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CONTRACTING OUT OF PROCESS, CONTRACTING OUT OF CORPORATE ACCOUNTABILITY: AN ARGUMENT AGAINST ENFORCEMENT OF PRE-DISPUTE LIMITS ON PROCESS

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“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

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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.⁴ 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.⁵ Accordingly, corporations⁶ (really, their managers) owe no general responsibility to other constituencies affected by the firm's activities.⁷ These constituencies, often referred to by corporate law theorists as "stakeholders," include the firm's employees, consumers, suppliers, and communities generally.⁸ Proponents of stakeholder theory argue that corporate management should have at least some generalized accountability to constituencies other than shareholders.⁹ 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.¹⁰

Further, in the field of civil procedure, arbitration has taken a strong foothold. Since Congress enacted the Federal Arbitration Act¹¹ (FAA) in 1925, and the Supreme Court's subsequent, repeated pronouncement of a "liberal federal policy favoring arbitration agreements,"¹² corporations have used arbitration with increasing frequency.¹³ 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."¹⁴ Here, again, a body of law defers to contract. Indeed, Professor Judith Resnick notes that the trend in

theory."); KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 17 (2006) (describing the traditional view that corporations are seen as "an intricate network of contracts").

4. See GREENFIELD, *supra* note 3, at 16–17.

5. See Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 363, 375–88 (2007) ("The prevalent view of the firm characterizes it as merely a vehicle for profit maximization.").

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.

11. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000 & Supp. V 2007).

12. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

13. Indeed, pre-dispute arbitration has become so widely used that some scholars have warned of an "end of law." Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 28–32 (2004). See generally Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 765 (2002) (discussing the "privatization of American contract law").

14. Federal Arbitration Act, 9 U.S.C. § 2 (2000).

civil procedure has been “the wholesale application of extant principles of contract law.”¹⁵ 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.”¹⁶

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.¹⁷ As an outgrowth of the trend toward arbitration, corporations have increasingly used standardized forms with provisions that expressly limit¹⁸ 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,”¹⁹

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”).

16. David H. Taylor & Sarah M. Cliffe, *Civil Procedure By Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1088 (2002).

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 limitations²⁰ 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, *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, *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, *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, *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 . . .”).

22. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (en banc); see also Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 17–82 (2006) (discussing the decision to hold a credit card agreement’s class action waiver as an exculpatory clause violative of public policy). “Exculpatory clause” is defined and used here to describe “[a] contractual provision [prospectively] relieving a party from liability resulting from a negligent or wrongful act.” BLACK’S LAW DICTIONARY 608 (8th ed. 2004).

23. David S. Schwartz, *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.²⁴ 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.”²⁵ Indeed, rather than stating a policy against such express, pre-dispute limitations, the use of the unconscionability doctrine has led to a patchwork of irreconcilable decisions and unpredictability in contract drafting.²⁶

Many well-articulated and convincing critiques have been aimed at “mandatory” arbitration,²⁷ and some equally strong counterarguments have also been made.²⁸ 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.²⁹ Indeed, presently before Congress is

24. See discussion *infra* Part I.B.

25. Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 515 (1967); see also Knapp, *supra* note 13, at 797 (citing Leff, *supra*); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 763 n.21 (2004) (citing Leff, *supra*).

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”).

28. See generally Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 698 (2001) (questioning anecdotal criticisms of “unfair” arbitration clauses and arguing that “fully informed individuals [may] benefit by agreeing to arbitration clauses that appear unfair”); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761 (2003) (contending that “arbitration is fair to individuals and provides benefits unavailable in traditional litigation”).

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*, 6 J. 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 (Ct. App. 2007) (“[A]rbitration agreements waive important legal rights . . .”).

30. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 3 (1st Sess. 2007) (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 Trials*, 2006 J. DISP. RESOL. 181, 211 (2006). See generally Michael L. Moffitt, *Customized 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 Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 583–4 (2007) (“[M]odified litigation has

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.³⁴ 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.³⁵ 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.³⁶

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.

34. See E. ALLEN FARNSWORTH, *CONTRACTS* § 1.3, at 8 (4th ed. 2004) (noting function of contract law from parties’ perspective is “planning for the future”); ANTHONY T. KRONMAN & RICHARD A. POSNER, *Introduction: Economic Theory and Contract Law*, in *THE ECONOMICS OF CONTRACT LAW* 1, 4 (1979) (asserting that a basic function of contract law is to enforce the “agreed-upon allocation of risk” between parties).

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.³⁷ 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.”³⁸ In 1925, as a response to this common law hostility,³⁹ Congress passed the FAA,⁴⁰ 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,”⁴¹ and arbitration is now ubiquitous across various industries and contractual relationships.⁴²

The FAA applies rather broadly to any transaction involving interstate commerce and preempts any state law that would contradict a policy favoring arbitration.⁴³ 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.⁴⁴

Arbitration is, thus, a creature of contract, and courts have interpreted the FAA as putting arbitration agreements on “equal footing” with other contracts.⁴⁵

Some of the perceived benefits of arbitration include its simplicity, informality and expedience relative to civil litigation.⁴⁶ 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.

38. Taylor & Cliffe, *supra* note 16, at 1092–93 (quoting *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. 445, 451 (1874)).

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.”).

40. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000 & Supp. V 2007).

41. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

42. See discussion *infra* Part II.

43. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269, 272–73 (1995) (holding that Alabama statute invalidating pre-dispute arbitration agreements is preempted by FAA); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 (1984) (holding that California franchise statute requiring claims be brought in court notwithstanding arbitration agreements is preempted by FAA).

44. Federal Arbitration Act, 9 U.S.C. § 2 (2000).

45. See *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 364 (2d Cir. 2003).

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.⁴⁷ 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.⁴⁸ Then, once a dispute arises, that party is compelled to arbitrate the dispute even though she would prefer to litigate in court.⁴⁹

Pre-dispute arbitration clauses⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³ It is debatable,

a party ‘trades the procedures and an opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628)). However, some have questioned whether arbitration actually produces these benefits. See, e.g., Noyes, *supra* note 33, at 584–91 (arguing that arbitration is not necessarily faster or cheaper than litigation). See generally Bruce A. Rubin & Jennifer J. Roof, *A Contrarian’s Checklist to Arbitration Clauses*, 74 DEF. COUNS. J. 242 (2007) (delineating “myths” of arbitration).

47. See examples *infra* Part II.

48. See, e.g., Drahozal, *supra* note 28, at 706–08; Schwartz, *supra* note 23, at 37 n.10.

49. See, e.g., Drahozal, *supra* note 28, at 707.

50. Federal Arbitration Act, 9 U.S.C. § 2 (2000) enforces both pre-dispute agreements to arbitrate as well as “submission” agreements, which are agreements to arbitrate once a dispute has arisen. As submission agreements are relatively uncontroversial, this Article is concerned only with express, procedural limitations contained within pre-dispute agreements, or “ex ante” agreements—that is, agreements to arbitrate that are formed prior to any dispute. Some had argued that the jurisprudence interpreting the FAA has failed to recognize important distinctions between pre-dispute agreements and submission agreements. See, e.g., Schwartz, *supra* note 23, at 104–05; Taylor & Cliffe, *supra* note 16, at 1085 n.2.

51. See examples discussed *infra* Part III.

52. See sources cited *supra* note 29.

53. See UNIF. ARBITRATION ACT §6, 7 U.L.A. 28 cmt. 7 (amended 2000) (“[A]n arbitration agreement effectively waives a party’s right to a jury trial . . .”); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 283 (1995) (“Obviously, in

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*,⁵⁴ 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.⁵⁵ The homeowners brought a putative class arbitration against the lender for consumer protection violations.⁵⁶ 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.⁵⁷ 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?⁵⁸ 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 presided over by a judge who is an elected or appointed public official . . . [and] to full-blown discovery.”) (footnotes omitted); Ryan Griffiths, *Steering Clear of the Runaway Jury*, 68 TEX. B.J. 320, 320 (2005) (“By executing arbitration agreements, the parties waive their right to have their case decided by a judge, and, more important, a jury.”); Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 19 (2003) (“[C]ritics attack mandatory arbitration on a variety of grounds, including not only its elimination of access to courts and juries, but also its actual or potential lack of neutrality, high cost, diminution of claimants’ remedies, elimination of class actions, and curtailment of discovery.”) (footnotes omitted); Steven C. Bennett, *Institution Versus Individual: The Arbitration Alternative to Litigation*, METROPOLITAN CORP. COUNS., Aug. 2005, at 9. Mr. Bennet, a trial lawyer practicing in the field of commercial arbitration, describes the practical consequences of arbitration agreements:

“[A]rbitration agreements and rules rarely require strict adherence to rules of evidence. Thus, hearsay and other forms of suspect evidence are often admitted in arbitration proceedings. Many arbitrators will take all evidence offered “for what it’s worth,” placing principal emphasis on the weight of the evidence, rather than its admissibility. Only limited rights of appeal exist. Even where an arbitrator may have committed an error of law, courts generally will not upset an arbitration award.”

Bennett, *supra*, at 9.

54. 539 U.S. 444 (2003) (plurality opinion).

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.⁵⁹

In the wake of *Bazzele*, businesses have not left these questions to implication by simply using broad agreements to arbitrate.⁶⁰ Rather, with increasing frequency, corporations have expressly limited the right to proceed on a classwide basis.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.⁶²

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.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.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].'"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."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.⁶⁷ If no such evidence exists, a

59. *Id.* at 453.

60. See Gilles, *supra* note 19, at 376–78; *infra* Part II.A. Indeed, this was Justice Stevens' prediction at the *Bazzele* 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, *Bazzele*, 539 U.S. 444 (No. 02-634).

61. See Gilles, *supra* note 19, at 376–78; *infra* Part II.

62. See *infra* Part II (providing examples of express, pre-dispute limitations); see also Hans Smit, *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.").

63. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

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

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)).

66. *Id.* (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25).

67. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (alteration in original) (citations omitted). For a brief but thorough discussion of who determines threshold issues of arbitrability, see June Lerhman, *On the Threshold of Arbitration*, L.A. LAW., December 2003, at 20.

presumption arises that the court (not the arbitrator) should decide arbitrability.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.⁶⁹

As discussed, however, rather than leaving these limitations to implication, companies are expressly stating such procedural limitations in their arbitration clauses.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.⁷¹ They are only unenforceable "upon such grounds as exist at law or inequity for the revocation of any contract."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.⁷³ Not surprisingly then, contracting parties claim unconscionability as a defense with increasing frequency in the context of arbitration.⁷⁴ Litigants have aimed challenges either at the arbitration clause in its entirety,⁷⁵ or more specifically at the express, procedural limitations contained within the clause.⁷⁶

68. *First Options of Chi., Inc.*, 514 U.S. at 944–45.

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> ("[T]he arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class . . .").

70. *See supra* note 60 and accompanying text.

71. *See generally*, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (discovery limitations); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (2005) (class arbitration waivers).

72. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000).

73. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

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.").

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

256, 271 (3d Cir. 2003) ("The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement. Because the sickness has infected the trunk, we must cut down the entire tree.").

76. See *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001) (finding inclusion of unconscionable damages-limitation clause does not require the invalidation of the arbitration agreement as a whole); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 103 (N.J. 2006) (enforcing the remaining provisions of an arbitration agreement after severing an unconscionable class action waiver provision).

77. 388 U.S. 395 (1967)

78. 546 U.S. 440 (2006).

79. See *Buckeye Check Cashing, Inc.*, 546 U.S. at 445–46; *Prima Paint Corp.*, 388 U.S. at 404.

80. See *Buckeye Check Cashing, Inc.*, 546 U.S. at 445–46; *Prima Paint Corp.*, 388 U.S. at 403–04.

81. See, e.g., *Coady v. Cross County Bank*, 729 N.W.2d 732, 737 (Wis. Ct. App. 2007) (finding unconscionability of arbitration provision and, thus enforceability, presents a preliminary inquiry into which state's unconscionability law applies).

82. See *Bennett*, *supra* note 53, at 9 ("The precise law of unconscionability varies from state to state. The mere fact that the individual must 'take it or leave it' with regard to a contract does not automatically invalidate the contract. The individual typically has at least the 'leave it' choice in responding to the proffered contract.").

83. See *Fotomat Corp. v. Chanda*, 464 So.2d 626, 629–30 (Fla. 1985) ("Most courts take a 'balancing approach' to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability.") (citations omitted); *Martin v. Sheffer*, 403 S.E.2d 555, 557 (N.C. Ct. App. 1991) (requiring both procedural and substantive unconscionability); *Constr. Assocs., Inc. v. Fargo Water Equip. Co.*, 446 N.W.2d 237, 241–42 (N.D. 1989) (describing a "two-pronged framework" of procedural and substantive unconscionability); 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:10, at 62 (4th ed. 1998) ("It has often been suggested that a finding of a procedural abuse, inherent in the formation process, must be coupled as well with a substantive abuse, such as an unfair or unreasonably harsh contractual term which benefits the drafting party at the other party's

require a strong showing of only one *or* the other to invalidate a contract.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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.⁸⁷

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.

8 WILLISTON & LORD, *supra* note 83, § 18:10, at 64–66 (footnotes omitted).

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).

86. See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100, 1117 (Cal. 2005); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 708 (Ct. App. 2001).

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.⁸⁸ This analysis looks at “whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction.”⁸⁹ 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.⁹⁰ 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.⁹¹

Substantive unconscionability focuses on the terms of the agreement and whether they favor the party with the superior bargaining position.⁹² 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.⁹³ If there is a lack of mutuality, these courts have held that the terms are unconscionable.⁹⁴

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.

90. For a discussion defining the term “contract of adhesion,” see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176–80 (1983).

91. 8 WILLISTON & LORD, *supra* note 83, § 18.10, at 62–64.

92. *Id.* at 57, 65–66.

93. See Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 547–52 (2002) (discussing jurisdictions that use a mutuality analysis).

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.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸ However, when such clauses are present, courts have in some instances refused entirely to compel arbitration.⁹⁹

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."¹⁰⁰ 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

95. See, e.g., *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94, 109 (D.C. 2004) (severing limitation on punitive damages from arbitration clause and otherwise allowing arbitration to proceed).

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 inseparability 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.

100. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

forum, the statute will continue to serve both its remedial and deterrent function.”¹⁰¹ 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.¹⁰²

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.¹⁰³ 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 *Bazzele* decision in 2003. *Id.* at 410 (citing *Green Tree Fin. Corp. v. Bazzele*, 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 “[a]ll 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.¹⁰⁴ 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."¹⁰⁵ 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]*.¹⁰⁶

In addition to franchise and employment contracts, other examples of collective action waivers abound in consumer¹⁰⁷ and loan¹⁰⁸ contracts. They have also

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

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

105. Quizno's Franchise Agreement, § 21.4, available at <http://www.secinfo.com/dsV1x.71a.a.htm> (emphasis added). Recent news stories have reported franchisee class action suits against the sandwich chain. See Julie Creswell, *Some Quiznos Franchisees Take Chain to Court*, N.Y. TIMES, Feb. 24, 2007, at C1. It appears the corporation has not yet raised the collective action waiver as a defense to the class action suit. For other examples of collective actions waivers in franchise agreements, see *Marron v. Snap-On Tools, Co.*, No. Civ. 03-4563, 2006 WL 51193, at *1 (D.N.J. Jan. 9, 2006); *Blimpie Int'l, Inc. v. Blimpie of the Keys*, 371 F. Supp. 2d 469, 471 (S.D.N.Y. 2005); and *Indep. Assoc. of Mailbox Ctr. Owners, Inc. v. Superior Court*, 34 Cal. Rptr. 3d 659, 662 (Ct. App. 2005).

106. *Konig v. U-Haul Co. of Cal.*, 52 Cal. Rptr. 3d 244, 247 (Ct. App. 2006) (alteration in original) (emphasis added), *rev. granted* 55 Cal. Rptr. 3d 864 (2007). For other examples of collective action waivers in employment agreements, see *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir. 2003); and *Skirchak v. Dynamics Research Corp.*, 432 F. Supp. 2d 175, 178–80 (D. Mass. 2006).

107. See, e.g., *Dale v. Comcast Corp.*, 453 F. Supp. 2d 1367, 1374 (N.D. Ga. 2006) (cable television service subscriber agreement); *Stern v. Cingular Wireless Corp.*, 453 F. Supp. 2d 1138, 1141–42 (C.D. Cal. 2006) (cellular telephone service contract); *Cunningham v. Citigroup*, No. Civ. 05-3476, 2005 WL 3454312, at *1 (D.N.J. Dec. 16, 2005) (credit card agreement); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 137–38 (Me. 2005) (optional contract for

been used in insurance contracts,¹⁰⁹ and one has even arisen in a standardized enrollment contract between an educational institution and its students.¹¹⁰ These collective action waivers have generally been enforced, with courts holding they are “not per se invalid.”¹¹¹ With mixed and sometimes irreconcilable results, courts have mostly left the enforceability of collective action waivers to a case-by-case unconscionability inquiry.¹¹²

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.¹¹³ Indeed, Professor Myriam Gilles has recently suggested that the focus on legislative reform may be somewhat misplaced.¹¹⁴ The significant threat to collective procedural mechanisms is not legislative but, rather, private standardized contracts.¹¹⁵ In what Professor Jean Sternlight dubs a “do-it-yourself” approach to law reform,¹¹⁶ businesses are contracting out of the existing class action, class arbitration, and joinder procedures by inserting collective action waivers into their arbitration clauses.¹¹⁶

computer service).

108. See, e.g., *Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 969–70 (W.D. Mo. 2005) (consumer loan agreement); *Walther v. Sovereign Bank*, 872 A.2d 735, 739 (Md. 2005) (mortgage agreement); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 949 (Or. Ct. App. 2007) (mortgage agreement).

109. See, e.g., *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (life insurance agreement); *Peach v. CIM Ins. Corp.*, 816 N.E.2d 668, 670 (Ill. App. Ct. 2004) (automobile “extended protection plan”).

110. *Davis v. ECPI Coll. of Tech., L.C.*, No. 05-2122, 2007 WL 840506, at *1 (4th Cir. Mar. 20, 2007).

111. See *supra* note 71 and accompanying text.

112. See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57 (1st Cir. 2007); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005).

113. 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. Sternlight, *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 liability¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

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.¹²⁰ There is simply no empirical evidence, however, to suggest that corporations actually do pass these hypothetical savings on to consumers.¹²¹

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").

120. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 77–92 (2004) (examining this consumer savings argument for allowing collective action waivers).

121. Sternlight & 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 . . .").

As an example, consider the facts of the widely-cited California case of *Discover Bank v. Superior Court*.¹²² Christopher Boehr, a credit card holder, was charged a \$29 late fee by Discover Bank despite making his payment on the due date.¹²³ 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.¹²⁴ 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.¹²⁵ However, Discover Bank's cardholder agreement contained a clause forbidding classwide arbitration.¹²⁶

Discover Bank insisted that, under the cardholder agreement, Boehr could only proceed on an individual basis.¹²⁷ 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.¹²⁸ 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.¹²⁹

California requires a showing of both procedural and substantive unconscionability.¹³⁰ 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.¹³¹ Rather, the arbitration clause was purportedly made a part of the cardholder agreement by a "notice of amendment" in a "bill stuffer."¹³² Further, the court held that the collective action waiver was substantively unconscionable because it, in effect, operated to insulate Discover Bank from liability.¹³³

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.*

accountable.¹³⁴ 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.¹³⁵ 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.”¹³⁶ The court noted that, while collective action is a procedural mechanism, it is “often inextricably linked to the vindication of substantive rights.”¹³⁷ 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.”¹³⁸

But not all courts have likened collective action waivers to exculpatory clauses.¹³⁹ In *Jenkins v. First American Cash Advance of Georgia, LLC*, for example, the Eleventh Circuit enforced a collective action waiver.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² The annual

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.

138. *Thibodeau v. Comcast Afroilan*, No. 4526, 2006 WL 416863, at *1 (Pa. Ct. C.P. Jan. 27, 2006), *aff’d* 912 A.2d 874 (Pa. Super. Ct. 2006).

139. Many courts have upheld “collective action waivers.” See *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174–75 (5th Cir. 2004); *Blaz v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638–39 (4th Cir. 2002); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274–77 (7th Cir. 1995); *Dale v. Comcast Corp.*, 453 F. Supp. 2d 1367, 1376–77 (N.D. Ga. 2006); *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865, 872–75 (N.C. Ct. App. 2006); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 921–27 (N.D. 2005); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 199–200 (Tex. Ct. App. 2003).

140. *Jenkins*, 400 F.3d 868 at 882–83.

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,

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.

147. *Jenkins v. First Am. Cash Advance of Ga., LLC*, 313 F. Supp. 2d 1370, 1374 (S.D. Ga. 2003), *rev’d* 400 F.3d 868 (11th Cir. 2005).

148. *Id.*

149. *See id.* at 1374–76.

150. *Id.* at 1374–75.

151. *Id.* at 1375.

152. *Id.*

assume that Georgia usury law governs¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ The appellate court did, however, address the substantive unconscionability of the collective action waivers.¹⁵⁶ 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.¹⁵⁷ 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.

Id.

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 Bank*¹⁶¹ 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

may be awarded attorney's fees.") (alterations in original).

158. *Id.*

159. *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 97 (N.J. 2006) (quoting *In re Cadillac*, 461 A.2d 736, 741 (N.J. 1983)).

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.").

161. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1105 (Cal. 2005).

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.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ Apparently moving beyond the concerns enunciated in *Discover Bank*,¹⁷⁰ 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."¹⁷¹ 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."¹⁷² 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.¹⁷³

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.

173. See Samuel Estreicher & Steven C. Bennett, *California Court Creates Class-Arbitration Waiver Test*, 238 N.Y.L.J. at *3 (2007), available at <http://www.jonesday.com> (search for "class-arbitration waiver test"; then follow "EstreicherBennet110807" hyperlink).

certain way on class action waivers.”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.¹⁷⁵ The same panoply of disparate outcomes happened with the collective action waiver in the standardized contract of Cingular Wireless.¹⁷⁶ Indeed, the case law largely defies any reliable pattern.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

174. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 271 (Ill. 2006).

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. *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. *Id.* at 1150 & n.14.

However, in *Ragan v. 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. *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. *See id.* The Illinois court also held that the provision was not substantively unconscionable. *See id.* at 1193–97.

176. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (enforcing the provision); *Merritt v. Cingular Wireless LLC*, No. B178747, 2006 WL 2744357, at *1 (Cal. Ct. App. Sept. 27, 2006) (refusing to enforce the provision); *Paton v. Cingular Wireless*, No. A108816, 2006 WL 1413537, at *1 (Cal. Ct. App. May 23, 2006) (refusing to enforce the provision); *Kinkel v. Cellular Wireless, LLC*, 828 N.E.2d 812, 824 (Ill. App. Ct. 2005) (refusing to enforce the provision).

177. *See generally* Martin C. Bryce, Jr., *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 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, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 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, *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”).

“near-total demise.”¹⁷⁸ This ability to prevent collective action is particularly troublesome because it allows corporations to circumvent fairly-debated and deliberatively-enacted legislation¹⁷⁹ and could, in effect, enable corporate “self-deregulation.”¹⁸⁰ Many of the substantive policies against usurious interest rates,¹⁸¹ 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.¹⁸²

B. Limits on Discovery

Part of the “simplicity, informality, and expedi[ency]”¹⁸³ 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.¹⁸⁴ Another common example of the added expediency of arbitration is that discovery is generally more limited in this context than in the courts.¹⁸⁵

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.¹⁸⁶ 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).

182. See Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2000) (giving judicial branch power to promulgate federal rules of civil procedure); Paul R. Rice, *Back to the Future with Privileges: Abandon Codification, Not the Common Law*, 38 LOY. L.A. L. REV. 739, 743 (2004) (describing the federal rule-making process through Advisory Committee as “quasi-legislative”). See generally Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655 (1995) (describing federal rule-making process, its historical background, and future initiatives).

183. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (“[B]y agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

184. See generally Dawes, *supra* note 29, at 603 (“The risks [of arbitration include] lack of appeal rights [and] waiver of other procedural and substantive rights . . .”); Schwartz, *supra* note 23, at 60–61 (listing “[w]hy corporate defendants like arbitration”).

185. *Gilmer*, 500 U.S. at 31.

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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.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ 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).¹⁹⁰ As part of his employment, Gilmer was registered with the New York Stock Exchange (NYSE).¹⁹¹ As required in part of the standardized registration application, Gilmer agreed to arbitrate any disputes arising out of his employment pursuant to NYSE rules.¹⁹² The NYSE rules governing arbitration allowed for limited discovery, including "document production, information requests, depositions, and subpoenas."¹⁹³ 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.¹⁹⁴

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.

57:90, at 511 (4th ed. 2001) (citing *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980)).

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).

189. See *Gilmer*, 500 U.S. at 31.

190. *Id.* at 23–24.

191. *Id.*

192. *Id.*

193. *Id.* at 31.

194. *Id.*

In *Ostroff v. Alterra Healthcare Corp.*,¹⁹⁵ plaintiff Lillian Restine signed a thirty-one-page "Residency Agreement" on the day she moved into the defendant's assisted living facility.¹⁹⁶ The agreement provided that any claims relating to Restine's residency at the facility, except eviction, would be submitted to binding arbitration.¹⁹⁷ 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."¹⁹⁸

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.¹⁹⁹ Pursuant to the Residency Agreement, the defendant corporation moved to compel arbitration.²⁰⁰ Restine then challenged the arbitration clause on unconscionability grounds, pointing to the limitation that she could only depose expert witnesses.²⁰¹

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.²⁰² The restriction preventing Restine from deposing lay witnesses would limit her access to information and "put her at a distinct disadvantage in arbitration."²⁰³ Unlike the plaintiff in *Gilmer*, the restriction to depose only experts "may well deny Restine a 'fair opportunity to present [her] claims.'"²⁰⁴ Indeed, due to the nature of Restine's accident,²⁰⁵ 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.²⁰⁶ Generally,

195. 433 F. Supp. 2d 538 (E.D. Pa. 2006).

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.

206. See *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005); *Domingo v. Ameriquest Mortgage Co.*, 70 F. App'x 919, 920 (9th Cir. 2003); *Booker v. Robert Half Int'l*, 315 F. Supp. 2d 94, 103–04 (D.C. 2004); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001); *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 614 (D.S.C. 1998); *Hoffman v. Cargill, Inc.*, 968 F. Supp. 465, 475 (N.D. Iowa 1997).

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 *Gilmer*²¹⁰ 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 evidenced by the “lack of mutuality,” a shortened statute of limitations, and unduly burdensome costs.²²⁰ Thus, the court found it unnecessary to decide

207. See *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 546 (E.D. Pa. 2006).

208. No. 03 CV 9905(KMW), 2006 WL 2990032, at *1 (S.D.N.Y. Oct. 16, 2006).

209. *Id.* at *5.

210. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

211. *Bar-Ayal*, 2006 WL 2990032, at *16.

212. *Gilmer*, 500 U.S. at 31.

213. 921 S.W.2d 817, 822 (Tex. App. 1996).

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.”²²¹ 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.”²²²

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.²²³ On the other hand, it also acknowledged “discovery limitations are an integral part of the arbitration process.”²²⁴ 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.²²⁵

The reasoning used to justify the *Martinez* holding is problematic because the discovery restrictions are set by a form arbitration clause well before the dispute arises, and the employer is presumably in a much better position than the employee to predict the types of disputes that are likely to arise. At the time Martinez signed his employment contract containing the arbitration clause, he likely did not anticipate that a dispute would arise and, if so, whether it would be the type requiring extensive discovery to vindicate his rights. Whether or not the dispute turns out to be “straightforward”²²⁶ cannot be fairly assessed until the dispute arises.

Given, as the court acknowledged, that these limitations on discovery could put a plaintiff employee at a “serious disadvantage”²²⁷ in preparing his case, it

221. *Id.*

222. *Id.*

223. *Id.* at 672 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 683 (Cal. 2000)).

224. *Martinez*, 12 Cal. Rptr. 3d at 672 (emphasis added) (citation omitted).

225. *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 then [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”

Id. at 672–73 (citations omitted).

226. *Id.* at 673.

227. *Id.* at 672.

seems patently unjust that the relative “straightforward[ness]”²²⁸ of the claims saves the limitation from being deemed unconscionable, especially when unconscionability is ordinarily assessed as of the time the agreement is made.²²⁹ 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,²³⁰ which plaintiffs have challenged as unconscionable.²³¹ 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,²³² while others have declined to enforce these provisions based on the doctrine of unconscionability.²³³

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.”).

232. *See, e.g., id.* at 1044–45; *Aull v. McKeon-Grano Assocs.*, No. 06-2752, 2007 WL 655484, at *8 (D.N.J. Feb. 26, 2007); *Bar-Ayal v. Time Warner Cable, Inc.*, No. 03 CV 9905, 2006 WL 2990032, at *5, 16 (S.D.N.Y. Oct. 16, 2006); *In re Standard Meat Co.*, No. 05-06-01470-CV, 2007 WL 730660, at *3–5 (Tex. App. Mar. 9, 2007).

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.²³⁴ 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.²³⁵ 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.²³⁶ The Texas appellate court enforced the clause and noted that, in *EZ Pawn Corp. v. Mancias*,²³⁷ the Texas Supreme Court allowed the modification of a statute of limitations on a wrongful discharge claim through an arbitration agreement.²³⁸ 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.²³⁹

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.²⁴⁰ In *Davis v. O'Melveny & Myers*, Jacqueline Davis, a paralegal, sued her employer for violations of the Fair Labor Standards Act (FLSA).²⁴¹ 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."²⁴²

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."²⁴³ The court found it particularly

City Stores, Inc., 328 F.3d 1165, 1173 (9th Cir. 2003); *Martinez*, 12 Cal. Rptr. 3d at 669; *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732, 739 (Miss. 2007).

234. *In re Standard Meat Co.*, 2007 WL 730660, at *1.

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.²⁴⁴ On this basis, the court distinguished *Davis* from other California cases upholding arbitration clauses that shortened the statute of limitations to a six-month period.²⁴⁵ The *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.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 *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.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.

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

244. *Id.*

245. *Id.* (citing *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1044 (9th Cir. 2001)).

246. *Davis*, 485 F.3d at 1077. The court discerned:

The time to file [in *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.

Id.

247. See Schwartz, *supra* note 23, at 37; Taylor & Cliffe, *supra* note 16, at 1100.

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.

250. See Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 170–72 (2004).

consumer only after purchasing the computer and defined “assent” as simply keeping the computer longer than thirty days.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.²⁵² Some have argued that consent should be “knowing”—that the party agreeing to arbitration knew the clause was contained within the agreement.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.²⁵⁴

Although these arguments are compelling,²⁵⁵ courts have consistently upheld pre-dispute, contractual waivers of the right to a jury trial,²⁵⁶ and the contractual standard of a “manifestation of assent” remains the norm in assessing the validity of arbitration clauses.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).²⁵⁸ To the extent that corporations issue these form contracts en

251. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1147–48, 1151 (7th Cir. 1997).

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”).

253. See *Ware*, *supra* note 250, at 172–76 (discussing Sternlight, *supra* note 252, at 680–710).

254. See *id.* at 175.

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).

256. See *Noyes*, *supra* note 33, at 604–07 (discussing the standard of assent to a waiver of the right to a jury trial).

257. See generally *Ware*, *supra* note 250, at 205 (predicting that arbitration clauses will continue to be assessed by a contractual standard of consent).

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.²⁵⁹ Some scholars have argued that unconscionability sufficiently polices arbitration abuses.²⁶⁰ However, the unconscionability doctrine appears ill-equipped to address the express limitations contained within pre-dispute arbitration clauses.

Unconscionability is not readily definable.²⁶¹ 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,²⁶² 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.²⁶³ 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.”).

260. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 456–58 (2002).

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.²⁶⁴ 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.²⁶⁵ However, the same court addressed the *substantive* unconscionability of the collective action waiver by parsing it from the agreement.²⁶⁶ 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.

265. Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877 (11th Cir. 2005).

266. *Id.*

and instead weaken the deterrent and remedial purposes of the underlying substantive law.²⁶⁷ 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.²⁶⁸ 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]”).

are per se unenforceable,²⁶⁹ whether they are expressly stated in the agreement or incorporated by reference to institutional rules such as those of the AAA.

As this Article has shown, pre-dispute limitations have the potential to weaken the deterrent and remedial aims of the underlying substantive law and, thus, have been analogized to exculpatory clauses.²⁷⁰ Therefore, to the extent that the underlying substantive right is a statutory one, the clauses limiting these procedural rights should be unenforceable as a matter of public policy.²⁷¹ The law should not permit corporations (or any party) to effectively contract around statutory liability.²⁷²

Moreover, to the extent the underlying substantive law derives from common law sources, section 195 of the Restatement (Second) of Contracts provides guidance. Under Restatement Second section 195(1), “[a] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”²⁷³ Thus, to the extent the underlying common law cause of action involves intentional or reckless acts, the pre-dispute limitations should be unenforceable.

Further, the Restatement Second recognizes that, for harm caused by negligence, an exculpatory clause will not be enforced if the plaintiff is “a member of a protected class.”²⁷⁴ The term “protected class” includes, for example, the employment relationship, recognizing that an employer may not seek to exculpate itself from liability for negligent harm caused to an employee.²⁷⁵ While corporate law theory does not place on managers any generalized duty to stakeholders as contracting parties, other constituencies that have been the subject of this Article—consumers, franchisees, and insured parties—are also arguably within the contemplation of that class of protected relationships under Restatement Second section 195(2).²⁷⁶

269. This Article also is not the first to advocate for legislative reform prohibiting such clauses. See Sternlight, *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 limit 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.

273. RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981).

274. *Id.* at § 195 cmt. a.

275. *Id.*

276. See *Yang v. Voyageaire 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

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.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.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.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.²⁸⁰

to nature of relationship between lessor and lessee and disparity in bargaining power); *cf.* Valley Nat'l Bank v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 736 P.2d 1186, 1189 (Ariz. Ct. App. 1987) (enforcing spectator's release of liability of automobile race track because of absence of protecting relationship between the parties); *Kellar v. Lloyd*, 509 N.W2d 87, 93 (Wis. Ct. App. 1993) (enforcing racetrack volunteer's release of liability because volunteer was not an employee, and thus, not within protected class).

277. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991). This approach seems to garner the sentiment of Justice Stevens'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).

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.

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

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.

collective action waivers in adhesive consumer arbitration agreements); OKLA. STAT. ANN. tit. 12, § 1880 (West 2007) (providing that collective action waivers appearing in arbitration agreements within adhesive contracts are subject to heightened scrutiny in determining unconscionability).

281. UTAH CODE ANN. § 70C-3-104 (Supp. 2007) (enforcing conspicuous collective action waivers); Press Release, Ballard Spahr Andrews & Ingersoll, LLP, Ballard Attorneys Pilot Unprecedented Utah Law (Mar. 30, 2006), http://www.ballardspahr.com/press/press_detail.asp?ID=964 [hereinafter Press Release].

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.²⁸⁸ 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.²⁸⁹ 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.²⁹⁰ 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.²⁹¹

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.²⁹² However, the Revised Uniform Arbitration Act would reverse this default rule and allow courts to consider consolidation unless the parties'

288. *But see* Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 3 (1st Sess. 2007) (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, *supra*).

289. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 830 (2006) ("[A] rule of unconscionability that condemned one-sided terms would systematically favor opportunistic buyers without protecting fair buyers, because the latter are protected by the sellers' investment in reputation.").

290. David P. Pierce, *The Federal Arbitration Act: Conflicting Interpretations of Its Scope*, 61 U. CIN. L. REV. 623, 625 (1992).

291. *See* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1236 (2006) ("Without belaboring the issue, Bebchuk and Posner seem to me to do nothing to show that this combination of judicial enforcement and the reputational concerns of firms will produce systematically desirable results.").

292. *See* Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169, 174–75 & n.16 (2007) (citing ALAN SCOTT RAU ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 897–901 (4th ed. 2006)).

agreement explicitly forecloses the possibility.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 Procedure²⁹⁴ 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”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,²⁹⁶ the default should furnish the arbitrator with discretion to order discovery.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.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.²⁹⁹ In this regard, the treatment of a pre-dispute reduction of

293. *Id.*; 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.”).

294. 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:

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.

Id.

295. *See* *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 672 (Ct. App. 2004) (discussed *supra* Part II.B).

296. *See supra* note 187 and accompanying text.

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.

298. *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.”).

299. For example, U.C.C. § 2-725(1) (2007) allows parties, in their “original agreement,”

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.

to “reduce the period of limitation to not less than one year,” except in consumer contracts. This UCC provision would not be trumped by the reforms proposed in this Article.

300. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting in part) (addressing the development of laws concerning corporations).

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).

302. *Taylor & Cliffe*, *supra* note 16, at 1092–94 (quoting *Home Ins. Co. v. Morse*, 87 U.S. (1 Wall.) 445, 451 (1874)).

303. See cases cited *supra* note 12.