

## ARBITRATION AND UNCONSCIONABILITY

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### INTRODUCTION

In *Unconscionable Lawyers*, Professor Carrington argues that lawyers who encourage or enable their business clients to incorporate arbitration provisions in their contracts with individuals violate the law and the ethics of the profession, and are worthy of contempt.<sup>1</sup> These serious charges are seriously wrong. As a matter of fact, arbitration is fair to individuals and provides benefits unavailable in traditional litigation.<sup>2</sup> As a matter of federal law, arbitration agreements are as valid and enforceable as any contract.<sup>3</sup> As a matter of legal ethics, lawyers not only act ethically when they advise clients regarding arbitration provisions, but would be remiss if they failed to do so.<sup>4</sup>

Finally, we strongly disagree with Professor Carrington on one other, overarching issue. The current debate over arbitration is an important one, as it involves the very structure of how we as a society resolve disputes. Such a debate can and should improve arbitration and litigation alike. Each system of dispute resolution illuminates the other's strengths and weaknesses, and thereby suggests ways each system might be improved, or how each might be optimal for certain

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1. Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2003).
2. See *infra* Part I.
3. See *infra* Part II.
4. See *infra* Part III.

types of disputes. Vilifying those who use arbitration provisions is a poor way to further this important discussion. We propose that lawyers who disagree on this issue search for common ground rather than claim the moral high ground for themselves.

Part I of this article describes the benefits of arbitration to individuals and compares this method of dispute resolution to traditional litigation. Part II demonstrates that arbitration provisions are favored by federal law and that unconscionable provisions in arbitration agreements are already unenforceable, just as in any contract. Part III addresses the relationship of legal ethics and the fairness of arbitration provisions. Finally, this article concludes that members of the legal community should work together to improve arbitration as well as the traditional litigation system so that both forms of dispute resolution are beneficial to individuals and businesses alike.

## I. THE BENEFITS OF ARBITRATION TO INDIVIDUALS

### A. *Arbitration Is Fair and Provides Benefits to Individuals*

Professor Carrington's argument relies upon a caricature of arbitration, which is painted by citing a few selected examples of unfair arbitration clauses—most of which have been struck down by the courts.<sup>5</sup> These anecdotes are no substitute for analysis. First, such examples are hardly evidence of the need for reform since the courts seem to be able to identify and invalidate unconscionable arbitration agreements. Second, arbitration—like litigation—is too multifaceted to warrant such casual condemnation.<sup>6</sup> Third, there are

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5. See Carrington, *supra* note 1, at 373-77.

6. One would think that plaintiffs' advocates would be particularly sensitive to the flaws of criticism by anecdote as their work is often criticized by reference to unusual and frivolous cases. See Deborah L. Rhode, *Where Does Justice Come In?*, STAN. LAW., Fall 1999 ("The public hears endless accounts of cases that are too big for courts, cases that are too small, and cases that never should have been cases at all. A 25-year-old victim of 'improper parenting' seeks damages from his mother and father. A suitor, who is fed up when stood up, sues his date. A customer having a 'bad hair day' wants the beautician to pay. A woman tries to dry her poodle in a microwave following a shampoo and demands compensation from the manufacturer for the unhappy outcome. Such cases receive

ample examples of clauses that are plainly fair to individuals and therefore fairly enforced.<sup>7</sup> But most importantly, the available empirical evidence shows that arbitration is fair to individuals.

Too few studies rigorously compare arbitration and litigation results. However, those that exist find that arbitration can help individuals who seek to bring businesses to justice.<sup>8</sup> In the employment context, for example, one study found that of all employment arbitrations conducted by the American Arbitration Association (AAA), employees won 73% of the arbitration cases they filed and 64% of all arbitration cases.<sup>9</sup> These results show that individuals fared dramatically better in arbitration than they would have in litigation. A related study found that 63% of employees won in arbitration, while only 15% of employees won in federal court

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disproportionate media attention . . . .”) Just as such examples do not necessarily prove that the plaintiffs’ bar is out of control, the handful of unfair arbitration clauses cited by Professor Carrington does not prove that there is “a raging epidemic” of such provisions in standard form contracts. See Carrington, *supra* note 1, at 363.

Furthermore, no system of justice is perfect. Suppose, for example, that in a certain dispute resolution system, a litigant was required to take his case before a panel, the majority of which was appointed by the opponent’s father and his father’s business partner. Most people likely would agree that it would be unfair to require this litigant to present his or her case before such a panel. Yet that is what happened in the Supreme Court case of *Bush v. Gore*, 531 U.S. 98 (2000).

7. For example, some arbitration agreements permit individuals to choose among different arbitration administrators. See, e.g., *Roe v. Gray*, 165 F. Supp. 2d 1164, 1167 (D. Colo. 2001) (discussing an arbitration agreement permitting claimant to select administrator from three specified administrators); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at \*2 (D. Del. Sept. 28, 2001) (discussing an arbitration agreement permitting claimant to select from two designated administrators). Other agreements call for the business to pay most fees. See, e.g., *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 712 (5th Cir. 2002) (upholding an arbitration agreement that required the consumer to pay a \$125 filing fee, provided that the lender would pay “all other arbitration fees and expense costs for up to one day (eight hours) of proceedings,” and required that the non-prevailing party pay other costs); see also *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997) (noting that New York Stock Exchange (NYSE) and National Association of Securities and Dealers (NASD) arbitration rules required employer to pay all arbitration fees in employment dispute).

8. See, e.g., Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695 (reviewing franchise agreements and reporting that “unfair” pre-dispute arbitration agreements are less prevalent than arbitration critics suggest).

9. Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT’L J. CONFLICT MGMT. 369, 378 (1995). Employers filed 38 of the 171 cases in Professor Bingham’s sample.

during the same period.<sup>10</sup> Another study found that individual employees won 51% of arbitrations, while the Equal Employment Opportunity Commission (EEOC) won only 24% of cases it litigated in court, despite its superior experience, resources, and case-screening procedures.<sup>11</sup> Additional studies have reached the same conclusions.<sup>12</sup> Not only do employees win more often in arbitration, but they also win a higher percentage of the amount they demand: 18% of the amount demanded in arbitration, but only 10.4% of the amount demanded in litigation.<sup>13</sup> As Lewis Maltby, the Director of the ACLU National Taskforce on Civil Liberties in the Workplace, concluded, “it would be a serious mistake for the civil rights community to attempt to stop the trend to employment arbitration.”<sup>14</sup>

Additional studies have shown that individuals have also fared well in arbitration in contexts other than employment disputes. The National Arbitration Forum (NAF), for example, reports that individual plaintiffs win 71% of claims brought against corporate entities before the NAF.<sup>15</sup> In comparison, between 1987 and 1994,

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10. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46-48 (1998). Maltby compared the results of employment arbitration before the AAA from 1993-95 with data from federal district courts for 1994. See Bingham, *supra* note 9, at 210-13. Maltby also reported that pre-trial motions led to dismissal of roughly 60% of the 3,419 employment discrimination cases brought in 1994. See Maltby, *supra*, at 46-48.

11. Gregory W. Baxter, *Arbitration or Litigation for Employment Civil Rights?*, 2 VOL. OF INDIVIDUAL EMP. RTS. 19 (1993-94).

12. See, e.g., Paul Burstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 L. & SOC'Y. REV. 355, 373-74 (1986) (surveying all EEOC trials published in Fair Employment Practice Cases (BNA) between 1974 and 1983 and finding that employee-plaintiffs won only 16.8% of cases); William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.-Dec. 1995, at 40-43 (reporting that plaintiffs won 68% of cases in AAA arbitrations but only 28% in litigation).

13. Maltby, *supra* note 10, at 48. Maltby further concluded that, although the average awards received by employees are lower in arbitration than in litigation, the combination of higher win-rates and lower procedural costs in arbitration result in a higher adjusted outcome in arbitration than in litigation. *Id.* at 54-55. Making the same observation, Professor Samuel Estreicher explains that litigation gives Cadillacs to a few and rickshaws to the many, while arbitration can give Saturns to everyone. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001).

14. *Id.* at 63.

15. National Arbitration Forum, *Millennial Issues Regarding Arbitration Fairness: An Administrator's View*, at 3, at <http://arb-forum.com/arbitration/NAF/forms/millennialArticle.pdf> (Jan. 7, 2000). NAF reports that consumers win an even greater percentage (80%) of arbitrations. *Id.*

individuals won only 54.5% of claims brought in federal court under original diversity jurisdiction, and only about 30% of claims under removal jurisdiction.<sup>16</sup> Indeed, even in cases brought before National Association of Securities Dealers (NASD) arbitrators, a system that critics characterized as “provid[ing] inadequate due process,”<sup>17</sup> individuals win more often in arbitration than in court.<sup>18</sup> Furthermore, a recent survey revealed that more than 93% of parties believed that the NASD arbitrators handled their cases “fairly and without bias.”<sup>19</sup>

Not only do individuals fare better in arbitration than they do in court, but arbitration can provide several benefits to individuals that are unavailable in traditional litigation. Congress recognized these benefits, which flow to all parties in an arbitration, when it passed the Federal Arbitration Act (FAA) nearly eighty years ago.<sup>20</sup> As Congress explained, “by avoiding ‘the delay and expense of litigation,’ [FAA] will appeal ‘to big business and little business alike, . . . corporate interests [and] . . . individuals.’”<sup>21</sup> Decades later, Congress continued to acknowledge the manifold benefits of arbitration, stating that “[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and

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16. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 605 & table 1 (1998).

17. Maltby, *supra* note 10, at 49.

18. See National Association of Securities Dealers, *Dispute Resolution Statistics*, at <http://www.nasdaq.com/statistics.asp#graph7> (showing that customers obtained damage awards in 3,968 of 6,979 (57%) of cases from 1997 to 2001).

19. Gary Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations 2-5* (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business), available at [http://www.nasdaq.com/pdf-text/arb\\_eval99.pdf](http://www.nasdaq.com/pdf-text/arb_eval99.pdf); see also Louis Lavelle, *Poll Shows Most See Broker-Client Arbitration Process as Fair*, KNIGHT-RIDDER TRIB. BUS. NEWS, Aug. 6, 1999, available at 1999 WL 22004429.

20. See S. REP. NO. 68-536 at 3 (1924).

21. *Id.*, quoted by *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

places of hearings and discovery devices . . . .”<sup>22</sup> Consumer advocates likewise have noted that arbitration provides a fast, fair and affordable alternative to litigation.<sup>23</sup>

Arbitration is more convenient than litigation. Parties may participate in person (as in litigation), but arbitration hearings may also take place over the telephone or online.<sup>24</sup> Consequently, an individual can take part in an arbitration hearing without leaving home or taking a day off from work. Such conveniences simply are not available in litigation. Furthermore, individuals do not have to hire a lawyer in arbitration, although they may do so if they wish.<sup>25</sup>

Arbitration is also faster than litigation. A study that compared employment claims filed with AAA with similar claims filed in federal court found that, on average, arbitration resolved cases in about half the time of litigation.<sup>26</sup> Similarly, in March 2001, the average total turnaround time for NASD arbitrations was 12.9 months.<sup>27</sup> The average turnaround time for the previous year was 12.8 months.<sup>28</sup> In comparison, median turnaround time for civil cases in federal district courts during these same periods was more

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22. H.R. REP. NO. 97-542, at 13 (1982); *see also Allied-Bruce Terminix Cos.*, 513 U.S. at 280.

23. *See, e.g.*, Washington Center for Consumer Law, *Access to Affordable Justice*, at <http://consumerrights.net/theissues.html> (last visited June 21, 2002) (explaining that arbitration is fair, fast, affordable, and “endorsed by attorneys and judges statewide,” including the Washington State Trial Lawyers Association).

24. *See, e.g.*, NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE R. 26, *available at* [http://www.arb-forum.com/arbitration/NAF/Code\\_linked/code.htm](http://www.arb-forum.com/arbitration/NAF/Code_linked/code.htm) [hereinafter NAF CODE] (providing for participatory hearings in person, by telephone, or online); *see also* AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES R. C-6, *available at* <http://www.adr.org/upload/LIVESITE/focusArea/consumer/Consumer.pdf> [hereinafter AAA CONSUMER-RELATED DISPUTES] (providing for hearings in person or by telephone); JAMS, STREAMLINED ARBITRATION RULES AND PROCEDURES R. 17(g), *available at* [http://www.jamsadr.com/streamlined\\_arb\\_rules-2002.asp](http://www.jamsadr.com/streamlined_arb_rules-2002.asp) [hereinafter JAMS RULES].

25. *See, e.g.*, NAF CODE, *supra* note 24, R.3A; JAMS RULES, *supra* note 24, R.9.

26. *See* Maltby, *supra* note 10, at 55.

27. National Association of Securities Dealers, *Dispute Resolution Statistics*, at <http://www.nasdaq.com/statistics.asp> (Sept. 25, 2002). In 2001, the NASD reports that “Hearing Decisions” had an average total turnaround time of 16.6 months, while “Simplified Decisions” had an average turnaround time of 9.2 months. *Id.*

28. *Id.* In 2000, “Hearing Decisions” had an average total turnaround time of 16.7 months, while “Simplified Decisions” had an average turnaround time of 10.2 months. *Id.*

than 20 months.<sup>29</sup> Although the length of an arbitration “depends on a number of factors, including the types of claims being brought, the number of parties involved, and the ability to work with the schedules of the parties and their attorneys,” the NAF asserts that “most arbitrations can be completed within three to six months.”<sup>30</sup> These facts have led many commentators to the conclusion that “for smaller, simpler, more routine cases, it is hard to beat administered arbitration.”<sup>31</sup>

Arbitration is also less expensive than litigation. As the Supreme Court has held, the reduced expense of arbitration is “helpful to individuals . . . who need a less expensive alternative to litigation.”<sup>32</sup> For example, for disputes of less than \$2,500, the NAF filing fee is only \$25.<sup>33</sup> It is also possible to recover fees or obtain fee waivers in arbitration.<sup>34</sup> Moreover, some arbitration agreements provide that arbitration fees will be equivalent to what a court would charge in a similar case.<sup>35</sup> Indeed, in her dissent in *Green Tree Fin. Corp.-Ala. v. Randolph*,<sup>36</sup> Justice Ginsberg wrote favorably of the fee systems used by major arbitration administrators: “Under the AAA’s Consumer Arbitration Rules, consumers in small-claims arbitration incur no filing fee and pay only \$125 of the total fees charged by the arbitrator. All other fees and costs are to be paid by the business

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29. See *Judicial Caseload Profile Report*, at <http://www.uscourts.gov/cgi-bin/cmsd2001.pl> (Oct. 12, 2002).

30. National Arbitration Forum, *Frequently Asked Questions about the Forum*, at <http://www.arb-forum.com/about/questions.asp#28> (Oct. 12, 2002).

31. See, e.g., BERTHOLD H. HOENIGER, *COMMERCIAL ARBITRATION HANDBOOK* § 3.10 (1st ed. 1990, rev. 1 1991).

32. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995).

33. NAF CODE, *supra* note 24, app. C, available at [http://www.arb-forum.com/arbitration/NAF/Code\\_linked/apdx\\_c.htm](http://www.arb-forum.com/arbitration/NAF/Code_linked/apdx_c.htm).

34. See, e.g., *id.* R.45; AAA CONSUMER-RELATED DISPUTES, *supra* note 24, R.C-8; see also *Dobbins v. Hawk’s Enters.*, 198 F.3d 715, 717 (8th Cir. 1999) (noting that AAA permits the waiving of fees in hardship cases and holding that plaintiff should seek the waiver before objecting in court to arbitration fees).

35. Cf. *Drahozal*, *supra* note 8, at 755 (noting that “[b]oth the National Arbitration Forum and the American Arbitration Association now offer low-cost consumer arbitration, with fees that are roughly the same as court filing fees”).

36. 531 U.S. 79 (2000) (Ginsberg, J., dissenting).

party.”<sup>37</sup> She also noted that “[o]ther national arbitration organizations have developed similar models for fair cost and fee allocation.”<sup>38</sup> The greatest savings come from simple and informal procedures that allow an individual to pursue a small claim without having to retain a lawyer.<sup>39</sup> In this way, arbitration substantially benefits consumers with claims under \$20,000 because lawyers rarely agree to pursue such cases.<sup>40</sup> Thus, it is not surprising that only one in three Americans agrees that taking a case to court is affordable and “nearly nine of ten [people] point to the costs of legal representation as the main barrier” to the adjudication of claims.<sup>41</sup> Moreover, class actions are not an effective remedy for these high litigation costs because the strict standards for class certification result in most actions being pursued on an individual basis, where arbitration can be most helpful.<sup>42</sup>

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37. *Id.* at 95 (citation omitted).

38. *Id.* Justice Ginsburg cited as examples NAF’s “provisions that limit small-claims consumer costs to between \$49 and \$175” and the National Consumer Disputes Advisory Committee’s protocol, which recommends “that consumer costs be limited to a reasonable amount.” *Id.* at 95 n.2 (citing NAF Code, *supra* note 23, app. C, Fee Sched.(July 1, 2000); National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, Prin. 6, Cmt. (Apr. 17, 1998).

39. *See, e.g.,* Maltby, *supra* note 10, at 55, 56-57; *see also* Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 633 (2001) (comparing procedures employed in arbitration and litigation and concluding that arbitration provides “real advantages” to individuals).

40. *See* Jill Schachner Chanen, *Pumping Up Small Claims*, A.B.A. J., Dec. 1998, at 18. Employees as a group fare even worse. A survey of plaintiff employment lawyers showed that prospective plaintiff employees must have a claim with minimum damages of \$60,000—excluding intangible damages—for an attorney to consider taking the case. Maltby, *supra* note 10, at 57 (citing William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44). As a result of this and other hurdles, only 5% of those who seek help from lawyers succeed in retaining legal counsel. *Id.* (citing *Alternative Dispute Resolution: Testimony Before the Commission on the Future of Worker-Management Relation* (1994) (statement of Paul Tobias, Founder, National Employment Lawyer’s Association)).

41. Frank A. Bennack, Jr., *A Report on the National Survey*, in NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 1, 2 (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf).

42. *See, e.g.,* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN – EXECUTIVE SUMMARY 5, 5 (RAND Institute for Civil Justice 1999) [hereinafter HENSLER ET AL., EXECUTIVE SUMMARY], available at <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> (finding that a large number of “cases in which class action status is sought are dropped when the plaintiff attorney concludes that the case cannot be certified or settled for money”).

At a minimum, these studies and authorities demonstrate that arbitration is a reasonable alternative to litigation. In this light, a contract that calls for arbitration instead of litigation is not “oppressive and unfair” and does not “shock the conscience.”<sup>43</sup> Accordingly, notwithstanding Professor Carrington’s charges, lawyers who encourage or enable their clients to include such terms in their contracts with consumers do not act unconscionably.

### *B. Litigation Is an Imperfect Dispute Resolution Mechanism*

While opponents of arbitration flyspeck the way it works, they rarely confront the problems with our civil justice system. Lawsuits are slow, expensive, and complicated.<sup>44</sup> These factors favor large businesses over individuals. Large businesses, after all, have the time to wait, the money to fight, and the experience to handle the complexities of litigation, particularly class action litigation.

Litigation is slow. Between September 30, 2000 and September 30, 2001, the median total turnaround time for civil cases in federal district courts was 21.6 months.<sup>45</sup> For the previous year, the median turnaround time for civil cases was 20.0 months.<sup>46</sup> As of September

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43. See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981) (defining unconscionability); U.C.C. § 2-302 (2001)(same); see, e.g., Croote-Fluno v. Fluno, 734 N.Y.S.2d 298, 299-300 (N.Y.A.D. 2001) (looking to whether contract shocked the conscience when making unconscionability determination); Coast Plaza Doctors Hosp. v. Blue Cross of Cal., 83 Cal. App. 4th 677, 689 (2000) (same); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 315 (Wash. 2000) (same); Woodhaven Apartments v. Washington, 942 P.2d 918, 925 (Utah 1997) (same); Aves By and Through Aves v. Shah, 906 P.2d 642, 653 (Kan. 1995) (same).

44. See, e.g., Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 9 (1984).

In many ways, contemporary federal litigation is analogous to the dance marathon contests of yesteryear. The object of the exercise is to select a partner from across the ‘v,’ get out on the dance floor, hang on to one’s client, and then drift aimlessly and endlessly to the litigation music for as long as possible, hoping that everyone else will collapse from exhaustion.

*Id.*

45. *Judicial Caseload Profile Report*, at <http://www.uscourts.gov/cgi-bin/cmsd2001.pl> (providing median times from filing to trial for civil cases). Even for those cases that do not reach trial, the median turnaround time from filing to disposition in civil cases during this period was 8.7 months. *Id.*

46. *Id.* Median turnaround time from filing to disposition for civil cases during this period was 8.2 months. *Id.*

30, 2001, a full 14% of civil cases in federal district courts were over three years old.<sup>47</sup> These statistics are unlikely to improve. The Administrative Office of the United States Courts has noted that “the workload of the federal Judiciary has increased dramatically . . . [a]nd all indications are that . . . future caseloads will be larger and the demands on judicial resources even greater in the years to come.”<sup>48</sup> As discussed above, turnaround times in arbitration are usually much faster than in traditional litigation.<sup>49</sup>

Litigation is expensive—mostly because it requires lawyers.<sup>50</sup> The contingent fee device does not solve this problem because many disputes do not involve enough money to make a contingent fee enticing.<sup>51</sup> The class action device likewise does not solve this problem because many disputes do not qualify for class treatment.<sup>52</sup> Rule 23 of the Federal Rules of Civil Procedure and most state rules permit class treatment only if the plaintiffs can establish each of the

47. *Id.*

48. News Release, *Retrospective Shows Federal Caseload Increasing*, Administrative Office of the United States Courts (Dec. 9, 1998), available at [http://www.uscourts.gov/Press\\_Releases/5yr.htm](http://www.uscourts.gov/Press_Releases/5yr.htm) (internal quotation marks omitted).

49. See *supra* notes 26-29 and accompanying text.

50. The consumer advocacy organization Public Citizen presented a report purporting to show that arbitration is more costly than litigation. See Public Citizen, *The Costs of Arbitration*, *Public Citizen Congress Watch*, Apr. 2002, at <http://www.citizen.org/documents/ACF110A.pdf>. Public Citizen’s report fails to consider, however, the costs of legal representation in its analysis—costs that are often substantial. In criticizing Public Citizen’s report, Professor Stephen J. Ware explains:

The most glaring half-truth from Public Citizen is that courts charge lower fees than arbitration organizations. That, of course, is because courts are subsidized by taxpayers while arbitration is not. The most important point, however, is that fees charged by courts and arbitration organizations are only a tiny part of the total cost that a claimant faces. Any honest comparison of arbitration and litigation must include the cost of legal fees, discovery and delay. Those costs are generally lower in arbitration, and Public Citizen offers no persuasive evidence to the contrary.

News Release, Cato Institute, *Public Citizen Arbitration Study Contains Errors, Half-Truths and Exaggerations*, *Scholar Says*, May 3, 2002 (quoting Prof. Stephen J. Ware), available at <http://www.cato.org/new/05-02/05-03-02r-2.html>; accord Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen’s Jeremiad on the “Costs of Arbitration”*, DISP. RESOL. J., at 8-14 (Nov. 2002 - Jan. 2003); *Defenders and Proponents Square Off on New Report* 20 ALTERNATIVES TO HIGH COST LITIG. 91, 105 (May 2002) (“The problem with the Public Citizen report is that it implies that the total cost of arbitration is higher than the cost of going to court. That implication isn’t true—and the report doesn’t support it.” (quoting Lewis L. Maltby)).

51. See, e.g., Chanen, *supra* note 40, at 18; Maltby, *supra* note 10, at 57.

52. See, e.g., HENSLER ET AL., EXECUTIVE SUMMARY, *supra* note 42, at 5.

prerequisites of numerosity, commonality, typicality, and adequacy of representation.<sup>53</sup> If the particular facts surrounding the dispute prevent an individual from establishing that he or she is typical of other putative class members, for example, that individual's claim is ineligible for class treatment. Additionally, even if an individual's claim is one that allows for class treatment, those individuals who are not class representatives (1) do not meet the lawyer representing the class; (2) have no control over the case;<sup>54</sup> and (3) may not receive meaningful relief from the litigation.<sup>55</sup> Indeed, in a recent study, the Rand Institute for Civil Justice showed class members receive as little as 20% of the total recovery.<sup>56</sup> In fact, class counsel occasionally "receive[s] more than class members receive[] altogether."<sup>57</sup>

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53. FED. R. CIV. P. 23(a); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Class actions brought under Rule 23(b)(3) must satisfy the additional requirements of predominance of common issues and superiority of class treatment. *See* FED. R. CIV. P. 23(b)(3); *Amchem Prods. Inc.*, 521 U.S. at 614-15. The burden of establishing these requirements rests on the party seeking certification. *See, e.g.*, *Sikes v. Teledyne, Inc.*, 281 F.3d 1350, 1359 (11th Cir. 2002); *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

54. Professor Carrington appears to acknowledge the importance to litigants of the ability to control the resolution of one's own dispute: "It is of course in the interest of any litigant to control the resolution of all these features of conventional American civil procedure." Carrington, *supra* note 1, at 362.

55. Indeed, in some cases the resolution of class action litigation enriches the plaintiffs' lawyers while class members receive only a coupon. *See, e.g.*, Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991 (2002) (demonstrating that coupons issued in coupon-based settlements are increasingly being structured to resemble promotional coupons, "making the settlement worthless to many (and sometimes most) class members"); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 327 (2001) ("In a number of consumer fraud class actions, the lawyers negotiated deals, which some courts approved, in which class members received coupons of little real economic value, and the plaintiffs' lawyers received millions of dollars calculated based on the purely nominal value of the coupons."); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 34 (2000) ("The 'coupon' class actions have become symbolic of this concern, with class members receiving a few coupons toward the purchase of a new car, airline ticket, or dog food, while class attorneys reap large fees.").

56. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 445 (2000).

57. HENSLER ET AL., EXECUTIVE SUMMARY, *supra* note 42, at 21 (reporting that in three of the ten cases studied, class counsel received more than the total amount received by the class).

In sum, civil litigation has substantial weaknesses as a system of dispute resolution. Arbitration addresses many of those weaknesses. Accordingly, it is perfectly reasonable for parties to choose arbitration even before they know what sort of dispute will divide them. In the rhetoric of critics of arbitration, such a choice is a “mandatory arbitration clause.” This phrase offers more heat than light, however, since it is redundant to refer to a *contract* provision as mandatory. Similarly, the fact that the choice is made prior to the dispute is of no particular significance.<sup>58</sup> Of course, parties whose contract lacks an arbitration clause may later jointly choose arbitration. But parties who have an arbitration clause may later jointly choose litigation—a point routinely missed by critics of arbitration. The existence or absence of an arbitration provision merely establishes how the parties will resolve disputes in the *absence* of a post-dispute agreement on how to resolve disputes. Criticisms of arbitration provisions for being mandatory or preceding the dispute are justified only if being required to arbitrate a dispute is somehow inferior to being required to litigate a dispute. As explained above, the right to arbitrate is in fact often more valuable than the right to litigate. Pre-dispute agreements that require arbitration therefore benefit, rather than harm, individuals.

## II. ARBITRATION PROVISIONS ARE FAVORED BY FEDERAL LAW

Attacks on arbitration routinely ignore the fact that federal law and policy favor the enforcement of arbitration agreements. For example, Professor Carrington cites a number of sources to support his position that the arbitration agreements signed prior to a dispute should be unenforceable.<sup>59</sup> Many of these sources, however, predate Congress’

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58. Indeed, the FAA explicitly makes pre-dispute agreements enforceable. 9 U.S.C. § 2 (2000); *infra* Introduction.

59. Carrington, *supra* note 1, at 363 n.1 (“As late as 1924, both the National Conference of Commissioners on Uniform State Laws and the American Bar Association took positions firmly in opposition to what was perceived by some to be an idiosyncrasy of New York law, *i.e.*, the enforcement of arbitration clauses contained in printed contracts.”) Professor Carrington further supports his

enactment of the FAA in 1925.<sup>60</sup> Section 2 of the FAA, unchanged from the original 1925 version,<sup>61</sup> provides that arbitration agreements are “valid, irrevocable, and enforceable” whether agreed to before or after the dispute to be resolved.<sup>62</sup> The Supreme Court has repeatedly stated that Section 2 of the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . within the coverage of the Act.”<sup>63</sup> “[G]eneralized attacks on arbitration [that] ‘res[t] on [the] suspicion of arbitration as a method of weakening the protections afforded in the substantive law,’” such as those made by Professor Carrington, “are ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.’”<sup>64</sup> For example, the Supreme Court has refused to “indulge the presumption that the parties and arbitral body

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argument against the enforceability of pre-dispute arbitration agreements by arguing that most form contracts “are not really contracts in the moral and classical legal sense of that term.” *Id.* at 365. One of the authorities he cites to support this assertion is section 211, comment b of the *Restatement (Second) of Contracts*, which he quotes to support the proposition that parties who use standard form agreements do not ordinarily expect customers to understand or read the terms of those contracts. *Id.* at 365 n.5. This same comment, however, states that—even in the context of a form contract—parties who do not read the standard terms “understand that they are assenting to terms not read or not understood, subject to such limitations as the law may impose.” *RESTATEMENT (SECOND) OF CONTRACTS* § 211 cmt.b (1981).

60. *See, e.g.*, Carrington, *supra* note 1 at 363 (citing *Parsons v. Ambos*, 48 S.E. 696 (Ga. 1904); *Cocalis v. Nazlides*, 139 N.E. 95 (Ill. 1923)).

61. *Compare* 9 U.S.C. § 2 (2000), with Act of Feb. 12, 1925, Pub. L. No. 68-401, 43 Stat. 883. *See also* Pub. L. 80-282, 61 Stat. 670 (codifying Title 9 of the U.S. Code).

62. 9 U.S.C. § 2 (2000). Section 2 provides:

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

*Id.* (emphasis added).

63. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *accord* *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 762 (2002) (stating that FAA Sections 3 and 4 also evidence the liberal federal policy in favor of arbitration); *see also* *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 (2002) (noting that the Supreme Court has “long recognized and enforced a liberal federal policy favoring arbitration agreements” (internal quotation marks omitted)).

64. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (citation omitted).

conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.”<sup>65</sup>

*A. Pre-Dispute Arbitration Provisions Are Not Unconscionable*

Professor Carrington and others have argued that pre-dispute arbitration agreements that waive a trial by jury and a public hearing are unenforceable.<sup>66</sup> Because “the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate,”<sup>67</sup> Professor Carrington is really arguing that all pre-dispute arbitration agreements are unenforceable. Federal law refutes this claim. First, as mentioned above, Section 2 of the FAA makes both pre-dispute and post-dispute arbitration provisions enforceable.<sup>68</sup> Congress, surely well aware that the tactical dynamics of pre-dispute arbitration agreements are different than those of post-dispute agreements, specifically made pre-dispute agreements enforceable. The Supreme Court has confirmed this reading of Section 2, holding that the FAA preempts any state law making pre-dispute arbitration agreements invalid and unenforceable. In *Allied-Bruce Terminix Cos. v. Dobson*,<sup>69</sup> the Alabama Supreme Court held that Section 2 of the FAA did not preempt an Alabama law that made written, pre-dispute arbitration agreements invalid and unenforceable.<sup>70</sup> The United States Supreme Court reversed, holding that Section 2 preempted the Alabama anti-arbitration provision.<sup>71</sup> Thus, under the FAA, pre-dispute arbitration agreements are neither invalid nor unenforceable. Professor Carrington’s objections to pre-dispute arbitration agreements are sharply at odds with federal law.

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65. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).

66. Carrington, *supra* note 1, at 363; *see also* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001).

67. *Syndor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (quoting *Pierson v. Dean, Witter, Reynolds, Inc.*, 712 F. 2d 334, 339 (7th Cir. 1984)); *see also* *Stout v. Byrider*, 228 F.3d 709 (6th Cir. 2000).

68. *See supra* note 62 and accompanying text.

69. 628 So. 2d 354 (Ala. 1993).

70. *Id.* at 354; *see also* ALA. CODE § 8-1-41(3) (1993).

71. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995).

*B. Pre-Dispute Waivers of Class Treatment of Claims Are Not Unconscionable*

Courts have largely rejected the assertion that pre-dispute arbitration agreements that waive class treatment of disputes are unconscionable.<sup>72</sup> Many other courts have enforced arbitration provisions that implicitly, rather than expressly, preclude class actions.<sup>73</sup> In fact, the majority of courts have held that where arbitration agreements are silent on the issue of class treatment, the default rule is that class treatment is unavailable.<sup>74</sup> A contract

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72. *See, e.g.*, Snowden v. CheckPoint Check Cashing, 270 F.3d 631, 638-39 (4th Cir. 2002); Pick v. Discover Fin. Servs., 2001 WL 1180278, at \*5 (D. Del. Sept. 28, 2001) (“[I]t is generally accepted that arbitration clauses are not unconscionable because they preclude class actions.”); Goetsch v. Shell Oil Co., 197 F.R.D. 574, 578-79 (W.D.N.C. 2000); Zawikowski v. Beneficial Nat’l Bank, 1999 WL 35304, at \*2 (N.D. Ill. Jan. 11, 1999); Edelist v. MBNA America Bank, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001).

73. *See, e.g.*, Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 818 (11th Cir. 2001); Johnson v. W. Suburban Bank, 225 F.3d 366, 374-75 (3d Cir. 2000), *cert. denied* 531 U.S. 1145 (2001); McIntyre v. Household Bank, 216 F. Supp. 2d 719, 724 (N.D. Ill. 2002); Vigil v. Sears Nat’l Bank, 2002 WL 987412, at \*4-5 (E.D. La. May 10, 2002); Arriaga v. Cross Country Bank, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001); Hale v. First USA Bank, N.A., No. 00CIV5406JGK, 2001 WL 687371, at \*6 (S.D.N.Y. June 19, 2001); Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 922-23 (N.D. Tex. 2000); Frerichs v. Credential Servs. Int’l, 98 C 3684 (N.D. Ill. Sept. 30, 1999); Howard v. Klynveld Peat Marwick Goerderler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997), *aff’d*, 173 F.3d 844 (2d Cir. 1999); Doctor’s Assocs., Inc. v. Hollingsworth, 949 F. Supp. 77, 80-81 (D. Conn. 1996); McCarthy v. Providential Corp., 1994 WL 387852, at \*8-9 (N.D. Cal. July 19, 1994); Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998); Stein v. Geonerc, Inc., 17 P.3d 1266, 1271 (Wash. App. 2001); *see also* Caudle v. Am. Arbitration Ass’n, 230 F.3d 920, 921 (7th Cir. 2000) (holding that the procedural device of a class action suit does not entitle a party to be in litigation and, thus, a party that has promised to arbitrate disagreements cannot avoid arbitration on the ground that he or she is pursuing class relief and the arbitrator does not conduct class-wide arbitrations).

74. *See, e.g.*, Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 728-29 (8th Cir. 2001); Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995); Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002); Gray v. Consec, Inc., No. SACV000322DOCEEX, 2001 WL 1081347, at \*3 (C.D. Cal. Sept. 6, 2001); McCarthy, 1994 WL 387852, at \*8-9; Gammara v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993).

In a closely analogous context, the majority of federal appellate courts have held that the FAA prevents courts from consolidating the claims of even two parties in arbitration when the agreement is silent on the issue. *See* Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada, 210 F.3d 771, 774 (7th Cir. 2000); Gov’t of U.K. of Gr. Brit. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat’l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991); Baesler v. Cont’l Grain Co., 900 F.2d 1193, 1194-95 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat’l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 149-50 (5th Cir. 1987); Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984).

provision cannot be deemed unconscionable when that provision yields the same result as the default rule endorsed by many courts.<sup>75</sup>

The key issue in an unconscionability analysis should not be whether the procedural device of a class action is available, but whether individuals can vindicate their substantive rights through

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75. Although a small number of courts have held that preclusion of class-wide dispute resolution contributed to a finding that an arbitration provision was unconscionable on balance, other aspects of those arbitration provisions contributed to the courts' findings of unconscionability. See *Ting v. AT&T*, 182 F. Supp. 2d 902, 930-35 (N.D. Cal. 2002) (holding that arbitration provision was unconscionable because it limited AT&T's liability, shortened the limitations period, required confidentiality, and imposed excessive costs in addition to precluding class-wide dispute resolution), *appeal filed* No. 02-15416 (9th Cir. 2002); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000) (holding that arbitration provision was unconscionable because it precluded injunctive and declaratory relief in addition to precluding class-wide dispute resolution); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100-01 (Cal. App. 2002) (same); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 277-81 (W. Va. 2002) (holding that arbitration provision was unconscionable because it limited damages in addition to precluding class-wide dispute resolution); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574-77 (Fla. Dist. Ct. App. 1999) (same). Because other aspects of the arbitration provisions contributed to the courts' findings of unconscionability, it is unclear whether each court would have reached the same conclusion considering only a preclusion of class-wide dispute resolution. See, e.g., *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1076-77 (C.D. Cal. 2002) (enforcing arbitration clause that precluded class actions, and distinguishing *Szetela* because the *Szetela* court also based its holding on the preclusion of injunctive and declaratory relief); *Bischoff v. DirecTV Inc.*, 180 F. Supp. 2d 1097, 1108 (C.D. Cal. 2002) (enforcing arbitration provision that effectively precluded class actions, and distinguishing *Powertel* because "this Court is not convinced that the *Powertel* court would have made the finding of unconscionability on the class action prohibition alone"). At the time of this writing, California is the only jurisdiction of which we are aware that has found an arbitration provision unconscionable based solely on a preclusion of class treatment of claims. See *Mandel v. Household Bank (Nevada), N.A.*, 129 Cal. Rptr. 2d 380 (Cal. App.) (relying on *Szetela*), *review granted*, 132 Cal. Rptr. 2d 525 (Cal. 2003). California courts, however, are split on the issue. See *Discover Bank v. Superior Court*, No. B161305, 2003 WL 116143, at \*8- \*12 & n.12 (Cal. App. Jan. 14, 2003) (*Boehr*) (rejecting both *Szetela* and *Mandel* as wrongly decided and holding that the FAA preempts both legislative and judicial law limiting the enforceability of class action waivers in arbitration agreements), *review granted*, 132 Cal. Rptr. 2d 526 (Cal. 2003). The California Supreme Court has granted review of both *Mandel* and *Boehr*.

The reliability of some of these decisions is also in doubt. For example, "*Lozada* is no longer reliable law, as it based its holding largely on a case which was subsequently reversed by the Third Circuit." *Bischoff*, 180 F. Supp. 2d at 1108 (citing *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000)). Additionally, the *Szetela* court fails to cite any authority to support its finding of unconscionability, or to explain why it was shocked at a practice that has been endorsed by courts nationwide. See *Szetela*, 97 Cal. App. 4th at 1099-102. The *Szetela* court also fails to cite California precedent supporting the validity and enforceability of arbitration agreements that expressly preclude class-wide dispute resolution. See *id.* For example, in *Blue Cross of Cal. V. Superior Ct. of L.A. County*, 67 Cal. App. 4th 42 (Cal. App. 1998), the court held that class arbitration is available only "[i]n the absence of an express agreement not to proceed to arbitration on a class-wide dispute resolution would be permissible and certainly not shocking.

arbitration. “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>76</sup> Arbitration affords parties an opportunity to enforce statutory rights because, as with the class action device, arbitration is merely a procedural tool for vindicating substantive rights. “By 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.”<sup>77</sup> Courts have repeatedly found that statutory rights may be vindicated in arbitration, even though the class action device is unavailable.<sup>78</sup>

The same analysis applies when statutory rights, such as those granted under the Truth In Lending Act (TILA), are at stake, even if the monetary value of such claims is small. Three federal appellate courts and many federal district courts have upheld arbitration of TILA claims, even though TILA specifically provides for class actions as well as special damages for class actions.<sup>79</sup> The Third Circuit in *Johnson v. West Suburban Bank*,<sup>80</sup> upholding the waiver of class-action procedures in an arbitration provision, set forth principles equally relevant here. The court in *Johnson* explained that “while arbitrating claims that might have been pursued as part of

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76. *Mitsubishi Motors v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

77. *Id.* at 628.

78. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (enforcing the ADEA); *Snowden v. CheckPoint Check Cashing*, 390 F.3d 631, 638-39 (4th Cir. 2002), (enforcing TILA and RICO); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Horenstein v. Mortgage Mkt., Inc.*, 2001 WL 502010, at \*1 (9th Cir. May 10, 2001) (enforcing the Fair Labor Standards Act); *Johnson v. West Suburban Bank*, 225 F.3d 366, 378-79 (3d Cir. 2000) (enforcing TILA and Electronic Fund Transfer Act).

79. *See Snowden*, 290 F.3d at 638-39; *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *McIntyre*, 216 F. Supp. 2d at 724; *Hale*, 2001 WL 687371, at \*7; *Gray v. Conseco, Inc.* 2000 WL 1480273, at \*6 (C.D. Cal., Sept. 29, 2000); *Marsh*, 103 F. Supp. 2d at 922-24; *Brown v. Sur. Fin. Servs., Inc.*, 2000 WL 528631, at \*2-4 (N.D. Ill. Mar. 24, 2000); *Thompson v. Ill. Title Loans, Inc.*, 2000 WL 45493, at \*3-4 (N.D. Ill. Jan. 11, 2000); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627, 631-32 (D. Del. 1999); *Lopez v. Plaza Fin. Co.*, 1996 WL 210073, at \*2-\*3 (N.D. Ill. Apr. 25, 1996); *Gammara*, 828 F. Supp. at 674; *Meyers v. Univest Home Loan, Inc.*, 1993 WL 307747, at \*4-\*5 (N.D. Cal. Aug. 4, 1993).

80. 225 F.3d 366 (3d Cir. 2000).

class actions potentially reduces the number of plaintiffs seeking to enforce the TILA against creditors, arbitration does not eliminate plaintiff incentives to assert rights under the Act.”<sup>81</sup> The court set forth two reasons for its conclusion. First, a plaintiff’s individual recovery is the same whether a case is brought as a class action or as an individual suit; the “sums available in recovery to individual plaintiffs are not automatically increased by use of the class forum.”<sup>82</sup> Second, arbitration would not “necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors” because “[a]ttorney’s fees are recoverable under the TILA . . . and would therefore appear to be recoverable in arbitration.”<sup>83</sup> For these reasons, the Third Circuit held that, even though “pursuing individual claims in arbitration may well be less attractive than pursuing a class action in the courts,” the arbitration clause did not defeat “TILA’s goal of encouraging private actions to deter violations of the Act.”<sup>84</sup>

The Eleventh Circuit reached the same result in *Randolph v. Green Tree Fin. Corp.*,<sup>85</sup> concluding that the plaintiff failed to “establish that Congress intended to preclude the arbitration of TILA claims, even where arbitration would prevent the claims from being brought in the form of a class action,”<sup>86</sup> despite the Eleventh Circuit’s previous holding that Randolph’s claim would be for a “small sum.”<sup>87</sup> The Court held that “the public policy goals of TILA can be vindicated through arbitration.”<sup>88</sup> The court explained that other incentives such as attorneys fees, would allow plaintiffs to bring TILA claims in arbitration.<sup>89</sup> The Eleventh Circuit thus agreed with the Third Circuit that “Congress did not intend to preclude parties

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81. *Id.* at 374.

82. *Id.*

83. *Id.*

84. *Id.* at 374-75.

85. 244 F.3d 814 (11th Cir. 2001).

86. *Id.* at 818.

87. *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999), *rev’d in part, aff’d in part*, 531 U.S. 79 (2000).

88. *Randolph*, 244 F.3d at 818.

89. *Id.*

from contracting away their ability to seek class action relief under the TILA.”<sup>90</sup>

The Fourth Circuit in *Snowden v. CheckPoint Check Cashing*<sup>91</sup> also agreed that TILA rights can be vindicated through arbitration.<sup>92</sup> The court rejected Snowden’s claim that she would be “unable to maintain her legal representation given the small amount of her individual damages.”<sup>93</sup> The court explained that the fact that attorney’s fees are recoverable in arbitration enables individuals to vindicate TILA rights through individual arbitration.<sup>94</sup> Indeed, the court held that there is “no violation of public policy relating to consumer protection” in requiring consumers to arbitrate claims on an individual basis.<sup>95</sup>

### *C. Parties Retain Their Right to an Impartial Decision Maker in Arbitration*

Professor Carrington suggests that some pre-dispute arbitration agreements seek to deprive individuals of the right to an impartial decision maker.<sup>96</sup> It is unclear from his assertion whether he objects only to those unusual arbitration provisions designed to secure a biased decision maker, or whether he is making a broader claim that all pre-dispute arbitration agreements deprive individuals of access to an impartial decision maker. Whichever assertion he is making, federal law already protects individuals from biased arbitrators.

To the extent that an arbitration provision actually provides for a biased decision maker, courts may refuse to enforce such a provision. For example, in *Hooters of America v. Phillips*,<sup>97</sup> the Fourth Circuit

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90. *Id.*

91. 290 F.3d 631 (4th Cir. 2002).

92. *Id.* at 639.

93. *Id.* at 638.

94. *Id.*

95. *Id.* at 639.

96. Carrington, *supra* note 1, at 362.

97. 173 F.3d 933 (4th Cir. 1999).

refused to enforce Hooters' arbitration agreement.<sup>98</sup> The agreement provided that Hooters and the employee would each select one arbitrator, and that those arbitrators would select the third member of the arbitration panel.<sup>99</sup> However, the agreement required that all arbitrators be selected from a list compiled by Hooters.<sup>100</sup> The Fourth Circuit refused to enforce this agreement in part because the court concluded that the arbitration agreement was designed to provide for arbitrators who were biased in favor of Hooters.<sup>101</sup>

The fact that some pre-dispute arbitration agreements might provide for biased decision makers does not justify disallowing all such agreements. Under this logic, the occasional unfairness of some contracts would be grounds for forbidding contracts altogether. A better solution is to root out unfairness by identifying it when it occurs. In the case of arbitration, the Supreme Court has stated that it would not "indulge in the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."<sup>102</sup> In the unusual case that an arbitrator is biased in favor of one of the parties, the FAA authorizes the aggrieved party to challenge the arbitration award in court.<sup>103</sup>

Indeed, fairness in arbitration furthers the self-interest of both businesses and individual arbitrators. Because the FAA specifically allows federal court challenges to arbitration awards where the arbitrator was not impartial, any actual or apparent bias leads to costly litigation—the very result both parties are seeking to avoid.<sup>104</sup> An arbitration award tainted by evident partiality will be overturned in post-award litigation, further increasing dispute resolution costs to

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98. *Id.* at 935.

99. *Id.* at 938.

100. *Id.* at 938-39.

101. *Id.*

102. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

103. 9 U.S.C. § 10 (2000).

104. *See, e.g., Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (noting that wise corporate entities "should see no benefit in currying the favor of corrupt arbitrators, because this will simply invite increased judicial review of arbitral judgments").

the parties. These additional costs and the risk of overturning an award provide additional incentives for arbitrators to decide cases fairly.<sup>105</sup> In fact, “[c]orrupt arbitrators will not survive long in the business” because businesses are interested in keeping down dispute resolution costs, and because biased arbitrators increase those costs.<sup>106</sup>

In addition, many form arbitration agreements now offer consumers a choice among several national arbitration administrators.<sup>107</sup> Such provisions not only serve the interests of the individuals who have such a choice, but also ensure that all arbitration administrators named in such agreements have a financial interest in being seen by individuals (who choose among them) as impartial. This interest in being known for impartiality promotes fairness generally, even if the same administrators occasionally represent the only option in a particular agreement.

Moreover, perceived unfairness in arbitration increases both the threat of courts refusing to enforce awards and the likelihood of increased federal regulation of the arbitration process. While such regulation could take a variety of forms, it would likely “pose a serious threat to the business of arbitration institutions.”<sup>108</sup> For these reasons, it is in the financial self-interest of arbitration administrators to provide neutral, unbiased arbitrators.

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105. See Drahozal, *supra* note 8, at 769-70 (“[A]rbitration institutions have a strong incentive to enhance the fairness of the process in order to assure that their arbitration awards will be enforceable.”); Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT’L L. 647, 663-65 (arguing that arbitrators “care about whether courts enforce their awards or not”).

106. *Cole*, 105 F.3d at 1485.

107. See, e.g., *Roe v. Gray*, 165 F. Supp. 2d 1164, 1167 (D. Colo. 2001) (discussing arbitration agreement permitting claimant to select administrator from three specified administrators); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at \*2 (D. Del. Sept. 28, 2001) (noting choice of two designated administrators). An arbitration administrator, such as AAA or NAF, is an organization that provides parties with neutral arbitrators.

108. Drahozal, *supra* note 8, at 769; see also *id.* (“As often happens, the threat of government regulation can spur the industry to self-regulate in an attempt to head off restrictive legislation.”).

#### *D. Arbitration Can Provide The Same Remedies as Litigation*

Professor Carrington also asserts that pre-dispute arbitration agreements are unconscionable because they deprive individuals of exemplary or treble damages, attorneys' fees, and provisional remedies such as preliminary injunctions and attachments.<sup>109</sup> We agree that such limitations of remedies are problematic. Again, however, the answer is not to invalidate arbitration clauses altogether, but to allow such limitations to factor into a court's unconscionability analysis of a particular agreement.<sup>110</sup> As a factual matter, arbitration agreements often do not limit the availability of equitable remedies. Numerous courts have held that arbitrators can award exemplary damages and attorneys' fees.<sup>111</sup> Arbitrators may also provide a wide array of equitable relief,<sup>112</sup> including provisional remedies such as preliminary injunctions.<sup>113</sup> Furthermore, individuals may enforce in court equitable remedies awarded by an arbitrator.<sup>114</sup>

#### *E. Courts Refuse to Enforce Unconscionable Provisions in Arbitration Agreements*

Finally, the FAA itself has already addressed the problem of unconscionable provisions in arbitration agreements by authorizing courts to refuse to enforce any provisions of arbitration agreements that are truly unconscionable. Section 2 of the FAA provides that

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109. Carrington, *supra* note 1, at 362

110. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895 (9th Cir. 2002) (finding that an arbitration agreement was unconscionable in part because it limited the remedies available).

111. *See, e.g.*, Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638-39 (4th Cir. 2002) (holding that TILA rights may be effectively vindicated through arbitration because attorneys' fees are available through arbitration); Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 818 (11th Cir. 2001) (awarding statutory damages and attorneys' fees); Johnson v. W. Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000) (same).

112. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (discussing arbitrator's power to fashion equitable relief); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 939 (10th Cir. 2001) (noting that arbitrators may have broad equity powers).

113. *See, e.g.*, GATX Mgmt. Servs., LLC v. Weakland, 171 F. Supp. 2d 1159, 1167 (D. Colo. 2001) (holding that a motion for preliminary injunction was arbitrable).

114. *See, e.g.*, Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 864 (Pa. Super. 1991).

arbitration agreements are valid and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>115</sup> Courts have interpreted this language as incorporating common defenses to the enforceability of contracts, such as unconscionability.<sup>116</sup> Thus, any terms that are truly unconscionable are already unenforceable.<sup>117</sup>

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115. 9 U.S.C. § 2 (2000).

116. *See, e.g.*, *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

117. In fact, courts are not only able to invalidate provisions they consider unconscionable, but some courts have extended the doctrine of unconscionability to impose special requirements on arbitration agreements—in direct contravention of the FAA. The FAA explicitly limits judicial review of arbitration provisions to grounds on which “any contract” may be revoked. 9 U.S.C. § 2 (2000). The Supreme Court has made clear that this language precludes state legislatures from imposing special standards on arbitration provisions. *See Doctor’s Assocs., Inc.*, 517 U.S. at 688 (holding Montana’s limitation provisions aimed specifically and solely at arbitration provisions in conflict with and thus preempted by the FAA); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (stating that the FAA “foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.” (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984))). The same language precludes courts from inventing standards for arbitration agreements that could not be applied to “any contract.” *See Doctor’s Assocs., Inc.*, 517 U.S. at 687 (“Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.” (emphasis in original)); *id.* (holding that “*generally applicable* contract defenses” may be applied to arbitration agreements without contravening section 2 of the FAA (emphasis added)); *Perry*, 482 U.S. at 492 n.9 (asserting that only state law that “arose to govern issues concerning the validity, revocability, and enforceability of *contracts generally*” may be applied to arbitration agreements under section 2 (emphasis added)). Notwithstanding this prohibition, some courts recently have invented such standards while purporting to apply the doctrine of unconscionability. *See, e.g., supra* note 75 and cases cited therein. For example, a California court recently ruled that an arbitration provision was unconscionable, in part, because it expressly precluded the class-wide resolution of disputes. *See Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100-01 (Cal. App. 2002). *Contra* *Discover Bank v. Superior Court*, No. B161305, 2003 WL 116143, at \*8- \*12 (Cal. App. Jan. 14, 2003) (*Boehr*) (rejecting *Szetela* as wrongly decided and holding that the FAA preempts judicial law and finds express preclusion of class treatment of claims to be unconscionable and unenforceable), *review granted*, 132 Cal. Rptr. 2d 526 (Cal. 2003). *See also, supra*, note 75. However, the California Court of Appeals has already held that class-wide arbitration is available in the absence of a provision expressly precluding it. *See Blue Cross of Cal. v. Superior Ct. of L.A. County*, 67 Cal. App. 4th 42 (Cal. App. 1998). Because class-wide arbitration is available in California unless expressly precluded, and because *Szetela* holds that the express preclusion of class-wide arbitration is unconscionable, *Szetela* and *Blue Cross*, read together, create a requirement under California law that all arbitration agreements provide for class-wide arbitration. However, California does not require contracts without arbitration provisions to provide for class-wide arbitration. Thus, *Szetela*—in the guise of unconscionability analysis—has produced new substantive law that applies only to arbitration agreements. There is no reason why a court should be able to accomplish such an end when a state legislature cannot. *See Boehr*, 2003 WL 116143, at \*11 (holding that “state law, *whether of legislative or judicial origin*,” is preempted by the FAA if it did not arise “to govern issues concerning the validity, revocability, and enforceability of contracts generally” (emphasis added)). It appears that the Supreme Court will be required to make such a ruling to prevent courts from refusing to uphold arbitration

Indeed, the three cases cited by Professor Carrington demonstrate that courts can and do refuse to enforce arbitration provisions that they believe are unconscionable.<sup>118</sup> These cases also demonstrate that unconscionable arbitration provisions spawn costly litigation. As discussed above, businesses adopt arbitration provisions to reduce—not increase—the cost of resolving disputes.<sup>119</sup> Just as conscionable arbitration provisions can benefit all parties, unconscionable arbitration provisions undermine the interests of consumers and businesses.

### III. ARBITRATION AND LEGAL ETHICS

Finally, because Professor Carrington's description of arbitration and applicable law is flawed, so too is his conclusion regarding legal ethics. As discussed above, Professor Carrington's depiction of arbitration is inaccurate: arbitration provides many benefits to both businesses and individuals that are often unavailable in litigation.<sup>120</sup> His description of applicable law is also incorrect: many of the details of arbitration provisions that he criticizes as "bells and whistles" are not only fair and reasonable, they are routinely upheld by courts.<sup>121</sup> Because arbitration provisions are generally fair, legal, and fully enforceable, Professor Carrington is incorrect in suggesting

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agreements on grounds other than those that "exist at law or in equity for the revocation of any contract." See 9 U.S.C. § 2 (2000). Indeed, the Supreme Court has recently granted certiorari to review the South Carolina Supreme Court's decision in *Bazzle v. Green Tree Financial Corp.*, in which the South Carolina court held that class arbitration is available when the parties' agreement is silent on the issue. See 569 S.E.2d 349 (S.C. 2002), *cert. granted sub nom. Green Tree Fin. Corp. v. Bazzle*, 71 U.S.L.W. 3320 (U.S. Jan. 10, 2003) (No. 02-634). In reviewing *Bazzle*, the United States Supreme Court, directly or indirectly, may address the issue of courts using unconscionability as a guise to impose limitations on arbitration agreements, such as prohibiting parties from agreeing expressly to arbitrate their claims on an individual basis.

118. Carrington, *supra* note 1, at 374-75 (citing *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001); *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002)).

119. See *supra* notes 103-106 and accompanying text.

120. See *supra* Part II. C.

121. Compare Carrington, *supra* note 1, at 374-78, with Parts II.A-E *supra*.

that lawyers who encourage or enable clients to incorporate arbitration provisions in their contracts act unethically.

The rules of legal ethics require lawyers to protect their clients' interests by zealously employing those means permitted by law. For example, the Rules of Professional Conduct for the District of Columbia require that "[a] lawyer shall represent a client zealously and diligently within the bounds of the law."<sup>122</sup> The ethics rules also require that lawyers seek the lawful objectives of a client through "reasonably available means permitted by law."<sup>123</sup> Other jurisdictions have similar rules.<sup>124</sup> In the context of arbitration, where arbitration generally is both beneficial to businesses and individuals and arbitration agreements are legal, valid, and enforceable, a lawyer would be ethically remiss not to recommend that their clients incorporate arbitration provisions in their agreements.

The basis for Professor Carrington's ethical attack is, in part, his assertion that businesses are using pre-dispute arbitration agreements in an attempt to "self-deregulate."<sup>125</sup> To support this accusation, he cites no authority other than himself.<sup>126</sup> This argument ignores a simpler explanation for the proliferation of arbitration agreements: the abuse of the class action device. It is no secret that litigation—particularly class action litigation—is subject to abuse by plaintiffs and their attorneys.<sup>127</sup> The certification of a class, even where claims are weak or frivolous, creates tremendous pressure on businesses to settle to avoid a potential verdict that, although unlikely, might

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122. D.C. RULES OF PROF. CONDUCT, R. 1.3(a).

123. *Id.* R. 1.3(b)(1).

124. *See, e.g.*, IOWA CODE OF PROF. RESP. DR 7-101; MASS. RULE OF PROF. CONDUCT 1.2; NEB. CODE OF PROF. RESP. DR 7-101; OR. CODE OF PROF. RESP. DR 7-101; TENN. CODE OF PROF. RESP. DR 7-101.

125. Carrington, *supra* note 1, at 370.

126. *Id.* at 370 n.26 (citing Paul D. Carrington, *Self-Deregulation: A National Policy of the Supreme Court*, 2 NEV. L. REV. \_\_\_\_ (Forthcoming 2002)).

127. *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1255 (2002) (noting that the settlement pressure created by class certification makes the class action device "attractive to plaintiffs with frivolous and weak claims").

threaten the company's very existence. the Supreme Court has noted that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."<sup>128</sup> Businesses legitimately seek to protect themselves from such abuses of the judicial system. Lawyers are ethically obligated to counsel with their clients in pursuing these legitimate interests.<sup>129</sup>

### CONCLUSION

Professor Carrington argues that lawyers should not draft arbitration provisions that are unconscionable or deprive individuals of substantive rights. We wholeheartedly agree. But we part company with Professor Carrington when he suggests—contrary to the facts and the law—that arbitration is routinely unconscionable.

We propose a more measured approach. Arbitration is imperfect, and so is litigation. Lawyers who advise businesses on dispute resolution issues can and should not only advise clients that pre-dispute arbitration provisions are valid and enforceable under law,

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128. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also* *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (noting that "class certification places inordinate or hydraulic pressure on defendants to settle"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (noting that class certification may require defendants to "stake their companies on [the] outcome of a single jury trial"); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clause as a Defense*, BUS. L. TODAY, May-June 1998, at 24.

All of the dangers inherent in an individual consumer lawsuit—the threats of costly and drawn-out litigation, runaway juries, gargantuan punitive damages awards and adverse publicity—are magnified exponentially when a class of hundreds or thousands of consumers is certified. Faced with these threats, companies often feel pressured to pay substantial amounts in settlement for reasons having nothing to do with the actual merits of the dispute.

*Id.*; *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499 (1991)

[A] significant and identifiable class of settlements is in reality neither voluntary nor accurate. These settlements are not voluntary in that trial is not regarded by the parties as a practically available alternative for resolving the dispute, and they are not accurate in that the strength of the case on the merits has little or nothing to do with determining the amount of the settlement.

*Id.*

129. *See supra* notes 122-124 and accompanying text.

but also identify the concerns raised by critics of arbitration and seek to address them. Critics of arbitration should recognize the flaws in our civil justice system that make alternatives to it appealing, and work toward addressing them. The course suggested by Professor Carrington—that critics of arbitration provisions sue the lawyers who draft them—is almost certain to fail, not only as a tactic, but as an effort to improve arbitration provisions. It will certainly poison any hope for meaningful discussion of the issue. Our hope is that members of the legal community will instead work together in an effort to reach some agreement on best practices regarding such important issues as the procedures to be used in notifying individuals of arbitration provisions, the location and identity of arbitration forums, forum rules, arbitration fees, and the availability of discovery and appeals. In doing so, however, we should aim not to make arbitration just like litigation, but to ensure that it continues to be an alternative to litigation that benefits individuals and businesses alike.

