to this contract or
corporations across many industries have attempted to use arbitration clauses to have contracting parties expressly limit the right to bring a class action or class arbitration. In fact, in any place where a business has a contract, it can insert a collective action waiver into its arbitration clause.

For example, the franchise agreement of Quizno's Corporation, a sandwich chain franchisor, contains the following clause under its “Limitation of Claims” section: “Franchisor and Franchisee agree that any proceeding will be conducted on an individual, not a class-wide, basis, and that a proceeding between Franchisor and Franchisee . . . may not be consolidated with another proceeding between Franchisor and any other person or entity.”

Similarly, the standard form employment agreements of U-Haul Co., the moving van company, contain the following limitations within the arbitration clause:

This mutual obligation to arbitrate means that both you and [defendant] are bound to use the [U-Haul Arbitration Policy] as the only means of resolving any employment related disputes. This mutual obligation to arbitrate claims also means that both you and [defendant] forego any right either may have to a jury trial on claims relating in any way to your employment, and both you and [defendant] forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity, unless such procedures are agreed to by both you and [defendant].

In addition to franchise and employment contracts, other examples of collective action waivers abound in consumer and loan contracts. They have also

the relationships which result from this contract[.]” forbids class arbitration. Id. at 448, 451–54 (citation omitted) (alteration in original).

104. See Gilles, supra note 19, at 408–13


been used in insurance contracts, and one has even arisen in a standardized enrollment contract between an educational institution and its students. These collective action waivers have generally been enforced, with courts holding they are "not per se invalid." With mixed and sometimes irreconcilable results, courts have mostly left the enforceability of collective action waivers to a case-by-case unconscionability inquiry.

With this inquiry left to extant contract doctrine, companies have had some success in contracting around class actions and class arbitrations. Yet, this fiat by contract has not been the focus of the public or scholarly debate. Rather, the focus of the discussion of the "decline and fall" of class actions has been legislative reform. Indeed, Professor Myriam Gilles has recently suggested that the focus on legislative reform may be somewhat misplaced. The significant threat to collective procedural mechanisms is not legislative but, rather, private standardized contracts. In what Professor Jean Stemlight dubs a "'do-it-yourself approach to law reform," businesses are contracting out of the existing class action, class arbitration, and joinder procedures by inserting collective action waivers into their arbitration clauses.


111. See supra note 71 and accompanying text.

112. See Edward F. Sherman, Decline & Fall, 93 A.B.A. J. 51, 51 (2007). Since the class action's introduction into the Federal Rules of Civil Procedure, see Fed. R. Civ. P. 23, it has met with staunch supporters and detractors. See Sherman, supra, at 51. Professor Sherman describes the heated legal climate in which "business organizations pursued an intensive campaign to sway public opinion, and to lobby Congress and state legislatures for change in substantive and procedural law that would put the clamps on consumer class actions." Id. As Professor Sherman observes, "[d]epending upon one's point of view, the class action is a powerful vehicle for protecting the rights of individuals confronting powerful corporations—or a legal version of Frankenstein's monster." Id. Most recently, the class action has been restricted through legislation like the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2000 & Supp. V 2007), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b) (2001). Much of the scholarship concerning restricting class actions has focused on these legislative reforms.

114. See Gilles, supra note 19, at 375.

115. Id.

116. Jean R. Stemlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 WM. & MARY L. REV. 1, 11 (2000); see also Gilles, supra note 19, at
This "opting out" of liability is particularly problematic because it defeats the prevailing benefit of collective action: to aggregate claims that would, on an individual basis, otherwise have a negative or minimal value. Likewise, these waivers may also defeat the primary rationale for the class mechanism—judicial (or arbitral) economy—by permitting numerous claims that share common issues of law and fact to be adjudicated separately, thereby resulting in the duplication of efforts and the waste of resources that class mechanisms aim to minimize.

Certainly, the concerns with collective action waivers devolve into a battle of competing efficiency arguments, with the underlying justifications for collective action on the one hand and the corporations' arguments justifying the use of collective action waivers on the other. The aggregation of claims, especially when all contracting parties have signed the same standardized contract, streamlines the process of enforcing substantive laws and avoids the duplication of efforts and resources of litigants, courts, and arbitrators. However, corporations that use collective action waivers point to economic efficiency; they argue that the collective action waiver allows them to provide their services at a cheaper rate because they will not have to defend against costly class actions or arbitrations. There is simply no empirical evidence, however, to suggest that corporations actually do pass these hypothetical savings on to consumers.

430 (discussing how companies are using their arbitration clauses to expressly "opt out of all potential classwide liability").

117. See Gilles, supra note 19, at 430.

118. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985). Justice Rehnquist observed that “[m]odern plaintiff class actions follow the same goals, permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.” Id. That case, for instance, “involve[d] claims averaging about $100 per plaintiff [and therefore] most of the plaintiffs would have no realistic day in court if a class action were not available.” Id.

119. Devlin v. Scardelletti, 536 U.S. 1, 10 (2002) (noting that one of the major goals of class action litigation is “to simplify litigation involving a large number of class members with similar claims”).


121. Stemlight & Jensen, supra note 120, at 95 (“In sum, economic theory alone raises significant doubts that companies pass on to consumers the entire cost-savings from using arbitration clauses to eliminate class actions. It is not surprising that, to date, no published studies show that the imposition of mandatory arbitration leads to lower prices.”); see also Carrington, supra note 21, at 76 (“[A]n arbitration clause may be merely a disguised provision requiring [that] the weaker party . . . bear additional costs, such as those associated with contesting a matter in a distant forum or paying the salary of the neutral . . . [or] risk paying the stronger party’s legal fees if the claim fails . . .”\).

HeinOnline -- 75 Tenn. L. Rev. 384 2007-2008
As an example, consider the facts of the widely-cited California case of Discover Bank v. Superior Court. Christopher Boehr, a credit card holder, was charged a $29 late fee by Discover Bank despite making his payment on the due date. Boehr alleged that the late fee resulted from the bank’s undisclosed policy of crediting payments made after 1 p.m. to the next business day. Boehr sought to pursue class arbitration, alleging that class members suffered losses as a result of Discover Bank’s deception in representing the time at which fees would be assessed. However, Discover Bank’s cardholder agreement contained a clause forbidding classwide arbitration.

Discover Bank insisted that, under the cardholder agreement, Boehr could only proceed on an individual basis. Because Boehr had only a negligible $29 claim, his individual lawsuit was not worth enough money to prosecute and the harm would go without redress. Nonetheless, Boehr challenged the clause as unconscionable. In a decision that appeared to come just a little shy of declaring collective action waivers in consumer contracts against public policy, the California Supreme Court held that the collective action waiver was unconscionable and, thus, unenforceable.

California requires a showing of both procedural and substantive unconscionability. In Discover Bank, the court held that the collective action waiver was procedurally unconscionable because Boehr’s cardholder agreement did not initially contain an arbitration clause. Rather, the arbitration clause was purportedly made a part of the cardholder agreement by a “notice of amendment” in a “bill stuffer.” Further, the court held that the collective action waiver was substantively unconscionable because it, in effect, operated to insulate Discover Bank from liability.

Given the relatively small sum of Boehr’s claim, the collective action waiver served as a disincentive for consumers to hold Discover Bank

122. 113 P.3d 1100 (Cal. 2005).
123. Id. at 1104.
124. Id. at 1103.
125. Id.
126. The clause provided: “NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.” Id.
127. Id.
128. Id. at 1104.
129. Id. at 1110. “[W]hen the waiver is found in a consumer contract of adhesion . . . involv[ing] small amounts of damages, and when . . . the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . such waivers are unconscionable . . . .” Id.
130. Id. at 1108.
131. Id.
132. Id.
133. Id.
Correspondingly, Discover Bank insulated itself from the threat of any significant liability for the overcharge amounts that, on an individual basis, were comparatively meager but, in the aggregate, could have reaped the company a handsome return. Indeed, in holding that this particular collective action waiver was substantively unconscionable, the California Supreme Court analogized it to an exculpatory clause, remarking that Discover Bank had sought to use the clause as a "'get out of jail free' card." The court noted that, while collective action is a procedural mechanism, it is "often inextricably linked to the vindication of substantive rights." A case involving a similar waiver in a cellular telephone contract led another court to quote the French novelist Anatole France: "The law in its majesty prohibits rich and poor alike from sleeping under bridges." But not all courts have likened collective action waivers to exculpatory clauses. In *Jenkins v. First American Cash Advance of Georgia, LLC*, for example, the Eleventh Circuit enforced a collective action waiver. Plaintiff Charlene Jenkins attempted to file a class action lawsuit against a payday lender and its affiliate, alleging that the agreements under which she received loans violated Georgia usury laws. Jenkins and the defendants entered into at least eight payday lending transactions, with each of the loans each valued at less than $500 with maturity dates between seven and fourteen days. The annual

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134. Notably, the clause also expressly aimed to quell arbitration in any "private attorney general capacity." *Id.* at 1103.

135. The number of customers charged with this fee is unclear. Assuming Discover Bank charged 10,000 cardholders the $29 fee, Discover Bank would have billed $290,000.00 in fees, before interest.

136. *Discover Bank*, 113 P.3d at 1108 (citations omitted).

137. *Id.* at 1109.


141. *Id.* at 870.

142. *Id.* at 871. The court described the typical payday loan transaction:

In such transactions, a borrower receives a modest cash advance that becomes due for repayment within a short period of time, usually about 14 days. As security for the loan, the borrower gives a check to the payday lender in the amount of the cash advance, plus the interest charged by the lender. The interest rates in payday lending transactions typically range from 20% to 30% for a two-week advance, which computes to an annual
percentage rates charged by the defendants for the loans ranged from 438% to 938.57%. 143 To consummate each loan transaction, Jenkins executed a promissory note and an arbitration agreement. 144 Among other things, the arbitration agreements provided that Jenkins was waiving her right to participate in a class action or class arbitration against the lender. 145

Pointing to these clauses, the lender moved to stay the proceeding and compel arbitration on an individual basis. 146 The district court held that the arbitration clause was procedurally unconscionable, noting that a payday loan in a pre-printed adhesion contract "unquestionably places the consumer at a severe bargaining disadvantage." 147 Moreover, given the high interest rates, the loans "would only appeal to extremely desperate consumers." 148 The district court likewise held that the arbitration clause was substantively unconscionable. 149 First, the court recognized a lack of mutuality; to the extent that the arbitration clause limited Jenkins' access to small claims court, it was one-sided in favor of the lender. 150 Second, the court noted that the collective action waiver was unfair because "[e]ach arbitration clause was attached to a small loan of under $500," and thus, "[a] class action is the only way that borrowers with claims as small as the individual loan transactions can obtain relief." 151

The district court recognized that denying Jenkins access to the class action mechanism could effectively insulate the lender from liability. 152 To illustrate,

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percentage rate of about 520% to 780%. If the borrower has not repaid the lender by the due date, the lender can negotiate the check. Alternatively, the borrower may be able to extend the loan's due date by paying a fee. This type of extension is referred to as a renewal or a rollover.

Id. (footnote omitted).

143. Id.

144. Id.

145. Id. at 872. The agreements' class action waiver provided: "YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES." Id. The agreements also contained a class arbitration waiver: "THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION." Id. at 872 n.2.

146. See id. at 873.


148. Id.

149. See id. at 1374–76.

150. Id. at 1374–75.

151. Id. at 1375.

152. Id.
assume that Georgia usury law governs and the interest collected on the payday loans exceeds the legal limit. Further assume that Jenkins received eight $400 loans and owed 20% interest over a two-week period. In other words, fourteen days after receiving her first loan, she would owe the lender $480. Assuming she paid on time and did not carry over the balance on each loan, the interest paid on the eight loans would total $640. Thus, even if Jenkins was able to recover the interest paid plus treble damages, there would not be sufficient incentive for the lawsuit to be prosecuted on an individual basis. However, given that many borrowers signed identical loan documents agreeing to the same, allegedly usurious interest rates, even if only twenty of the borrowers were able to proceed collectively against the lender, the lawsuit would become worthwhile. Yet, by having Jenkins and other borrowers waive their right to proceed collectively, the lender thereby rendered the usury laws virtually unenforceable and insulated itself from any liability for charging excessive interest rates. In effect, by prohibiting aggregation of claims, the lender was able to disincentivize prosecution of the usury laws and, correspondingly, exempt itself from the reach of usury regulations.

Although the district court declined to enforce the arbitration agreements on the basis of unconscionability, the Eleventh Circuit reversed and remanded with instructions to grant defendants’ motion to compel arbitration. The Eleventh Circuit refused to entertain the plaintiffs’ procedural unconscionability arguments because it characterized them as directed at the contract generally, not just at the arbitration clause, and thus held that it was an issue for the arbitrator to decide. The appellate court did, however, address the substantive unconscionability of the collective action waivers. In reversing the district court’s substantive unconscionability finding and upholding the collective action waivers, the Eleventh Circuit noted that the arbitration agreements and usury statutes allowed for the recovery of expenses and attorneys’ fees. Thus, the court held that the statutory availability of

153. Georgia usury laws might not have applied to this dispute because the loan documents included a choice of law provision stating that South Dakota law governed. Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 871 (11th Cir. 2005). Of course, the choice of South Dakota was no coincidence as South Dakota generally has no usury limits. See S.D. CODIFIED LAWS § 54-3-1.1 (2004) The relevant statute provides the following minimal conditions for bypassing usury limits:

Unless a maximum interest rate or charge is specifically established elsewhere in the code, there is no maximum interest rate or charge, or usury rate restriction between or among persons, corporations, limited liability companies, estates, fiduciaries, associations, or any other entities if they establish the interest rate or charge by written agreement.

154. Jenkins, 400 F.3d at 882–83.
155. Id. at 876–77.
156. Id. at 877–78.
157. Id. at 878 (citing GA. CODE ANN. § 16-14-6(c)) (“The Arbitration Agreements expressly permit Jenkins and other consumers to recover attorneys’ fees and expenses ‘[i]f allowed by statute or applicable law.’) Under the Georgia RICO statute, a prevailing plaintiff
costs and attorneys' fees ensured that there was incentive for representation of borrowers on an individual basis and, thus, no barrier to the vindication of those borrowers' substantive rights.158

The Eleventh Circuit's analysis failed to recognize, however, that without the possibility of aggregation, fewer (and perhaps no) attorneys would take the case given the risk involved. By aggregating claims, a class action may produce a sizeable fund to compensate both the class members and their attorneys. In a similar case addressing whether a collective action waiver in a payday loan was unconscionable, the New Jersey Supreme Court stated that the "substantial fund" not only covers the attorney's actual fees, but also provides incentive in the form of possible contingency fees for attorneys to risk the prospect of receiving no recovery for their efforts.159

In addition, the arbitration of claims on an individual basis might not result in meaningful enforcement of the law. As Professor Sternlight has argued, a few successful suits for individual relief might not induce a company to make company-wide policy changes to comply with the substantive law.160 In this regard, liability to a few individual plaintiffs does not equate to general accountability, especially when the company's gain from the wrongdoing is an aggregate one. Thus, Jenkins might be able to recover the excessive interest the payday lender charged her, but she might not be able to effect a change in the lender's company-wide policy concerning the interest rates it charges borrowers.

Moreover, given that the Discover Bank161 line of reasoning heavily considers the incentives to bring the lawsuit, many courts have focused on the size of the individual claims.162 This focus has not always fared well for employees seeking to bring a class action or class arbitration.163 If a plaintiff's individual claim would provide a large enough monetary award, a court is less likely to view the collective action waiver as an effective bar to substantive relief. For example, in Konig v. U-Haul Co.,164 the plaintiff employee sought to commence class action against his employer, U-Haul, for unpaid wages and

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158. Id.
160. Sternlight & Jensen, supra note 120, at 90–91 (“A company may find it worthwhile to pay off a few individual claims but keep its overall policy.”).
162. See, e.g., Konig v. U-Haul Co. of Cal., 52 Cal. Rptr. 3d 244, 251–52 (Ct. App. 2006), rev'd, 153 P.3d 955 (Cal. 2007) (“[P]laintiff failed to establish ‘predictably... small amounts’ of damages payable to class members are at issue...’” (quoting Discover Bank, 113 P.3d at 1110)); Gentry v. Superior Court, 37 Cal. Rptr. 3d 790, 794–95 (Ct. App. 2006), rev. granted 135 P.3d 1 (Cal. 2006) (refusing to hold unconscionable a class action waiver where plaintiff "alleged statutory violations that could result in substantial damages and penalties should he prevail on his individual claims").
163. See, e.g., cases cited supra note 162.
164. 52 Cal. Rptr. 3d 244 (Ct. App. 2006).
unfair business practices. However, because each plaintiff's individual claim could exceed $1,000, the California appellate court enforced the collective action waiver in the plaintiff's employment agreement. Relying on Discover Bank, the court reasoned that each of the individual plaintiffs' damages was not "predictably . . . small" enough that the inability to proceed collectively would insulate the employer from liability.

The California Supreme Court, however, may have recently taken the focus of the collective action waiver analysis in a new (or slightly revised) direction. In Gentry v. Superior Court, the court addressed the enforceability of a class action waiver in a standardized employment contract. The court noted that a finding of procedural unconscionability was not required to invalidate a collective action waiver that implicated unwaivable statutory rights: the plaintiffs' claimed violations of California's overtime laws. Apparently moving beyond the concerns enunciated in Discover Bank, a majority of the California Supreme Court articulated the following standard to determine a class action waiver's enforceability: whether "class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." The court enunciated certain factors to aid in this determination, including "the modest size of the potential individual recovery [and] the potential for retaliation against members of the class." The court's decision, however, seems to be narrowly limited to overtime pay claims, or at least to collective action waivers where the underlying substantive claim was based on an unwaivable statutory right. The reach and significance of Gentry will only become apparent as it is applied in California courts and interpreted by other jurisdictions.

The norm has been to use the unconscionability analysis to police these problematic clauses; the results of this case-by-case analysis are dizzying. After reviewing many of the numerous cases concerning collective action waiver to determine whether such a waiver in a cellular telephone contract was unconscionable, the Supreme Court of Illinois recently concluded that "it is not useful to do a simple head count of the number of state courts to have ruled a

165. Id. at 246.
166. Id. at 251-53.
167. Id. at 252 (quoting Discover Bank, 113 P.3d at 1110).
168. 165 P.3d 556, 559 (Cal. 2007).
169. Id. However, a finding of procedural unconscionability "is a prerequisite to determining that the arbitration agreement as a whole is unconscionable." Id. (emphasis added).
170. 113 P.3d 1100.
171. Gentry, 165 P.3d at 559.
172. Id. at 568.
certain way on class action waivers."\textsuperscript{174} For example, collective action waivers in AT&T's substantially similar (if not identical) standardized customer services agreements have, under substantially similar facts, been enforced by some courts and deemed unconscionable by others.\textsuperscript{175} The same panoply of disparate outcomes happened with the collective action waiver in the standardized contract of Cingular Wireless.\textsuperscript{176} Indeed, the case law largely defies any reliable pattern.\textsuperscript{177}

In short, to the extent that the courts enforce collective action waivers, which are effected through adhesion contracts, the availability of collective action may be written out of the procedural law by private contract. Consequently, as Professor Gilles predicts, the class action could meet its

\begin{itemize}
\item \textsuperscript{174} Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 271 (Ill. 2006).
\item \textsuperscript{175} See, e.g., Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003). Applying California law, the Ninth Circuit found the collective action waiver in AT&T's consumer services agreement procedurally unconscionable as consumers had to either accept the waiver through a contractual amendment or cancel their service. \textit{Id.} at 1149. The court also found the waiver substantively unconscionable because of a lack of mutuality—the proscription on class relief affected only the customers as there was no chance AT&T would file a class action against its customers. \textit{Id.} at 1150 \& n.14.
\item However, in \textit{Ragan} v. \textit{AT&T Corp.}, 824 N.E.2d 1183 (Ill. App. Ct. 2005), an Illinois Appellate Court, applying New York law under a choice of law provision, addressed essentially the same boilerplate collective action waiver as addressed in Ting, 319 F.3d 1126. \textit{See Ragan}, 824 N.E.2d at 1189. Nevertheless, the Illinois court held that the provision was not procedurally unconscionable because, although presented as an amendment after the contract's formation, the consumer had an opportunity to reject the amendment by cancelling the cellular telephone service. \textit{See id.} The Illinois court also held that the provision was not substantively unconscionable. \textit{See id.} at 1193–97.
\item \textsuperscript{177} See generally Martin C. Bryce, Jr., \textit{Red State Versus Blue State: Surprisingly Most (But Not All) Courts in Both "Red" and "Blue" States Enforce Express Class Action Waivers in Consumer Arbitration Agreements}, 59 \textit{CONSUMER FIN. L.Q. REP.} 222, 223 (2005) (explaining that the majority, but not all federal courts, enforce express class action waivers in consumer arbitration agreements); Alan S. Kaplinksy & Mark J. Levin, \textit{Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements}, 60 \textit{BUS. LAW.} 775, 776 (2005) ("[T]he absence of definitive guidance from the nation's highest court [concerning whether express collective action waivers are enforceable under the Federal Arbitration Act] leaves room for disagreement by the lower federal courts and the state courts as to the enforceability of express class action waivers."); William M. Howard, Annotation, \textit{Validity of Arbitration Clause Precluding Class Actions}, 13 A.L.R. 6th 145 (2006) (surveying "the state and federal cases that consider whether an arbitration clause in a contract . . . renders the agreement to arbitrate unconscionable or otherwise unenforceable").
\end{itemize}
This ability to prevent collective action is particularly troublesome because it allows corporations to circumvent fairly-debated and deliberatively-enacted legislation and could, in effect, enable corporate “self-deregulation.” Many of the substantive policies against usurious interest rates, deceptive bank fees, and payment of fair wages are the product of carefully debated legislation. Likewise, the class action system exists through the federal rule-making process, which is quasi-legislative.

B. Limits on Discovery

Part of the “simplicity, informality, and expediency” of arbitration is the relative lack of procedure—that is, the aspects of litigation that are implicitly relinquished with the agreement to arbitrate. Without the right to a jury trial, or the right to appeal an arbitral award, the adjudicatory process is presumed to be faster and less expensive. Another common example of the added expediency of arbitration is that discovery is generally more limited in this context than in the courts.

The FAA does not address the availability of discovery in arbitration, and absent a statutory or contractual right to discovery, a party has no legal entitlement to discovery prior to the arbitration hearing. For the most part, if

178. See generally Gilles, supra note 19, at 373, 375 (arguing that “with a handful of exceptions, class actions will soon be virtually extinct”).

179. Taylor & Cliffe, supra note 16, at 1099, 1100-01 (describing standardized arbitration and pre-litigation agreements as end runs around fairly-enacted legislation).

180. The term “self-deregulation” is borrowed from David A. Schwartz’s comprehensive critique of the pre-dispute arbitration regime. Schwartz, supra note 23, at 37 (“The enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to deregulate themselves.”).

181. See, e.g., TENN. CODE ANN. § 47-14-103 (2007) (setting the maximum interest rate at ten percent).


186. 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §
the parties' agreement is silent concerning the availability of discovery or incorporates institutional rules such as those of the American Arbitration Association (AAA), the question will be left to the discretion of the arbitrator. In determining whether a party is entitled to document requests or depositions, the arbitrator is presumably weighing the expediency and cost-effectiveness of the arbitral forum against the need of a party to obtain the information necessary to prove her claim.

In *Gilmer v. Interstate/Johnson Lane Corp.*, the United States Supreme Court held that limitations on discovery do not necessarily render an arbitration clause invalid. Robert Gilmer claimed he was terminated as Manager of Financial Services at Interstate/Johnson Lane Corporation because of his age, in violation of the Age Discrimination in Employment Act of 1967 (ADEA). As part of his employment, Gilmer was registered with the New York Stock Exchange (NYSE). As required in part of the standardized registration application, Gilmer agreed to arbitrate any disputes arising out of his employment pursuant to NYSE rules. The NYSE rules governing arbitration allowed for limited discovery, including "document production, information requests, depositions, and subpoenas." The Court held that that the NYSE's discovery provision was sufficient to allow Gilmer a fair opportunity to present his claims against his employer under the ADEA.

Unlike the NYSE rules, however, not all pre-dispute arbitration clauses allow for the possibility of basic discovery devices. The following examples illustrate how some corporations have used pre-dispute arbitration clauses to substantially limit the availability of discovery or to eliminate it entirely. Plaintiffs have responded by challenging such limitations on discovery as unconscionable.


187. REVISED UNIF. ARBITRATION ACT § 17 (2000); Transwestern Pipeline Co. v. Blackburn, 831 S.W.2d 72, 78 (Tex. App. 1992); 21 WILLISTON & LORD, supra note 186, § 57:90, at 511–12 (citing Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1988)). For example, in employment disputes under agreements referencing the AAA Rules, the arbitrator has discretion to allow the employee's use of many basic discovery tools. See AAA, EMPLOYMENT ARBITRATION RULES & MEDIATION PROCEDURES R.9, available at http://www.adr.org/sp.asp?id=28481 ("The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.").

188. REVISED UNIF. ARBITRATION ACT § 17(c) (2000).


190. *Id.* at 23–24.

191. *Id.*

192. *Id.*

193. *Id.* at 31.

194. *Id.*
In *Ostroff v. Alterra Healthcare Corp.*, plaintiff Lillian Restine signed a thirty-one-page "Residency Agreement" on the day she moved into the defendant's assisted living facility. The agreement provided that any claims relating to Restine's residency at the facility, except eviction, would be submitted to binding arbitration. Among other things, the arbitration clause provided that "[d]iscovery in the arbitration proceeding is governed by the Pennsylvania Rules of Civil Procedure, but on a shortened timeline, and with only depositions of experts allowed." Ms. Restine sued the corporation, alleging that she was injured by the negligent action of an employee of the residence facility, "suffered a broken hip and numerous other physical and mental injuries, including memory loss," and was unable to walk as a result of the accident. Pursuant to the Residency Agreement, the defendant corporation moved to compel arbitration. Restine then challenged the arbitration clause on unconscionability grounds, pointing to the limitation that she could only depose expert witnesses.

The district court denied the corporation's motion to compel arbitration, noting that, while limitations on discovery are not per se invalid, the clause in this case was severely restrictive and, thus, substantively unconscionable. The restriction preventing Restine from deposing lay witnesses would limit her access to information and "put her at a distinct disadvantage in arbitration." Unlike the plaintiff in *Gilmer*, the restriction to depose only experts "may well deny Restine a 'fair opportunity to present [her] claims.'" Indeed, due to the nature of Restine's accident, and with only expert depositions, it would likely be impossible to gather the information necessary to prove the claim.

The court reached the appropriate result in *Ostroff* and recognized the corporation's overreaching in limiting discovery. Other jurisdictions, in various contexts, have found arbitration clauses substantively unconscionable based in part on similar, pre-dispute limitations on discovery. Generally,

196. Id. at 540.
197. Id. at 541.
198. Id. (citation omitted).
199. Id. at 540-41.
200. Id. at 541.
201. Id. at 541, 545.
202. Id. at 545.
203. Id.
204. Id. (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (alteration in original)).
205. Restine's injuries were allegedly caused by an employee who swung open Restine's door without knocking, striking Restine and causing her to fall. Id. at 540.
courts have treated discovery limitations on a case-by-case basis under the unconscionability doctrine, looking to the Gilmer standard that requires a plaintiff have a “fair opportunity” to present her claims.207 Yet, not all unduly restrictive discovery limitations have been invalidated. For example, in Bar-Ayal v. Time Warner Cable, Inc., plaintiff Shlomo Bar-Ayal brought a putative class action against Time Warner, a cable provider, for alleged practices of improperly levying additional charges against customers.208 The service agreement’s arbitration clause not only waived collective action and shortened the statute of limitations but also eliminated pre-hearing discovery.209 The court cited Gilmer210 in holding that the discovery limitation was allowable,211 but did not discuss the Gilmer standard that such limitations should not prevent plaintiffs from fairly presenting their claims.212

Moreover, in Pony Express Courier Corp. v. Morris, a court again upheld an arbitration clause limiting discovery.213 In that case, employee Diane Morris brought an action against her employer alleging sexual harassment.214 The employer moved to compel arbitration pursuant to the parties’ arbitration agreement.215 Although the agreement eliminated discovery and the court conceded that “binding arbitration seem[ed] harsh,” it held that the limitations were not unconscionable and enforced the arbitration clause.216

A corporation might not use an arbitration clause to attempt to eliminate discovery entirely, but it could place an onerous burden on a plaintiff seeking discovery. For example, in Martinez v. Master Protection Corp., employee Tony Martinez sued his employer Master Protection Corporation, alleging various claims based on national origin discrimination.217 Among other things, the parties’ arbitration agreement limited discovery to one single deposition unless there was a showing of “substantial need.”218 Martinez successfully challenged the arbitration clause on unconscionability grounds—not on the basis of the discovery limitation, however.219 The court was persuaded that the clause was substantive unconscionability because its one-sidedness was evidence by the “lack of mutuality,” a shortened statute of limitations, and unduly burdensome costs.220 Thus, the court found it unnecessary to decide

209. Id. at *5.
214. Id. at 819.
215. Id.
216. Id. at 822.
217. 12 Cal. Rptr. 3d 663, 667 (Ct. App. 2004).
218. Id. at 672.
219. Id. at 672–73.
220. Id. at 673.
whether the discovery restrictions, themselves, "prevent[ed] Martinez from vindicating his rights."\footnote{Id.} The court noted, however, that, "considered against the backdrop of the other indisputably unconscionable provisions, the limitations on discovery do . . . compound the one-sidedness of the arbitration agreement."\footnote{Id.}

The analysis of the Martinez court elucidates the inadequacy of this ad hoc treatment of limitations on discovery. On one hand, the court acknowledged that adequate discovery was "indispensable" for Martinez to vindicate his statutory rights.\footnote{Id. at 672 (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683 (Cal. 2000)).} On the other hand, it also acknowledged "discovery limitations are an integral part of the arbitration process."\footnote{Martinez, 12 Cal. Rptr. 3d at 672 (emphasis added) (citation omitted).} Addressing this balance, the court reasoned that, "given the relatively straightforward allegations of misconduct," the discovery limitation did not, as a matter of law, prevent Martinez from vindicating his statutory rights.\footnote{Id. at 673. The court stated:
We recognize that, in many employment disputes, restricting a plaintiff to a single deposition and document request could place him at a serious disadvantage if testimony from numerous witnesses is necessary to prepare his case. We are also aware the same restriction could operate to the employer’s advantage, because it has ready access to most of the relevant documents and many of the witnesses remain in its employ. Consequently, the employer typically has far less need for discovery in order to prepare for arbitration than [sic] the employee.

However, given the relatively straightforward allegations of misconduct involved in this action, and the possibility that proof of Martinez’s Labor Code claims will rest largely on documentation rather than testimony, we are unable to state as a matter of law that [the employer’s] “arbitration agreement does not afford adequate discovery rights to employees seeking to vindicate statutory rights . . . .”}

Given, as the court acknowledged, that these limitations on discovery could put a plaintiff employee at a "serious disadvantage"\footnote{Id. at 672–73 (citations omitted).} in preparing his case, it

\begin{itemize}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id. at 672 (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683 (Cal. 2000)).}
\item \footnote{Martinez, 12 Cal. Rptr. 3d at 672 (emphasis added) (citation omitted).}
\item \footnote{Id. at 673.}
\end{itemize}
seems patently unjust that the relative "straightforward[ness]" of the claims saves the limitation from being deemed unconscionable, especially when unconscionability is ordinarily assessed as of the time the agreement is made. Moreover, such limitations essentially place a difficult burden of proof on the plaintiff in two regards—first, the plaintiff must show that the discovery limitations are unconscionable and, if that is unsuccessful, second, the plaintiff must show that she has a substantial need for additional deposition testimony. As a result, the burden of litigation (and proof) falls on the party that is least able to bear it financially.

Certainly arbitration is more efficient and expedient if discovery is limited; however, these benefits should not come at the expense of procedural fairness, the enforcement of substantive laws, or both. Implicit in the agreement to arbitrate is some informality and limitation on discovery; however, at some point, too many limitations on discovery will defeat the purpose of arbitration as a forum to hear the plaintiff's claims. By expressly limiting discovery, and thereby removing a determination of the availability of discovery from the arbitrator's discretion, a corporation may effectively weaken the enforcement of substantive laws.

C. Shortening the Statute of Limitations

Another example of a pre-dispute limitation is the shortening of the applicable statute of limitations, which plaintiffs have challenged as unconscionable. As with limitations on discovery, the courts have reached different conclusions concerning the enforceability of shortened statutes of limitations. Some courts have allowed companies to use their arbitration clauses to effectively shorten a statute of limitations, while others have declined to enforce these provisions based on the doctrine of unconscionability.

228. Id. at 673
229. 8 WILLISTON & LORD, supra note 83, § 18:12, at 77 ("The determination of whether a given clause or contract is in fact unconscionable is to be made at the time of its making rather than at some subsequent point in time.") (footnote omitted); see also In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001) (unconscionability assessed based on "circumstances existing when the parties made the contract").
230. See, e.g., Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042-45 (9th Cir. 2001) (requiring that suits be brought within six months).
231. See, e.g., id. at 1042 ("[Plaintiffs] . . . argued under a . . . general unconscionability analysis that they were presented with contracts of adhesion, could not negotiate terms, and thus should not be held to the shortened limitations period.").
233. See, e.g., Davis v. O'Melveny & Myers, 485 F.3d 1066, 1070 (9th Cir. 2007); Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 278 (3d Cir. 2004); Ingle v. Circuit
For example, in *In re Standard Meat Co.*, employee Adriana Chagoya, sued her employer for negligence based on injuries she allegedly sustained while working on a food assembly line. Her employer moved to compel arbitration, referring to the arbitration agreements signed by Chagoya when she applied for the job and during the orientation process. Chagoya argued the agreements were unconscionable on numerous grounds, one of which was that the agreement gave her one year to file a notice of her intent to arbitrate and, thereby, effectively shortened the statute of limitations on her claims. The Texas appellate court enforced the clause and noted that, in *EZ Pawn Corp. v. Mancia*, the Texas Supreme Court allowed the modification of a statute of limitations on a wrongful discharge claim through an arbitration agreement. Indeed, in *EZ Pawn*, that court enforced a pre-dispute arbitration clause requiring an employee to initiate arbitration within 180 days of the date that the claim accrued.

In contrast, the Ninth Circuit recently declined, on unconscionability grounds, to enforce an arbitration clause that, among other things, contained an effective shortening of the statute of limitations. In *Davis v. O'Melveny & Myers*, Jacqueline Davis, a paralegal, sued her employer for violations of the Fair Labor Standards Act (FLSA). However, an arbitration clause in the firm’s “Dispute Resolution Program” governing employees provided that the employee had one year to give notice of any claim that is “known to the employee or with reasonable effort . . . should have been known to him or her.

The court expressed concern that this “notice provision” had the effect of shortening the limitations period by effectively barring the employee from pressing a “continuing violations” theory, which allows consideration of related acts that began prior to the limitations period if they constitute part of a “systematic policy of discrimination.” The court found it particularly

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235. *Id.*
236. *Id.* at *4.
237. 934 S.W.2d 87, 89 (Tex. 1996).
238. *In re Standard Meat Co.*, 2007 WL 730660 at *4. The court noted that the arbitrator should determine the appropriate limitations period. *Id.*
239. 934 S.W.2d at 89. In *EZ Pawn*, while preparing for depositions, the employer’s counsel realized an arbitration agreement existed and, thus, only first moved to compel arbitration after litigating the case in court for ten months. *Id.*
240. *Davis v. O'Melveny & Myers*, 485 F.3d 1006, 1070 (9th Cir. 2007).
241. *Id.*
242. *Id.* at 1071. This provision effectively limited the statute of limitations because, under the FLSA, the limitations period is either two or three years, depending on the type of violation. *Fair Labor Standards Act, 29 U.S.C. § 255(a) (2000)* (providing that the statute of limitations is two years, unless the violation is willful, in which case it is three years).
243. *Davis*, 485 F.3d at 1077.
troublesome that the notice period in the invalidated arbitration clause ran from the date that the employee knew or should have known of the alleged violation.\textsuperscript{244} On this basis, the court distinguished \textit{Davis} from other California cases upholding arbitration clauses that shortened the statute of limitations to a six-month period.\textsuperscript{245} The \textit{Davis} court reasoned that the six-month limitations periods in those cases were reasonable because they ran from the date the employee left employment and, thus, did not bar a "continuing violations" theory.\textsuperscript{246} However, the potential bar of a "continuing violations" theory, while troubling, should not drive the unconscionability analysis. Rather, it certainly is arguable that the cases allowing a six-month limitations period were wrongly decided and the provisions should not have been enforced, even though they measured the limitations period from the last day of employment. In other words, even narrow statutes of limitations that do not bar a continuing violations theory should be struck down. Any \textit{pre-dispute} shortening of a statute of limitations not permitted by the substantive statute should be considered suspect. Otherwise, as with class action waivers and discovery limitations, corporations may use such provisions in standard form agreements to circumvent fairly-debated and deliberatively-enacted legislation.\textsuperscript{247} First, businesses may use standard form agreements as an end run around legislatively enacted limitations periods. Second, these shortened limitations periods can thwart the enforcement of substantive policies against, for example, unfair labor practices. While perhaps not as obvious or reliable as limitations on collective action, a shortened statute of limitations does surreptitiously, in effect, serve to weaken the remedial and deterrent functions of underlying substantive laws.

\textbf{III. THE PROBLEMS PRESENTED BY EXPRESS, PRE-DISPUTE LIMITATIONS OF PROCESS AND THE USE OF THE UNCONSCIONABILITY DOCTRINE TO POLICE THEM}

The Supreme Court’s policy favoring arbitration should not be repeated as an empty mantra to support the enforcement of all limitations contained within

\footnotesize{
\begin{itemize}
  \item \textsuperscript{244} \textit{Id}.
  \item \textsuperscript{245} \textit{Id} (citing Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1044 (9th Cir. 2001)).
  \item \textsuperscript{246} \textit{Davis}, 485 F.3d at 1077. The court discerned: The time to file [in \textit{Soltani}] did not depend upon when the employee knew of the claim, or otherwise when it arose. A three-year old claim could still be filed, as long as it was also filed within six-months from when the employee stopped working (and as long as it was not otherwise barred by the relevant statute of limitations). This type of provision does not raise the concerns about nullifying the "continuing violations" theory, as the employee would during that six-month period still be able to take full advantage of the ability to reach back to the start of the violation.
  \item \textit{Id}.
  \item \textsuperscript{247} \textit{See Schwartz, supra} note 23, at 37; \textit{Taylor & Cliffe, supra} note 16, at 1100.
\end{itemize}
}
arbitration clauses. Many of the critiques that have been aimed generally at pre-dispute arbitration, especially in the consumer and employment contexts, can likewise be aimed at the express, procedural limitations contained within those clauses. At the same time, it is conceptually possible to accept the critiques of additional, pre-dispute limitations and still allow the continuation of the current arbitration regime. This is because these limits on process can work as an effective barrier to holding corporations accountable. Thus, the Court’s stated policy can be upheld by enforcing arbitration clauses in general, while striking down certain other express limitations contained therein.

The aims of arbitration are not necessarily defeated when certain express limitations within arbitration clauses are struck down. Curtailing pre-dispute limitations on discovery, for example, would not impede the policy generally favoring arbitration. Likewise, refusing to enforce collective action waivers is not necessarily inconsistent with the efficiency goals of arbitration—actually, such refusal may advance efficiency by allowing many similar individual disputes to proceed in a class arbitration. At some point, certainly, procedural fairness and corporate accountability outweigh the efficiencies associated with arbitration. Thus, these perceived benefits of arbitration should not be a distraction from its underlying purpose: providing an alternative forum to present substantive claims.

The problem with express pre-dispute limitations is compounded by some of the objections to pre-dispute arbitration more generally. Namely, corporations that draft arbitration clauses into their standardized agreements are usually in a position of superior bargaining power, with a wider knowledge of the intricacies of the deal and the potential disputes that might arise. As “repeat-players” in the marketplace, these businesses also have more incentive to keep disputes out of court, as well as more resources to invest toward this goal.248 The potential for corporate abuse of express, pre-dispute limitations is compounded by the fact that the vast majority of arbitration clauses are contained in contracts of adhesion, which “bear little resemblance to the voluntary agreements envisioned when one thinks of ‘consent.’”249

The idea of consent in this context is mythical and, thus, so too is the notion of party autonomy. To assess whether the parties formed a binding arbitration clause, the courts have looked to contractual standards of assent: an objective manifestation of a willingness to enter into a bargain, whether or not the party has read or understood the arbitration clause.250 This standard has allowed the enforcement of arbitration clauses such as those contained in the now infamous Gateway “terms and conditions,” which were presented to a

248. See Alderman, supra note 27, at 1253–58 (discussing the benefits of the “repeat-player” in consumer arbitration); see also Knapp, supra note 13, at 790 (discussing the relationship between possible measures for reform and the “‘repeat player’ advantage”).
249. Alderman, supra note 27, at 1247.
consumer only after purchasing the computer and defined "assent" as simply keeping the computer longer than thirty days.\textsuperscript{251} Generally, pre-dispute agreements to arbitrate have been treated no differently than any other contract; a party may assent to its terms by signing human resources paperwork, filling out a credit card application, or keeping a product for a certain amount of time.

Critics have made the case for more exacting standards of pre-dispute consent to arbitration because, by agreeing to arbitrate, a party might be waiving the Seventh Amendment right to trial by jury.\textsuperscript{252} Some have argued that consent should be "knowing"—that the party agreeing to arbitration knew the clause was contained within the agreement.\textsuperscript{253} Others have argued even further that a pre-dispute agreement to arbitration should require "knowing and intelligent" consent such that the party agreeing to arbitration was not only aware of the arbitration clause but understood it as well.\textsuperscript{254}

Although these arguments are compelling,\textsuperscript{255} courts have consistently upheld pre-dispute, contractual waivers of the right to a jury trial,\textsuperscript{256} and the contractual standard of a "manifestation of assent" remains the norm in assessing the validity of arbitration clauses.\textsuperscript{257} Moreover, it is not clear that a pre-dispute agreement to arbitrate or to limit certain procedures can be "knowing and intelligent." For example, the very nature of a pre-dispute agreement to eliminate discovery cannot really be knowing and intelligent until the underlying dispute becomes known. In other words, one cannot know what discovery might uncover unless discovery is actually conducted.

Thus, because express, pre-dispute limitations in arbitration clauses are often contained in contracts of adhesion and are formed by the contractual standard of objective assent, the idea of party autonomy is strained. Further, the potential for corporate self-deregulation is amplified. Limitations on class relief and discovery, as well as shortened statutes of limitations, may act as a barrier to a party's substantive relief. Moreover, these barriers are being effected in standardized forms that stakeholders generally do not read (or do not understand).\textsuperscript{258} To the extent that corporations issue these form contracts en

\textsuperscript{251} See Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1147–48, 1151 (7th Cir. 1997).
\textsuperscript{252} See generally, e.g., Jean R. Sternlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 OHIO ST. J. ON DISP. RESOL. 669, 676 (2001) (arguing that "the Seventh Amendment jury trial waiver standard is applicable in many arbitration cases").
\textsuperscript{253} See Ware, supra note 250, at 172–76 (discussing Sternlight, supra note 252, at 680–710).
\textsuperscript{254} See id. at 175.
\textsuperscript{255} But see id. at 197–204 (arguing that a heightened standard of consent is not required to effectively waive the right to a jury trial).
\textsuperscript{256} See Noyes, supra note 33, at 604–07 (discussing the standard of assent to a waiver of the right to a jury trial).
\textsuperscript{257} See generally Ware, supra note 250, at 205 (predicting that arbitration clauses will continue to be assessed by a contractual standard of consent).
\textsuperscript{258} Indeed, the Restatement of Contracts assumes that signatories to standardized form agreements do not read them. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981).
masse, they become the standard for transactions and, in effect, the legislation governing an industry. As illustrated by the examples discussed in this Article, the opportunity to draft standardized arbitration clauses invites companies to privately enact contractual limitations on process, which may effectively weaken the deterrent and remedial effects of existing substantive laws.

Moreover, it is certainly true that the doctrine of unconscionability has served to temper the formalism of arbitration. Some scholars have argued that unconscionability sufficiently polices arbitration abuses. However, the unconscionability doctrine appears ill-equipped to address the express limitations contained within pre-dispute arbitration clauses.

Unconscionability is not readily definable. Indeed, one of the charms of this doctrine is its flexibility to serve as a counterbalance when a contract does not quite involve fraud or duress but would leave the conscience uneasy if it were enforced. The weakness of such a vague standard, however, is its ex ante unpredictability. While the ex ante unpredictability of unconscionability is not unique to arbitration, this frailty has presented itself as a particularly problematic theme in the context of pre-dispute procedural limitations. This is because courts are applying a case-by-case analysis to clauses that most often arise in one-size-fits-all, standardized form agreements. As illustrated in the foregoing examples, this analytical approach leads to inconsistent results among substantially similar (if not identical) facts and, further, defeats the efficiency goals of arbitration. Thus, in any given dispute, it is not certain whether an express contractual limit on procedure contained in a standardized contract will be enforced.

Yet, one of the general goals of contract law is to provide the comfort of certainty in the marketplace. In addition, the enforcement of pre-dispute arbitration clauses seeks to avoid the delay and costs of litigating in court. In this context, neither of these objectives is served by an unconscionability analysis. Rather, the corporations that draft these clauses cannot be certain that their pre-dispute procedural limitations will be enforced. Furthermore, if the limitations are determined to be unconscionable, corporations cannot fairly predict whether the entire arbitration clause will be defeated. Thus, at much time and expense to the corporation and to the contracting stakeholders, both parties are likely to end up in court, litigating the enforceability of the

259. See generally Stempel, supra note 25, at 763 ("[M]any scholars have suggested that unconscionability is simply too plastic a concept that permits too much post-hoc judicial meddling with contracts.").


261. Indeed, the Uniform Commercial Code does not even attempt to define "unconscionability." See U.C.C. § 2-302 (2005); see also Leff, supra note 25, at 487 ("If reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative.").

262. See supra Part II.

263. See supra note 34 and accompanying text.
procedural limitation. This has the effect of seriously undermining the supposed expediency and cost effectiveness of arbitration.

Even where the unconscionability analysis appears to lead to a fair result when the express limitation is not enforced, unfairness nonetheless results. This is because the plaintiff bore the burden of proving unconscionability and, thus, had to decide to undertake the significant time and costs associated with challenging the provision. This burden, in turn, serves as another barrier to corporate accountability.

Additionally, the unpredictability concerning the enforceability of these clauses, and the attendant worry that they will not be enforced ex ante, has not deterred corporations from drafting such overreaching clauses. Because a plaintiff must prove unconscionability, and because many courts will simply strike an offending clause from the agreement and otherwise compel the parties to proceed in arbitration, corporations have little incentive to refrain from overreaching.

Moreover, the separability doctrine, which dissects the arbitration provision from the contract in which it is contained, presents confusion in the application of the unconscionability analysis. As a threshold matter, courts should be determining the unconscionability of the arbitration clause, not the entire contract. However, it is not always easy to discern where the arbitration clause ends and the rest of the contract begins. For example, where a collective action waiver was contained within a larger contract of adhesion, at least one circuit court has refused to entertain procedural unconscionability arguments directed at the contract as a whole, determining that the matter was for an arbitrator to decide, not the court. However, the same court addressed the substantive unconscionability of the collective action waiver by parsing it from the agreement. Thus, in states where a showing of both procedural and substantive unconscionability is required, adherence to the separability doctrine can prevent the determination that an arbitration clause is unconscionable.

Further, the focus of the unconscionability doctrine is inapt. The procedural unconscionability inquiry, which asks whether there was an “absence of meaningful choice,” is usually simply window dressing because the limitations are contained in adhesion contracts, which do not allow negotiation. Moreover, the substantive unconscionability analysis, with its focus on whether the agreement is one-sided, does not squarely address the serious problem with collective action waivers, discovery limitations, and shortened statute of limitations: they can serve as an effective barrier to the vindication of substantive rights. Thus, for example, in assessing the enforceability of a discovery limitation, it should not matter that, after the fact, the case turns out to be “straightforward.” Rather, the inquiry should focus on whether a pre-dispute limitation could, if a dispute arises, fail to provide an alternative forum

264. Indeed, Professor Todd Rakoff has argued that terms in adhesion contracts should be presumptively unenforceable. See Rakoff, supra note 90, at 1173–74.


266. Id.
and instead weaken the deterrent and remedial purposes of the underlying substantive law. Because this potential exists wherever a standardized form contract includes a pre-dispute limitation on procedural rights, such clauses should be per se unenforceable.

IV. REGULATING PRE-DISPUTE LIMITATIONS ON PROCESS: BALANCING EFFICIENCY, AUTONOMY AND ACCOUNTABILITY

Assessing whether pre-dispute procedural limitations should be enforced requires a delicate balancing of efficiency and private autonomy against procedural fairness and corporate accountability. The unconscionability doctrine has not been an appropriate or dependable tool to achieve this balance. In light of unpredictable results, the parameters for enforceable pre-dispute arbitration terms need to be more reliably articulated. Drawing on the analogy to exculpatory clauses, one solution calls for prohibition of express, pre-dispute limitations of procedural rights in standardized form agreements. If the parties agree to these limitations once a dispute has arisen, they should be free to do so. However, federal legislation should be enacted to clarify that pre-dispute collective action waivers, limitations on discovery, and shortened statute of limitations in standardized form agreements will not be valid. Congress could, for example, amend the FAA to specify that such limitations

267. These concerns are heightened by companies' aggressive use of choice of law and choice of forum clauses. Companies concerned with the enforceability of their pre-dispute procedural limitations can require, in their standard form agreements, that the law of a state with weaker unconscionability jurisprudence be applied. See generally William J. Woodward, Jr., Finding the Contract in Contracts for Law, Forum and Arbitration, 2 HASTINGS BUS. L.J. 1, 3, 12–13 (2006). Professor Woodward highlights the irony in this approach:

Very few would think that a vendor could avoid an unconscionability challenge by simply adding a “waiver of unconscionability” to that very form. Yet a modern drafter might very well accomplish the same thing by ‘choosing’ the law of a place with weaker consumer protection and arguing that, as a matter of contract, the customer is bound by that “choice of law.”

Id.

268. This Article is certainly not the first to suggest that the law should look “beyond unconscionability” when assessing pre-dispute limitations of procedural rights. See generally J. Maria Glover, Note, Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements, 59 VAND. L. REV. 1735, 1760 (2006) (arguing that courts should consider “whether there is a sufficiently close nexus between the class action waiver and non-waivable substantive rights such that these waivers should not be left to private bargaining”); Robert S. Safi, Note, Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration, 83 TEX. L. REV. 1715, 1717–18 (2005) (asserting that “unconscionability serves mainly as a point of departure for the discussion of other, more effective tools available to states that want to protect their consumers from [class action waivers]”)

HeinOnline -- 75 Tenn. L. Rev. 404 2007-2008
PRE-DISPUTE LIMITS ON PROCESS

269. This Article also is not the first to advocate for legislative reform prohibiting such clauses. See Stemlight, supra note 116, at 121.

270. See supra notes 22, 136 and accompanying text.

271. See 57A AM. JUR. 2D Negligence § 55 (2004) ("Statutory liability for negligence cannot be contracted away . . . ."). As stated in American Jurisprudence, "if an injury results from a violation of a statute that establishes a certain standard of conduct for the protection and benefit of the members of a class, an immunity contract or clause exculpating a defendant from liability for negligence is unenforceable as contrary to public policy." Id. (footnotes omitted).

272. However, in places where the underlying statutory law allows a corporation to limits its own liability, the analogy to exculpatory clauses no longer holds. For example, the Uniform Commercial Code allows a seller to disclaim warranties. See U.C.C. § 2-316 (2007). Thus, in the narrow circumstance where the underlying substantive right involves a disclaimed warranty, the procedures to enforce that warranty might, likewise, be disclaimable. In other words, if an underlying statutory scheme allows contractual exculpation from substantive liability, it follows that it may also permit narrow procedural limitations to enforce that statute.


274. Id. at § 195 cmt. a.

275. Id.

276. See Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783, 789 n.3, 790–91 (Minn. 2005) (en banc) (refusing to enforce an exculpatory clause in a houseboat rental agreement due to it being a protected class relationship).
Thus, whether the underlying substantive law is a creature of statute or common law, a strong argument exists by analogy to prohibit pre-dispute limitations on procedural rights that could effectively exculpate corporations from liability. Such a rule is consistent with the Supreme Court jurisprudence describing arbitration as an alternative forum but not an avenue for weakening the deterrent and remedial functions of the underlying substantive law.\textsuperscript{277} Again, rather than leaving the courts in a position of discerning this policy, which is likely to lead to a patchwork of irreconcilable results, Congress should act to amend the FAA to render these limitations unenforceable per se.\textsuperscript{278}

Admittedly, it must be recognized that this solution likely suffers from political infeasibility. Corporations generally favor arbitration over civil litigation in handling disputes with stakeholder constituencies and have the lobbying power and influence to frustrate legislation that threatens their interests in arbitration. Likewise, arbitration is itself a big business and not without its own political influence.\textsuperscript{279} Yet, hopeful progress has been made in some states; a handful of state legislatures have prohibited or required heightened scrutiny of collective action waivers.\textsuperscript{280}

\textsuperscript{277}See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27–28 (1991). This approach seems to garner the sentiment of Justice Steven’s dissent in Gilmer, which expressed concern that “an essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims.” Id. at 42 (Stevens, J., dissenting).

\textsuperscript{278}See supra note 269 and accompanying text. Given this Article’s definition of “stakeholder,” this per se rule would apply to all standardized agreements, even those between two business entities. There are two potential responses to whether the prohibitions here proposed should be applied to business-to-business arbitration agreements. First, to the extent there are arguments that the rules applicable to business-to-business arbitration should be different than those applicable to consumers, employees, and franchisees, these arguments could be addressed to the default rules that apply to the parties’ contract—i.e., as a baseline, how much discovery is available in arbitration—and not the problematic pre-dispute terms identified in this Article. For a discussion of the baselines for collective action, discovery, and limitations periods, see infra notes 292–99 and accompanying text. Second, anecdotally, these problematic clauses do not appear to arise with any frequency in business-to-business contracts and, thus, there is likely a compelling argument that the restrictions on these clauses need not apply in the business-to-business context. Moreover, it seems that empirical evidence now supports this anecdotal claim. See Eisenberg et al., supra note 17, at 15.

\textsuperscript{279}See Alderman, supra note 27, at 1256 (“The provision of arbitration services . . . is a competitive business involving large profits.”).

\textsuperscript{280}See CONN. GEN. STAT. ANN. § 36a-746c(7) (West 2004) (prohibiting the inclusion of class action waivers in high cost home loans); GA. CODE ANN. § 16-17-2(c)(2)(C) (2007) (directing courts to consider waiver of class action rights in determining an arbitration agreements’ unconscionability); N.M. STAT. §§ 44-7A-1(b)(4)(f), 44-7A-5 (prohibiting
At the same time, however, what has occurred in Utah is disquieting. In 2006, the Utah legislature enacted the first statute to validate collective action waivers in all types of consumer credit card and other loan agreements.\(^{281}\) Interestingly, a press release from the law firm of Ballard Spahr Andrews & Ingersoll, LLP, boasts having "shepherded" the enactment of the Utah law, "which will help banks and finance companies defeat class actions filed against them throughout the country."\(^{282}\) One of the firm's partners commented: "Given that Utah has dozens of large banks that extend consumer credit throughout the country, this is very significant legislation. This statute will serve as significant protection against unnecessary and unwarranted class action suits."\(^{283}\) The press release notes that "[n]ot only will the statute apply to class actions brought in Utah, it should also apply to class actions filed elsewhere whenever a valid contractual choice of Utah law provision has been included in the agreement."\(^{284}\)

Thus, the proposed legislative reform must recognize this race to the bottom. The simplest option is to enact reform on a federal level by amending the FAA.\(^{285}\) The FAA preempts state laws concerning arbitration; thus, corporations would be unable to contract around the reach of the reforms.\(^{286}\) If reforms occur on a state level, as has happened in Utah, aggressive use of choice of law clauses might allow one state's corporation-friendly laws to effectively deny access to justice for all contracting parties.\(^{287}\) In essence, absent federal legislative reforms, corporations could use express procedural limitations in arbitration clauses to contract around substantive accountability and, in tandem, use a choice of law clause to write themselves into the law of a state that promises to enforce such limitations.

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\(^{282}\) Press Release, supra note 281.

\(^{283}\) Id.

\(^{284}\) Id.

\(^{285}\) To the extent that a general choice of law clause could invoke state arbitration law and thereby opt out of the FAA, state reforms should be encouraged as well. See supra note 87.

\(^{286}\) See Federal Arbitration Act, 9 U.S.C. § 2 (2000). Another option, which would allow the reforms to occur on an incremental, state-by-state level, is for states to use "bomb shelter" provisions in their statutes to prohibit the enforcement of these problematic clauses against their citizens. See Jack M. Graves, Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform, 36 Seton Hall L. Rev. 59, 69 n.73 (2005) (discussing use of "bomb shelter" provisions in context of UCITA).

\(^{287}\) Notably, this also raises federalism concerns as it allows Utah to effectively trump the contrary policies of other states, such as Connecticut and Georgia.
The compelling breadth of scholarship recommending various reforms to the arbitration regime has largely gone unheeded. If Congress is not prepared to ban pre-dispute arbitration clauses outright, it should at least act to prohibit these further procedural limitations contained within such clauses. This solution would not undermine the policy favoring arbitration. Instead, it would actually be consistent with the efficiency goals of arbitration by eliminating litigation over the enforceability of common arbitration terms.

Moreover, regulation of these problematic clauses is warranted. The contract of adhesion apologists argue that it is appropriate to simply leave equalizing effects to market forces. At least in the context of consumer contracts, scholars have argued that a corporation's reputational concerns will prevent it from acting opportunistically. However, arbitration terms set up a sturdy "wall of silence" to protect corporate reputation. Indeed, one of the very purposes of diverting disputes to the arbitral forum is confidentiality. It is true that, at much expense and with the burden of proof, a contracting stakeholder may take the dispute out of the private sphere and into court to challenge an overreaching term as unconscionable. However, with all the barriers of pre-dispute arbitration erected, it is doubtful that corporations' reputational concerns will reliably prevent them from using overreaching terms, especially when the doctrine of unconscionability does not reliably inform parties which terms are overreaching in this context.

Finally, a per se rule against these procedural limitations begs the question of what the default rules are and what they should be. If a pre-dispute limit on process will not be enforced, what, then, are the parties left with? Regarding class action waivers, the common law default rule provides that courts may not order consolidation of arbitration unless the parties' express agreement allows for it. However, the Revised Uniform Arbitration Act would reverse this default rule and allow courts to consider consolidation unless the parties'
agreement explicitly forecloses the possibility.\textsuperscript{293} For the reasons asserted in this Article, unless the parties agree after the dispute has arisen to foreclose aggregation of claims, the mechanism of collective action should be unequivocally permitted. Thus, to the extent that the existing common law default rules would not accomplish this end, the federal legislative reforms must, likewise, establish a rule that unequivocally allows collective action.

The same issues arise with regard to discovery. If the parties cannot limit discovery, the question becomes what the baseline of discovery should be. The permissive relevance standard of the Federal Rules of Civil Procedure\textsuperscript{294} arguably defeats the efficiency of arbitration, which is ordinarily marked by less discovery. At the same time, an arbitration agreement providing for a heightened standard of "substantial need"\textsuperscript{295} perhaps sets too high a burden on the party seeking discovery and presents the problems outlined in this Article. For this reason, consistent with many institutional rules concerning discovery,\textsuperscript{296} the default should furnish the arbitrator with discretion to order discovery.\textsuperscript{297} The parties should not be permitted to contractually limit the arbitrator's discretion by pre-dispute agreement. Using this discretion, the arbitrator should balance the parties' need to obtain the information required to establish a claim or defense against the efficiency goals of arbitration.\textsuperscript{298}

The minimum limitations period is an easier question because it is set by the laws applicable to the substantive claim. It should be noted, however, that if a particular substantive statute expressly allows the parties to contractually reduce the limitations period, that statute should trump this Article's proposed legislative reform.\textsuperscript{299} In this regard, the treatment of a pre-dispute reduction of

\begin{itemize}
  \item \textsuperscript{293} \textit{Id.}; \textbf{REVISED UNIF. ARBITRATION ACT} § 10(c) (2000) ("The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.").
  \item \textsuperscript{294} \textbf{FED. R. CIV. P.} 26(b)(1). The Federal Rules of Civil Procedure require that the evidence sought is relevant to a claim or defense in the action:
  \begin{quote}
  Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.
  \end{quote}
  \textit{Id.}
  \item \textsuperscript{295} \textit{See} Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 672 (Ct. App. 2004) (discussed \textit{supra} Part II.B).
  \item \textsuperscript{296} \textit{See supra} note 187 and accompanying text.
  \item \textsuperscript{297} Certainly, limited discovery is part of arbitration. Perhaps the per se rule against discovery limitations or the minimum quantum of available discovery should be limited or amended to cater to certain categories of arbitration—for example, business-to-business arbitration.
  \item \textsuperscript{298} \textit{See REVISED UNIF. ARBITRATION ACT} § 17(c) (2000) ("An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.").
  \item \textsuperscript{299} For example, \textit{U.C.C.} § 2-725(1) (2007) allows parties, in their "original agreement,"
\end{itemize}
the applicable statute of limitations would be consistent in both litigation and arbitration.

CONCLUSION

Tellingly, the law first met reluctantly with corporations and with arbitration. In the words of Justice Brandeis, early restrictions on corporate activity and financing were born of “a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.” 300 These restrictions were eventually liberalized to the current system of corporation statutes, which serve largely as enabling laws. 301 Likewise, with arbitration, the common law was initially hostile to the notion that private contractual arrangements could “oust the courts of the jurisdiction conferred by law.” 302 The FAA has reversed this hostility and the Supreme Court precedent has embraced pre-dispute arbitration with open arms. 303 The Supreme Court’s stated policy favoring arbitration, as well as the increased popularity of arbitration, have in turn fostered the increased use of express terms limiting certain procedural rights in arbitration. If Congress is not prepared to prohibit pre-dispute arbitration clauses generally, it should at least address certain additional, specific express procedural limitations contained within such clauses in standardized forms.

The examples discussed in this Article—collective action waivers, limits on discovery, and shortened statute of limitations—may serve to weaken the enforcement of underlying substantive laws and, in effect, allow corporations to evade accountability to those stakeholders with whom they have contractual relationships. The doctrine of unconscionability, which has been used to police these limitations, does not provide clear guidelines. Rather than defer to the law of extant contract defenses, Congress should articulate clearer standards for the enforcement of these terms. This articulation will only serve to further the aims of arbitration: expediency and simplicity. Moreover, it will ensure that corporations are prevented from using standardized form agreements with stakeholder constituencies to contract out of process, and with that, contract away accountability for statutory and common law violations.

301. See JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS § 2.06, at 92 (2d ed. 2003) (discussing how modern corporation statutes became “‘enabling,’ ‘permissive’ and ‘liberal’” as a result of reduced restrictions on corporations).
303. See cases cited supra note 12.