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THE HIGH COST OF MANDATORY CONSUMER ARBITRATION

MARK E. BUDNITZ*

I

INTRODUCTION

Consumers are being denied access to any forum in which they can bring their disputes with businesses selling the goods and services they buy. They are prevented from bringing these disputes to court because consumer contracts increasingly include mandatory, predispute, binding arbitration provisions.[1] These provisions force consumers to resolve any future dispute by arbitration in lieu of litigation and to waive almost any right to appeal. At the same time, arbitration, which is promoted as a more efficient dispute-resolution process, is, in practice, also unavailable to many consumers because its cost is too great.

Courts have recognized that the expense of arbitration can preclude consumers from utilizing the forum that an arbitration clause has made the exclusive forum for resolving their disputes.[2] In general, however, cases and literature on the issue understate the seriousness of the problem.[3] This Article critically examines a sampling of arbitration agreements and the rules of the major

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This Article is also available at http://www.law.duke.edu/journals/67LCPBudnitz.

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1. *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call For Reform*, 38 HOUS. L. REV. 1237, 1247 (2001) (describing mandatory arbitration as "set forth in a standard form contract, proposed by the business, and provided to the consumer on a take-it-or-leave-it basis").

2. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003) (recognizing that the consumer complainants would face prohibitive arbitration costs if they brought their small claims individually); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 573 (App. Div. 1998) (noting that excessive costs serve "to deter consumers from invoking arbitration"); Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 605 (Wash. Ct. App. 2002) (holding that prohibitive costs may "render the arbitral forum inaccessible").

3. While recent articles have addressed consumer arbitration costs, they have not included an in-depth examination of the difficulties of proving costs or a survey of arbitration agreements and their relationship to the rules of the major arbitration services. *See* Alderman, *supra* note 1; Melissa Briggs Hutchens, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599 (2002); R. Brian Tipton, *Allocating the Costs of Arbitrating Statutory Claims Under the Federal Arbitration Act: An Unresolved Issue*, 26 AM. J. TRIAL ADVOC. 325 (2002); Julia A. Scarpino, Comment, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 AM. U. J. GENDER SOC. POL'Y & L. 679 (2002); Robert Alexander Schwartz, Note, *Can Arbitration Do More for Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809 (2003).

arbitration service providers and concludes that the cost of arbitration is often prohibitively high, either because consumers simply cannot afford the fees attendant to filing and prosecuting a claim, or because the costs of bringing a claim outweigh the benefits of any potential remedies. Having relinquished their right to access the courts, consumers precluded in this way from arbitrating their claims have no legal means of obtaining a remedy for a business's illegal conduct. To compound the problem, because of the many contingencies upon which arbitration costs depend, and because the courts have been unable to articulate workable standards, it is difficult for consumers to prove, *ex ante*, in court that high costs preclude them from arbitrating their claims. Mandatory arbitration thus threatens the integrity of the nation's dispute-resolution system, a situation that demands correction by Congress.

Part II of this Article surveys the rules of the major arbitration service providers, reported cases, and the terms commonly found in arbitration agreements in an effort to begin to provide a picture of the actual costs consumers face in arbitration. In doing so, it examines the many factors that enter into the calculation of arbitration costs. To understand the common arbitration-clause terms that can make arbitration more expensive, a survey was conducted of the arbitration agreements of thirty-one companies. Fourteen agreements were collected from their description in case law, and seventeen were collected from other sources.[4] These agreements provide a rich source of empirical information on how agreements impose costs on consumers beyond what is indicated in the fee schedules of arbitration providers.

Part III showcases the fact that, notwithstanding the known costs of arbitration, consumers have great difficulty proving to the courts that the costs they face are prohibitively high because the cost of arbitration depends on matters

4. Agreements from the following cases, all decided after *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), were included in the survey: *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002); *American Heritage Life Insurance Co. v. Orr*, 294 F.3d 702 (5th Cir. 2002); *Acorn v. Household International, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002); *Dabney v. Option One Mortgage Corp.*, No. CIV. A. 00-5831, 2001 WL 410543 (E.D. Pa. Apr. 19, 2001); *Hale v. First USA Bank*, No. 00CIV5406JGK, 2001 WL 687371 (S.D.N.Y. June 19, 2001); *Bank One v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001); *Ex parte Thicklin*, 824 So. 2d 723 (Ala. 2002); *Bank America Housing Services v. Witherspoon*, 833 So. 2d 609 (Ala. 2002); *Cavalier Manufacturing., Inc. v. Jackson*, 823 So. 2d 1237 (Ala. 2001); *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002); *Parkerson v. Wayne Smith*, 817 So. 2d 529 (Miss. 2002); *Garcia v. Wayne Homes, LLC*, 2002 Ohio 1884 (Ct. App. 2002); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.2d (Tenn. Ct. App. 2001); and *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002). The survey also included arbitration agreements mailed to consumers by business establishments in 2002, agreements posted on popular websites, and agreements compiled in connection with a book, F. PAUL BLAND ET AL., CONSUMER ARBITRATION AGREEMENTS (2d ed. 2002) (including copies of arbitration agreements in a CD-ROM accompanying the book). These agreements included those used by the following companies: AT&T Broadband, Bank of America, Chase Manhattan Bank, DirecTV, Discover, First Union, MBNA, Sears, Sam's Club, SouthTrust Bank, Sprint, eBay, Dell, Lending Tree, Amazon, Gateway, and PayPal (whose contract was declared unconscionable in *Comb v. PayPal*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002)). The companies surveyed represent a variety of industries that sell goods, offer financial services, and conduct Internet transactions. Some of the industries included have a customer base numbering in the millions. All the agreements listed herein are referred to collectively as "the Survey" in the text. A graphic summary of the findings of the Survey is on file with *Law and Contemporary Problems*. Copies of all arbitration agreements not drawn from case law are on file with the author.

that cannot be predicted with certainty and because courts have not been able to formulate a coherent analytical framework for such a claim.

Part IV highlights the additional problem that, even if the costs of arbitration were determinable before the fact, and even if the courts agreed on how this should be done, they have not been able to develop a unified, workable theory on which to invalidate an arbitration agreement on grounds of prohibitive expense. While some courts find such agreements unconscionable, others strike them down as precluding the vindication of statutory rights. Both approaches are flawed. Part V therefore concludes that legislative or regulatory approaches should be adopted to ameliorate this denial of access to justice. Two possible strategies are put forward. One is to establish a regulatory structure in which the Federal Trade Commission (FTC) would regulate consumer arbitration to ensure that costs are reasonable. Alternatively, Congress could flatly prohibit the use of predispute arbitration agreements in consumer transactions, allowing consumers to consider the benefits and costs of arbitration once a dispute arises, but not beforehand.

II

THE COSTS OF ARBITRATION

This Part examines the rules of the major national arbitration service providers and the interaction of those rules with the terms of the arbitration agreements included in the Survey, with a view toward estimating the costs consumers face in bringing their disputes to arbitration and identifying the many variables that can affect the size of those costs. Though the service providers charge modest fees for claims involving small amounts of damages, arbitration agreements often impose restrictions that make actual costs prohibitively high. For substantial claims, the services' fees alone likely make access to arbitration infeasible, and actual costs are often made even greater by the terms of the arbitration agreement.

A. The Fees of the Arbitration Service Providers

An examination of the fees charged by arbitration service providers demonstrates that the costs are often so high consumers are denied access to arbitration and, therefore, to any dispute-resolution forum. This section surveys how three leading arbitration services assess their charges. The fees charged by the services vary according to the damages claimed, procedures selected, and arbitrators chosen. This section analyzes the services' fee schedules for the full range of damages alleged in consumer disputes, which involve damage claims ranging from the very small to the very large.[5]

5. *See, e.g.*, Brief for American Arbitration Association as Amicus Curiae app. 26-27, Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995) (No. 93-1001) (stating that more than one-third of the claims it arbitrates involve disputes over less than $10,000, with a third of the claims between $10,000 and $50,000, and, by implication, the remainder above $50,000), *cited in Allied-Bruce*, 513 U.S. at 280-81. Most complaints filed with state and local consumer protection agencies in 2001 related to

1. The AAA's Fees

Effective July 1, 2003, the American Arbitration Association (AAA) issued new rules for consumer-related disputes.[6] If a consumer's claim or counterclaim is for less than $10,000,[7] the consumer must pay half of the arbitrator's compensation, but the consumer's responsibility cannot exceed $125. This must be paid as a deposit at the time a case is filed. Any unused portion is refunded. If the claim or counterclaim is for between $10,000 and $75,000, the consumer must pay one-half of the arbitrator's fee, but not more than $375. Apparently, a consumer with a claim of less than $75,000 is not obligated to pay any other fees.[8]

If the consumer's claim is greater than $75,000 or is "non-monetary,"[9] the consumer must pay a partially refundable administrative fee as provided in the AAA's commercial fee schedule.[10] According to that schedule, the fee is $2,250 for a claim between $75,000 and $150,000, and $4,000 for a claim between

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the home improvement, household goods, automotive sales, automotive repair, and credit/lending industries. *See* NAT'L ASS'N OF CONSUMER ADVOCACY ADM'RS & THE CONSUMER FEDERATION OF AMERICA, ELEVENTH ANNUAL NACAA/CFA CONSUMER COMPLAINT SURVEY REPORT (Nov. 25, 2002), *available at* http://www.nacaanet.org/publications/survey02.pdf. Many of these types of disputes, such as with homebuilders and mortgage lenders, typically involve large sums of money. *See* Jeff Gelles, *The Big Problem with Mandatory Arbitration*, PHILA. INQUIRER, May 8, 2002, at C01. Other types of disputes can involve large claims because of consumer-friendly statutory damages schemes. Consumers have been awarded large damages in many cases involving debt collection. *See* ROBERT J. HOBBS, FAIR DEBT COLLECTION 62-68 (4th ed. 2000). Credit reporting agencies violating the Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000), are liable for substantial damages, including punitive and intangible damages. WILLARD P. OGBURN, FAIR CREDIT REPORTING ACT 298, 300-04 (4th ed. 1998). Creditors violating the Truth in Lending Act, 15 U.S.C. §§ 1601-67 (2000), may be liable for statutory as well as actual damages, including emotional distress. *See* KATHLEEN KEEST & ELIZABETH RENUART, TRUTH IN LENDING 480 (4th ed. 1999). State laws outlawing unfair and deceptive practices often provide for treble damages, punitive damages, and incidental and consequential damages, including pain and suffering. *See* JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 613-46 (5th ed. 2001).

6. *See* AM. ARBITRATION ASS'N, SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES (effective July 1, 2003) [hereinafter AAA CONSUMER RULES], *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\consumer\AAA236current.htm.

7. The AAA fee schedule is based only on *actual* damages claimed; it is not affected by claims for "additional damages, such as attorneys' fees or punitive damages." *Id.* at C-8.

8. *Id.* The business must pay all of the arbitrator's compensation beyond the portion the consumer must pay, as well as administrative fees, hearing fees, and "case service" fees, all scaled to the size of the claims and counterclaims involved. *See id.*

9. *Id.* "Non-monetary" is not defined in the AAA rules. Presumably, it includes a claim for injunctive relief. Such relief is possible since the AAA rules provide that the arbitrator "may grant any remedy, relief or outcome that the parties could have received in court." It is unclear what justifies imposing the high fees for large claims on a claim for injunctive relief. The law on what must be shown to prove the need for injunctive relief is well-developed, so the arbitrator need not engage in extensive original research. Furthermore, a consumer justifiably seeking injunctive relief in arbitration is a consumer in serious trouble. She may not even have the opportunity to ask for an injunction because of the time and expense required to do so.

10. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (amended and effective July 1, 2003) [hereinafter AAA COMMERCIAL RULES], *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\commercial\AAA235current.htm.

$150,001 and $300,000.[11] In addition, the consumer must deposit one-half of the arbitrator's compensation. The rate individual arbitrators charge varies, and the AAA does not provide the rate until the arbitrator is appointed.[12] Therefore, in regard to large claims, the consumer cannot know in advance what the fee will be.

In certain respects, the AAA's new policy is advantageous to consumers. It guarantees that consumers with smaller claims will not be faced with overwhelming arbitrator fees.[13] The costs, however, for claims between $10,000 and $75,000 are higher than if the consumer filed in court.[14] Moreover, looking at the fee schedules alone presents a distorted picture of the true costs of arbitration, for an arbitration agreement may include terms that increase overall costs beyond those charged by the service provider.[15] Lending Tree's agreement, for example, precludes consolidated or class actions and bars the award of multiple, consequential, or exemplary damages, raising the cost of individual claims relative to possible awards.[16] Thus, although the AAA ostensibly provides the consumer a low-cost forum in which to file her claim, the arbitration agreement's restrictions on damages and other terms may make filing a claim financially infeasible, or, at the least, alter the balance between the potential costs and potential recovery so as to discourage filing a claim.

The AAA rules provide what could be a viable alternative in that the consumer may file in small claims court instead of proceeding with arbitration.[17] However, small claims court may impose even more onerous restrictions than arbitration. For example, many small claims courts do not allow representation

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11. *Id.* For claims from $75,000 to $150,000, the initial filing fee is $1,500, and the "case service fee" is $750. For claims from $150,001 to $300,000, the initial filing fee is $2,750, and the case service fee is $1,250. For nonmonetary claims, the administrative fee is $4,500. *Id.*

12. *See* AAA CONSUMER RULES, *supra* note 6, at C-8 ("The arbitrator's compensation rate is set forth on the panel biography provided to the parties when the arbitrator is appointed.").

13. Beyond requiring consumers with small claims to pay only relatively small fees, the AAA rules make some provision for indigent claimants. The AAA's Commercial Fee Schedule states that "[t]he AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees." AAA COMMERCIAL RULES, *supra* note 10, Rule 49. The Consumer Rules declare that in all disputes under agreements covered by the California Arbitration Act and all arbitrations conducted in California, consumers with gross monthly incomes of less than 300% of the federal poverty guidelines will be required to pay only actual arbitrator fees. AAA CONSUMER RULES, *supra* note 6, at C-8. *But see infra* notes 78-83 (discussing the illusory nature of fee waiver rules).

14. PUBLIC CITIZEN'S CONGRESS WATCH, THE COSTS OF ARBITRATION 2 (2002), *available at* http://www.publiccitizen.org/documents/ACF110A.pdf.

15. *See infra* Part II.E.

16. Survey, *supra* note 4.

17. *See* Licitra v. Gateway, Inc., 734 N.Y.S.2d 389, 396 (Civ. Ct. 2001) (comparing the advantages, including the lower cost, of small claims court relative to arbitration under the NAF's rules). With most arbitration agreements silent on the point, many consumers may be unaware they can proceed to small claims court with their disputes. Only two agreements in the Survey, Sprint's and Sam's Club's, mention the small claims alternative. *See* Survey, *supra* note 4. The other arbitration agreements subject to the AAA's rules not only did not mention this option but instead stated emphatically that the consumer had no choice but arbitration. Consumers will only discover this choice after reading the AAA's website, where the disclosure is buried in a mass of other information. *See* AAA CONSUMER RULES, *supra* note 6, ¶ 2.

by counsel,[18] and without a lawyer it is possible that a consumer would not be aware of the full range of statutory and common law claims available to her. Even if consumers knew about such legal theories, few would be able to effectively litigate such cases without legal representation. In addition, discovery is generally not available in small claims court,[19] and approximately half the states do not allow equitable relief.[20] Finally, because of low monetary jurisdictional limits, the consumer often will not be able to collect more than a fraction of the damages to which she is entitled under the law.[21] In the end, arbitration under the AAA rules may be a more attractive option for consumers with small claims than small claims court, since the rules require businesses to pay most of the costs for claims of $75,000 or less.[22]

2. The NAF's Fees

The National Arbitration Forum (NAF) imposes a variety of fees depending on the amount claimed and the services requested.[23] The following description provides examples designed to enable a comparison between the fees charged by the AAA and the NAF, and to illustrate the difficulties consumers have in estimating the cost of arbitrating under the NAF rules. The examples assume the consumer has chosen a "participatory hearing," which includes in-person,

18. RALPH WARNER, EVERYBODY'S GUIDE TO SMALL CLAIMS COURT 7/3 (7th ed. 1997) (listing numerous states in which attorneys and other representatives are forbidden).

19. *Id.* at 23/14. The consumer may, however, be able to subpoena documents. *Id.* at 14/6.

20. *Id.* at 4/15.

21. *Id.* at 4/1 ("The maximum amount for which you can sue in Small Claims Court varies from state to state. For example, it's $7,500 in Minnesota, $1,500 in Kentucky, $3,000 in New York, and $5,000 in Texas.").

22. This financial arrangement, of course, has the potential to exacerbate another problem with the mandatory arbitration system: the potential for conflicts of interest on the part of arbitration providers beholden to the businesses that select and pay them. Large businesses become "repeat players" in arbitration, using a provider again and again, and providing it with needed revenue; the consumer, by contrast, is most likely a "one-shot player," appearing before the provider's arbitrators only once. *See, e.g.*, Alderman, *supra* note 1, at 1256-57 & n.84. Even if arbitration services are not actually biased in favor of repeat-player businesses, the competition among arbitration services at least creates an incentive for providers to favor the company that designates and, in part, pays the arbitration service.

One court has noted what it characterized as the irony in the issue of who pays. *See* Livingston v. Assocs. Fin. Co., No. 01C11659, 2001 WL 709465, at *3 (N.D. Ill. June 25, 2001). If a consumer or employee has to pay substantial costs, she argues that the high costs preclude the vindication of her rights. On the other hand, if the business pays the costs, the consumer or employee may allege that the arbitration service is biased in favor of the business because the business is a repeat player and the service has an incentive to rule in its favor. Although ironic, this arrangement also poses a serious dilemma for the parties to arbitration and the courts trying to determine how to resolve this problem. One court has approached this by determining that using one service presented a high probability of bias, while implicitly assuming that using another would not. *See id.* Such an approach, however, is fraught with difficulty, requiring a court to determine what services provide sufficient safeguards against bias even when the business pays all or most costs.

23. NAT'L ARBITRATION FORUM, CODE OF PROCEDURE, pt. VII, app. C (July 1, 2003) [hereinafter NAF CODE], *at* http://www.arb-forum.com/code/070103.pdf.

telephone, and on-line hearings,[24] rather than a decision based solely on the submission of documents.[25]

If a consumer files a claim for between $5,000 and $10,000, she must pay a minimum of $185.00 unless the parties agree otherwise or applicable law requires a different cost allocation.[26] For claims between $10,000 and $75,000, the cost to the consumer varies depending upon the specific amount of damages alleged. If, as an example, the amount claimed is between $15,001 and $30,000, the consumer's minimum cost is $310. If the consumer claims more than $50,000 but less than $75,000, her minimum cost is $490.[27]

Beyond these minimum fees, consumers arbitrating under the NAF rules must pay additional fees for each request for an amendment, subpoena, discovery order, continuance, stay, or time waiver, for reopening or reconsideration, or for any other type of dispositive or nondispositive order.[28] A consumer claimant pays a $10 "processing fee" for each of these requests, with the exception of requests for reopening or reconsideration, which cost the consumer $200.[29] Additional $100 fees apply if the consumer requests written findings of fact or conclusions of law (if not required by the arbitration agreement),[30] or submits a post-hearing memorandum to the arbitrator.[31]

Consumer costs under the NAF rules also vary according to how the arbitrator or arbitrators are selected and what fees they charge. For claims valued at less than $75,000, the parties may select a single arbitrator on "mutually agreeable terms," or each party may select an arbitrator, with those two arbitrators in turn selecting a third for the composition of an arbitral panel.[32] If the first

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24. *Id.* at 3.

25. *See id.* at 2-3, 18-19 (explaining that the term "participatory hearing" includes in-person, telephone, and on-line hearings, whereas a "document hearing" is "[a] proceeding in which an Arbitrator reviews documents or property to render an Order or Award"). If the hearing is held at the request of the consumer, she is responsible for half of the hearing session fee. If held at the request of the business, the business is responsible for the full hearing fee. *Id.* at 38.

26. *Id.* at 38. The consumer pays a filing fee of $35 and a participatory fee of $150. The business respondent pays a "commencement fee" of $60 and an administrative fee of $650. *Id.* There also is a participatory hearing fee of $500 if the business selects such a hearing. *Id.*

27. *Id.* The filing fee is $240, and the participatory hearing fee is $250.

A direct comparison between the AAA's and the NAF's fees is not possible, but the NAF's fees would often be much higher. First, the NAF's fees are apparently completely exclusive of arbitrator fees, which are of course within the minimum costs of any arbitration. The AAA's consumer fees for small claims, by contrast, seem to be exclusively composed of arbitrator fees. Second, the AAA determines the fee category in which a claim belongs by considering only the *actual* damages claimed, *see supra* note 7, while the NAF fee schedule is based on "[t]he total value of all relief sought." NAF CODE, *supra* note 23, at 2. Presumably, then, a dispute involving claims beyond actual economic damages would often be placed in higher fee category under the NAF rules than it would under the AAA rules.

28. *Id.* at 40.

29. *Id.* The business respondent has to pay a "request fee" ranging from $50 to $250 (for claims under $75,000) for each request made by the consumer or the respondent. *Id.*

30. *Id.* at 41. Under the NAF rules, "[a]n Award shall not include any reasons, findings of fact or conclusions of law unless required by prior written agreement of the Parties or requested in writing by a Party before the beginning of any Hearing." *Id.* at 27.

31. *Id.* at 40.

32. *Id.* at 15.

method is used, each party must pay a $50 "procedural fee" for each scheduled hearing session.[33] If the second method is chosen, each party must pay $75 for each session. This fee is in addition to the actual fee paid to the arbitrator or arbitrators, which is to be "mutually agreed to by the parties."[34]

Needless to say, the costs of arbitrating under the NAF's rules are difficult to estimate in advance of arbitration because they are dependent on a wide variety of factors that may not be known before a complaint is filed, including the type and number of hearings and arbitral orders required to resolve the dispute.

Like the AAA, the NAF has a separate fee arrangement for claims of $75,000 and higher. These fees are considerably greater than those for smaller claims. For a claim of $75,000, for example, a consumer requesting only a document hearing would be required to pay a filing fee of $750,[35] a $2,500 hearing fee, and a hearing procedural fee of either $100 or $150.[36] For participatory hearings, the consumer would pay an additional $1500 for the initial session, plus $1,000 for each additional session. The fee for requests for amendments, subpoenas, discovery orders, or continuances or time waivers, for submission of post-hearing memoranda, for reopening or reconsideration, and for other orders would range from $75 for a subpoena to $2,500 for a dispositive order.[37] A written opinion not provided for by the arbitration agreement or requested by the business opponent would cost the consumer at least $1,000.[38] Other fees would be imposed for expedited hearings.[39]

The substantial increase in the fees for claims of $75,000 and higher may create a strong incentive for consumers to claim less than the law would allow. This perverse incentive undermines important objectives underpinning consumer protection legislation: deterring and remedying egregious commercial conduct, and compensating consumers for injuries suffered.

The NAF rules are subject to two important provisos: First, the fee schedules do not apply if "otherwise provided by agreement of the Parties or required by the applicable law."[40] Second, the NAF allows indigent consumers,

33. *Id.* at 40.

34. *Id.* at 31.

35. *Id.* at 42.

36. *Id.* at 45.

37. *Id.* at 43. The Public Citizen study defines a dispositive motion as a motion to dismiss or for summary judgment. *See* PUBLIC CITIZEN'S CONGRESS WATCH, *supra* note 14, at 46.

38. *See* NAF CODE, *supra* note 23, at 44.

39. *Id.*

40. *Id.* at 32, 38, 41-42. It is unclear whether the rules allow the direct fees imposed upon a consumer to be *increased* over those provided for in the NAF fee schedule. The rules continually repeat that a fee will be imposed "unless otherwise provided by agreement of the Parties or required by applicable law." *See, e.g., id.* at 38-39. But Rule 44(I), which is referenced by the subsequent rules, seems only to contemplate that fees otherwise imposed on a consumer can instead be imposed on or absorbed by the business party. *See id.* at 31 ("A Consumer Party may submit a statement to the Director stating that an agreement of the Parties or the applicable law requires an opposing Business Party to pay fees. The Business Party may be required to pay fees for the Consumer as provided in this Code and Fee Schedule or by the agreement of the Parties or applicable law.").

defined as those who "meet the United States federal poverty standards,"[41] to apply for a full or partial waiver of fees, which "shall" be granted if the consumer qualifies under the NAF rules, federal poverty standards, or applicable law. An NAF director "may order that the business [p]arty pay the appropriate fees" in lieu of the consumer.[42]

3. JAMS's Fees

Compared to the AAA and the NAF, JAMS has a relatively straightforward and affordable fee arrangement. But the JAMS rules may nevertheless substantially reduce consumers' ability to pursue their full range of remedies under the law. JAMS's failure to explicitly permit consolidation of claims, class actions, and full business subsidization of the process raises additional concerns.

When a consumer files a claim under the JAMS rules, she must pay a flat fee of $125 and no more, regardless of the services requested or the size of the claim.[43] JAMS considers this fee to be "approximately equivalent to current court filing fees."[44] This is in sharp contrast to the AAA and NAF rules, which impose expensive fees and other costs when the consumer brings a large claim.[45] In addition, under JAMS's rules, either party may file in small claims court instead of using arbitration.[46] JAMS also refuses to enforce requirements that arbitration proceedings occur in only one location.[47] Rather than force the consumer to shoulder expensive proceedings in a far-flung location, JAMS requires consumers have access to an in-person hearing in their own "hometown area."[48] It also requires that consumers be provided a "concise written statement of the essential findings and conclusions on which the award is based."[49]

Although many arbitration agreements severely limit the remedies an arbitrator may award,[50] JAMS refuses to arbitrate claims based on such clauses, insisting that arbitrators remain free to award any "[r]emedies that would otherwise be available to the consumer under applicable federal, state or local laws."[51] JAMS's general rules provide that the arbitrator must "be guided by

41. *Id.* at 5.

42. *Id.* at 32.

43. JAMS, JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS ¶7 (revised Apr. 2003) [hereinafter JAMS POLICY], *at* http://www.jamsadr.com/images/PDF/Consumer_Arbitration_Min_Std-2003.PDF. All other fees must be paid by the business, including the arbitrator's compensation. *Id.*

44. *Id.*

45. *See infra* text accompanying notes 55-56, 80-84.

46. JAMS POLICY, *supra* note 43, ¶ 1.

47. *See* Survey, *supra* note 4. Several arbitration agreements included in the Survey, including those of Lending Tree, PayPal, and Amazon, required all arbitration hearings to take place in a specific location designated by the business. *See infra* note 109.

48. JAMS POLICY, *supra* note 43, ¶5.

49. *Id.* ¶10.

50. *See* Survey, *supra* note 4. For example, the AT&T Broadband agreement prohibits the award of attorneys' fees or consequential, punitive, or incidental damages.

51. JAMS POLICY, *supra* note 43, ¶3.

the principles of law and equity" in determining an award.[52] The parties normally may "specify a different standard,"[53] but this allowance apparently does not apply to arbitrations governed by predispute arbitration agreements between consumers and businesses. The JAMS consumer policy states that JAMS will administer arbitrations "only if the contract arbitration clause and specified applicable rules comply with the . . . minimum standards of fairness" contained in the policy.[54]

The question arises how JAMS handles an arbitration agreement that provides that JAMS's rules apply but that the terms of the agreement prevail if the rules and the arbitration agreement conflict.[55] Presumably, if there were a conflict between such an agreement and JAMS's consumer arbitration policy, JAMS would refuse to administer the arbitration. However, many agreements designate not only JAMS, but also the NAF and the AAA as arbitral service providers,[56] so the consumer might then be subject to the more expensive fee schedules of the AAA and the NAF. Ultimately, JAMS's consumer arbitration policy aids consumers only to the extent it persuades businesses to draft conforming agreements.

An important but unaddressed issue under JAMS's rules is whether JAMS will enforce agreements that prohibit claim consolidation and class actions. Businesses can use such prohibitions to prevent consumers from pursuing their claims in arbitration because individual consumers may find it financially infeasible to retain an attorney, and attorneys may find it infeasible to represent them, especially when their claims are small.[57] Many consumer arbitration agreements include this prohibition.[58] While JAMS's policy statement does not directly address the issue of consolidation and class actions, the statement does say that the arbitration "clause or procedures must not discourage the use of counsel."[59] Consumers might argue that an arbitration clause prohibiting consolidation and class actions has exactly that effect and that JAMS should refuse to administer such arbitrations. On the other hand, the general JAMS rules, which apply to matters not addressed in JAMS's consumer policy statement,

52. JAMS, JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES, R. 24(c) (revised Apr. 2003) [hereinafter JAMS RULES], *at* http://www.jamsadr.com/images/PDF/comprehensive_arbitration_rules-2003.PDF (providing that if an arbitration agreement designates JAMS as the administrator without specifying any particular JAMS rules, the Comprehensive Rules and Procedures apply to the arbitration).

53. *Id.*

54. JAMS POLICY, *supra* note 43.

55. *See* Survey, *supra* note 4. The Chase Manhattan agreement provides that the terms of the agreement prevail if there is a conflict between the agreement and JAMS's rules.

56. *See* Survey, *supra* note 4. The Chase Manhattan, Sears, and Sam's Club agreements are examples.

57. *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, *passim* (Winter/Spring 2004).

58. *Id.* The Discover, MBNA, Sears, Sam's Club, SouthTrust Bank, PayPal, Gateway, and Lending Tree agreements are examples.

59. JAMS POLICY, *supra* note 43, ¶6.

provide that "[t]he parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with applicable law and JAMS policies."[60] Businesses may take advantage of the failure to clearly address this issue by arguing that an agreement prohibiting consolidation and class actions constitutes an agreement on procedure that is permitted under JAMS's general rules. The failure to clearly and unequivocally permit consumers to bring class actions in arbitration is a major deficiency in JAMS's consumer rules.

B. Examples of Costs from Cases

The above discussion has described the fee schedules of the national arbitration service providers. Another source of information is the opinions that disclose the costs in individual consumer cases. The following cases demonstrate that arbitration costs can be substantial:

(1) In *Popovich v. McDonald's Corp.*,[61] the agreement required arbitration under the AAA's rules.[62] The plaintiff obtained an affidavit from an AAA-certified arbitrator that the cost of the arbitration would likely be $48,000 and could be as high as $126,000. The plaintiff claimed that this cost would be prohibitive, which the defendant did not dispute, and the court found that the plaintiff had carried his burden under *Green Tree Financial Corp. v. Randolph*[63] in demonstrating that arbitration would be cost-prohibitive and that the arbitration clause was unenforceable.

(2) In *Phillips v. Associates Home Equity Services, Inc.*,[64] the plaintiff presented evidence that under the AAA Commercial Rules she would have to pay about $4,000 at the time of filing her claim.[65] The court pointed out that many other costs would be shared equally by both parties, bringing the total cost to the consumer much higher.[66] The court found that the evidence on costs, together with evidence of the plaintiff's financial condition, were sufficient to show that the cost of arbitration would be prohibitive.

(3) In *Mendez v. Palm Harbor Homes, Inc.*,[67] the arbitration agreement required a three-judge panel of arbitrators who would follow the rules of the AAA.[68] A low-income consumer asserted a claim of $1500 and demonstrated he would have to pay $2,000 in fees up front, as well as thousands of dollars more to arbitrate his claim.[69] The defendant countered that the consumer's costs could not be verified until incurred. The court held it "unreasonable" to require

60. JAMS RULES, *supra* note 52, at R. 2.

61. 189 F. Supp. 2d 772 (N.D. Ill. 2002).

62. *Id.* at 778.

63. 531 U.S. 79 (2000).

64. 179 F. Supp. 2d 840 (N.D. Ill. 2001).

65. *Id.* at 846.

66. *Id.* In addition to the filing fee and arbitrator's fees, other costs, including travel expenses and hotel rentals, would have to be paid.

67. 45 P.3d 594 (Wash. Ct. App. 2002).

68. *Id.* at 598.

69. *Id.* at 599.

a consumer to complete the entire arbitration process and incur all the costs to meet her burden of proof.[70]

(4) In *Brower v. Gateway 2000, Inc.*,[71] the agreement required the consumer claimants to pay a $4,000 fee in advance, of which $2,000 was nonrefundable.[72] With arbitrations limited to the Chicago area, the complainants, New York residents, would also incur transportation and lodging expenses. Even if an individual consumer obtained an award, the consumers' counsel estimated that the damages would not exceed $1,000. Thus, the court held that arbitration was financially infeasible, and the clause substantively unconscionable.

These cases demonstrate that the claim that arbitration is cost-prohibitive is not merely theoretical. Consumers have been able to document as much to the satisfaction of the courts.

C. Waiver and Deferral

Notwithstanding the potential costs of arbitration, businesses argue somewhat disingenuously that access is not barred given the allowances for fee waivers and deferrals under the rules of the arbitration providers. Both the NAF and the AAA offer fee waivers, deferrals, or reductions for individuals who are unable to pay. A close examination of that offer, however, indicates that low-income consumers cannot count on being able to qualify.

The NAF permits a consumer to request a waiver only if she is suing for less than $75,000.[73] Her request must be accompanied by an affidavit that contains information about her family's size, income, resources, property, liabilities, debts, and assets.[74] The NAF Director is required to "promptly determine whether the consumer is eligible for a full or partial waiver."[75] If the consumer is eligible, the Director may order the business to pay the "appropriate fees."[76] The waiver does not apply to the fees assessed if the consumer requests written findings of fact, conclusions of law, or reasons for the award.

The standards for determining eligibility are not specified in the NAF rules. The Director is instructed to determine if the consumer is eligible under NAF Rule 45 or under "United States poverty standards or the applicable law." There is more than one federal poverty standard, however, and the rule does not specify which the Director must follow.[77] It is therefore impossible to know how the Director makes the eligibility determination under the rule. There are also no instructions for deciding when a partial waiver might be more appropriate than a full waiver.

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70. *Id.* at 605.

71. 676 N.Y.S.2d 569 (S. Ct. 1998).

72. *Id.* at 571.

73. NAF CODE, *supra* note 23, at R. 45(A) (providing for waivers only in "common claims," which are defined as claims for less than $75,000).

74. *Id.*

75. *Id.*

76. *Id.* at R. 45(B).

77. The Census Bureau and the Department of Health and Human Services publish various measurements of poverty at http://www.census.gov/hhes/www/poverty.html (last revised Oct. 27, 2003).

The AAA also provides for fee waivers, reductions, and deferrals.[78] For claims under $75,000 the only such mechanism available is for disputes based on arbitration clauses governed by the California Arbitration Act and arbitrations held in California. In such cases, consumers with gross monthly incomes of less than 300% of the federal poverty guidelines are required to pay only arbitrator fees.[79] For claims over $75,000, consumers are eligible to apply for a waiver or deferral of administrative fees, but requests are granted only at the service's discretion.[80] Persons are "eligible for consideration" if their annual gross income is less than 200% of the federal poverty guidelines.[81] To be considered, applicants are required to submit a signed affidavit of hardship, and the AAA may consider their "income prospects" and assets. Applicants must provide copies of federal tax returns for the past two years, bank statements for the past three months, and possibly additional financial records and documentation.[82] The AAA reserves the right to deny any request. Even if the AAA responds favorably to a consumer's affidavit, arbitration may remain unaffordable. Certain fees, including the arbitrator's fee, are not covered by the waiver policy.[83]

In addition to the possibility of waiver, fees may be deferred until the conclusion of the case. AAA policies do not explain how the AAA decides between deferral and waiver of fees, leaving much to the discretion of AAA administrators. This discretion is premised on the recognition that "every hardship request is unique and involves many variables."[84] While this open-ended approach may be appropriate, consumers cannot know in advance whether they will qualify for a waiver, a deferral, or neither. Furthermore, whether discretion will be exercised fairly depends entirely upon the persons exercising it.

The courts have recognized the general lack of standards governing the granting of fee waivers under the AAA's rules and policies. According to one court, the AAA rarely grants hardship waivers, and even if granted, the plaintiff

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78. *See* AM. ARBITRATION ASS'N, ADMINISTRATIVE FEE WAIVERS AND PRO BONO ARBITRATION SERVICES (updated July 1, 2003) [hereinafter AAA WAIVER RULES], *available at* http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/focusArea/cosumer/Administrative%20Fee%20Waivers%20and%20Pro%20Bono%20Arbitrators%20Services.htm; *see also* AAA COMMERCIAL RULES, *supra* note 10, at R. 49 ("The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees."); Brief of Amicus Curiae American Arbitration Association at 4, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235), *available at* 2000 WL 744161 ("The AAA . . . has administrative procedures that allow deferrals or reductions in the AAA's administrative fees where extreme hardship on the part of a party makes paying or advancing some or all of such fees inappropriate. The AAA receives one or two requests each week for a waiver or deferral of administrative fees on the basis of economic hardship. When the hardship is substantiated, these requests are liberally granted.").

79. AAA CONSUMER RULES, *supra* note 6, at C-8. This seems a very small concession since the fees the AAA imposes on consumers in such disputes are solely comprised of arbitrator fees. *See supra* Part II.A.1. Perhaps this waiver allows consumers to avoid incidental expenses, such the fee for hearing-room rental.

80. AAA WAIVER RULES, *supra* note 78.

81. *Id.*

82. Ting v. AT&T, 182 F. Supp. 2d 902, 917 (N.D. Cal. 2002), *rev'd in part, aff'd in part*, 319 F.3d 1126 (9th Cir. 2003).

83. AAA WAIVER RULES, *supra* note 78.

84. *Id.*

has usually already expended substantial funds arbitrating the case.[85] Another court has explained that the AAA's accounting department determines who is awarded "extreme hardship" status, but that the AAA does not provide formal standards for the department to follow.[86] Just as there are no mandatory guidelines, there are also no publicly available statements of criteria that the AAA might use, and at least some of the persons evaluating requests for waivers receive no training on how to handle the requests.[87]

It may be that the costs of arbitration are sometimes lowered by the informal, customary practices of arbitrators. For instance, in one case, the business respondent contended that it is customary for AAA arbitrators to serve the first day for no compensation, in effect waiving their fees for that day and leaving the consumer to pay only the filing fee, at least initially.[88] According to one study, prior to 1994 the AAA prohibited its arbitrators from charging for the first day they served, but the AAA has since dropped this requirement.[89] But even if such a customary practice was widely followed, there is no guarantee that a dispute will require only one hearing or that a particular arbitrator will follow the custom. Furthermore, even if the hearing took only one day, and the arbitrator adhered to the custom, the consumer would still have to pay the arbitrator for preparation time.

This review of the waiver rules of the NAF and the AAA demonstrates that consumers cannot depend upon the arbitration service providers to provide access to arbitration to persons who cannot afford it. Even very poor consumers must be prepared to challenge the cost of arbitration. Moreover, the AAA and NAF rules on fee waivers can always be tightened or eliminated at the will of these organizations. The courts' fee-waiver provisions, by contrast, are embodied in statutes and court rules not subject to the whims of a private company.[90]

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85. Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 606 (Wash. App. Div. 2002). The parties stipulated that waivers are "extremely rare" in *Camacho v. Holiday Homes*, 167 F. Supp. 2d 892, 897 (W.D. Va. 2001).

86. *Camacho*, 167 F. Supp. 2d at 897.

87. *Ting*, 182 F. Supp. 2d at 917 (showing that the last two individuals responsible for evaluating fee waiver requests had received no training on how to evaluate these requests).

88. State *ex rel* Dunlap v. Berger, 567 S.E.2d 265, 281 n.13 (W. Va. 2002).

89. PUBLIC CITIZEN'S CONGRESS WATCH, *supra* note 14, at 71; *see id.* at 61, 70 & 75. The AAA website states that the AAA has over three thousand arbitrators who have volunteered to "serve pro bono" when an individual is financially unable to pursue rights through arbitration. *See* AAA WAIVER RULES, *supra* note 78. No information is provided as to how the AAA determines whether an individual qualifies for this benefit, how many volunteer arbitrators have the expertise needed to decide consumer cases, or where these arbitrators live. Thus, it is unknown whether pro bono arbitrators are widely available.

90. *See, e.g.*, 28 U.S.C. § 1915 (2000); MINN. STAT. ANN. § 563.01 (1999); ARIZ. CODE JUDICIAL ADMIN. § 5-206 (2002); ALASKA R. ADMIN. 10; ME. R. CIV. PRO. 91; JUDICIAL COUNCIL OF CAL., INFORMATION SHEET ON WAIVER OF COURT FEES AND COSTS (revised Mar. 21, 2003), *at* http://www.courtinfo.ca.gov/forms/documents/982a17a.pdf.

D. Business Subsidization

A form of de facto fee waiver, not specifically discussed in the services' rules but having the same effect, occurs when the business offers to pay all or some of the costs of arbitration once the consumer or employee has filed a lawsuit challenging the arbitration agreement. Courts are divided on how to deal with these offers. Some hold that if the business makes such an offer, the consumer or employee no longer has a valid argument against compelled arbitration based on costs.[91] A few others apply the terms of the contract to decide the issue. Some arbitration contracts, for example, contain a provision that any modification must be in writing and signed by the parties. Some courts treat an offer to pay all costs as an offer to modify the arbitration agreement; unless the consumer or employee has agreed in writing to the business's offer, it cannot affect a finding that the costs are prohibitive. [92]

Other courts have correctly recognized the policy implications of permitting companies to "cleanse" the taint of invalid provisions imposing high costs by offering to pay a particular plaintiff's costs. In at least three cases under Title VII of the Civil Rights Act,[93] courts have refused to sever an impermissible provision of an arbitration agreement because doing so would encourage employers to include these provisions in their agreements.[94] Some employees would be deterred from bringing cases because they could not afford the fees. Those who decided to challenge the fees would have to file lawsuits seeking a court order invalidating the cost provisions. This creates an impermissible disincentive for persons to seek to vindicate their statutory rights.[95] As one court held, "If [d]efendants could sever invalid provisions from their contracts, [this] would create an incentive for employers to craft questionable arbitration agreements, require plaintiffs to jump through hoops in order to invalidate those agree-

91. *See* Arellano v. Household Fin. Corp., No. 01 C 2433, 2002 WL 221604, at *3 (N.D. Ill. Feb. 12, 2002) (stating that since the corporation offered to pay all costs, the plaintiff can no longer dispute an arbitration agreement based on prohibitive costs); Dumais v. Golf Corp., 150 F. Supp. 2d 1182, 1190 (D.N.M. 2001) (discussing the plaintiff's failure to show that costs would be prohibitive in light of the defendant's offer to pay); Roberson v. Clear Channel Broad., Inc., 144 F. Supp. 2d 1371, 1374 (S.D. Fla. 2001) (stating that the defendant's evidence that it would pay the arbitration costs renders the plaintiff's claim of prohibitive cost meritless).

92. *See* Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1284 n.2 (11th Cir. 2001), *vacated on stipulation*, 294 F.3d 1275 (2002); Bailey v. Ameriquest Mortgage Co., No. CIV. 01-545(JRTFLN), 2002 WL 100391, at *8 (D. Minn. Jan. 23 2002) (mem.) (holding parties are only bound by contract modifications to which they have both assented in a signed, written confirmation), *rev'd* 346 F.3d 821 (8th Cir. 2003); Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671, 681 (Ct. App. 2002) (finding that the "purported modification fails to cure the defect caused by imposing arbitration fees on the employee"); Flyer Printing Co. v. Hill, 805 So. 2d 829, 833 (Fla. Dist. Ct. App. 2001) (declining to discuss whether the contract prohibited oral modifications, but refusing to "remake the parties' contract" after the employee rejected the employer's offer to pay all the costs); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 268 (W. Va. 2002).

93. 42 U.S.C. § 2000a (2000).

94. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 676-77 (6th Cir. 2003); *Perez*, 253 F.3d at 1287; Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 782 (M.D. Tenn. 2002).

95. *See Cooper*, 199 F. Supp. 2d at 782.

ments, and ultimately allow the defendants to jettison questionable provisions from the arbitration agreements."[96]

E. Agreement Terms Affecting Costs

Beyond the fee schedules of the arbitration service providers, the terms of arbitration agreements also contribute to the costs of arbitration, potentially making it financially infeasible for consumers. Among the terms that increase the cost of arbitration, and have thereby come under the scrutiny of the courts, are provisions limiting remedies, prohibiting class actions, or requiring that hearings take place in a particular, inconvenient location.[97] While accounting for these restrictions creates a more realistic assessment of arbitration costs, there is no consistency among the courts as to whether these costs will be considered in determining the financial feasibility of arbitration.[98] Consequently, consumers have no assurance of when or how these factors will be included in a court's determination of costs.

One factor affecting the costs of arbitration is the recovery that is available should a claim be successful. Many arbitration agreements provide that the arbitrator may not award consequential or punitive damages, severely restricting the consumer's total recovery. Some courts consider the damages an arbitrator is authorized to award when gauging the financial feasibility of submitting a claim in arbitration,[99] and some have refused to enforce limitations-of-remedies provisions on the basis of unconscionablility.[100]

Another factor that the courts have considered is whether the economics of the case provide sufficient incentives for a lawyer to agree to represent the consumer in arbitration.[101] A lawyer is necessary if the consumer's success depends on making legal arguments and engaging in sophisticated discovery. It is in this context that some courts have found provisions prohibiting class actions unconscionable because lawyers may find it financially infeasible to handle small, discrete claims with limited recovery unless those claims can be joined.[102] If an

96. *Id.*

97. *See Ting*, 182 F. Supp. 2d at 918; *Ex parte* Thicklin, 824 So. 2d 723, 731-33 (Ala. 2002) (criticizing limitations on remedies); Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 566-67 (Ct. App. 1993) (criticizing requirements that hearings be held in inconvenient locations); *Dunlap*, 567 S.E.2d at 277 (criticizing class action prohibitions).

98. *See infra* Part III.

99. *See, e.g.*, *Ting*, 182 F. Supp. 2d at 919 (discussing the prohibitive quality of limitations on attorneys' fees and damages recovery).

100. *See, e.g.*, *Thicklin*, 182 So. 2d at 731-33 (holding that prohibiting punitive damages is against public policy and substantively unconscionable); *Dunlap*, 567 S.E.2d at 277 (holding that prohibiting punitive damages is unconscionable).

101. *See, e.g.*, *Ting*, 182 F. Supp. 2d at 918 (noting that limitations on damages can make litigating or arbitrating a particular claim infeasible).

102. *See Ting*, 182 F. Supp. 2d at 919; *Dunlap*, 567 S.E.2d at 277 (holding that prohibiting class action relief is unconscionable); *see also* Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 81 (2000) ("Most consumer claims require sufficient legal and factual analysis, so that persons could not fully expect to represent themselves, and few lawyers would be willing to take a very small case based only on the possible recovery

arbitration agreement restricts damages and forbids class actions, a "lawyer would almost certainly incur more in costs and time charges just getting the complaint prepared, filed[,] and served than she would recover, even if the case were ultimately successful .... The net result is that cases ... will not be prosecuted even if meritorious."[103]

Neither JAMS's nor the NAF's rules directly address the issue of class actions.[104] The failure of the arbitration services to do so means that whether class arbitration will be permitted is left largely to contract law. The Supreme Court has not directly decided this issue,[105] and most courts have held that class arbitration is permitted only if the agreement specifically allows it.[106] While several of the agreements in the Survey specifically prohibited consolidation and class actions, none expressly permitted them.[107]

Another factor the courts have considered as affecting the costs of arbitration is the location of the hearing.[108] Many consumer arbitration agreements stipulate that any hearing will to take place in a particular city or geographic area, causing consumers to bear burdensome and disproportionate outlays of

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of some attorney fees and costs."). *Contra* Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 359 (Tenn. Ct. App. 2001) (refusing to find a class action prohibition unconscionable).

103. *Ting*, 182 F. Supp. 2d at 919 (noting that the costs in the case would be so high, and damages and remedies so limited, that even "desk arbitration" (arbitration decided on documents alone), would not be feasible). The *Ting* court also noted that legal aid programs lack the resources to take these cases. *Id.*

104. The AAA has recently adopted procedures for class arbitration. It "will administer demands for class arbitration ... if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." AM. ARBITRATION ASS'N, AMERICAN ARBITRATION ASSOCIATION POLICY ON CLASS ARBITRATION, *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\Topics_Interest\Class%20Action.htm (last visited Oct. 30, 2003). It will not administer class arbitration if the underlying agreement prohibits class claims, consolidation, or joinder unless a class suit is directed to arbitration under court order. *Id.*

105. The closest the Court has come to the issue was in *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), in which the court held that when an arbitration agreement does not clearly prohibit class arbitration, the arbitrator and not the court should determine whether the contract bars class arbitration.

106. *See, e.g.*, Champ v. Siegel Trading Co., 55 F.3d 269, 274 (7th Cir. 1995) (upholding the lower court's refusal to certify a claim when the agreement was silent on issue of class arbitration); Gov't of U.K. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993) (holding that "[a] district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"); Am. Centennial Ins. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991) (holding that "a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation").

107. *See* Survey, *supra* note 4.

108. *See, e.g.*, Patterson v. ITT Consumer Fin. Corp, 18 Cal. Rptr. 2d 563, 567 (Ct. App. 1993) (holding that a contract stating that arbitration will be conducted in Minneapolis, Minnesota, is unconscionable and unenforceable when the transaction occurred in San Francisco, California, and consumers were unsophisticated borrowers with small claims); *see also* NAF CODE, *supra* note 23, at 23 (providing that any in-person participatory hearing will be held where the arbitration agreement designates, if there is such a designation); F. PAUL BLAND, JR., ET AL., CONSUMER ARBITRATION AGREEMENTS 52 (2d ed. 2002) (detailing the NAF rules on such clauses).

money and time.[109] Arbitrating in a far-away place may contribute to costs far in excess of what would be incurred in a judicial proceeding.

III
CHALLENGING ARBITRATION COSTS

Consumers face many obstacles in challenging arbitration costs. For consumers who cannot afford arbitration, the only meaningful time to raise a challenge is before the arbitration has commenced. It is difficult, however, to estimate what the costs will be before the fact. Many agreements do not designate an arbitration service provider, so there is no way to know what fee schedule will apply. Even when an agreement names a provider and that provider publishes a fee schedule, those schedules frequently change. Further, arbitration costs depend upon a number of factors in addition to service-provider fees, factors that often cannot be estimated in advance. Finally, the courts have not adopted a uniform approach regarding which factors to include in determining whether costs are sufficiently high for consumers to prevail in their challenges. Because of these obstacles, consumers who cannot afford arbitration are often unable to raise successful challenges. As a result, they are denied access to a forum for resolving their disputes, a situation that undermines the integrity of the dispute-resolution process.

A. Obstacles to Determining the Costs of Arbitration

In *Green Tree Financial Corp. v. Randolph*,[110] the Supreme Court declared that a consumer seeking to "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs."[111] The Court failed, however, to provide any guidelines for determining what would constitute prohibitive expense, specifically refusing to indicate "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence."[112]

Another issue the Supreme Court left unclear is *when* a consumer is permitted to bring a challenge based on the cost of arbitration. Several courts have permitted consumers to mount a challenge before arbitration occurs based on estimates of the likely cost,[113] but at least one court has refused to do so.[114]

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109. Survey, *supra* note 4. For example, the Lending Tree contract provides that the hearing will be in Mecklenburg County, North Carolina. The PayPal hearing will be in Santa Clara, California, the Amazon hearing in Seattle, Washington, and the eBay hearing in San Jose, California.

110. 531 U.S. 79 (2000).

111. *Id.* at 92.

112.. *Id.*

113. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003); Phillips v. Assocs. Home Equity Serv., Inc, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001); Lelouis v. W. Directory Co., 230 F. Supp. 2d 1214, 1224 (D. Or. 2001) ("While the precise cost may not be known (and often cannot be known until after the arbitration), this court could make a reasoned estimate of the probable arbitration costs based upon its knowledge of the relevant legal community and of arbitration practices in

Either way, consumers face considerable difficulty. If the latter case is followed, consumers would be forced to make an unacceptable choice. Costs can be too high for two principal reasons: because the consumer simply cannot afford to pay the necessary fees and other expenses, or because those expenses would be far greater than any possible benefit from bringing the claim.[115] If a consumer cannot afford to arbitrate but must wait until arbitration is completed to bring a challenge, she will have to abandon her claim altogether. If the consumer can afford the expense, but it is greater than the damages she could collect if she won, she has to take the substantial risk of incurring the costs anyway and hoping she can then persuade a court to invalidate the arbitration clause, after spending an additional sum on litigation.

If consumers are allowed to bring a challenge prior to arbitration, they must somehow estimate its costs. Yet, these costs are often impossible to determine in advance because of the common terms of arbitration agreements and the many variables that go into the fees of the arbitration service providers. Arbitration agreements themselves typically provide little or no information about costs.[116] Some do not even designate a service provider or the rules that will govern, making it impossible to determine what the costs of arbitration would be.[117] And while many agreements provide that the arbitration will be governed by the rules of a named provider, some do not require that the provider be the one whose rules are designated.[118] This distinction is significant,[119] for at least

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general."); Giordano v. Pep Boys—Manny, Moe & Jack, Inc., No. 99-1281, 2001 WL 484360, at *6 (E.D. Pa. Mar. 29, 2001) (holding that although the employee could not precisely establish the amount of the arbitrator's fee, based on the employee's income and the initial filing fee, the costs impeded the employee's ability to vindicate his rights); Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 605 (Wash. Ct. App. 2002) (refusing to force the plaintiff to spend $2,000 arbitrating a $1,500 dispute before challenging the fees).

114. *See In re* First Merit Bank, 52 S.W.3d 749 (Tex. 2001).

115. *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 575 (App. Div. 1998) (finding that the arbitration service imposed a $4,999 fee, $2,000 of which was non-refundable, when the plaintiff class members sought only around $1,000 in damages per consumer).

116. Fifteen of the thirty-one agreements in the Survey said nothing about costs. *See* Survey, *supra* note 4. The remainder gave minimal information about costs, stating only that the fees would be split. *Cf.* Acorn v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1162 (N.D. Cal. 2002) (noting that the agreement was vague with regard to cost); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 271 (W. Va. 2002) (pointing out that nothing in the agreement would enable the consumer to project arbitration costs).

117. *Cf. Randolph*, 531 U.S. at 90 n.6 (noting that the failure of the arbitration clause at issue to designate a service provider meant that the plaintiff's claim that the costs of arbitrating her claim would be prohibitively high was based solely on "unfounded assumptions"); Acorn v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1162 (N.D. Cal. 2002) (explaining that Household International's agreement provided that the parties would select the rules when a claim was filed).

118. In the Survey, thirty out of the thirty-one agreements collected state that the arbitration will be governed by the rules of a named provider. Nineteen of those state that the provider will administer the arbitration. The remaining eleven are silent on who will administer the arbitration. In that situation, the arbitration may be administered by the named provider or by some other organization, presumably one chosen by the business. If a different organization administers the arbitration, there is less assurance that the rules will be known and followed, and little institutional interest in making sure they are. The rules on fees are quite complex, with the applicable fees depending on several factors. It therefore seems reasonable to be concerned that an entity other than the named provider will not know or follow the rules. In addition, as discussed below, the providers change their rules from time to time, and agreements addressing the issue provide that the applicable rules are those in effect at the time the

one court has rejected a consumer's challenge when the agreement designated a particular provider's rules but did not require that the provider administer the arbitration.[120] The court pointed out that under such circumstances, the consumer could provide "no evidence that the [provider] would actually conduct the arbitration or charge the specified fees."[121]

Moreover, even if it is perfectly clear what fee schedule will apply, it is still difficult, if not impossible, for a consumer to estimate the cost of arbitrating a claim. The consumer must first find and untangle the provider's rules and their fee provisions. Then the consumer has to engage in a lengthy and complex investigation to determine what the fees might be because provider fees are generally contingent upon a host of variables, including, most importantly, the size of the claim.[122] She has to estimate the amount of damages she has suffered and then determine what, if any, amounts in addition to actual damages are considered part of the claim for purposes of determining the fees that will be assessed.[123] She has to distinguish between filing fees, administrative fees, and arbitrator fees. Then, at least under the NAF's rules, the consumer has to guess as to all sorts of contingencies that often cannot reasonably be known until arbitration begins: the type and number of hearings she will need; whether she will need to request a subpoena, a discovery order, or another type of order; and whether she will want a written disposition.[124] If the consumer wants an in-person hearing, transportation costs may also be an important factor. Under the NAF's rules, in-person hearings are held where the respondent resides or does business unless the arbitration agreement designates another location or the parties agree otherwise.[125] In the Survey conducted for this Article, some agreements specify that the hearing will be heard in only one location, which may be far from where the consumer resides, requiring substantial transporta-

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arbitration commences. It is less likely that an entity other than the named provider will keep abreast of these changes. *See* Survey, *supra* note 4.

An additional difficulty in proving costs is presented by arbitration agreements that provide consumers the choice of two or more providers. The agreements of Sam's Club, Sears, Discover, and Chase Manhattan fit this description. *Id.* When challenging such clauses, consumers will presumably have to prove that the costs would be too high under each provider the consumer might choose.

119. Justice Ginsburg may have failed to appreciate this distinction in her dissent in *Randolph.* She suggested that Green Tree could have provided that the arbitration "would be governed by" the AAA's rules and that this would have made the cost determination easier. *Randolph*, 531 U.S. at 95 (Ginsburg, J., dissenting). But this overlooks the possibility that the arbitration might be governed by the AAA's rules but not administered by the AAA. *Id.*

120. *See In re* First Merit Bank, 52 S.W.3d 749 (Tex. 2001); *accord* Bess v. Check Express, 294 F.3d 1298, 1301 (11th Cir. 2002) (rejecting challenge because, although the agreement required arbitration under the AAA's rules, it also provided that the AAA would not administer the arbitration unless both parties agreed).

121. *First Merit Bank*, 52 S.W.3d at 757.

122. *See supra* Part II.A.

123. *See supra* note 27 (distinguishing between the ways in which the AAA and the NAF determine the operative size of the claims involved).

124. *See supra* Part II.A.2.

125. NAF Code, *supra* note 23, at 23. Rule 32(A) is the default rule that applies unless the agreement designates a location or the parties agree upon one.

tion expenses.[126] Certain costs simply cannot be estimated in advance. For example, under the AAA rules, if the claim is over $75,000, the consumer will not be able to estimate the arbitrator's fees until the arbitrator is selected,[127] and the business can force additional expenses on the consumer by filing a summary judgment motion or refusing discovery requests and thereby increasing the time the arbitrator spends resolving the claim.[128]

Finally, the arbitration providers frequently change their rules, causing additional uncertainty.[129] Those agreements that address the issue of what version of a provider's rules will apply designate those in effect when the claim is filed or when the arbitration commences.[130] Other agreements are silent on this point, leaving open the issue of whether the applicable rules are those in effect when the agreement is entered into, when the dispute arises, when the claim is filed, or when the arbitration proceedings begin. Under such an agreement, unless the parties agree, the question will have to be brought to a court or an arbitrator. Even when the agreement specifies that the rules in effect when the arbitration commences apply, the consumer will not know what those rules say about costs until the arbitration does in fact commence because the rules could change at any time, and the case cannot commence until the consumer pays at least part of the fee to which he is objecting.[131]

The arbitration service providers have attempted to address the issue of rule revisions, but it is doubtful that their attempts put the issue to rest. The AAA provides that "[t]he AAA's most current rules will be used when the arbitration is started."[132] The NAF specifies that the governing rules will be those in effect at the time the claim is filed, unless the parties or the applicable law direct otherwise.[133] JAMS designates the "[r]ules in effect on the date of the commencement of the [a]rbitration, . . . unless the [p]arties have specified another version," defining "commencement of the arbitration" in excruciating detail.[134] The AAA's approach raises two questions: First, does the arbitration "start" when the claim is filed or when the hearing is held? Second, how should a court rule when the arbitration agreement provides that the dispute will be arbitrated by the AAA and under the AAA's rules, but also provides that a set of rules other

126. *See supra* note 109.

127. *See supra* note 12 and accompanying text.

128. PUBLIC CITIZEN'S CONGRESS WATCH, *supra* note 14, 55.

129. *See, e.g.*, AM. ARBITRATION ASS'N, RULES AND PROCEDURES; ARCHIVES, *at* http://www.adr.org/index2.1.jsp?JSPssid=15708 (last visited Sept. 30, 2003) (listing outdated rules of the AAA); Brief of Amicus Curiae American Arbitration Association at 20, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235), *available at* 2000 WL 744161 (explaining that under the AAA's Consumer Rules, "[r]ules, forms, procedures and guides are subject to periodic change and updating"); AAA CONSUMER RULES, *supra* note 6 (same).

130. *See, e.g.*, Survey, *supra* note 4; Hale v. First USA Bank, No. 00CIV5406JGK, 2001 WL 687371 (S.D.N.Y. June 19, 2001); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002). The agreements of Chase Manhattan, DirecTV, Discover, Sears, Sam's Club, and Sprint are examples.

131. *See* AAA CONSUMER RULES, *supra* note 6, at C-8; NAF CODE, *supra* note 23, at 31.

132. AAA CONSUMER RULES, *supra* note 6, at C-1(a).

133. *See* NAF CODE, *supra* note 23, at 1, R. 1(C).

134. JAMS RULES, *supra* note 52, at R. 3, 5.

than the "most current . . . when the arbitration is started" apply? Both the AAA's and JAMS's attempts to address the issue raise the problem addressed earlier that a consumer still might not be able to determine which rules apply because the rules could change at the last moment.

Despite these obstacles to determining the costs of arbitration before the fact, consumers have prevailed in several reported cases.[135] However, winning may require substantial expertise and resources. For example, the consumer attorneys in *Ting v. AT&T* [136] were experienced and skilled lawyers, with the resources needed to mount a sophisticated attack that included not only engaging in extensive discovery[137] but also commissioning their own survey.[138] The businesses defending consumer arbitration generally have substantial resources and are represented by lawyers who have participated in many cases and have developed their own expertise.[139]

B. Conflict in the Courts

In addition to the obstacles consumers encounter in estimating the costs of arbitration, the courts are conflicted over what considerations count in determining whether arbitration costs are prohibitively high. In *Randoph*, the Supreme Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[140] Courts are split over what type of showing is required to prove that costs are so high as to bar access to justice. Interpretations of what *Green Tree* requires focus on three factors: the financial condition of the claimant, the absolute cost of arbitration, and the relative cost of arbitration when compared to court proceedings. Some courts focus on the financial condition of the plaintiff, requiring her to prove that, under the facts of the particular dispute, she cannot afford to proceed on her claim. Other courts consider the costs of the particular arbitration coupled with the plaintiff's finan-

135. *See, e.g.*, Ting v. AT&T, 182 F. Supp. 2d 902, 906 (N.D. Cal. 2002), *rev'd in part, aff'd in part*, 319 F.3d 1126 (9th Cir. 2003).

136. 182 F. Supp. 2d at 902.

137. *See* Sternlight & Jensen, *supra* note 57, at 87-88. The *Ting* plaintiffs were represented by a sophisticated consumer advocate and Trial Lawyers for Public Justice, a "national public interest law firm." *See* Trial Lawyers for Public Justice, *at* http://www.tlpj.org (last visited Sept. 4, 2003). The plaintiffs' attorneys were also counsel in other major arbitration cases. *See, e.g.*, Armendariz v. Found. Health Psycare Servs., Inc., 6 P.3d 669 (Cal. 2000); Sobremonte v. Superior Court, 72 Cal. Rptr. 2d 43 (Ct. App. 1998); Badie v. Bank of Am., 17 Cal. Rptr. 2d 721 (Ct. App. 1998); Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563 (Ct. App. 1993).

138. *Ting*, 182 F. Supp. At 912.

139. One notes, for example, the repeated presence of certain defendants in disputes over arbitration. *See, e.g.*, Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402 (2003); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000); Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3rd Cir. 1999); Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360 (S.C. 2001).

140. 531 U.S. at 90 (refusing to conclude that the costs of arbitration precluded the vindication of the plaintiff's statutory rights because the record contained no evidence of the costs the consumer would incur).

cial situation.[141] Still others compare the costs of proceeding to arbitration with the costs of litigating the same claim.

Some courts focus on the individual plaintiff's impoverished financial condition,[142] rejecting the challenge if the plaintiff fails to demonstrate that she cannot afford the costs of arbitration. These courts have not established uniform standards for determining whether arbitration is too expensive relative to a consumer's resources, instead relying on a case-by-case determination of whether the consumer is unable to pay.[143] This makes it impossible for either consumers or businesses to predict who might be able to make the requisite showing and encourages litigation of the issue, a result that conflicts with the goal of judicial efficiency.

Other courts focus on the costs of arbitration relative to litigation, interpreting *Randolph* to require a showing of "the likelihood that [the plaintiff] will be responsible for significant arbitrators' fees[] or other costs [that] would not be incurred in a judicial forum."[144] This standard is much less subjective and more predictable than a case-by-case examination of each consumer's ability to afford arbitration. As an initial matter, the court can simply compare court filing fees with the arbitration minimums. Often, this simple comparison will be sufficient to conclude that arbitration poses cost barriers substantially greater than those imposed by a court. For example, the filing fee for a civil case in a U.S. district court is $150.[145] For claims over $75,000, the NAF's and the AAA's

141. *See, e.g.*, Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 (4th Cir. 2001) (explaining that courts should consider whether arbitration fees are prohibitively expensive); Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 781 (M.D. Tenn. 2002) (explaining that the consumer need only prove the costs would be too high for her).

142. *See, e.g.*, Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 846 (N.D. Ill. 2001) (finding costs prohibitive in light of the AAA's arbitrators fees, the subprime nature of the claimant's mortgage, and her affidavit showing that she was in financial distress and unable to pay the costs); Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 597 (Wash. Ct. App. 2002) (addressing the plaintiff's educational attainment, employment situation, and family size to show his inability to pay arbitration costs).

143. *Phillips*, 179 F. Supp. 2d at 846 (relying on an affidavit of the consumer alleging her inability to pay); *Mendez*, 45 P.3d at 603 ("[T]he cost of arbitration is so high relative to [the plaintiff's] financial condition and the small size of his primary claim ($1,500) that forcing AAA arbitration with three arbitrators effectively precludes him from pursuing his claims.").

144. Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 240 (N.D.N.Y. 2001); *see also* Bailey v. Ameriquest Mortgage Co., No. Civ. 01-545, 2002 WL 100391, at *5 (D. Minn. Jan 23, 2002) (mem.) ("The arbitration agreement . . . requires plaintiffs to incur fees and costs in pursuit of their statutory rights [under the Fair Labor Standards Act] that they would not otherwise incur in a judicial forum."); *Phillips*, 179 F. Supp. 2d at 846 (considering both the consumer's poverty and the fact that arbitration likely would cost at least twelve times more than filing a case in federal court); Giordano v. Pep Boys—Manny, Moe & Jack, Inc, No. 99-1281, 2001 WL 484360, at *23 (E.D. Pa. Mar. 29, 2001) (stating that the Supreme Court in *Randolph* "seemed to focus on the absence of information about the costs of arbitration rather than on any absence of information about Randolph's personal finances").

145. *See* U.S. District Court for the District of Minnesota, *Current Fees & Charges* (effective Jan. 1, 2004), *at* http://www.mnd.uscourts.gov/court_fees.htm; U.S. District Court for the Eastern District of Virginia, *Clerks Office Fees* (effective Nov. 1, 2003), *at* http://www.vaed.uscourts.gov/formsandfees/schedule.htm; U.S. District Court for the Eastern District of Arkansas, *U.S. District Court Fees*, at http://www.are.uscourts.gov/fees.htm (last visited July 7, 2003); U.S. District Court for the District of Nebraska, *Court Fees*, *at* http://www.ned.uscourts.gov/info/fees.html (last visited July 7, 2003).

fees are many hundreds of dollars higher. Fees in many state courts also are far less than the NAF and AAA fees for large claims.[146]

The minimum fees of the arbitration service providers are closer to court fees for smaller claims, but consumers can, of course, incur expenses in arbitration well beyond the minimum fees. A fair comparison would consider the likelihood that the consumer will incur additional fees under the fee schedule of the arbitration provider or under provisions in the arbitration agreement limiting damages, prohibiting class actions, or designating an inconvenient venue. Even the cost of JAMS arbitration might be substantial when these provisions are considered.

Comparing arbitration costs to court costs is far more efficient than examining each consumer's ability to pay. Nevertheless, this approach is not a panacea. It remains unanswered how great the cost difference must be to justify invalidating the arbitration agreement. Additionally, in determining what the cost of arbitration would be, it is not yet clear what expenses courts will include, beyond the minimum provider fees.

C. What the Conflicts and Difficulties Mask

Despite the difficulties of proving the costs of arbitration in individual cases, it is clear that the costs of arbitration are sufficiently high to deny many consumers access to justice. Indigent consumers with claims exceeding the jurisdiction of small claims court are forced into arbitration subject to vague, discretionary rules regarding fee waivers and deferrals. Consumers who can afford the higher costs of arbitrating smaller claims are dissuaded from doing so because those costs may make it financially infeasible to bring the claim, given the small amount that may be recoverable. For large claims, the cost of arbitration is at least several hundred dollars in filing fees alone if the arbitration is administered by the AAA or the NAF, far more than many consumers can afford and substantially more than court fees. The consumers most likely to be barred by these costs—consumers of modest means—are also the ones who most need access to a dispute-resolution forum and who are the most damaged by any out-of-pocket losses they might have suffered as a result of a business's conduct.

146. *See generally* PUBLIC CITIZEN'S CONGRESS WATCH, *supra* note 14, at 1 (stating that the fees charged by arbitration services can be up to 5,000% higher than court fees). In Massachusetts, the cost of filing a complaint in district court is $150. MASS. GEN. LAWS ANN. ch.262 §2 (2003). Filing a complaint in superior court costs $200. *Id.* § 4A. In the district courts of Alaska (amount claimed is under $50,000), the fee for filing a complaint is $60. Filing a complaint in superior court (amount claimed is $50,000 or more) costs $10. *See* http://www.state.ak.us/courts/adm.htm (last visited July 7, 2003). In Connecticut, the fee is $125 for a claim of less than $2,500 and $225 if the amount is $2,500 or more. *See* http://www.jud.state.ct.us/external/super/courtfee.htm (last visited July 7, 2003).

IV

INSUFFICIENT LEGAL THEORIES

Whether courts employ a standard that focuses on the individual consumer's financial situation, her ability to pay for a particular arbitration, or a comparison of the costs of arbitration to those of a judicial proceeding, a court cannot simply conclude that the costs are too high and invalidate an arbitration agreement. Instead, some legal theory must apply allowing the court to conclude that high cost can justify invalidating the agreement. The courts have used two legal theories to strike down arbitration agreements or their terms based on cost. When the claimant raises and the agreement purports to cover statutory claims, the courts have asked whether the costs of arbitration impermissibly preclude the plaintiff from vindicating her statutory rights. In statutory and other cases, the courts have asked whether the costs make the agreement or parts thereof unconscionable. Significant deficiencies plague both theories.

The Supreme Court applied the vindication-of-statutory-rights theory to the issue of consumer arbitration cost in *Green Tree Financial Corp. v. Randolph.*[147] The case involved the purchase of a mobile home on credit and the consumer's allegation that the creditors violated two federal statutes.[148] The arbitration agreement between the parties required the consumer to submit all disputes to binding arbitration but did not designate any arbitration service to administer the case.[149]

The Eleventh Circuit held that the agreement was unenforceable "because it fails to provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration."[150] The court was also disturbed by other aspects of the agreement: its failure to provide for waiver of fees when the costs would impose a financial hardship, its failure to address the possibility that the consumer's costs might exceed the arbitrator's award even if she prevailed, and its failure to indicate whether established rules would govern or whether the parties were to negotiate their own rules.[151] The agreement's silence on these points made it invalid.

The Eleventh Circuit clearly viewed the consumer's ability to vindicate her federal statutory rights as a paramount value and treated the Federal Arbitration Act's general validation of arbitration[152] within that frame of reference. Therefore, the court put the onus on the drafter of the agreement to write a contract including "guarantees" that the consumer can exercise her rights. For example, the court was bothered that the agreement "provides no guarantee

147. 531 U.S. 79 (2000).
148. *Id.*
149. *Id.* at 83.
150. Randolph v. Green Tree Fin. Corp., 178 F.3d 1149, 1158 (11th Cir. 1999).
151. *Id.*
152. *See* 9 U.S.C. § 2 (2000).

that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order."[153] The court also understood the financial realities of litigating many consumer cases, referring to the "small sum that is likely to be the object of the dispute in arbitrations of this kind"[154] as well as the likelihood that the consumer would have a modest income.[155]

The Supreme Court reversed. On its simplest level, the case can be boiled down to four sentences.

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter .... The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable.[156]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*,[157] the Court held that one party can force another to pursue a statutory claim in arbitration "so long as the litigant effectively may vindicate the statutory cause of action in the arbitral forum."[158] In *Randolph*, the Court made it clear that the converse also applies: A party can successfully challenge an arbitration agreement on the basis that she cannot effectively vindicate her statutory rights. Furthermore, excessive cost is one basis for such a challenge.[159] The Court reversed the Eleventh Circuit's decision for two reasons. First, neither the agreement nor the record gave any indication of what the costs would be. Second, the Court ruled that the person who challenges an arbitration agreement based on cost bears the burden of proof.[160]

The advantage of applying the vindication-of-statutory-rights theory to cases challenging the cost of consumer arbitration is its clear authorization by the Supreme Court. The disadvantages, however, may outweigh the advantages. For example, it is unclear what the consumer has to prove, which the Court purposely avoided answering.[161] At one point, the Court stated that "large" costs can support a challenge.[162] Later in the opinion, the Court spoke of a litigant seeking to invalidate an arbitration agreement on the basis that it would be "prohibitively expensive."[163] "Large" and "prohibitively expensive" are terms that convey a similar meaning, but they are far from synonymous. As a result, it is unclear what the Court intended.

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153. *Randolph*, 178 F.3d at 1158.
154. *Id.*
155. *Id.*
156. Green Tree Fin. Corp v. Randolph, 531 U.S. 79, 90 (2000).
157. 473 U.S. 614 (1985).
158. *Id.* at 637.
159. *Randolph*, 531 U.S. at 90.
160. *Id.* at 92.
161. *Id.* at 90.
162. *Id.* at 92.
163. *Id.*

In addition, the Court failed to say whether courts should examine in each case whether the individual plaintiff can afford arbitration as it is proposed, or should instead compare the likely arbitration costs to court costs. Although the Court reversed the Eleventh Circuit, it did not expressly criticize the lower court's approach of looking at all aspects of the arbitration agreement that might bear upon costs and the financial realities of litigating consumer cases. Finally, the vindication theory is too narrow to be applicable in some cases. It applies only when the consumer's claim is based on statutory rights, not when it is based on nonstatutory rights, such as common law contract or tort duties.

Several courts have applied the doctrine of unconscionability to strike down consumer arbitration agreements. Courts have considered several aspects of arbitration costs in doing so. Some courts compare the cost of arbitration to the cost of litigation.[164] One court not only made that comparison but also considered the consumer's financial condition and the small amount of the claim.[165] Another relevant factor is whether the arbitrator's fee is so high that it would be prohibitively expensive to bring small claims in arbitration.[166] Some courts also take into account limitation-of-damages provisions in the agreement.[167]

The doctrine of unconscionability presents several advantages over the vindication-of-statutory-rights approach. Unlike the vindication theory, unconscionability is not confined to claims asserting statutory rights. In addition, innumerable cases define and apply the unconscionability doctrine in other contexts. Consequently, it is not as vague as the vindication theory, and courts can find guidance in its application by examining prior decisions.

Nevertheless, a consumer's ability to succeed on an unconscionability claim is severely limited. Case law puts the burden of proving unconscionability on the consumer[168]—a substantial burden because neither statutes nor cases precisely define "unconscionability."[169] In most states, the consumer must show

164. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003) (finding the scheme to be unconscionable "because it imposes on some consumers costs greater than those a complainant would bear if he or she would file the same complaint in court"); Kloss v. Edward D. Jones & Co., 54 P.3d 1, 16 (Mont. 2002) (comparing the costs of arbitration with those associated with resolution through the courts); Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 602 (Wash. Ct. App. 2002) (describing disparity of costs as relevant to the question of unconscionability).

165. *See Mendez*, 45 P.3d at 603 (determining that a consumer's financial condition and the size of her claim could be defenses to the enforcement of an arbitration agreement).

166. *See, e.g.*, *Kloss*, 54 P.3d at 8 (listing the arbitrator's fee as an example of the cost-prohibitive nature of some arbitration).

167. *See, e.g.*, Thicklin v. Fantasy Mobile Homes, Inc., 824 So. 2d 723, 739 (Ala. 2002) (holding that contract provisions immunizing defendants from liability for punitive damages are invalid); Carll v. Terminex, Int'l Co., 793 A.2d 921 (Pa. Super. Ct. 2002) (finding unconscionability when the arbitrator lacked the power to award consequential damages for personal injuries); State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 275 (W. Va. 2002) (requiring exceptional circumstances to hold a provision limiting recovery enforceable).

168. JAMES J. WHITE & ROBERT S. SUMMERS, 1 UNIFORM COMMERCIAL CODE 211 (4th ed. 1995) (explaining that the burden of proof lies with the party bringing the claim).

169. *Id.* at 213 ("It is not possible to *define* unconscionability. It is *not a concept, but a determination* to be made in light of a variety of factors not unifiable into a formula.").

both procedural and substantive unconscionability.[170] Because a challenge to the costs of arbitration is substantive, the consumer must find other types of problems with the transaction to prove "procedural" unconscionability. This second part of the unconscionability equation focuses on "the process of making the contract,"[171] including "the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract . . . and the presence or absence of a meaningful choice."[172] The case law illustrates the difficulty consumers have had in persuading some courts to find procedural unconscionability in consumer arbitration cases.[173]

Substantive unconscionability is often interpreted to mean that a term in the contract unfairly allocates risks or is not within the consumer's reasonable expectations.[174] Courts look at "the commercial reasonableness of the contract term, [and] the purpose and effect of the terms."[175] These are vague standards, and the courts have not provided needed specificity in the context of lawsuits based on the cost of arbitration. Although a few courts have struck down arbitration agreements on the basis of substantive unconscionability,[176] others have refused to do so.[177] In most jurisdictions no decisions provide satisfactory guidance on how to apply substantive unconscionability to challenges to the cost of arbitration. Courts might look to analogous cases in which a consumer has alleged that the price charged for goods or services is unconscionable, but the case law on price unconscionability is largely unhelpful because of its lack of uniformity as to what the consumer must prove.[178]

Finally, the unconscionability doctrine is an inefficient tool for resolving the cost issue. Proving both procedural and substantive unconscionability doctrine is fact intensive. The courts list the factors to consider, but every holding depends heavily on the facts of the particular case. Consequently, it is impossi-

170. *E.g.*, *Ting*, 319 F.3d at 1148; *see also* Milton Roberts, Annotation, *Unconscionability, Under UCC § 2-302 or 2-719(3), of Disclaimer of Warranties or Limitation or Exclusion of Damages in Contract Subject to UCC Article 2 (Sales)*, 38 A.L.R. 4th 25, 39 (1985).

171. *See* NEC Techs., Inc. v. Nelson, 478 S.E.2d 769, 771 (Ga. 1996).

172. *Id.* at 772; *see also Ting*, 319 F.3d at 1149 (finding procedural unconscionability when the consumer had no opportunity to negotiate, modify, or waive the terms of the arbitration agreement even though the consumer could have closed his account with the defendant and obtained service from a competitor).

173. *See, e.g.*, Harris v. Green Tree Fin. Corp., 183 F.3d 173, 184 (3d Cir. 1999) (overturning the district court's holding of procedural unconscionability on the grounds that forced arbitration and denial of arbitrator choices are reasonable measures).

174. *See* MICHAEL M. GREENFIELD, CONSUMER LAW: A GUIDE FOR THOSE WHO REPRESENT SELLERS, LENDERS, AND CONSUMERS 532 (1995).

175. *Nelson*, 478 S.E.2d at 772.

176. *See, e.g.*, *Ting*, 319 F.3d at 1151 (finding that "substantively oppressive contract" terms warrant invalidation of an arbitration agreement).

177. *See, e.g.*, *In re* RealNetworks, No. 00 C 1386, 2000 WL 631341, at *7 (N.D. Ill. May 8, 2000) (refusing to find an agreement substantively unconscionable for precluding class actions); Hutchins, *supra* note 3, at 608-10 (discussing Alabama cases rejecting consumers' unconscionability arguments).

178. WHITE & SUMMERS, *supra* note 168, at 218-23 (discussing the lack of uniformity among the courts regarding what constitutes unconscionability).

ble for the parties to accurately predict what a court might do. This may encourage businesses to impose costly arbitration. In addition, it may encourage litigation rather than settlement as each side hopes the vagueness of the doctrine will work to its advantage.

The two theories courts use to determine whether to invalidate arbitration agreements based on excessive costs are unsatisfactory. It remains unclear what factors must be proven, and even with a strong showing, the parties cannot predict with any certainty how a court might decide a challenge. Lack of predictability causes an inefficient use of judicial resources. Since the courts employ unsatisfactory approaches, a legislative solution is preferable to continued reliance on the courts.

V

CONCLUSIONS AND RECOMMENDATIONS

The costs of arbitration can be so high that they deny consumers access to a forum in which to air their disputes. Costs can be excessive whether one considers the consumer's ability to pay, the absolute cost of arbitration, or the cost of arbitration compared to the cost of litigation. The problem is only exacerbated by agreement terms restricting remedies, class actions, and venue that make the actual cost of arbitration greater than the direct fees charged. Nevertheless, consumers face tremendous obstacles in proving that arbitration agreements should not be enforced because of those high costs. These obstacles arise from several sources. First, to avoid having to pay costs, the consumer must mount her challenge before the arbitration takes place, forcing her in many situations to estimate what the costs might be. In addition, the rules and fee schedules of the arbitration service providers and the common terms of arbitration agreements often makes this estimation extremely difficult, if not impossible. This is only made worse by the courts' disagreement over what factors to consider in estimating the costs of arbitration and what standard to use in determining if those costs are too high. Finally, the courts apply two different legal theories to invalidate agreements based on cost, neither of which is satisfactory.

These problems could be partially ameliorated by regulation or by prohibiting mandatory, predispute, binding arbitration. Congress could, for example, create a regulatory scheme comparable to that which exists for securities arbitration.[179] Under this scheme, consumer arbitration agreements would be

179. *See generally* Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1024-25 (2202) (explaining that investors who have disputes with their brokers are subject to mandatory arbitration agreements, but that the agreements are subject to the rules of the National Association of Securities Dealers (NASD) and the oversight of the Securities and Exchange Commission). The NASD has established a subsidiary, the NASD Regulation Office of Dispute Resolution, exclusively dedicated to handling disputes. *Id.* at 991 n.5. Additionally, the NASD has assembled panels of arbitrators in which a majority of the arbitrators cannot have had recent ties to the securities industry. Marc I. Steinberg, *Securities Arbitration: Better for Investors than the Courts?* 62 BROOK. L. REV. 1503, 1505 n.10, 1514 (1996). The NASD has a formal

required to specify that one or more certified independent arbitration service providers would arbitrate any disputes pursuant to their rules.[180] The Federal Trade Commission (FTC) would be required to establish an independent organization to certify and supervise providers and to issue regulations ensuring reasonable costs for consumer complainants. The agency would require providers to clearly disclose all fees, including arbitrator compensation. Providers would be certified if they complied with the FTC's regulations and standards. The FTC would also require consumer arbitration agreements to clearly disclose the cost of arbitration. Business subsidization would raise fewer conflicts-of-interest concerns because of the regulatory oversight that would be present.

The objections that would be raised to such regulation are predictable and not without a reasonable basis. If possible, it is better to solve problems without creating yet another government bureaucracy, with its inevitable inefficiencies, unintended consequences, and over-regulation. At the same time, regulation is not unreasonable given the current situation, so aptly described by Judge Nelson of the Montana Supreme Court, in which "[f]or their own obvious economic benefit, large national and multi-national corporations are effectively privatizing an important segment of the civil justice system in this country by including fine-print, non-negotiable, take-it-or-leave-it, mandatory, binding arbitration clauses in their standard-form contracts."[181]

A less bureaucratic solution would be for Congress to simply prohibit mandatory, predispute, binding arbitration agreements in consumer transactions.[182] If consumers and businesses wanted to arbitrate once a dispute arose, they could always execute an agreement at that time. This approach would not resolve all the problems consumers face in attempting to determine the actual

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training program and publishes guidance materials for arbitrators. Black & Gross, *supra*, at 1027-28. Arbitral awards are published on-line. *See* http://www.nasdadr.com/arb_awards.asp (last visited July 3, 2003). Member firms who refuse to pay arbitral awards are suspended. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1356 (2002).

This system is, of course, not without its critics. *See generally* Robert Gregory, *Arbitration: It's Mandatory But It Ain't Fair*, 19 SEC. REG. L.J. 181 (1991); Therese Maynard, McMahon: *The Next Ten Years*, 62 BROOK. L. REV 1533, 1536 (1996) (claiming that the "industry sponsored arbitration process [is] stacked in favor of the securities arbitration defendants"); Norman S. Poser, *Securities Arbitration: A Decade After* McMahon, 62 BROOK. L. REV. 1329, 1332 (1996) (criticizing the system because arbitrators are not subject to the control that judges exercise over juries); Brooke A. Masters, *Meting Out Quick Justice in Murky World of Arbitration*, WASH. POST, July 15, 2003, at E01 (highlighting how the paucity of explanation in decisions undermines the ability to depend on trends and build upon previous decisions).

180. To ensure that arbitration costs are truly kept reasonable, the statute would also prohibit businesses and certified arbitration service providers from restricting consumer remedies.

181. Kloss v. Edward D. Jones & Co., 54 P.3d 1, 14 (Mont. 2002) (Nelson, J., concurring).

182. *See* Alderman, *supra* note 1, at 1265 (recommending this approach); *see also* PUBLIC CITIZEN'S CONGRESS WATCH, *supra* note 14, at 70, 74 (explaining that a less desirable alternative would be to permit predispute arbitration agreements if the arbitration is nonbinding). Under the Public Citizen proposal, a business could still force a consumer to arbitrate, but if the consumer were dissatisfied with the result for any reason, she could go to court for a trial de novo. *Id.* at 70. This approach, however, would not address the issue of arbitration costs, and allowing consumers a right to appeal does little if consumers cannot afford to get through the first round of adjudication. *Id.*

cost of arbitrating their disputes. Even after a dispute has occurred, consumers, many without representation, do not have all the information they need to decide whether to arbitrate. As explained above, calculating the possible costs of arbitration is a complex matter, requiring one to make many assumptions. In addition, consumers may not understand the significance of a clause in an arbitration agreement severely restricting the damages they can collect. Consumers may also fail to appreciate the effect a ban on class actions will have on their ability to retain a lawyer.

Nevertheless, prohibiting mandatory, predispute arbitration agreements in consumer transactions would improve upon the current situation. Businesses wanting to arbitrate would carry the burden of persuading consumers it was in their best interests to do so. Consumers could decide whether to choose arbitration under circumstances in which they possessed far more bargaining power. At present, it is highly unlikely that consumers signing predispute arbitration contracts knowingly waive their right to a judicial forum and agree to arbitrate their disputes at a cost substantially greater than the cost of going to court.[183] The arbitration agreement is one paragraph buried in a pile of documents that sellers give consumers at the time they purchase goods or services. At the time of purchase, a consumer's attention is most likely on the price and quality of the goods or services, not on any arbitration clause. Even if consumers read the arbitration agreement, they cannot make an intelligent decision about whether to agree unless they know what type of dispute they may have with the business, what injury they might suffer, and whether court or arbitration would be the preferable forum. Furthermore, the costs of arbitration are not disclosed in the arbitration agreements, leaving consumers without warning that actually accessing the arbitration forum may be cost-prohibitive. If predispute mandatory arbitration were prohibited, consumers would not be under the time pressure that often is exerted when they purchase goods and services with form contracts that include arbitration agreements. Instead, when a business approached them with a proposal to arbitrate, consumers would have the opportunity to take the time to consult with others about the best course of action. Although it would be difficult to estimate the cost of arbitration, they would be better able to project the costs and compare them with the costs of a lawsuit.

Both businesses and the arbitration service providers would, however, likely oppose the prohibition of mandatory, predispute, binding arbitration agreements. Thus, the AAA has argued that once a dispute has arisen, it is difficult for the parties to agree "on any subject,"[184] making it highly unlikely the parties

183. *See* PUBLIC CITIZEN'S CONGRESS WATCH, *supra* note 14, at 74 (highlighting the inability of consumers to "contemplate the consequences of submitting a hypothetical, yet to arise claim to arbitration"); Kloss v. Edward D. Jones & Co., 54 P.3d 1, 17 (Mont. 2002) (Nelson, J., concurring) (arguing that it is hard to show consumers knowingly and intelligently waived their "constitutional right to a jury trial and to access the courts" when they sign standard-form contracts).

184. Brief of Amicus Curiae American Arbitration Association at 13, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235), *available at* 2000 WL 744161.

would agree to arbitrate. It is curious that service providers who lavish praise on arbitration in general suddenly have no faith that they can sell their product to consumers once a dispute arises. Advocates of consumer arbitration insist arbitration is cheaper, quicker, and easier than litigating in court.[185] If they are correct, businesses should be able to convince consumers of the advantages of arbitration post-dispute. And, indeed, in some cases arbitration may be advantageous to a consumer's interests. When a case involves a simple issue, a small claim, or an obvious resolution, a consumer, especially a sophisticated one, may be very willing to agree to arbitration. Under those circumstances, the problem may be persuading the business to do so.

Prohibiting predispute arbitration agreements is not unheard of; mandatory arbitration is statutorily prohibited in several countries.[186] Because these laws have not been repealed, it is reasonable to assume they have not resulted in a major disruption of the dispute-resolution process in those countries. In addition, in the United States, a number of measures have been taken to protect consumers. Fannie Mae and Freddie Mac, major purchasers of residential mortgages in the secondary market, no longer invest in mortgages that contain mandatory arbitration provisions.[187] The AAA announced in March 2002 that it would no longer administer health care disputes unless the parties agree to arbitration post-dispute.[188] The AAA also permits consumers to bring cases in small claims courts instead of forcing them into arbitration.[189] Businesses such as Sprint and Sam's Club include the small claims option in their arbitration agreements.[190] In limited areas, Congress has acted to ban arbitration, most recently by prohibiting automobile manufacturers from requiring arbitration with dealer franchisees.[191] One might ask why automobile dealers are entitled to protection but consumers are not.

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185. *See, e.g.*, Duncan A. McDonald, *A Different View on* Green Tree *Arbitration Ruling*, AM. BANKER, July 11, 2003, at 8 (claiming that consumer arbitration "usually is faster, cheaper, and less bureaucratic than its counterpart in our byzantine court system"). McDonald is former general counsel of Citigroup's European and North American card business.

186. *See* Alderman, *supra* note 1, at 1242 n.18; *see also* Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 268 (1995) (explaining that an Alabama statute invalidated all written predispute arbitration agreements).

187. *See* Jennifer Harmon, *Fannie Mae Ceases Buying of B&C Loans with Mandatory Arbitration Clauses*, NAT'L MORTGAGE NEWS (Feb. 9, 2004), *available at* 2004 WL 61722230; Press Release, Fannie Mae and AARP to Collaborate on Efforts to Build Affordable Housing and Livable Communities (Feb. 4, 2004), *available at* http://www.fanniemae.com/faq/231001a.jhtml?p=FAQ; Press Release, Freddie Mac Promotes Consumer Choice with New Subprime Mortgage Arbitration Policy (Dec. 4, 2003), *available at* http://www.freddiemac.com/news/archives/afford_housing/2003/consumer_120403.html.

188. *See* Press Release, American Arbitration Association, AAA Announces Change in Health Care Policy (June 13, 2003), *available at* http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/About/whatsnew/Health%20Care%20Policy.htm.

189. *See supra* text accompanying note 18.

190. Survey, *supra* note 4.

191. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273 § 11028, 116 Stat. 1758 (2002).

Several bills introduced in Congress in 2003 reflect the variety of ways in which a ban on predispute mandatory arbitration might be imposed. One bill targets a single industry: payday lenders.[192] Another targets the high-cost mortgage market.[193] Two others take a much broader approach, covering virtually all consumer transactions.[194] The bills also differ in terms of how completely they prohibit predispute arbitration. One provides a safe harbor for arbitration agreements that meet specified minimum standards.[195] Two others contain comprehensive prohibitions of all predispute consumer arbitration agreements.[196] All the bills permit consumer arbitration agreements executed after a dispute arises.

Among these approaches, the broader are clearly preferable. Laws that target payday lenders and high-cost mortgage firms would certainly alleviate the problems millions of people currently face when they confront high-cost arbitration as their only dispute-resolution forum, but consumers outside these markets also need protection. Nor do the proposals that would create safe harbors provide a satisfactory answer. For example, the safe harbor provision in House Bill 833 requires that the arbitration clause comply with standards set by a nationally recognized arbitration service, such as the AAA advisory committee, if the Federal Reserve Board (FRB) approves those standards.[197] This approach has several problems. First, it imposes bureaucratic burdens on the FRB, which must decide what standards, if any, to approve. Second, the Bill seems to treat the AAA's standards as the model rather than delegating to the FRB or another government agency the task of developing standards after receiving input from all interested persons.[198] The AAA's competitors undoubtedly would establish their own standards, requiring the FRB to determine whether those other standards are comparable to the AAA's.

Furthermore, the Bill is unclear as to whether the business has the burden of proving compliance or if the burden falls to the consumer challenging the safe harbor. Litigation undoubtedly would arise over whether the law required strict or only substantial compliance with approved standards. Finally, the business would be required to pay the "reasonable costs" of all the parties to the arbitration, including the costs associated with the production of witnesses and documents. However, the business would only be required to do so for the first two days of arbitration, and the Bill does not define "reasonable costs," so

192. H.R. 2407, 108th Cong. (2003).

193. H.R. 833, 108th Cong. (2003).

194. H.R. 1663, 108th Cong. (2003); H.R. 1887, 108th Cong. (2003).

195. H.R. 833.

196. H.R. 1663; H.R. 1887.

197. H.R. 833.

198. On the issue of costs, the AAA's advisory committee stated merely that arbitration services should charge "reasonable costs to consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the consumer to pay." The advisory committee never resolved the fundamental question of whether binding arbitration is appropriate in consumer cases. *See generally* Thomas J. Stipanowich, *Due Process Protocol Protects Consumer Rights*, 53 DISP. RESOL. J. 8, 13 (1998).

it is unclear what costs are covered. For example, does it include the cost of the arbitrator? If it does, how does one determine if the arbitrator's fee is unreasonable?

The better approach would be to enact a law that is as clear and comprehensive as possible. A comprehensive law avoids the problem of defining what costs are excessive and should be prohibited. A clear, flat prohibition on predispute consumer arbitration agreements, permitting post-dispute agreements, would negate the problem of endless litigation over general, vague, and ambiguous provisions. Two of the bills introduced in 2003 add a comprehensive prohibition of mandatory, predispute arbitration as a new title to the Consumer Credit Protection Act,[199] a logical place considering that this is where most consumer protection legislation already resides.

If some legislative solution—whether it is to establish an administrative structure to regulate consumer arbitration or to prohibit predispute consumer arbitration agreements altogether—is not adopted, consumers will continue to be denied an affordable forum in which to resolve their disputes. This is an intolerable situation that makes a mockery of our justice system. In addition, litigation over the cost of arbitration will continue, and the present chaotic situation will persist. For the welfare of consumers and the integrity of the legal system, it is essential to solve this problem through legislation.

199. 15 U.S.C. §§ 1601-1693r (2000); *see* H.R. 1663; H.R. 1887.