# MANDATORY ARBITRATION CLAUSES IN CONSUMER CONTRACTS: A LEGALLY PERMISSIBLE MEANS OF DENYING CONSUMERS THE CONSTITUTIONAL RIGHT TO LITIGATE CONTRACT DISPUTES IN COURT AND THE RIGHT TO TRIAL BY JURY

**by**

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## I. INTRODUCTION

Mandatory arbitration clauses in consumer contracts have had a checkered past in the United States. Courts historically viewed arbitration as a means of settling disputes with significant disfavor, a fact that has been noted by many courts, including the United States Supreme Court in numerous decisions as well as by Congress.[1]

Congress enacted the Federal Arbitration Act (FAA) in 1925 in order to overcome the judicial resistance to arbitration and declare a national policy to favor arbitration of claims that parties agree to settle through arbitration.[2] Since its enactment, the U.S. Supreme Court has interpreted the FAA as requiring that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration"[3] and has

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admonished lower courts to "rigorously enforce agreements to arbitrate."[4]

Some commentators write in support of arbitration clauses in consumer contracts by noting that arbitration is generally faster and cheaper than litigation as a means of resolving disputes.[5] Further, arguments advanced in support of arbitration include the elimination of the uncertainty that can result from jury verdicts, and the cost savings to over-taxed publicly funded judicial systems.[6] These and other arguments in support of binding arbitration clauses in consumer contracts have some merit. Critics, however, note that there are important questions about basic fairness and due process raised by the ubiquitous mandatory arbitration clauses in consumer contracts in light of the broad interpretation of the FAA by the U.S. Supreme Court preempting state regulation of these clauses. The same is true of class arbitration waiver clauses in consumer contracts that prevent consumers from joining class action suits and require a case-by-case resolution of consumer claims in separate arbitrations by each aggrieved consumer. Because both mandatory arbitration and class action waiver clauses can effectively bar consumers from access to the courts, it is important to examine whether the ends of justice are best served by such clauses or whether Congress needs to set some limits on such clauses when consumer contracts are involved.

## II. THE U.S. SUPREME COURT'S INTERPRETATION OF THE FAA

Congressional hearings relating to the FAA make it clear that Congress intended the act to apply to merchant-to-merchant arbitrations but not to merchant-to-consumer arbitrations.[7] The purpose of the FAA was to make arbitration agreements enforceable in federal courts and toprovide a simple and expeditious process that would allow merchants to resolve their

disputes more cheaply and easily.[8] "The FAA was a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength to questions arising out of their daily relations."[9] Congressional hearings preceding the FAA's enactment demonstrate the Act was intended to apply to contracts involving two merchants agreeing to arbitrate future disputes.[10] Be that as it may, the U.S. Supreme Court has made it very clear that the FAA applies to consumer contracts as well as to contracts between merchants.

In *AT&T Mobility LLC v. Concepcion*[11] a cellular phone contract between AT&T and the respondents provided for arbitration of all disputes arising out of the agreement and included a class action waiver requiring preventing aggrieved parties from banding together in class action arbitration.[12] Respondents brought suit in the District Court for the Southern District of California that was later consolidated with a putative class action against AT&T for false advertisement and fraud by charging sales tax on the full value of phones advertised as "free" to consumers.[13] AT&T then moved to compel arbitration and petitioners opposed the motion arguing the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed class action.[14] The District Court denied AT&T's motion and the Ninth Circuit Court of Appeals affirmed, agreeing with the District Court that the class waiver provision was unconscionable under California law as announced in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).[15] The Supreme Court reversed in a 5-4 decision, quoting from the FAA as follows:

> "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 ... shall be valid, irrevocable, and

> enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[16]

The majority reasoned that the saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration itself or an agreement to arbitrate[17] In other words, the validity of the agreement to arbitrate itself cannot be the basis of a claim of unconscionability.

A second recent U.S. Supreme Court case challenging the enforcement of an arbitration clause with a class action waiver is *American Express Co. v. Italian Colors Restaurant*[18] The case involved an agreement between petitioners, American Express and a subsidiary, and respondents, merchants who accept American Express cards, requiring all of their disputes to be resolved by arbitration and provided that there "shall be no right or authority for any Claims to be arbitrated on a class action basis."[19] Respondents brought a class action against petitioners for violations of the federal antitrust laws, claiming that American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.[20] Petitioners moved to compel individual arbitration under the FAA and respondents opposed the motion, submitting a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled.[21] The District Court granted the motion and dismissed the lawsuits, but the Court of Appeals reversed and remanded for further proceedings. It held that because respondents had established

that they would incur prohibitive costs if compelled to arbitrate under the class action waiver, the waiver was unenforceable and the arbitration could not proceed.[22] The U.S. Supreme Court then granted certiorari, vacated the judgment and remanded for further consideration in light of *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*[23] which held that a party may not be compelled to submit to class arbitration absent an agreement to do so.[24] The Court of Appeals stood by its reversal, stating that its earlier ruling did not compel class arbitration and the U.S. Supreme Court once again granted certiorari to determine "[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."[25] The Court held the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.[26] The Court then went on to state in reliance on prior cases the overarching principle that arbitration is a matter of contract, that the FAA requires courts to rigorously enforce arbitration agreements according to their terms, even for claims alleging a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command (citations omitted).[27]

## III. THE NEED TO DISTINGUISH CONSUMER CONTRACTS FROM NON-CONSUMER CONTRACTS

The Second Circuit Court of Appeals held the arbitration and class action waiver clauses in merchants' contracts with American Express effectively prevented merchants from filing class a class action suit in court or banding together for a class action arbitration against American Express because of the prohibitively high cost of proving antitrust claims individually.[28] The U.S. Supreme Court noted in reversing the Second Circuit decision in *Italian Colors* that "the antitrust laws do not

guarantee an affordable procedural path to the vindication of every claim."[29] The holding in *Italian Colors* that class action arbitration clauses in contracts cannot be invalidated merely because the cost of arbitration exceeds any potential recovery, coupled with the interpretation of the FAA as requiring courts to rigorously enforce contracts according to their terms, is particularly troubling when contracts between merchants and consumers are involved.

Generally speaking, contracts between merchants involve parties with greater sophistication and real bargaining power that can provide some room for negotiation. The same is not true of adhesion contracts offered to consumers on a take it or leave it basis.[30] Merchants are also much likelier to understand the ramifications, limitations and potential costs involved with arbitration and class waiver clauses in business-to-business contracts where some negotiation to limit or omit these clauses may be possible.[31] Not so with consumers who encounter these clauses in boilerplate language at the point of sale when selecting a cell phone carrier, renting an automobile, insuring their house, car, health or life, or being admitted to a hospital for treatment. They have no bargaining power to strike an arbitration or class action waiver clause from a contract for a needed product or service even if they actually read the contract carefully, know that these clauses are binding, and understand the consequences of signing the contract that gives away their right to sue (including in a small claims court at nominal cost when modest damages are involved) if the contract is breached.

Firms that include arbitration clauses in consumer contracts tout the benefits of arbitration both for themselves and for their customers.[32] One study examined the contractual practices by well-known firms marketing consumer products and compared the firms' consumer contracts with contracts the same firms negotiated with business peers.[33] The findings of the study were

telling:

> In sum, despite their rhetorical stance in favor of arbitration, the firms in our sample did not uniformly include arbitration clauses in their contracts. Instead, the use of arbitration clauses varied markedly according to the contract type: arbitration clauses appeared routinely in employment contracts (92.9 percent), frequently in consumer contracts (76.9 percent), and rarely in non-employment, non-consumer business contracts (6.1 percent). In consumer contracts, mandatory arbitration clauses were coupled uniformly with provisions barring class arbitration, and frequently with non-severability clauses and waivers of class litigation.[34]

The study also found that every consumer contract with a mandatory arbitration clause also included a waiver of the right to participate in class-wide arbitration.[35] This led the study's authors to conclude that "[t]he most likely explanation for the pattern we observed is that firms value arbitration clauses for their effects in suppressing aggregate proceedings by consumers, and perhaps averting liability for widespread but low-value wrongs."[36]

## IV. THE HIDDEN COST OF ARBITRATION

An oft-touted benefit of arbitration, including mandatory arbitration clause in consumer contracts, is that it is less expensive and faster than traditional litigation in the courts.[37] And while this statement holds true in many cases when litigation involves significant damages that would otherwise end up in the courts of record at the state or federal levels, it is highly questionable when the damages suffered by a consumer are

within the jurisdiction of a small claims court where access is inexpensive and, unlike state and federal trial courts, it will not take years for a civil case to be heard. In New York, for example, where both the general cost of living and legal fees are much higher than the national average, one can access a small claims court for a $15 filing fee in city courts for claims of up to $1,000 or $20 for claims between $1,000 and $5,000.[38] For town or village courts the filing fee is $10 for claims of up to $1,000 and $15 for claims between $1,000– $3,000.[39] Defendants are served by regular and certified mail by the clerk of the court[40] so service of process is not a separate expense in most cases. In the event that service by mail is ineffective and service of process must be done in person, the plaintiff can have a friend or family member at least 18 years of age not involved in the case serve the defendant at no cost, or a process server can be used.[41] Sheriffs can also serve process on behalf of litigants. The fee in Manhattan (New York County) for a sheriff to serve papers, as an example, is currently $52.[42] Thus a resident of New York City who wants to dispute a $300 charge imposed by her cell phone carrier for overages or long distance calls she did not make on her phone can sue the carrier for a cost of $15. And if her cell phone catches fire and causes her severe burns, she could also sue the phone maker for up to $5,000 for a total cost of $20. But if her contract for cellular service or phone purchase with her carrier contains a mandatory arbitration clause, these avenues will be closed to her. And the arbitration clause could specify that the arbitration fees will be split between the parties or even paid in whole by the losing party. In addition, the arbitration clause could specify where the arbitration must take place (which could pose inconvenience and travel expenses for the consumer), what state laws would apply, and the choice of arbitration service, among other important restrictions that could make it expensive and unfeasible to arbitrate.

Moreover, although the up-front costs for consumer arbitration are modest, they are much higher than the cost of filing in small claims court were that an option. The American Arbitration Association (AAA) requires a non-refundable filing fee of $200 if a consumer initiates arbitration pursuant to a pre-dispute arbitration agreement, with the business paying the remaining fees.[43] JAMS, a competing international provider of arbitration services, treats consumer arbitration in a similar way, requiring consumers to pay an up-front fee of $250 if the consumer initiates arbitration, with the business paying all other required fees.[44] In arbitrations conducted under the auspices of both AAA and JAMS, the business pays all fees if it initiates the arbitration and in both cases the fees can add up to many thousands of dollars.[45] A third national provider of arbitration and mediation services, National Arbitration and Mediation (NAM), states in its rules for consumer arbitration "With respect to the cost of the arbitration, it must be at a reasonable cost to the Consumer based on the circumstances of the dispute, the size and nature of the claim."[46] Notably, though, unlike AAA and JAMS, NAM does not cap the cost of consumer-initiated arbitration and requires the party that initiates the arbitration to pay an initial filing cost of $575 for disputes up to $10,000 in value.[47] The fee covers up to one hour of arbitrator's time with additional time billed at $680 per hour.[48] Thus in AAA and JAMS arbitrations, the cost for consumers that wish to initiate an arbitration is significantly higher and can impose on the consumer greater inconvenience than access to small claims courts. And in JAMS arbitration, the potential cost can be quite high as the arbitrator's hourly fees and ancillary costs can quickly amount to a sizable sum out of all proportion to the potential recovery of damages when these are minor.

In addition to the significantly higher filing fees for dispute resolution through arbitration rather than through small claims courts, mandatory arbitration can pose additional significant

costs to consumers. Businesses are free to choose any national, regional or local arbitration service provider and need not utilize a well-established provider with rules that limit the cost for the consumer who initiate arbitration proceedings. This can result in arbitration clauses requiring a consumer to pay for half of the entire cost of arbitration or even the entire cost if she/he fails to prevail and the arbitration agreement contains a loser-pays provision. That could leave a consumer liable for thousands of dollars in arbitration fees. Arbitration agreements can also require arbitration outside of the consumer's home county or state which can be both inconvenient and require additional travel-related expenses.

While it is true that arbitration clauses that make it unreasonably difficult or expensive for a consumer to effectively pursue arbitration can be challenged as unconscionable, the determination as to validity of the clause will be made not by a court of law but by the arbitrator if the contract gives the arbitrator exclusive authority to decide any issue as to the enforceability of the agreement.[49] Numerous state court decisions have likewise held that questions of arbitrability of contracts containing arbitration clauses must be decided in the first instance by the arbitrator and not the courts.[50]

## V. ADDITIONAL DISADVANTAGES OF ARBITRATION CLAUSES FOR CONSUMERS

Cost issues aside, mandatory arbitration can pose additional notable disadvantages for consumers. One such disadvantage is a potential denial of access to justice. In the United States unlike in most of the rest of the world, the American Rule was adopted in colonial times requiring each person to pay for their own attorney's fees in civil litigation.[51] The main justification most often cited in support of the American System is access to justice.[52] We are told that the reason each litigant is required to

pay for their own legal fees is that if "loser pays" were the rule as it is essentially in the rest of the world, aggrieved individuals might refrain from pressing their claims in court for fear of having to pay the prevailing party's legal expenses if they fail to prove their case, resulting in a denial of access to justice.[53] Mandatory arbitration clauses in consumer contracts clearly have the potential for imposing on consumers costs that can far surpass the cost of litigation in small claims courts and can even be structured to shift the entire cost of the arbitration to consumers who do not prevail in arbitration proceedings.[54] Thus, consumers with provable damages in the hundreds (or even thousands) of dollars who are denied the right to pursue their claims in small claims courts may well opt not to demand binding arbitration of their claims for fear of having to pay the entire cost of the arbitration if they fail to prevail. And while it is true that arbitration agreements that use AAA or JAMS protect consumers from "loser pays" fee shifting clauses in the arbitration contracts, businesses are not required to use AAA or JAMS and can use the services of NAM or any other arbitration services provider which does not prevent losing parties from being required to pay the entire cost of arbitration. Given that arbitration agreements in consumer contracts are not generally subject to negotiation, businesses can insulate themselves from the risk of law suits involving modest sums of loses for consumers by selecting an arbitration services provider that allows arbitration fees to be equally paid by consumers and businesses and/or incorporating a "loser pays" provision that will require a consumer who does not prevail in an arbitration to bear the entire cost of the proceeding. In such cases, a consumer would have to think twice before pressing an arbitral claim that may require higher fees than any potential arbitral award could justify if fee splitting is required, or abandoning a claim for fear of losing when fee shifting is involved. This is a great advantage for businesses wishing to minimize the risk and cost of litigation, but it is very difficult to see what concomitant benefit mandatory

arbitration can have for consumers with modest claims under such circumstances.

Another factor that can have a chilling effect on consumers' ability to utilize arbitration for settlement of their claims is the ability of the arbitration clause to require it in a venue that is convenient for the business and inconvenient for the consumer. Businesses that include mandatory arbitration clauses in consumer contracts can not only prevent consumers from pursuing claims in their local small claims court where they can do so quickly, cheaply and most conveniently, but can also require them to travel to inconvenient locations that can add additional costs and inconvenience to the dispute settlement process. This too can have a chilling effect of consumers' pursuit of grievances through the arbitration process.

It should come as no surprise, then, that "[i]ndividual consumers rarely use arbitration and when they do, they recover very little."[55] By contrast, corporate claims or counterclaims resolved by arbitrators have a markedly higher success rate and consistently yield much higher awards.[56]

## VI. RECENT STATE LEGISLATIVE AND JUDICIAL EFFORTS TO CURB MANDATORY ARBITRATION CLAUSES IN CONSUMER CONTRACTS

Although the current pro-arbitration interpretation of the FAA by the U.S. Supreme Court preempts states from invalidating mandatory arbitration clauses in consumer contracts, there are some recent efforts by several states to try to mitigate some of the negative effects of mandatory arbitration through legislation.

California introduced a Senate Joint Resolution in 2016 urging the Consumer Financial Protection Bureau (CFPB) to

pass final regulations prohibiting mandatory arbitration clauses in consumer contracts that prohibit class actions.[57]

In 2016, legislators in Connecticut introduced a bill that would declare the following provisions in any consumer contract that contains a mandatory arbitration clause unconscionable:[58] requiring resolution of legal claims in a venue that is inconvenient to the consumer;[59] waiving of the consumer's substantive rights to assert claims or seek remedies provided by state or federal law;[60] waiving of the consumer's right to seek punitive, minimum, multiple or other statutory damages as provided by law or attorney's fees if authorized by statute or common law;[61] requiring that any action brought by the consumer with regard to the contract be initiated within a shorter time period than the applicable statute of limitations;[62] requiring the consumer pay fees and costs to bring a legal claim that substantially exceed the fees and costs that would be required to bring a claim in a state court or that makes no provision for the waiver of fees and costs for a consumer who cannot afford such fees and costs;[63] and failing to permit a party to present evidence in person or to ensure that the consumer can obtain, prior to a hearing, any information that is material to the issue to be determined at such hearing.[64]

The Illinois Senate considered a bill that would prohibit the state from doing business with companies that use mandatory arbitration agreements in contracts with their employees or with consumers.[65] The bill would also make it presumptively unconscionable for a mandatory arbitration clause in an adhesion contract when the contract involves only one individual (and an entity) and that individual did not write the contract to contain a requirement for settlement of an arbitration dispute outside of the county where the individual resides or the contract was executed.[66] It would also make it presumptively unconscionable for such contracts to contain a waiver of

remedies provided by state or federal statutes,[67] a waiver of an individual's right to seek punitive damages,[68] a provision shortening any applicable statute of limitation,[69] and the payment of any fees and costs above the cost to bring an action in the state's courts or in a federal court.[70] The proposed Act goes on to note that it is the state's policy to prohibit forced arbitration in consumer and employment agreements,[71] (a prohibition that is preempted to the extent that the FAA applies to the arbitration for reasons previously discussed), and it further declares mandatory arbitration agreements in insurance contract involving a consumer unconscionable and void.[72] The last prohibition should not be preempted by the FAA as the FAA is inapplicable to insurance contracts because it does not specifically reference the industry as covered by the Act.[73]

The New Jersey Supreme Court has ruled a mandatory arbitration clause in a consumer contract involving a home warranty contract unenforceable for lack of mutual assent because the arbitration clause was included in an inconspicuous section of the contract under the title of "MEDIATION" with a font of less than 10-point type and a general lack of clarity in the drafting language as to the binding arbitration.[74]

New York prohibits mandatory arbitration clauses in consumer contracts for the sale or purchase of consumer goods and declares such clauses void.[75] But as we have seen such general prohibitions are unenforceable when preempted by the FAA when consumer transactions affect interstate commerce. In an apparent attempt to make consumers better aware of the existence of mandatory arbitration contracts they sign, New York has introduced a bill pending before the New York State Senate as of this writing that would require all contracts for the sale of goods involving a consumer that have mandatory arbitration clauses to print such clauses in large type not smaller than 16 point type.[76] The bill would impose civil penalties on

merchants of $250 for a first offense and $500 for each subsequent offense.[77] A second bill also pending before the New York State Assembly as of this writing would require arbitrators in consumer and employment arbitration to be neutral (e.g., no conflict of interest or prior relationship to the parties) and would give Courts the ability to invalidate arbitral decisions where conflict of interest was not disclosed by the arbitrator.[78] The Act would also continue to prohibit mandatory arbitration clauses in consumer and employment contracts where permissible under the FAA.[79]

There is a bill pending before the Tennessee General Assembly that would prohibit mandatory arbitration clauses in consumer contracts.[80] (The bill would also prohibit mandatory arbitration clauses in contracts involving infants or adjudicated incompetents[81] and in certain claims with respect to estates in real property.[82])

## VII. SHOULD CONGRESS ACT TO PRESERVE CONSUMERS' ACCESS TO JUSTICE?

In passing the Federal Arbitration Act, Congress intended to overcome judicial resistance to arbitration and declare a national policy in favor of arbitration.[83] This goal was achieved, but the broad interpretation by U.S. Supreme Court decisions of the FAA has created unintended negative consequences for consumers with modest claims that at once deny them access to the courts and can leave them with no economically feasible means of seeking redress through arbitration. Mandatory arbitration clauses in consumer contracts coupled with a restriction on consumers banding together as a class in arbitration allow businesses to leave aggrieved consumers with no economically feasible remedy to redress modest losses when a contract is breached. Given that consumer contracts are typically adhesion contracts, consumers have no choice but to

give up the right to seek redress in court (including small claims courts) and the right to file class action lawsuits when that restriction is also imposed contractually if they wish to avail themselves of the product or service they need which are offered by companies that incorporate these clauses in consumer contracts.

Mandatory arbitration (and class arbitration waiver) clauses in consumer contracts overwhelmingly benefit businesses at the expense of consumers. By using these clauses businesses can effectively prevent aggrieved consumers to quickly, conveniently and very inexpensively seek redress in small claims courts. They can also prohibit them from banding together in both class action lawsuits and class action arbitration, thus making it economically unfeasible for consumers who suffer slight economic losses due to a breach of contract to obtain remedies for their losses. It is telling that according to at least one study, companies overwhelmingly use mandatory arbitration clauses in their consumer contracts but rarely do so in their non-consumer contracts where both parties have real negotiating power and both contracting parties must actually want mandatory arbitration to be a part of the contract.[84] The study found that mandatory arbitration appeared in more than three quarters of sampled firms' consumer contracts but fewer than one-tenth of their business-to-business contracts.[85] All companies in the study's sample that used mandatory arbitration clauses in consumer contracts also included a waiver of the right to participate in class-wide arbitration.[86]

Congress has repeatedly introduced legislation since 2007 that would ban compulsory arbitration of nearly all employment, civil rights, franchise, and consumer matters.[87] To date, however, legislation limiting compulsory arbitration and class-wide arbitration wavers in consumer contracts has not been enacted. It is past time for Congress to address the issue and

clarify to what extent, if any, the FAA should apply to Consumer contracts.

## VIII. CONCLUSION

Given recent U.S. Supreme Court decisions interpreting the FAA, only Congress can redress the unintended consequences for consumers in the FAA by clarifying whether the Act was intended to apply to all business and consumer contracts, including adhesion contracts. If it is the will of Congress that the FAA apply to consumer contracts, then Congress needs to find some reasonable protection for consumers in order to preserve the right of access to justice.

This could be accomplished in numerous ways short of a wholesale exclusion of arbitration clauses from consumer contracts. The U.S. Constitution protects the right to a trial by jury for all civil claims in excess of $20 in value.[88] That right should not be abrogated by a clause in a contract of adhesion at a minimum unless a consumer willfully, knowingly and specifically gives up that right. One solution is making mandatory arbitration clauses in consumer contracts optional and valid only if a consumer agrees to it in a separate writing. Another solution is to retain the validity of such clauses but provide consumers and businesses with the option to bring suit in small claims court in lieu of arbitration. Maintenance of the status quo should at a minimum require Congress to amend the FAA to protect the integrity and fairness of the arbitration process. Such protections should include all of the following:

1. Requiring arbitration to take place in the consumer's home county or in the county where the contract was executed;

2. Requiring mandatory arbitration and waivers of class arbitration clauses in contracts to be conspicuous in all consumer contracts (e.g., written in a larger font size than other contractual clauses and/or bold-faced font for emphasis);

3. Prohibiting the selection of an arbitrator with past business dealings or other conflict of interest as relates to the parties;

4. Making it presumptively unconscionable to include waivers of otherwise applicable state or federal consumer protection laws; and

5. Requiring arbitrators in all contract-based arbitration involving consumer contracts to provide the parties written award letters that include findings of fact and conclusions of law where applicable to provide a written record that could be examined by an appellate court in case of claims of fraud, conflicts of interest, or arbitrary or capricious decisions by an arbitrator.

Of course, Congress could also simply make mandatory arbitration and class-wide arbitration waivers inapplicable in consumer contracts which is this author's preferred solution.

In the interest of justice, Congress should revisit this issue of vital importance to consumers. Even in the current political climate, this is an issue that should allow Senators and Representatives to find common ground regardless of their party affiliation or political ideology as it involves fundamental issues of fairness and access to justice for all Americans on which

reasonable politicians should be able to reach that most precious, rare and nearly extinct quality of effective leadership: compromise.

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[1] 7 Williston on Contracts § 15:11 (4th ed.), May 2017 Update.

[2] *Id.* (Referencing *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

[3] Steven C. Bennett, Dean A. Calloway, "A Closer Look at the Raging Consumer Arbitration Debate", 65-OCT Disp. Resol. J. 28, 30 (2010) (Quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[4] *Id.* (Quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

[5] *Id.* at 31

[6] *Id.*

[7] Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006).

[8] *Id.* at 111.

[9] I*d.* at 111-112.

[10] Rhys E. Burgess, *Protecting Those Who Cannot Protect Themselves: the Efficacy of PRE-Dispute Arbitration Agreements in Nursing Homes*, 17 Loy. J. Pub. Int. L 1, 5 (Fall 2015).

[11] 131 S.Ct. 1740 (2011).

[12] *Id.* at 1744.

[13] *Id.*

[14] *Id*. at 1744-45.

[15] *Id*. at 1745.

[16] *Id*.

[17] *Id*. at 1746.

[18] 133 S.Ct. 2304 (2013).
[19] *Id*. at 2306.

[20] *Id*. at 2308.

[21] *Id*.

[22] *Id*. (Referencing *In re American Express Merchants' Litigation,* 554 F.3d 300, 315–316 (C.A.2 2009).
[23] 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010).
[24] *Italian Colors* at 2308.

[25] *Id*.

[26] *Id*. at 2308-2312.

[27] *Id.* at 2308-2309.

[28] *In re American Express Merchants' Litigation,* 554 F.3d 300, 315–316 (C.A.2 2009).

[29] *Italian Colors* at 2309.

[30] Mindy R. Hollander, 46 HOFLR 363, 365 (Fall 2017).

[31] *Id*.
[32] Theodore Eisenberg, Geoffrey P. Miller, Emily Sherwin, Mandatory Arbitration for Customers but Not for Peers: *A Study of Arbitration Clauses in Consumer and Non Consumer Contracts*, 92 Judicature 118 (2008).

[33] *Id*. at 119.

[34] *Id*. at 122.

[35] *Id*. at 121.

[36] *Id*. at 123.

[37] See generally, e.g., Steven C. Bennett, Dean A. Calloway, "A Closer Look at the Raging Consumer Arbitration Debate", 65-OCT Disp. Resol. J. 28 (2010) (Quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[38] *A Guide to Small Claims & Commercial Small Claims in the New York State City, Town & Village Courts* at 6, New York State Unified Court System (Updated August 2018), at Available online at http://www.nycourts.gov/courthelp/pdfs/SmallClaimsHandbook.pdf (Last accessed October 8, 2018).

[39] *Id*.

[40] *Id*. at 8.

[41] *Id*. at

[42] See New York City Department of Finance available online at https://www1.nyc.gov/site/finance/sheriff-courts/sheriff-serving-legal-papers.page (Last accessed October 8, 2018).

[43] *American Arbitration Association Consumer Arbitration Rules,* Amended and Effective September 1, 2018 available online at https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf (Last accessed October 8, 2018).

[44] *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, Effective July 15, 2009, available online at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf (Last accessed October 8, 2018).

[45] See https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf for AAA arbitration fees (last accessed September 2, 2019). (For business-initiated arbitration filings, a filing fee of $500 for 1 arbitrator or $625 for three arbitrators is required. In addition, the business must also pay a case management fee of $1,400 for one arbitrator or $1,775 for three arbitrators and an additional $1,500 to the arbitrator(s).) See https://www.jamsadr.com/consumer-minimum-standards/ and https://www.jamsadr.com/arbitration-fees (lst accessed September 2, 2019). (JAMS requires businesses to pay all fees in business-initiated arbitration, including a $1,500 fee in two-party arbitration and an additional case management fee equal to 12 percent on all professional fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation. The actual hourly rate payable to each arbitrator is set by the arbitrator.)

[46] *NAM's Minimum Standards of Procedural Fairness for Consumer Arbitrations* (Effective November 6, 2009), Standard #6, Available online at https://www.namadr.com/wp-content/uploads/2018/07/Consumer-MinimumStandards.pdf (Last accessed October 8, 2018).

[47] *NAM Comprehensive Fees*, Available online at https://www.namadr.com/wp-content/uploads/2016/07/Comprehensive-Fees-7.1.18-1.pdf (Last accessed October 8, 2018).

[48] *Id*.

[49] See *Rent-A-Center West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776-2781 (2010). (Holding that in an employment contract containing an arbitration clause that gave the arbitrator the exclusive authority to resolve any dispute as to its enforceability, only unconscionability relating to the clause delegating the authority to resolve any dispute relating to the enforceability of the contract could be challenged in court, but not any other issue such as the unconscionability of the arbitration itself.)

[50] See, e.g., **Landers v. Federal Deposit Ins. Corp.,** 402 S.C. 100 (2013); BossCorp, Inc. v. Donegal, Inc., 370 S.W.3d 68 (2012); Tiri v. Lucky Chances, Inc., 226 Cal.App.4th 231 (2014); Baltimore County Fraternal Order of Police Lodge No. 4 v. Baltimore County, 429 Md. 533 (2012); Schumacher Homes of Circleville, Inc. v. Spencer, 237 W.Va. 379 (2016); Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 26 N.Y.3d 659 (2016); HPD, LLC v. TETRA Technologies, Inc., 2012 Ark. 408 (2012); Locklear Automotive Group, Inc. v. Hubbard, 252 So.3d 67 (2017).

[51] See generally Victor D. López, Eugene T. Maccarrone, *Leading the World in the Wrong Direction: Is It Time For The United States To Adopt The World Standard "Loser Pays" Rule In Civil Litigation?*, North East Journal of Legal Studies: Vol. 32 , Article 1 (Fall 2014) available at http://digitalcommons.fairfield.edu/nealsb/vol32/iss1/1 (last accessed 2/2/2019).

[52] *Id.* at 3 (referencing John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U.L. Rev. 1567 (Summer 1993).

[53] *Id.*

[54] See Section IV *supra*.

[55] Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 Harv. L. & Pol'y Rev. 329 (Summer 2015) at 329.

[56] *Id*.

[57] 2015 CA S.J.R. 25 (Introduced August 3, 2016). (It passed the Senate on August 11, 2016 but died on the inactive file in the Assembly on November 30, 2016.)

[58] 2016 CT H.B. 5561. (The bill was Raised by the House of Representatives in its February 2016 session but has not been enacted as of this writing.)

[59] *Id*. at § 2(1)

[60] *Id*. at § 2(2)

[61] *Id*. at § 2(3)

[62] *Id*. at § 2(4)

[63] *Id*. at § 2(5)

[64] *Id*. at § 2(5)

[65] 2017 IL S.B. 983 (NS) § 5-15(a) (Introduced February 7, 2017; Reintroduced January 6, 2019 with no further action as of this writing.)

[66] *Id*. at § 10-10(1)

[67] *Id*. at § 10-10(2)

[68] *Id*. at § 10-10(3)

[69] *Id*. at § 10-10(4)

[70] *Id*. at § 10-10(5)

[71] *Id*. at § 15-5

[72] *Id*. at § 15-10

[73] See 7 Williston on Contracts § 15:11 (May 2017 Update). See also 15 U.S.C.A. § 1011("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.") Since the FAA does not specifically reference the insurance industry, it is inapplicable to it and states can continue to regulate it, including making forced arbitration inapplicable if they so choose.

[74] See *Kernahan v. Home Warranty Administrator of Florida*, 2019 WL 166309 (2019).

[75] McKinney's General Business Law § 399-c (2).

[76] 2017 NY S.B. 7111 (NS) (Introduced January 3, 2018; reintroduced in the NYS Assembly as 2019 NY A.B. 2497 January 23, 2019 and is still pending in the 1919-1920 legislative session).
[77] *Id*.

[78] 2017 NY A.B. 6983 (NS) (introduced March 28, 2017; reintroduced as 2019 NY A.B. 326 on January 29, 2019 and is still pending in 1919-1920 legislative session).

[79] 2019 NY A.B. 326 at § 7516(b).

[80] 2015 Bill Text TN H.B. 2388 § 1(a)(3) (Introduced January 21, 2016).

[81] *Id*. at § 1(a)(1)

[82] *Id*. at § 1(a)(2)

[83] See Willinston on Contracts, supra note 2.

[84] See generally Theodore Eisenberg, Geoffrey P. Miller, Emily Sherwin, *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 Judicature 118 (2008).

[85] *Id*. at 119.

[86] *Id*. at 121.

[87] John R. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents*, 22 Elder L.J. 141, 143 (2014) (Referencing the Arbitration Fairness Act of 2011, S. 987, 112th Cong. §§ 1-4 (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. §§ 1-5 (2009); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. §§ 1-5 (2007)).

[88] U.S. Const. Amend. VII.