AMEND THE FEDERAL ARBITRATION ACT: A CALL TO REFORM THE LAW ON MANDATORY PRE-DISPUTE ARBITRATION AGREEMENTS

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I. INTRODUCTION

Referred to committee in May of 2013, the Arbitration Fairness Act (AFA) never became law. Similar to its predecessors, the AFA was overbroad and excessive, as reflected by its reception in Congress. After the bill’s introduction, probability calculators gave the AFA only around a 9% chance of making it out of committee, and the odds of it actually becoming law were a dismal 3%. With no other legislation attempting to reform the law on mandatory pre–dispute arbitration agreements, status quo will continue and the judiciary’s interpretations of the Federal Arbitration Act (FAA) will stand. Under these interpretations, statutory rights may be suppressed through mandatory pre–dispute arbitration agreements, often because of disparate bargaining power between the parties.

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1 The Arbitration Fairness Act of 2013 was referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. See Bill Summary & Status 113th Congress, Library of Congress (June 14, 2013) available at http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.01844.
3 Percentages are subject to change. The factors used to calculate these probabilities are as follows: (1) cosponsor’s ranking in the committee to which the bill has been referred; (2) whether or not a companion bill exists; (3) what year of this Congress the bill was introduced; (4) whether the sponsor of the bill is in a majority or minority party; (5) whether six or more cosponsors of the bill are in the committee to which the bill has been referred; and (6) whether this bill is a reintroduction of a bill from last Congress. Status & Summary of the Arbitration Fairness Act of 2013 (June 14, 2013), available at https://www.govtrack.us/congress/bills/113/hr1844.
Reforming the law on mandatory pre–dispute arbitration agreements is therefore necessary. I propose that Congress do this by amending the FAA. Throughout this note I make several recommendations, but my three core ideas for the amendment are this: (1) pre–dispute arbitration agreements with class action waivers should be unenforceable to the extent that it waives class relief; (2) pre–dispute arbitration agreements for both class and bilateral arbitration should generally be enforceable provided that the agreements are not entered into per an adhesion contract; and (3) class arbitrations should be subject to a discretionary judicial review, limited to class certification, and only considered by the court at the request of a party. Under this amendment, pre–dispute arbitration agreements will be entered into and enforced fairly.

II. THE PROBLEM BRIEFLY EXPLAINED

The Supreme Court’s interpretation of the FAA allows those with great bargaining power to suppress the statutory rights of others. As the law stands today, a party with a lot of bargaining power and a party with little to no bargaining power may enter into a mandatory pre–dispute arbitration agreement that includes a class action waiver. Let’s say afterwards the stronger party causes minor harm to the weaker party. The weaker party will probably not pursue legal recourse because the harm was so minor that it would not be fiscally beneficial to pursue the claim. A claim for that harmed party only becomes fiscally beneficial if that party can join in an action with other parties who were also only slightly harmed. Together, they would form a class, and collectively they could pursue their claims against the party that harmed them. Since


class action waivers suppress such capabilities, a stronger party with an agreement like this could theoretically commit numerous calculated minor harms to several weaker parties, and do so to its own benefit and without worry, because the harmed parties could never unite as a class to sue the harmer while concomitantly each claim is not fiscally beneficial enough to pursue individually. That, in essence, is the problem.

The Court determined that the FAA requires courts to enforce pre–dispute arbitration agreements with class action waivers because statutory class relief is waivable by agreement— even when the agreement is between parties of disparate bargaining power. According to the Court, in order for a class action statutory right to displace a class action waiver, the statute must explicitly state that its right to class relief trumps the FAA’s “freedom-of-contract” principles. But few statutes, if any, explicitly trump the FAA. These judicial rulings thus cultivate an environment where the stronger party may block the weaker party from recourse.

Now, some may argue that pre–dispute arbitration agreements are not forced onto anyone, and if these agreements were unfair, the competitive nature of business would weed these agreements out of use. The problem with this argument is that, while no one is literally

6 See Harvard Law Review Ass’n, supra note 4, at 283.
forced to sign a pre–dispute arbitration agreement, we easily could be forced to. If, for example, the five or so major cell phone companies decide that they are all going to include mandatory pre–dispute arbitration agreements with class action waivers in their new contracts, almost everyone in the country would eventually be subject to those class waivers, because the alternative would be to live without a cell phone, something that most people are not going to do, especially when something like cell phones are so engrained in our culture and daily lives. This idea applies beyond the consumer context as well. For example, an employer could include a mandatory pre–dispute arbitration agreement in all employee contracts, thereby effectively waiving many potential employee claims. A lower–level employee is not going have the bargaining power to negotiate such a term out of the agreement.

I therefore do not buy into the idea that the market will naturally rid itself of this problem. Some markets are immune it; markets where people will buy their products almost under any conditions, especially when the condition at issue is not the price. There are other situations, like with employment contracts, where people do not have another viable option but to sign the pre–dispute agreement, because they need a job and have no bargaining power. In other words, I am of the opinion that there are certain situations where strong entities could effectively force people to sign mandatory pre–dispute arbitration agreements with class action waivers.

III. THE THREE CASES THAT MOLDED THE FAA

Three recent Supreme Court decisions have molded our current understanding of the FAA, providing us with the FAA's main objective: to ensure that “private agreements to arbitrate are enforced according to their terms.” 10 It is thus the parties' intentions that control. 11 The


11 Id.
Supreme Court has also articulated that the FAA demonstrates a “liberal . . . policy favoring arbitration.”\(^\text{12}\) Arbitration agreements can only be invalidated in the same manner as all other contract defenses.\(^\text{13}\) Therefore a contract defense may not “apply only to arbitration or [] derive their meaning from the fact that an agreement to arbitrate is at issue.”\(^\text{14}\)

A. **The First Case: Stolt-Nielsen**

*Stolt-Nielsen* helped solidify the Court’s current interpretation of the FAA. In this case, respondent’s charter party contained a pre-dispute arbitration clause.\(^\text{15}\) After an attempt to bring a class action antitrust suit against the petitioners for price fixing, the parties agreed that they must arbitrate their dispute.\(^\text{16}\) Whether the agreement allowed for class arbitration was voluntarily submitted by the parties before a panel of arbitrators.\(^\text{17}\) Despite the fact that the clause was silent as to class arbitrations, the panel ruled that the agreement allowed for class arbitration.\(^\text{18}\) The Supreme Court reviewed the partial award and disagreed with panel’s conclusion.\(^\text{19}\) Under the FAA, the Court said, a party cannot be forced into class arbitration unless the party has explicitly consented to it by agreement.\(^\text{20}\)

B. **The Second Case: Concepcion**


\(^{13}\) Id. at 1746.

\(^{14}\) Id.

\(^{15}\) Stolt-Nielsen, 559 U.S. at 667.

\(^{16}\) Id. at 668.

\(^{17}\) Id.

\(^{18}\) Id. at 669.

\(^{19}\) See id. at 692 (Ginsburg, J., dissenting).

\(^{20}\) Id. at 684–87.
After *Stolt-Nielsen*, the assault on class relief continued. In *Concepcion*, consumers alleged that AT & T engaged in false advertising by charging a sales tax on “free” phones.\(^1\) There was an arbitration agreement between the parties and it did not permit class arbitration,\(^2\) but the case made it to the courts anyway, and there, the court asked: is this agreement unconscionable?\(^3\) The Superior Court of California addressed this question by applying its own *Discover Bank* rule,\(^4\) a rule which stated that “class waivers in consumer arbitration agreements are unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud.”\(^5\)

The applicability of this rule, however, was short-lived, as the United States Supreme Court held that it was pre-empted by the FAA.\(^6\) The Court suggested that the AT & T contract was fair;\(^7\) indeed, the Concepcions may have been “better off” adhering to the contract rather than pursuing other routes of relief.\(^8\) The Court in *Concepcion* thus continued to allow stronger parties to use the FAA as a weapon to subdue recourse for weaker parties.

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\(^1\) *Concepcion*, 131 S. Ct. at 1744.

\(^2\) *Id.* at 1745.

\(^3\) Unconscionability traditionally occurs when there is procedural and substantive unconscionability. Procedural unconscionability typically relates to disparate bargaining power while substantive unconscionability usually pertains to unfair contractual terms. Padis, *supra* note 7, at 686.

\(^4\) *Concepcion*, 131 S. Ct. at 1745.

\(^5\) *Id.*

\(^6\) *Id.* at 1753.

\(^7\) *Id.*

\(^8\) *Id.*
C. *The Third Case: Italian Colors Restaurant*

The FAA solidified its dominance over other statutory rights when the Court issued the *Italian Colors Restaurant* majority opinion. In this case, there was an arbitration agreement between American Express and some of its customers, an agreement which waived class relief. The plaintiffs attempted class relief anyway, because without class relief, it was not fiscally beneficial to bring a claim. The Court ruled for American Express, finding that under the FAA, a class waiver is valid even when “the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”

The Court declared that, in strict adherence to the FAA, there was no congressional command requiring the Courts to invalidate class arbitration waivers like the one in this case. Even though enforcing this agreement effectively eliminated the restaurant’s antitrust claim, Congress had not indicated that the FAA required a different result. Many laws “do not guarantee an affordable procedural path to the vindication of every claim,” they said, and nor do many laws require class relief. The Court also declared that Rule 23 of the Federal Rules of Civil Procedure cannot modify a substantive right. Bluntly stated, then, the fiscal practicalities

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30 *Id.*

31 See generally *Id.*

32 *Id.* at 2309.

33 See *id.*

34 *Id.*

35 *Id.*

36 *Id.*

of a lawsuit are irrelevant to the “right to pursue” a claim if a mandatory pre–dispute arbitration agreement includes a class relief waiver.\(^{38}\)

Justice Kagan’s dissent strongly criticized this result, arguing that American Express “used its monopoly power to force merchants to accept a form contract violating the antitrust laws.”\(^{39}\) In turn, “Amex ha[d] insulated itself from antitrust liability—even if it ha[d] in fact violated the law.”\(^{40}\) The Court’s interpretation gave stronger bargaining parties a “get-out-of-lawsuits-free-card”.\(^{41}\) Hypothetically, a stronger party could establish “outlandish filing fees” or require an “absurd statute of limitations,”\(^{42}\) and an agreement could even possibly block certain types of necessary testimony.\(^{43}\) Thus, \textit{Italian Colors Restaurant} made “it likely that many federal statutes will no longer be enforced privately in certain contexts.”\(^{44}\)

\textbf{IV. Passing the AFA Would Have Caused More Problems Than It Would Have Fixed}

The answer to the mandatory pre–dispute arbitration agreement problem was not the AFA. The bill would have solved one issue, and it would have caused several more, as it proposed to render \textit{all} pre–dispute arbitration agreements in consumer, employment, civil rights, and antitrust disputes unenforceable.\(^{45}\) The AFA was thus rather extreme.

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Italian Colors Rest.}, 133 S. Ct. at 2311.
\item \textit{Id.} at 2313 (Kagan, J., dissenting).
\item \textit{Id.}
\item See \textit{id.} at 2314.
\item \textit{Id.}
\item \textit{Id.}
\item Harvard Law Review Ass’n., \textit{supra} note 4, at 278.
\item See \textit{ARBITRATION FAIRNESS ACT OF 2013 (2013) available at https://www.govtrack.us/congress/bills/113/hr1844/text.}
\end{enumerate}
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In a polarizing political climate, a bill of that nature will not pass. In this case, it is good that the bill did not pass. The bill was disadvantageous to citizens because pre–dispute arbitration agreements render several positive results. Declaring all of these agreements unenforceable would wrongfully overprotect our citizens from an adjudication system rich in benefits. The current abuses of mandatory pre–dispute arbitration agreements can be stopped with much more tempered legislation, legislation that would still allow pre–dispute agreements to exist but that would also rid our society of its current exploited condition.

V. THE BENEFITS AND DETRIMENTS OF MANDATORY PRE–DISPUTE ARBITRATION AGREEMENTS

The benefits and detriments of mandatory pre–dispute arbitration agreements often turn on the benefits and detriments of arbitration. It is thus important to first understand arbitral basics. Parties can contract and thereby agree to arbitrate their disputes, but only the types of disputes specified in the contract may be arbitrated. And only the contracting parties may go to arbitration. Just like any other contract, it is the parties’ intent that controls.

Arbitrators are therefore a lot like judges. They determine the outcome of the dispute and render a judgment. Oddly enough, though, arbitrators “do not need to be lawyer[s] . . . [and] their word is nearly always final and un-appealable.” Arbitrators, moreover,

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46 *Stolt-Nielsen*, 559 U.S. at 684.

47 Id.


51 See generally id.

may craft awards without adhering to precedent; they must, however, “identify the rule of law that governs.” These governing laws are extracted from the contract, common law, and applicable statutes. Arbitrators thus may not command their “own brand of industrial justice.” Because arbitration has these characteristics, many have questioned the benefits of mandatory pre–dispute arbitration agreements. But several benefits do exist.

A. The Benefits of Mandatory Pre–Dispute Arbitration Agreements

Ridding the world of pre–dispute arbitration agreements could have several ill–effects on our society. Both strong and weak parties observe numerous benefits from arbitration. It is often cost-saving when compared to litigation, and it allows for quick results. Outlawing pre–dispute arbitration agreements could increase the cost of products, lower wages for employees, shorten the availability of remedies, and increase frivolous litigation.

Whether class action waivers are enforceable or not, businesses will often choose to arbitrate their disputes, as arbitration generally cuts costs for stronger, larger entities. Litigating an employment claim, for example, can cost as much as $1 million in attorneys’ fees. Using

53 Stolt-Nielsen, 559 U.S. at 673.
54 See id. at 671.
55 Id.
56 See Spakovsky, supra note 8.
58 Testimony of Peter B. Rutledge, Associate Professor of Law, Columbus School of Law, Catholic University of America, Hearing on H.R. 3010, House Judiciary Committee, 110th Cong. 9 (2007).
59 See Spakovsky, supra note 8, at 4–8.
60 Id. at 8.
61 Id.
arbitration, however, could drop a company’s legal fees by 90 percent.\footnote{Id.} It is easy, then, to see why big companies and other stronger parties use mandatory pre-dispute arbitration agreements.

Arbitration is also fair. A study of over 200 American Arbitration Association (AAA) employment arbitrations indicated no business bias, cutting at the repeat player theory, a theory which proffers that repeat players in arbitration may receive favorable treatment since the arbitrator receives multiple cash-ins from the repeat player and only one from the repeat player’s opponent.\footnote{See generally Lisa Bingham, \textit{On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards}, 29 McGeorge L. Rev. 223 (1998).} The repeat player theory is not completely without appeal, as it is not hard to imagine a person thinking in the back of their head that they may get hired again if they ruled in the repeat player’s favor. The problem that I have with it, though, is that it is a substantial accusation to call a professional like an arbitrator partial, especially without solid evidence. Moreover, in the AAA study mentioned earlier in this paragraph, the repeat player effect did not show,\footnote{See generally id.} and all the other studies I mention in this section below demonstrate evidence to the contrary as well, as those studies also revealed that arbitration rendered equitable results for both the “big guy” and the “little guy.”

Arbitration is also time efficient. AAA submits that consumer-initiated arbitrations typically last only 6.9 months.\footnote{Christopher R. Drahozal and Samantha Zyontz, \textit{An Empirical Study of AAA Consumer Arbitrations} (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1365435.} Compare this to litigation, where consumer-initiated litigation

\footnote{id}
usually takes 19.4 months. Some federal courts can even take as long as 38.6 months just to get to trial. Thus, in general, arbitrations are less time consuming than litigation.

Arbitration allows many claims that litigation would not, which often helps the “little guy.” In the employment arena, a study found that an employee’s claim must be worth “at least $60,000 for an employment lawyer to be willing to litigate the case.” Consequently, ninety-five percent of employees seeking representation are turned away by attorneys. Discrimination, FMLA, and FLSA claims all go by the wayside when the claim is not worth enough. And pursuing a claim is not cheap. The average employment dispute costs $10,000 before going to trial. The average cost to take that same dispute to trial is $50,000. Litigation thus discourages many harmed individuals from bringing a claim. Arbitration therefore is a better choice for those with smaller valued claims.

Weaker parties seem to do better in arbitration than litigation. In one study, for example, employment arbitrations from the securities industry were compared to employment discrimination lawsuits filed in the Southern District of New York. The employees who pursued their claims through arbitration won 46% of the time, while the employees who pursued their claims through the courts won only 34% of the time. The average amount of recovery was

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66 Spakovksy, supra note 8.
67 Id.
68 Id.
69 Schwartz, supra note 9, at 8.
70 Padis, supra note 7, at 704–05.
71 Id.
72 Spakovksy, supra note 8.
73 Id.
greater in arbitration as well.\textsuperscript{74} Another study that observed over 3,000 employment discrimination court cases discovered that 60\% were vanquished by pretrial motion.\textsuperscript{75} And employees only prevailed in 14.9\% of court cases.\textsuperscript{76} Comparatively, in arbitration, employees won 63\% of their claims.\textsuperscript{77} Arbitrations do not favor weaker or strong parties, bigger or smaller.

Arbitral institutions ensure that arbitrations are fair and just. To illustrate, a study of disputes before FINRA, a large operate of arbitral forums, suggested that arbitration under this institution was beneficial to all parties involved.\textsuperscript{78} FINRA’s arbitral rules, and presumably the rules of all reputable arbitral institutions, are expertly drafted to better ensure an impartial adjudication.\textsuperscript{79} Under the current rules of FINRA, a party may “opt for an all public arbitrator panel,” and motions for a dismissal are discouraged.\textsuperscript{80} Parties are entitled to explained decisions, and individuals with close ties to the securities industry may not serve as a public arbitrator.\textsuperscript{81}

\textsuperscript{74} Id.
\textsuperscript{75} Padis, supra note 7, at 694.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} David J. Libowsky, Congress Again Considers the Arbitration Fairness Act, MARTINDALE (July 11, 2013), available at http://www.martindale.com/securities-law/article_Bressler-Amery-Ross-A-Professional_1880884.htm. FINRA is a non-profit organization designed to protect investors and ensure market integrity in the securities industry. The organization writes and enforces regulations, demands compliance, fosters transparency, and educates investors. FINRA is not part of the government, but it is authorized by Congress to make sure that “the securities industry operates fairly and honestly.” FINRA, http://www.finra.org/AboutFINRA/ (last visited Feb. 28, 2015).
\textsuperscript{79} See generally id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
Statistics from a study on FINRA arbitrations also suggest that they are equitable.\textsuperscript{82} From 2008 to May of 2013, yearly statistics remained consistent,\textsuperscript{83} as parties were awarded damages in 39\% to 47\% of arbitrations, depending upon the year.\textsuperscript{84} Parties should thus use a reputable arbitral institution when participating in arbitration.

Arbitration is not only beneficial for the bigger, stronger parties. It is quite beneficial for weaker, smaller parties as well. In general, arbitration is fair and less time consuming than litigation. It also fiscally allows for claims that litigation would not, and the chances of the “little guy” winning at arbitration are about the same as they are in court.

With all these benefits, it is easy to see why some individuals vehemently opposed the AFA and all legislation like it. Although it is good that the AFA did not pass, that does not mean reform is not needed.

B. \textit{The Detriments of Mandatory Pre-Dispute Arbitration Agreements}

There are several valid criticisms of mandatory pre–dispute arbitration agreements. For starters, some critics simply dislike the arbitration process. It hinders the further development of public law.\textsuperscript{85} It also lacks transparency and adequate judicial review.\textsuperscript{86} But as discussed, the process can be beneficial to both strong and weak parties. So the problem is probably not the entire process. Indeed, the problem is procedural.

Procedural problems are curable. But without reform, mandatory pre-dispute arbitration agreements with class actions waivers will continue to erode the benefits of arbitration. It is the

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Libowsky, \textit{supra} note 78.

\textsuperscript{86} Id.
lack of legal checks on these agreements that allow some to exploit the current state of arbitral law, especially when there is disparate bargaining power amongst the parties. But some have suggested that mandatory pre-dispute arbitration agreements are not that great, as they may even infringe upon the right to trial by jury. Individuals can unknowingly become obligated to participate in arbitration by signing an adhesion contract, and within this agreement to arbitrate, the individual may also unknowingly waive their right to class action. Courts, however, have ignored the “placement of arbitration clause[s] . . . as well as the parties’ degrees of knowledge, sophistication, and education.” Thus, some argue that a poorly worded agreement jammed pack with legalese could effectively waive an individual’s right to a trial by jury and class relief, without the individual even realizing it.

Not only is it perfectly legal for a powerful entity to impose these agreements upon weaker parties, but arbitration agreements are not even required to be conspicuous. Powerful parties thus have little incentive to tell weaker parties about these clauses, unless they decide to do so out of the goodness of their hearts.

87 See Padis, supra note 7, at 668.
89 See id. at 248.
90 See id. at 237.
91 Id. at 251–52.
92 See id.
93 Id. at 252–253.
Class action waivers derail potential rights “under consumer, antitrust, securities, employment, and civil rights statutes.” As a consequence, corporate accountability dwindles while potential wrongdoings go unchecked. And powerful entities are using class action waivers more often. Consequently, students misled by educational institutions, employees wronged by their employers, and consumers with “ordinary small-value” claims, have little to no recourse.

Some members of Congress recognized this as a problem; hence the proposal of the AFA. And Congress has taken additional action in an effort to protect citizens from class actions waivers. The body has started by “outlawing mandatory arbitration clauses in standard form agreements in payday loan and consumer credit contracts with military families.” Arbitration has also been limited in agreements concerning residential mortgage loans and automobile dealer franchises. Congress, however, is not the only entity concerned.


95 Id.

96 A study by the Consumer Financial Protection Bureau concluded that the trend to utilize class-waivers has not faltered. See id.

97 Id. at 6.

98 Id.

99 Id.

100 Gilles, supra note 94.
Several organizations have voiced their opinions regarding the current state of mandatory pre–dispute arbitration agreements. Some organizations target the FAA’s original meaning. To illustrate, the organization NASAA submitted a statement to the Senate Judiciary Committee, and in that statement, they claimed that the FAA was not intended to cover contracts of adhesion; thus, by enforcing pre–dispute arbitration clauses, the courts had rejected the original purpose of the FAA.

The NASAA also contended that the FAA was only meant to target commercial parties of similar bargaining power. As a consequence of this belief, the NASAA asserted that “investors

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101 The American Antitrust Institute (AAI) has also expressed concern about mandatory pre–dispute arbitration agreements in adhesion contracts. The AAI therefore supported the Arbitration Fairness Act of 2013. They claimed that consumers rarely read these contracts, and if they do, it is unlikely that they understand the ramifications of them. See AAI Letter to Senator Al Franken, at 2, available at http://www.antitrustinstitute.org/sites/default/files/aai-%20Letter%20to%20Franken.pdf.

Alliance for Justice supported the Arbitration Fairness Act of 2013 too. They find it troubling that one could be barred from the court system. Moreover, they contend when private arbitration is “chosen and paid for by the business itself,” eye-brows should be raised. Arbitration Fairness Act Would Reopen Courthouse Doors for Millions of Americans, ALLIANCE FOR JUSTICE, available at http://afjjusticewatch.blogspot.com/2013/05/arbitration-fairness-act-would-reopen.html.


103 Gilles, supra note 94.

104 Rothman, supra note 102.

105 Id.
must have a choice of forum when it comes to resolving disputes,” \(^{106}\) because without such a choice, there is potential that investors will lose confidence in the securities market. \(^{107}\)

Under the Dodd-Frank Act, Congress gave the SEC the ability to “prohibit or impose limitations on the use of mandatory pre–dispute arbitration clauses in broker–dealer and investment adviser customer contracts.” \(^{108}\) The SEC, however, and many agencies with similar powers to potentially regulate class action waivers, have not and probably cannot, completely and adequately reform the laws on mandatory pre–dispute arbitration agreements. \(^{109}\)

Congress and several organizations recognize that mandatory pre–dispute arbitration agreements are harming parties with little to no bargaining power. Parties that sign mandatory pre–dispute arbitration agreements with class action waivers effectively give up a number of statutory rights, leaving the actions of opponent–parties to go unaddressed. Congress’s previous attempts to address this problem have failed to get the job done.

\section*{VI. Previously Offered Solutions}

Previously offered solutions to the mandatory pre–dispute arbitration agreement problem have either not been adopted or have failed to completely solve the problem. None of the following solutions pertain to the AFA. They do, however, provide interesting and unique perspectives, and this note draws upon some of their suggestions for guidance. There are three solutions of interest: (a) agency regulation; (b) associational lawsuits; and (c) legislative action.

\subsection*{A. Agency Regulation}

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\(^{106}\) \textit{Id.}\\

\(^{107}\) \textit{Id.}\\

\(^{108}\) \textit{Id.}\\

\(^{109}\) See generally \textit{id.}
Administrative agencies could regulate arbitration “for companies with more than fifty employees.” The Consumer Financial Protection Bureau (CFPB) and the Equal Employment Opportunity Commission (EEOC) could be tasked with the job. Under this proposition, the strong bargaining party (usually a company) would have the burden of proof to show that the arbitration agreement was not unconscionable and that the agreement is in line with agency regulations. But “[i]f the large company can show by clear and convincing evidence that its procedures are fair—even though it fails to meet the requirements of the regulation—then the court would compel arbitration.” This regime, however, to a certain degree, has already been in effect.

Many agencies have already been given the power to regulate arbitration. Established by the Dodd-Frank Act, the Consumer Financial Protection Bureau (CFPB) may study and regulate arbitration. It may “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties.” This regulation must be in the interest of the public. But having such a broad standard is almost equivocal to having no standard at all.

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110 Padis, supra note 7, at 696.
111 Id. at 696–97.
112 Id.
113 Id. at 697–98.
114 Spakovsky, supra note 8, at 3.
116 Spakovsky, supra note 8, at 3–4.
117 Id. at 4.
And, “there already are concerns about the way the CFPB is designing its study.”\textsuperscript{118} The study appears to focus too heavily on the prevalence of pre–dispute arbitration agreements, rather than whether or not arbitration is beneficial to the participants.\textsuperscript{119} A misguided study could potentially lead to a misguided regulation.\textsuperscript{120} In order to comprehensively and truly test the arbitration process on merit, a study should compare multiple arbitral adjudications to multiple federal court adjudications covering the same topics of law, testing things like speed, damages, and results.\textsuperscript{121}

Without any notable studies to mention, the EEOC and the National Labor Relations Board (NLRB) have also challenged the current state of arbitration. The EEOC has represented employees in employment discrimination disputes by bringing claims to court on behalf of the employee.\textsuperscript{122} The NLRB has taken a stab at pre–dispute arbitration agreements. It declared that mandatory pre–dispute arbitration agreements violate the National Labor Relations Act if it requires employees to waive class rights.\textsuperscript{123} The Board concluded that the right to engage in a concerted activity under Section 7 includes the right to act in a class lawsuit.\textsuperscript{124} Despite these minor achievements, these agencies have made little overall impact.

\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} See generally Spakovskv, supra note 8, at 4.
\textsuperscript{123} Id. at 40.
\textsuperscript{124} Id.
This is unacceptable, but it’s not the agencies’ fault, its Congress’s. Congress could address the issues of mandatory pre-dispute arbitration agreements in one bill. Congress, moreover, should be held accountable for the effects laws have on its citizens. Not that agencies are not held accountable for their actions, but it is easier for the citizens to hold a congressman or congresswoman accountable than it is for them to hold an agency responsible. Citizens vote for representatives, not agency positions. Policies of great importance, like how our nation will handle this mandatory pre-dispute arbitration agreement problem, should be passed through Congress as it is more visible to the public. Congress is also more equip than the agencies to address this issue since class action waivers affects so many different areas of interest, from employment to securities to consumer rights, and so on.

B. Associational Lawsuits

Consumers may be able get around mandatory pre-dispute arbitration agreements with class action waivers by forming associations and suing through them. Associations in the franchisee setting have already had standing in some jurisdictions to sue for injunctive and declaratory relief. This occurred in the Edible Arrangements case.

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126 Id. at 863.
128 Id.
In that case, franchisees of Edible Arrangements formed an association. This association then sought a declaratory judgment against Edible Arrangements claiming that they had breached their agreement, violated a statute, and failed to meet the standard of good faith and fair dealing. Edible Arrangements moved for a dismissal on the grounds that the association did not have standing.

The District Court, however, ruled that the association had standing to represent its members. So the franchisees avoided arbitration and had their day in court. Proponents of this result contend that associations allow for greater capital and class relief, incentivizing corporations to settle. The problem with this solution is that it could probably only help very motivated and properly incentivized groups, like the group in the Edible Arrangements case. These franchisees were heavily invested in the success of their business and wanted to request relief from the court as an association rather than arbitrate. Whether the courts allowed the association to bring the suit could have influenced the ultimate result, a result which possibly made a significant impact of these peoples’ lives. Incentives like those just do not exist in many other contexts. No one wants to pay an association to keep their cell phone company from ripping them off. People do not have enough resources to do that anyway.

130 Id. at 1.
131 Id.
132 Id.
133 Id. at 3.
134 See Balewski, supra note 127, at 113–15.
Associations, moreover, may not be a legal option for long. Many courts have not even addressed this issue.\(^{135}\) Potentially, then, consumers could go through all the work to form an association just to be compelled to go to arbitration by the courts.\(^{136}\)

C. *Legislative Action*

Professor Sarah R. Cole has argued that legislative action is the best solution to the mandatory pre–dispute arbitration agreement problem in the consumer context.\(^{137}\) Her solution: amend the FAA to disallow the prohibition of class arbitration and class litigation in the consumer context.\(^{138}\) Her reasoning: consumer contracts need the availability to act as a class.\(^{139}\) Without such ability, consumers with low value claims will not likely be able to obtain a remedy.\(^{140}\) Professor Cole’s solution encourages the benefits of arbitration, but also recognizes its current exploitation. As she states, “consumer arbitration may provide more benefit to consumers with significant individual claims than would litigation,” but “the evidence also shows that the primary reason many companies implement arbitration provisions is to avoid class action procedures.”\(^{141}\)

\(^{135}\) See id.

\(^{136}\) See id. Advocates of this solution, however, disagree. Some argue that contractual agreements cannot bind nonparties. Moreover, the Supreme Court has already determined that the FAA cannot mandate parties to arbitrate when those parties have not agreed to do so.

\(^{137}\) Cole, *supra* note 2, at 467–68.

\(^{138}\) See id.

\(^{139}\) *Id.* at 464–66.

\(^{140}\) *Id.*

\(^{141}\) *Id.* at 477.
Professor Cole thus suggests the following solution: “An arbitration agreement between a consumer and a provider of goods or services is invalid to the extent that it precludes the consumer from accessing the court or arbitral system to participate in a class action as defined by Federal Rule of Civil Procedure 23.” Under this solution, then, consumers may pursue claims through either class arbitration or litigation.

VII. **Pre–Dispute Arbitration Agreements with Class Action Waivers Should Be Unenforceable**

The current law has made “it likely that many federal statutes will no longer be enforced privately in certain contexts.” Once this problem is fixed, arbitration will again become a useful adjudication process for both strong and weak bargaining parties. When operating properly, it is fair in result, and less time consuming than litigation. It allows claims that litigation would not, and the chances of winning at arbitration are about the same as winning at trial.

While Congress continually fails to meaningfully act on the matter, parties continue to be harmed by the current law. I thus offer the following amendment to the FAA: pre–dispute arbitration agreements with class action waivers should be unenforceable to the extent that it waives class relief. Parties therefore always have access to class relief.

VIII. **Pre–Dispute Arbitration Agreements Should Generally Be Enforceable**

I propose that the law should enforce both, pre–dispute bilateral arbitration agreements and pre–dispute class arbitration agreements, provided that these kinds of agreements are not agreed to as part of an adhesion contract. Standard affirmative contract defenses would of course still apply—unconscionability included. Both types of pre–dispute arbitration agreements should

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142 *Id.* at 498–99.

143 Harvard Law Review Ass’n., *supra* note 4, at 278.
explicitly state whether the arbitration agreement binds the parties to bilateral, class, or both types of arbitration should a certain type of dispute occur. In the absence of such an explicit statement, it will be assumed that the pre–dispute agreement is only for bilateral arbitration. Such an assumption is made because class arbitration changes the nature of arbitration, just like class litigation changes the nature of litigation. The written instrument should thus make it absolutely clear as to the party’s commitment to class arbitration before having to forsake class litigation. This is not a concern for pre–dispute bilateral arbitration agreements, because whenever a party is signing one of these agreements per the standards of this note’s FAA amendment proposals, parties should know when they are agreeing to a pre–dispute arbitration provision, and thus, at the least, they should expect to be committed to bilateral arbitration.

I also propose a few rules for class arbitration specifically. In amending the FAA, class arbitrations should be subject to discretionary judicial reviews if a party wishes to appeal an arbitrator’s class certification. This policy will encourage parties to arbitrate class disputes, which will alleviate the judiciary’s caseload and speed up the class relief process across the board. I secondly submit that all classes for class arbitrations should be formed using the opt–out regime.

A. A Brief Overview of Class Arbitration

In class arbitration, only those whom are subject to the agreement may proceed as members of the class. Parties cannot “contractually expand the grounds or nature of judicial

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144 See Stolt-Nielsen, 559 U.S. at 685.
review,\footnote{Concepcion, 131 S. Ct. at 1752 (quoting Hall Street Assocs., 552 U.S., at 578.).} but parties may alter class proceedings by agreement.\footnote{Id.} Class arbitration is thus flexible, and in certain situations, it is the proper recourse.

Many claims, and therefore statutory rights, cannot be properly pursued without class action.\footnote{See Stolt-Nielsen, 559 U.S. at 699. (Ginsburg, J., dissenting).} Class arbitration is simply one avenue a class may pursue with such claims and many have done so. Since 2003, more than 300 class arbitrations have taken place.\footnote{Strong, supra note 145, at 206.} Similar to bilateral arbitration, AAA statistics suggest that class arbitration takes significantly less time than class litigation.\footnote{Concepcion, 131 S. Ct. at 1759 (Breyer, J., dissenting).} Unsurprisingly, then, arbitral institutions have embraced class arbitration.

Highly respected arbitral institutions, such as AAA and the Judicial Arbitration and Mediation Services (JAMS), have written and implemented class arbitration rules similar to the federal class action rule, Rule 23 of the Federal Rules of Civil Procedure.\footnote{See Cole, supra note 2, at 501.} The rules should thus be familiar to the parties’ attorneys. There are not, however, a multitude of class arbitration awards.\footnote{Id. at 503.} This may suggest that businesses in class arbitration, where the appeals process of the courts is not available, feel forced to settle claims instead of continuing their case as they would have had they been in court.\footnote{See generally id.} But, more likely, it probably suggests that businesses treat class
arbitration claims similarly to class litigation claims, settling many of them before they are adjudicated.\textsuperscript{154} The worries about class arbitration are thus inflated.\textsuperscript{155}

B. \textit{Discretionary Judicial Review of Class Certifications upon a Party’s Request Provides Sufficient Procedural Protections for Class Arbitration Participants while Simultaneously Minimizing the Additional Burdens Placed upon the Courts.}

A major part of a class action is class certification, and naturally, such certifications are complex. Just as in class litigation, class certification is a major and complex part of class arbitration. As such, and since I have already proposed to make pre-dispute class arbitration agreements enforceable under certain conditions, and with a purpose to encourage parties to participate in class arbitration, I further submit, as an FAA amendment, that class certifications for class arbitrations should be subject to some form of judicial review, a review which will provide the parties procedural protection while simultaneously minimizing the additional burden placed upon the courts. If this policy works as planned, it would do the much needed and lighten the judiciary’s caseload, as theoretically more class actions would be brought to class arbitration instead of to the courts.\textsuperscript{156}

In a 2012 article, S.I. Strong discussed two different models for judicially regulating class arbitration.\textsuperscript{157} The first was developed at common law and is called the hybrid model.\textsuperscript{158} This

\textsuperscript{154} See generally id.

\textsuperscript{155} See generally id.

\textsuperscript{156} The federal court’s docket is overloaded with cases, often forcing long delays in the process for parties seeking their remedy in civil law. Civil law claims are regularly not receiving timely judgments, which can cause parties to accept inadequate settlement agreements, and in this way, the federal court’s caseload is effectively hindering citizens from exercising their legal rights. \textit{See Overloaded Courts, Not Enough Judges: The Impact on Real People, PEOPLE FOR THE AMERICAN WAY 1}, http://www.pfaw.org/sites/default/files/ lower_federal_courts.pdf [hereinafter Overloaded].

\textsuperscript{157} Strong, supra note 145, at 232.
method calls for the courts to rule on all class certifications. Essentially, the court has control over all the procedural aspects of the arbitration while the arbitrator evaluates the merits. This method, however, greatly intrudes upon the arbitration process, and it is burdensome on the courts because the courts are forced to act in every dispute.

The second method is much less intrusive and less burdensome. Under the second method, courts have no mandatory duty to review class certifications and courts may not interject sua sponte. Partial final awards, however, may be subject to immediate judicial review if a party requests such a review and the court agrees to review it. Parties’ autonomy is thus preserved while limited judicial review potentially takes place. It is an attractive choice, because providing optional judicial review only at a party’s request relieves the judiciary burden and, at the same time, allows a party a potential appeal.

Although discretionary and limited to class certification, judicial review of this kind will diminish some arbitral benefits. Simply requesting a judicial appeal of a class certification would cause a delay, and receiving a judicial review would obviously delay the process even more. But even if such delays occur, the class arbitration process should still provide adequate utility to its participants, because under the policy this note advocates for, no additional appeal of the judicial review would be allowed. Also, since no issue other than class certification may be reviewed, the

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158 Id. at 258.
159 Id.
160 See generally id.
161 Id. at 217.
162 Partial final awards involve “(1) the construction of the arbitration agreement and (2) the determination of whether class treatment is warranted as a factual matter.” Id.
163 See id. at 235–38.
process should still be faster and more cost-effective than class litigation, where class certification is only one of many issues a party faces in the court. Class arbitration would still be faster and thereby more cost-effective, in general, than the courts would be.  

C. Classes for Class Arbitrations Should be Formed under the Opt–Out Regime.

I propose that classes for class arbitrations be formed under the opt–out regime. Under the opt–out regime, an unnamed member of a class does not officially become a part of the class until that member has been given the option to leave the proceeding. The opt–in approach, however, requires an individual to affirmatively join the class. The opt–in approach carries too many potential detriments as compared to the opt–out regime.

An individual may not want to participate in class arbitration for several reasons. A potential member may believe that they can obtain better relief individually. A potential member may also have particular concerns about a specific panel of arbitrators. With an opt–in regime, however, an individual, without understanding the consequences, may not proceed with class arbitration to their own detriment. In contrast, with an “opt–out” regime, an informed individual, with the concerns mentioned above, has the choice to leave the class, thus

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164 As mentioned, AAA statistics suggest that class arbitrations take significantly less time than class litigation. See Cole, supra note 2, at 501. The process can thus afford some delays in speed in exchange for a limited judicial review. How a court would determine whether or not to hear class certification disputes in class arbitration proceedings is beyond the scope of this article.

165 Strong, supra note 145, at 213–214.

166 Id.

167 Id. at 234.

168 Id.

169 See id.
maintaining the option of individual recourse. An opt–out regime therefore seems preferable because it allows informed and concerned parties to opt–out of the proceeding without potentially having less interested parties lose their possible remedy.

D. Parties may Enter into Pre–Dispute Arbitration Agreements Provided that it was not per an Adhesion Contract.

The Court has stated that “class-action arbitration changes the nature of arbitration.” But class arbitration does not change the nature of arbitration any more than class litigation changes litigation. All class proceedings present complex issues with high stakes involved, and thus, if the parties want enter to into a pre–dispute class arbitration agreement, they should be able to, provided that it was not per an adhesion contract. Such a commitment would demonstrate a party’s valuation of time and efficiency in comparison to their valuation of a court’s appeal process. In other words, a party gets faster results with class arbitration and thereby probably saves money, while a party gets the court’s appeal process with class litigation. The same basic rule applies to bilateral arbitration too. If a party wishes to agree, pre–dispute, to the benefits of arbitration over the benefits of the court system, they should be able to. As long as the pre–dispute arbitration agreement was not per an adhesion contract, the agreement is enforceable.

Adhesion contracts indicate great disparate bargaining power between the parties, under which one party had no say in the terms of the contract. Parties greatly outmatched in bargaining power should not feel like they have to forfeit their right to class litigation or regular litigation, and such provisions should not be buried in a long, boilerplate–filled contract.

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170 See id. at 234.

171 Stolt-Nielsen, 559 U.S. at 685.

172 See generally Gilles, supra note 94.
Companies who still want to enter pre–dispute bilateral or class arbitration agreements may do so. They just cannot force another party to enter into these agreements or bury it in a stack of standard forms.

IX. CONCLUSION

Arbitration has proven to be fast, fair, and cost–effective. It is clearly unfair, however, for a party with great bargaining strength to suppress the rights of weaker parties through mandatory pre–dispute arbitration agreements with class action waivers. Ultimately, Congress should pass legislation that makes pre–dispute arbitration agreements unenforceable to the extent that it denies class relief, while at the same time encouraging pre–dispute arbitration agreements between parties of relative bargaining power.