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# MANDATORY BINDING ARBITRATION CLAUSES PREVENT CONSUMERS FROM PRESENTING PROCEDURALLY DIFFICULT CLAIMS

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Jean R. Sternlight\*

## I. INTRODUCTION

The longstanding debate over the benefits and detriments of mandatory arbitration in the consumer context has often focused on the wrong issue. Although we have now argued for almost twenty years over whether it is appropriate to require consumers to arbitrate rather than litigate claims against providers of products and services,<sup>1</sup> too often commentators have asked whether consumers win or lose when they bring claims in arbitration,<sup>2</sup> rather than whether consumers' claims are suppressed or

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\* Saltman Professor and Director of the Saltman Center for Conflict Resolution, UNLV Boyd School of Law. I thank Ron Aronovsky, the ABA Dispute Resolution Section, Myriam Gilles and Cardozo Law School for hosting conferences at which I first aired these ideas. I thank Elaine Shoben for her excellent feedback. I thank my research assistants Sarah Mead, Jaimie Stilz and David Schnell-Davis and reference librarian Jennifer Gross for their competent hard work and perseverance.

1. For some of the earliest criticisms of the imposition of mandatory binding arbitration on consumers and employees, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U.L.Q. 637, 642 (1996) [hereinafter Sternlight, *Panacea*]; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 53-55 (1997); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996). For partial or complete defenses of the practice see Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 172 (2010) (arguing that complete abolition of mandatory consumer arbitration would likely harm consumers); Sarah R. Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 469-70 (2011); PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS: A RESPONSE TO PUBLIC CITIZEN 28 (2008), available at [http://www.instituteforlegalreform.com/get\\_ilr\\_doc.php?id=1091](http://www.instituteforlegalreform.com/get_ilr_doc.php?id=1091).

2. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564–566 (2001); Peter

eliminated altogether as a result of companies' use of mandatory arbitration clauses.<sup>3</sup>

The Supreme Court's decision in *AT&T Mobility v. Concepcion*<sup>4</sup> brings this claim suppression issue to the forefront, as that decision allows companies to use arbitration clauses to insulate themselves from exposure to plaintiffs' class actions.<sup>5</sup> A 2012 report by the advocacy group, Public Citizen, identified "76 potential class action cases where judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable."<sup>6</sup> There is substantial reason to believe that many more

B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. & PUB. POL'Y 549, 556–60, 570 (2008) (examining consumer and employee win rates and recoveries in arbitration, relative to litigation, albeit later recognizing that arbitration can also be critiqued for eliminating access to class actions). See also Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 292–96 (2012) (focusing on win-loss rates in employment arbitration, while also noting that most employment claims "of modest value are not likely to lend themselves to class action treatment").

3. See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012); NACA Legislative Unit, *Consumer Attorneys Report: Arbitration Clauses are Everywhere, Consequently Causing Consumer Claims to Disappear*, NAT'L ASSOC. OF CONSUMER ADVOCATES 1 (June 25, 2012), [http://www.naca.net/sites/default/files/NACA2012BMASurveyFinalRedacted\\_1.pdf](http://www.naca.net/sites/default/files/NACA2012BMASurveyFinalRedacted_1.pdf) [hereinafter *Consumer Attorneys Report*]; Alliance for Justice et al. Comments Regarding the Notice and Request for Information on the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, to Bureau of Consumer Financial Protection (June 23, 2012), available at <http://www.citizen.org/documents/group-comments-to-cfpb-re-arbitration-study.pdf>; Letter from Lisa Gilbert, Acting Dir., Public Citizen, Congress Watch division, to Monica Jackson, Exec. Sec'y, Consumer Fin. Prot. Bureau, Comments of Public Citizen Regarding the Notice and Request for Information on the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, at 13 (June 23, 2012) (. . . the impact of the mere *existence* of arbitration clauses in consumer contracts is tremendous, because they suppress valid legal claims of most, if not all, American consumers who are parties to financial services contracts), available at [www.citizen.org/documents/public-citizen-comments-to-cfpb-re-arbitration-study.pdf](http://www.citizen.org/documents/public-citizen-comments-to-cfpb-re-arbitration-study.pdf).

4. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

5. *Id.* at 1753. See Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 706-07 (2012) [hereinafter *Tsunami*]. See also Maureen Weston, *The Death of Class Action After Concepcion?*, 60 KAN. L. REV. 767 (2012); *Consumer Attorneys Report*, *supra* note 3, at 1 ("The presence of an arbitration clause in a contract, particularly one that includes a waiver of the consumer's right to join in a class proceeding, means that consumer claims will be suppressed.")

6. PUBLIC CITIZEN & NAT'L ASSOC. OF CONSUMER ADVOCATES, JUSTICE DENIED—ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S CONCEPCION DECISION ARE PLAINLY EVIDENT 4 (2012), available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf> [hereinafter JUSTICE DENIED]. There have been numerous additional similar decisions since publication of that study. See, e.g., *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1235-36 (11th Cir. 2012) (affirming district court decision refusing to hold arbitral class action waiver unconscionable on the ground that even if the waiver were unconscionable *Concepcion* would preempt and therefore invalidate such a finding); *Homa v. American Express Co.*, No. 00-CV-229-B, 2012 WL 3594231, at \*4 (3d Cir. Aug. 22, 2012) (finding that *Concepcion* requires that arbitral class action waivers be upheld, and stating that

companies in the consumer setting, post-*Concepcion*, will use arbitration to prevent consumers from joining together in class actions either in arbitration or in litigation.<sup>7</sup> Indeed, a recent empirical study by Professor Myriam Gilles of thirty-seven consumer clauses found that *all* of them contained class action waivers and that most of the clauses had been amended in the aftermath of *Concepcion*.<sup>8</sup> While the Article recognizes that some simpler consumer claims can indeed be brought in arbitration, it contends that many “procedurally difficult” consumer claims cannot realistically be brought individually, by consumers, in arbitration.<sup>9</sup> Thus, by preventing consumers from joining together in class actions *Concepcion* has greatly reduced the likelihood that consumers can enforce certain of their legal rights in any forum.<sup>10</sup>

One could use many metaphors to try to describe commentators’ improper focus on the results in arbitration hearings rather than the claim suppression impact of mandatory arbitration. I have chosen a science fiction metaphor. Imagine that a villain has spread poison over the earth that has killed ninety-nine percent of the plants on our planet. Imagine, further, that one percent of the plants have survived, for some mysterious reason being immune to the poison. Scientists are trying to analyze the scope of the disaster. The Group A scientists are busily measuring the

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“[e]ven if [plaintiff] cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not.”).

7. Even before *Concepcion*, when companies had to worry in many jurisdictions that an arbitral class action waiver might be struck down as unconscionable, many companies were using arbitration clauses to block consumers’ access to arbitration. See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–85 (2008) (finding that 77 % of the consumer contracts studied contained arbitration clauses, that all of these prohibited arbitral class actions, and that 80% prohibited all class actions); SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 102 (2009) (reporting that every arbitration agreement studied covering credit cards or cell phone services proscribed class actions). See also PEW HEALTH GRP., HIDDEN RISKS: THE CASE FOR SAFE AND TRANSPARENT CHECKING ACCOUNTS 18 (2012), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2011/SafeChecking\\_Pew\\_Report\\_HiddenRisks.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/SafeChecking_Pew_Report_HiddenRisks.pdf) (observing that 94 percent of checking accounts at the 10 largest U.S. banks include a clause waiving the right to bring a class action suit).

8. Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility vs. Concepcion*, 88 NOTRE DAME L. REV. (forthcoming 2013), <http://ssrn.com/abstract=2132604> (studying clauses issued by some of the best known national companies in areas such as telecommunications, consumer banking and credit cards, e-commerce, and entertainment).

9. The terms “procedurally difficult” and “procedurally easy” are part of a taxonomy enunciated in this article to distinguish among critically different types of consumer claims. See *infra* Part III.

10. See *Tsunami*, *supra* note 5, at 704-05.

growth of the few plants that were not killed by the poison. They observe that these plants are actually thriving—growing just as quickly or perhaps even more quickly than they ever did. But don't we all agree these Group A scientists have missed the main event? Isn't the primary issue the one being focused on by the Group B scientists, who are extremely disturbed that 99% of the plants on earth have been destroyed? While I admit to despising the Supreme Court's decision in *Concepcion*,<sup>11</sup> I do at least credit it for providing more acuity in the world of mandatory consumer arbitration. We can now see more clearly than ever before both how companies can use arbitration clauses to insulate themselves from class actions and also what impact such clauses are likely to have on consumers.

Ten years ago I wrote an article—*As Mandatory Binding Arbitration Meets the Class Action Will the Class Action Survive?*<sup>12</sup> The Article offered some suggestions as to how courts might use contractual or statutory arguments to strike down the class action waivers that were, at the time, increasingly becoming part of the arbitration clauses companies were imposing on their customers.<sup>13</sup> For a time courts used these tools to strike down certain such waivers, finding they were unconscionable or would prevent consumers from vindicating their rights under federal law.<sup>14</sup>

However, the Court's *Concepcion* decision held that at least one court's use of unconscionability to strike down arbitral class action waivers was preempted by the Federal Arbitration Act,<sup>15</sup> and as I have discussed elsewhere many courts are interpreting this decision quite broadly to block all unconscionability attacks on arbitral class action waivers.<sup>16</sup> Indeed, some courts are even holding that the distinct vindication of federal rights argument for voiding arbitral class action waivers was weakened if not eliminated by *Concepcion*, though the decision did not directly discuss that argument.<sup>17</sup> While the vindication of federal rights argument remains hotly contested, and conceivably may survive,<sup>18</sup> it likely will not apply to

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11. 131 S. Ct. 140.

12. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) [hereinafter *Mandatory Binding Arbitration*]. See also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 393 n.101 (2005).

13. *Mandatory Binding Arbitration*, *supra* note 12, at 106. Specifically, the Article suggested that courts could use either unconscionability arguments or vindication of statutory rights arguments to strike down arbitral class action waivers.

14. See *Tsunami*, *supra* note 5, at 703, 706.

15. 131 S. Ct. at 1753.

16. See *supra* note 5.

17. *Tsunami*, *supra* note 5, at 714–15. See also Weston, *supra* note 5, at 124-25.

18. See *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 214–20 (2d Cir. 2012) (voiding arbitral class action prohibition, even post-*Concepcion*, on the ground that it would prevent

consumer claims brought under common law or possibly state statutes.<sup>19</sup> Thus, it is clear, at minimum, that *Concepcion* has made it much easier for companies to insulate themselves from consumer class actions.<sup>20</sup>

But is the elimination of many or even virtually all consumer class actions detrimental or instead perhaps even beneficial to consumers? This is a modern version of a question I asked in an article now almost twenty years ago: *Mandatory Binding Arbitration: Panacea or Corporate Tool?*<sup>21</sup> Some urge that consumer arbitration offers a more effective way for consumers to resolve their claims than do class actions.<sup>22</sup> They contend that whereas consumer class actions purportedly provided no significant benefit to consumers, in that trial attorneys rather than individual plaintiffs supposedly secured the bulk of any benefits obtained through class actions,<sup>23</sup> consumers can present their claims quickly and inexpensively in individualized arbitration.<sup>24</sup> For example, Matt Webb, a senior vice president of the United States Chamber of Commerce stated that whereas class actions are flawed, designed by and for lawyers, arbitration can provide better benefits to consumers: “If you have a \$30 dispute and a good arbitration system in place, one that is administered fairly, . . . you have the ability to get a claim resolved without giving money to a lawyer.”<sup>25</sup>

Indeed, some have even suggested that, at least on occasion, a company might hurt itself rather than consumers by eliminating class actions, because the company might then face numerous individual claims brought in arbitration.<sup>26</sup> One might draw an analogy to the story of the Sorcerer’s

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affected merchants from asserting claims under federal antitrust laws). See also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 633-37 (discussing and advocating for survival of “vindication of federal statutory rights” argument even following Court’s decision in *Concepcion*).

19. Gilles & Friedman, *supra* note 18, at 648-53 (recognizing that “vindication of federal rights” argument does not work when class action prohibition curtails state claims, but still suggesting ways to distinguish *Concepcion*).

20. *Id.* at 627, n.17.

21. Sternlight, *Panacea*, *supra* note 1.

22. See articles cited *supra* note 2.

23. See, e.g., Rutledge, *supra* note 2, at 572-73.

24. See Estreicher, *supra* note 2, at 564 (claiming that his conclusions apply to both employees and consumers, although Estreicher’s argument focuses more on the former).

25. David Segal, *A Rising Tide Against Class-Action Suits*, N.Y. TIMES (May 6, 2012), <http://www.nytimes.com/2012/05/06/your-money/class-actions-face-hurdle-in-2011-supreme-court-ruling.html>.

26. Malin, *supra* note 2, at 300 n.79. Malin discusses his own personal experience as an employment arbitrator in which the company, having enforced an arbitral class action waiver, was sued in arbitration by forty other individuals. Because the relevant AAA rules required the company to deposit anticipated arbitrator fees for each case up front Malin posits that the

Apprentice, in which the apprentice cut an enchanted broom in half to stop it from bringing water only to be faced with more and more brooms each carrying water.<sup>27</sup> In the summer of 2011, after AT&T Mobility had won its great victory in *Concepcion*, AT&T announced that it intended a \$39 billion takeover of cell phone carrier T-Mobile.<sup>28</sup> A law firm that normally handles class actions filed over a thousand individual arbitration claims against AT&T, seeking to block the merger.<sup>29</sup> However, in response, AT&T sued the customers who had brought those claims in at least eight federal court actions.<sup>30</sup> The federal courts all rejected the customers' attempts to use arbitration to secure the requested injunctive relief.<sup>31</sup> Some consumer advocates have now founded an organization, Consumers Count, which attempts to use social media to help consumers join together to bring multiple individual claims in arbitration.<sup>32</sup>

Is it realistic to think that class actions might be replaced by individual claims? Would many individuals who were blocked from filing class actions proceed individually? Moreover, can such individual actions serve the same purpose as class actions—not only to compensate wronged consumers but also to deter companies from engaging in misconduct?<sup>33</sup>

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employer may have had to deposit more than \$500,000 up front, and that the anticipated costs of the forty cases gave the employees substantial settlement leverage. *Id.*

27. The Sorcerer's Apprentice story was first told in a poem by Goethe, *Der Zauberlehrling*, and then popularized in the Disney film *Fantasia*. See *The Sorcerer's Apprentice*, WIKIPEDIA, [http://en.wikipedia.org/wiki/The\\_Sorcerer's\\_Apprentice](http://en.wikipedia.org/wiki/The_Sorcerer's_Apprentice) (last visited Jun. 26, 2012). The author credits attorney Joseph Sellers for sharing the sorcerer's apprentice metaphor at a conference in April 2012. However, Sellers was not suggesting that individual arbitration could take the place of class actions, but only that multiple smaller class actions might be more threatening to a company than a single large class action.

28. Daniel Fisher, *AT&T's Arbitration Victory Breeds Swarm of Antitrust Cases*, FORBES (Aug. 18, 2011, 4:36 PM), <http://www.forbes.com/sites/danielfisher/2011/08/18/atts-arbitration-victory-breeds-swarm-of-antitrust-cases/>.

29. See Scott A. Bursor, *Fight AT&T's Takeover of T-Mobile*, BURSOR & FISHER P.A., <http://www.fightthemerger.com> (last visited June 26, 2012) (detailing efforts of law firm Bursor & Fisher P.A. to stop the proposed merger).

30. Fisher, *supra* note 28.

31. See *AT&T Mobility LLC v. Bernardi*, No. C11-03992 CRB, 2011 WL 5079549, at \*13 (N.D. Cal. Oct. 26, 2011); *AT&T Mobility LLC v. Gonnello*, No. 11 Civ. 5636(PKC), 2011 WL 4716617, at \*4-5 (S.D.N.Y. Oct. 7, 2011). See also Jeffrey May, Wolters Kluwer Law & Business, *Customers' Efforts to Use Arbitration to Challenge AT&T/T-Mobile Merger Fail*, ANTITRUSTCONNECT BLOG (Oct. 31, 2011), <http://antitrustconnect.com/2011/10/31/customers%E2%80%99-efforts-to-use-arbitration-to-challenge-att-mobile-merger-fail/>.

32. See Consumers Count, [www.consumerscount.org](http://www.consumerscount.org) (last visited Oct. 12, 2012). This organization will be discussed in further detail. See *infra* text accompanying notes 182-84.

33. See Gilles & Friedman, *supra* note 18, at 626, 632, 633-34 (discussing multiple purposes of class actions). The extent to which class actions actually deter companies from engaging in misconduct is contested. Compare Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2517-18 (2008) ("corporate officers and directors

This Article explores the viability of replacing consumer class actions with individualized consumer arbitration in four parts. Section I examines the existing landscape of consumer arbitration and finds that although millions upon millions of consumer disputes are covered by arbitration clauses, almost no consumers assert their claims in arbitration. When consumers are aware they have claims and feel competent to bring claims on their own behalf they typically do so by contacting customer service, or seeking a chargeback with their credit card company, rather than by filing a claim in arbitration. Yet, some will suggest that even if many consumers are not currently bringing claims in arbitration, consumer arbitration could be modified to make it more hospitable to consumer claims, perhaps by using the Internet. To explore the question of whether arbitration could be modified to make it more attractive to consumer claimants Section II provides a taxonomy of consumer claims. It argues that while individual arbitration may work well for “procedurally easy” claims, it does not work well for those many consumer claims that are “procedurally difficult” (specifically claims of which individual consumers are not aware or that they cannot reasonably present on their own). Section III then examines what kinds of processes might be useful to permit consumers to present “procedurally difficult” claims. Finally, Section IV concludes that procedurally difficult consumer claims cannot realistically be presented by individual consumers in arbitration, or in other settings. Thus, it suggests that to the extent we care about procedurally difficult consumer claims we should either resurrect consumer class actions or increase the funding for government agencies that might realistically present such claims.

Admittedly, this Article does not address two issues that some may see as central. First, it takes as a given that it is worthwhile enforcing laws that give rise to procedurally difficult claims. Second, it also takes as a given

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agonize less over the Securities Exchange Commission than over potential securities fraud class actions; pharmaceutical companies worry less about the Federal Drug Administration’s post-approval monitoring than about products liability class actions; and the Federal Trade Commission is less threatening to companies apt to ignore fair credit reporting requirements than the class action bar.”), Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PENN. L. REV. 103, 106 (2006) (stating that the Federal Trade Commission is less feared than class actions), and James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 894 (2005) (“So robust is the securities class action that with great confidence the attorney can advise her client that one is far more likely to encounter the plaintiffs’ securities class action lawyer than SEC enforcement personnel.”), with Daniel Fisher, *Will the Government Protect You from Arbitration Clauses?* FORBES (Apr. 26, 2012, 11:08 AM), <http://www.forbes.com/sites/danielfisher/2012/04/26/will-the-government-protect-you-from-arbitration-clauses/> (quoting banking attorney Alan Kaplinsky as stating that the CFPB itself has “almost unlimited resources” to rein in his clients, and that his “clients are a lot more scared about what the CFPB might be doing than being sued in a class action.”).



that the benefits of class actions outweigh their costs. While some may disagree with either or both of these positions, Congress and state legislatures have already spoken on these issues. Federal and state legislation gives rise to procedurally difficult claims and federal and state bodies have adopted rules of civil procedure authorizing class actions.<sup>34</sup> If as a society we wish to revoke this legislation or eliminate class actions we should do so explicitly, rather than allow companies to use arbitration to eliminate legal protections or class actions surreptitiously.<sup>35</sup>

## II. THE MYTH AND REALITY OF CONSUMER ARBITRATION

It is often asserted that arbitration offers a quicker and cheaper form of dispute resolution.<sup>36</sup> All else equal, a quicker and cheaper dispute resolution process would certainly be a good thing for consumers, so at first glance the appeal of arbitration as a venue for resolution of consumer claims is quite understandable. Yet, as discussed below it turns out that at least to date very few consumers seem to be choosing to resolve their claims through arbitration. While we don't have as much or as good empirical information as would be desirable regarding how many consumers choose to resolve their disputes through arbitration, we do have some signposts, and they all point in the same direction. Although many consumers are covered by mandatory arbitration clauses, very few actually file arbitration claims.<sup>37</sup> Surely this apparent fact at least calls into question the idea that individual arbitration is a desirable venue for the resolution of many consumer claims?

### A. *The Incidence of Mandatory Arbitration Clauses*

Anecdotal information regarding the high incidence of mandatory arbitration clauses in the consumer context is abundant. Were each of us to engage in a systematic examination of our own consumer status we would typically find that we are required to arbitrate disputes by credit card providers,<sup>38</sup> banks,<sup>39</sup> discount lenders,<sup>40</sup> and cell phone providers.<sup>41</sup> As

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34. Fed. R. Civ. P. 23.

35. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STANFORD L. REV. 1631 (2005).

36. See, e.g., *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (citing benefits of arbitration as including informality, efficiency, cost-effectiveness and procedural flexibility).

37. See *infra* Part II.B.

38. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice* 5 (Georgia Law, Working Paper No. 79, 2012), available at [http://digitalcommons.law.uga.edu/fac\\_wp/79](http://digitalcommons.law.uga.edu/fac_wp/79) (concluding that as of December 31, 2009 95% of credit card loans were held by firms which

well, we know that arbitration is often imposed on us as consumers when we purchase or rent certain products (e.g. computers,<sup>42</sup> items bought through Amazon<sup>43</sup> or Zappos,<sup>44</sup> Starbucks gift cards,<sup>45</sup> or rental equipment<sup>46</sup>), enroll in schools,<sup>47</sup> rent movies,<sup>48</sup> or purchase auto parts.<sup>49</sup>

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mandated customers resolve future disputes through arbitration). *See also Consumer Credit Card Customer Agreement & Disclosure Statement*, WELLS FARGO 1, [https://www.wellsfargo.com/downloads/pdf/credit\\_cards/agreements/wf\\_cash\\_back\\_card.pdf](https://www.wellsfargo.com/downloads/pdf/credit_cards/agreements/wf_cash_back_card.pdf) (last visited Aug. 25, 2012).

39. *See* PEW HEALTH GRP., *supra* note 7, at 18 (reporting that out of 265 bank accounts examined about 71% of accountholders were required to agree to have disputes resolved before a private arbitrator of the bank's choice, and that 94% of accountholders were required to waive the right to a class action).

40. *See, e.g.,* Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 447-49 (2006); King v. Advance Am., 415 F. App'x. 399, 401 (3<sup>rd</sup> Cir. 2011).

41. AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 744 (2011); Pendergast v. Sprint Solutions, Inc., 592 F.3d 1119, 1121-23 (11th Cir. 2010).

42. *E.g., Dell Consumer Hardware Service Agreement*, DELL 1, [http://i.dell.com/sites/content/shared-content/solutions/en/Documents/consumer-hardware-services-contract-12\\_8\\_2011.pdf](http://i.dell.com/sites/content/shared-content/solutions/en/Documents/consumer-hardware-services-contract-12_8_2011.pdf) (last visited June 25, 2012) (requiring individual arbitration of warranty claims brought against Dell). *See also Toshiba Terms and Conditions of Sale*, TOSHIBA 2, <http://www.toshibadirect.com/t/b2c/legalstmt.to> (last visited June 25, 2012) (containing Toshiba computers terms of sale requiring customers to resolve claims through binding arbitration and waive right to participate in a class action); *Microsoft To Ban Class Actions*, LEGAL SKILLS PROF BLOG 1 [http://lawprofessors.typepad.com/legal\\_skills/2012/06/microsoft-to-ban-class-actions.html](http://lawprofessors.typepad.com/legal_skills/2012/06/microsoft-to-ban-class-actions.html) (stating Microsoft currently is in the process of compelling customers to give up the right to class actions).

43. *See Amazon Conditions of Use*, AMAZON.COM 3 (June 25, 2012), [http://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088](http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088) (mandating arbitration and prohibiting class or consolidated claims).

44. *See Zappos.com Terms of Use*, ZAPPOS.COM 2, <http://www.zappos.com/terms-of-use> (last visited June 25, 2012) (requiring consumers to bring any claims against Zappos in arbitration and prohibiting use of class actions by consumers, but reserving to Zappos the right to sue a consumer in court for violating intellectual property rights).

45. *See Starbucks Card Terms & Conditions*, STARBUCKS 4-5, <https://www.starbucks.com/card/card-terms-and-conditions> (last visited June 25, 2012).

46. *See, e.g.,* U-Haul Arbitration agreement, U-HAUL 1, <http://www.uhaul.com/arbitration/> (last visited June 25, 2012) (containing terms requiring U-Haul equipment renters to accept mandatory arbitration and waive right to participate in class action).

47. *See, e.g., University of Phoenix Consumer Information Guide 2011–2012*, UNIVERSITY OF PHOENIX 81-89, [http://cdn.assets-phoenix.net/content/dam/altcloud/doc/about\\_uopx/University-of-Phoenix-Consumer-Information-Guide-2011-2012.pdf](http://cdn.assets-phoenix.net/content/dam/altcloud/doc/about_uopx/University-of-Phoenix-Consumer-Information-Guide-2011-2012.pdf), (last visited June 25, 2012) (requiring University of Phoenix students to bring any claims using binding arbitration and to waive right to class action).

48. *See Blockbuster Terms and Conditions of Use*, BLOCKBUSTER 6, <http://www.blockbuster.com/corporate/termsAndConditions#disputeResolution> (last visited June 25, 2012) (requiring all disputes arising from Blockbuster transactions to be resolved by binding arbitration without participation in class action or class-wide arbitration).

49. *See PepBoys Terms & Conditions*, PEPBOYS 1, [http://www.pepboys.com/customer\\_care/policies/terms?CID=FtrMain\\_AbtPBTOU\\_P2](http://www.pepboys.com/customer_care/policies/terms?CID=FtrMain_AbtPBTOU_P2) (last visited June 25, 2012) (requiring binding arbitration and prohibiting class action for any dispute arising from use of Pepboys' website or a purchase from the online store). The *Consumer Attorneys Report*, *supra* note 3, at 2–3, provides a

Perhaps companies will soon be permitted to use arbitration clauses to eliminate securities fraud class actions as well.<sup>50</sup>

Unfortunately, however, more exact empirical measures of the incidence of mandatory consumer arbitration are far harder to come by. For this reason the Consumer Financial Protection Bureau,<sup>51</sup> tasked under the Dodd-Frank Financial Protection Act<sup>52</sup> with studying and potentially regulating mandatory arbitration “between covered persons and consumers in connection with the offering or providing of consumer financial products or services,”<sup>53</sup> has recently issued a request for information asking interested parties to provide suggestions for how the agency might learn about the prevalence of pre-dispute arbitration agreements.<sup>54</sup>

We do have a few snippets of intriguing information that imply that the incidence of mandatory arbitration clauses in the consumer setting is very high. For example, in 2004 Linda Demaine and Deborah Hensler published an article examining the extent to which a hypothetical “average Joe” in Los Angeles was likely to be subject to mandatory consumer arbitration clauses.<sup>55</sup> They looked at 67 industries with which “Joe” might have relationships and found that the incidence of arbitration in those industries ranged from zero to sixty-seven percent.<sup>56</sup>

Other empirical studies have focused on particular types of consumer contracts. Professor Ted Eisenberg and his co-authors found that seventy five percent of studied financial services and telecommunications companies used arbitration clauses in their consumer agreements, and that

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long list of some of the kinds of consumer contracts in which mandatory arbitration clauses appear.

50. See Daniel J. Morrissey, *Will Arbitration End Securities Litigation?* 9-10 (Gonzaga Univ. Sch. of Law, Legal Studies Research Paper No. 2012-4, 2012), available at <http://ssrn.com/abstract=2048707> (arguing that companies should not be permitted to use arbitration clauses to eliminate securities fraud class actions, stating that it is not feasible for consumers to bring such actions individually, and that the SEC is also not capable of conducting all necessary enforcement actions).

51. CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/> (last visited June 25, 2012).

52. Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, 12 U.S.C. § 5301 (Supp. IV 2006).

53. 12 U.S.C. § 5518.

54. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25148 (Apr. 27, 2012).

55. Linda J. Demaine & Deborah R. Hensler, *Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (2004).

56. *Id.* at 63.

all of these contracts included arbitral class action waivers.<sup>57</sup> With respect to credit cards, Peter Rutledge and Christopher Drahozal concluded that as of December 31, 2009, ninety-five percent of credit card loans were held by firms which mandated customers resolve future disputes through arbitration,<sup>58</sup> though that percentage dropped dramatically to forty-eight percent as of December 2010 because one major issuer was pressured into an antitrust settlement under which it agreed to suspend use of the mandatory arbitration clauses.<sup>59</sup>

While much empirical work remains to be done regarding the use of arbitration clauses in the consumer context,<sup>60</sup> based on both existing studies and anecdotal information it seems clear that millions upon millions of potential consumer disputes are covered by arbitration clauses. The United States census data shows that as of 2010 there were approximately 234,564,000 residents in the U.S., age eighteen or over.<sup>61</sup> It seems reasonable to assume that each of those persons was covered on average by at least three consumer contracts including mandatory arbitration provisions. As noted above these could include credit card agreements, bank deposition agreements, car loans, cell phone contracts, cable television contracts, rental agreements, insurance contracts, certain on-line purchases,

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57. Theodore Eisenberg et al., *Arbitration's Summer Soldiers*, 41 U. MICH. J.L. REFORM 871, 882–84 (2008). Cf. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RES. 433 (2010) (critiquing Eisenberg et al for certain of their broad conclusions but accepting their empirical results for the industries that were studied).

58. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice* 5 (Georgia Law, Working Paper No. 79, 2012), available at [http://digitalcommons.law.uga.edu/fac\\_wp/79](http://digitalcommons.law.uga.edu/fac_wp/79).

59. *Id.* at 5, 9. The authors also found that nearly 95% of the arbitration clauses sampled included class waivers, and that this figure rose to 99% when measuring by loan volume rather than by firms. They examined 293 credit card agreements submitted by the issuers to the Federal Reserve. See also Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 146 (2010) (finding, in small empirical study, that 7 of 13 credit card agreements required consumers to bring claims in arbitration, and that all of these precluded class or consolidated proceedings).

60. Indeed, Congress in the Consumer Financial Protection Act of 2010 ordered the new Consumer Financial Protection Board to conduct such a study, Consumer Financial Protection Act, 12 U.S.C.A. § 5518(a), and they have commenced to do this work. *Consumer Financial Protection Bureau launches public inquiry into arbitration clauses*, CONSUMER FINANCIAL PROTECTION BUREAU (Apr. 24, 2012), <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>. It would be interesting to know both how many consumers and how many consumer transactions are covered by mandatory arbitration provisions. Apart from the predictable quibbles among empiricists as to the validity of individual studies, it is clear that no empiricists have yet studied the bulk of consumer transactions in this country. For a collection of the comments submitted in response to the CFPB's request for suggestions on how to study consumer arbitration see *supra* note 3.

61. U.S. CENSUS BUREAU, RESIDENT POPULATION BY SEX AND AGE: 1980–2010 (2010), available at <http://www.census.gov/compendia/statab/2012/tables/12s0007.pdf>.

etc. Thus, it would seem that U.S. consumers are covered by over half a billion contracts containing mandatory arbitration provisions. In short, based on studies, anecdotes, and back of the envelope calculations it seems that reasonable people could agree there are lots and lots of mandatory consumer arbitration contracts in the United States at present.

*B. The Extent to Which Consumers Bring Claims in Arbitration*

Although, as set out above, a great many consumer transactions are covered by mandatory arbitration provisions, remarkably few consumers bring claims against companies in arbitration. Once again, while the empirical record is incomplete, the information available from a variety of sources all points in the same direction: consumers almost never initiate individual claims against companies in arbitration.

Some of our limited data regarding consumers' tendency to file individual claims against companies in arbitration comes from arbitration providers. In the United States there are presently two major arbitration providers: the American Arbitration Association ("AAA")<sup>62</sup> and JAMS.<sup>63</sup> Neither handles more than a miniscule number of consumer claims, particularly by comparison to the numbers of consumers covered by arbitration clauses, to the numbers of consumers who bring claims in other venues, or to the numbers of consumers at least formerly covered by class actions.<sup>64</sup>

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62. See AMERICAN ARBITRATION ASSOCIATION, <http://www.adr.org> (last visited Aug. 25, 2012).

63. Although JAMS once stood for Judicial Arbitration and Mediation Service, JAMS is no longer an acronym. JAMS ARBITRATION, MEDIATION, AND ADR SERVICES, <http://www.jamsadr.com> (last visited Aug. 25, 2012).

64. A third major provider, the National Arbitration Forum, used to exist, but was effectively driven out of business when it was sued by the Minnesota Attorney General. "On July 14, 2009, the Minnesota Attorney General brought a complaint in Hennepin County against NAF alleging consumer fraud act and deceptive trade practices act violations and false advertising. NAF settled that litigation less than a week later, agreeing to cease performing consumer arbitrations and entering into a consent judgment to that effect with the Minnesota Attorney General." See *In re Natl. Arbitration Forum Trade Practices Litig.*, 704 F. Supp. 2d 832, 835 (D. Minn. 2010). NAF, at the time, was primarily handling arbitrations brought by lenders against consumers as a collection tool. The Minnesota AG's lawsuit alleged that far from being neutral, NAF had an intertwined business relationship with some of the very companies that were bringing collections claims against consumers. For general discussion of the NAF fiasco see Nancy A. Welsh, *What is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 391, 427-31 (2010). Although millions of consumers were covered by clauses naming NAF as the arbitration provider, and although this entity handled 50,000 consumer debt collection actions per year, only 226 consumers brought claims against companies through NAF during a four-year period. ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES

JAMS is an ADR provider that specializes in higher-end, i.e. more complicated and more expensive disputes.<sup>65</sup> JAMS arbitrators and mediators are typically retired judges or attorneys with a great deal of practice experience.<sup>66</sup> These neutrals often charge hundreds of dollars per hour for their services.<sup>67</sup> Thus, it is not surprising that few consumers choose to file arbitration claims with JAMS. JAMS Executive Vice President and General Counsel Jay Welsh reported to this author that JAMS handles at most a few hundred consumer arbitration claims.<sup>68</sup> He further explained that most of these are from claims alleging that certain credit card companies violated federal collections statutes, asserted to fend off potential collections actions by those companies.<sup>69</sup> The AAA handles a broader range of disputes than does JAMS, but even AAA handles quite few claims brought by consumers against companies. While precise numbers are hard to obtain,<sup>70</sup> in one informal report AAA stated it handled roughly 1,000 claims by consumers per year.<sup>71</sup>

The same story—relatively few individual consumers bring claims in arbitration—is supported by data revealed in several lawsuits<sup>72</sup> and by statements of individual attorneys as well. For example financial institution

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(2004), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf>.

65. See *About JAMS*, JAMS ARBITRATION, MEDIATION, AND ADR SERVICES 1, [http://www.jamsadr.com/aboutus\\_overview/](http://www.jamsadr.com/aboutus_overview/) (last visited Aug. 25, 2012) (“JAMS is the largest private alternative dispute resolution (ADR) provider in the world. With its prestigious panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases . . .”).

66. *Id.*

67. See PUBLIC CITIZEN, THE COSTS OF ARBITRATION (April 2002), available at <http://www.citizen.org/documents/ACF110A.PDF> 44 (reporting JAMS’ estimate that its arbitrators charge between \$150 and \$300 per hour, in addition to a daily \$250 case management fee).

68. Telephone interview with Jay Welsh, JAMS General Counsel (Apr. 23, 2012).

69. *Id.*

70. The author attempted to obtain more precise numbers from AAA but has not, to date, been successful.

71. NATIONAL ROUNDTABLE ON CONSUMER AND EMPLOYMENT DISPUTE RESOLUTION, CONSUMER ARBITRATION ROUNDTABLE SUMMARY REPORT Attachment D, at 48 (2012), available at [http://law.psu.edu/\\_file/YAM/YAM\\_National\\_Roundtable\\_Summary%20Report.pdf](http://law.psu.edu/_file/YAM/YAM_National_Roundtable_Summary%20Report.pdf) [hereinafter ROUNDTABLE SUMMARY REPORT].

72. *E.g.* Coneff v. AT&T Mobility, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (finding only an “infinitesimal” proportion of customers had brought claims in either arbitration or small claims court), reversed on grounds this was irrelevant in light of FAA preference for arbitration, 673 F.3d 1155 (9<sup>th</sup> Cir. 2012); *Reuter v. Davis*, No. 502001CA001164XXXXMB, 2006 WL 3743016, at \*4-5 (Fla. Cir. Ct. Dec. 12, 2006) (observing that consumers had not filed individual claims in arbitration because “the wages and out of pocket costs lost in prosecuting [individual] claims dwarf the amounts sought” and therefore finding class action waivers to be unconscionable).

First USA revealed in discovery that in the two years after it implemented its mandatory arbitration clause in early 1998 only four customers filed claims against the company.<sup>73</sup> As well, discovery produced in three class action lawsuits against three payday loan businesses revealed that no arbitrations had been filed against any of the three lenders,<sup>74</sup> even though the three classes covered hundreds of thousands of payday loan customers allegedly charged illegal fees and interest rates.<sup>75</sup> Similarly, a law firm responding to the CFPB Request for Information pertaining to how to study pre-dispute arbitration agreements reported that in cases involving “hundreds of thousands of consumers we have never discovered evidence of a single arbitration being initiated.”<sup>76</sup> And, affidavits submitted in *AT&T Mobility v. Concepcion* stated that “[f]ewer than 200 of AT&T’s millions of customers brought claims in individual arbitration against the company for any reason, [compared to thousands who sought help from a consumer group for the specific claims alleged in *Coneff*.]”<sup>77</sup>

In sum, although millions of consumers, and more millions of consumer claims are covered by mandatory arbitration provisions, at most a few thousand consumers seem to bring claims in arbitration. This author suggests that the small number of claims brought by consumers in

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73. In contrast, First USA itself filed 51,622 arbitration claims against consumers in the same period. See Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum’s Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at 2, available at 2000 WLNR 10701587.

74. JUSTICE DENIED, *supra* note 6, at 19. The Public Citizen Report cites a court order in *Hager v. Check Into Cash of North Carolina*, 652 S.E.2d 263 (N.C. 2007) available at [http://www.nccheckintocashsettlement.com/pdf/Hager\\_OrderreArbitration.pdf](http://www.nccheckintocashsettlement.com/pdf/Hager_OrderreArbitration.pdf) (order denying motion to compel arbitration and stay proceedings, stating that interrogatories revealed that no arbitrations had been filed in North Carolina against any of the three payday lenders sued in class actions). See also Order in *Kucan v. Advance America*, No. 04-CVS-2860, 2009 WL 2115349 para. 50 (N.C. Super. Ct. June 16, 2009) (stating record revealed “there ha[d] never been an arbitration proceeding arising from this business” despite “the large number” of loans).

75. JUSTICE DENIED, *supra* note 6, at 18. See also *McQuillan v. Check ‘N Go of North Carolina, Inc.*, 636 S.E.2d 807 (N.C. 2006), available at <http://www.nccgsettlement.com> (order denying motion to compel arbitration, stating that company had issued almost 160,000 loans with allegedly illegal fees per year for four years prior to initiation of lawsuit).

76. Chavez & Gertler LLP, Comments to Bureau of Consumer Financial Protection (June 19, 2012) (discussing Docket No. CFPB-2012-0017). Another firm responding to the CFPB request stated that although thousands and perhaps even millions of Wachovia Bank customers complained of their overdraft fees, from 2003–2008 none ever pursued a claim regarding those fees in arbitration. Statement of Robert C. Gilbert, Plaintiffs’ Coordinating Counsel, Grossman Roth, P.A. 8-9 (June 22, 2012) (discussing Docket No. CFPB-2012-0017 and observing that although hundreds of thousands of customers complained to Wells Fargo about its overdraft fees, just one filed an arbitration, and that one paid more than the amount in dispute to bring the claim to arbitration).

77. Brief of Marygrace Coneff, et al. as Amici Curiae Supporting Petitioners at 9, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3973886.

arbitration may show that arbitration is not, in fact, an ideal forum for many consumer claims.

### C. *Why Don't More Consumers Bring Claims in Arbitration?*

Before one jumps to a conclusion that individualized arbitration is not a good forum for individual consumers' claims one must explore at least two alternative explanations. First, perhaps consumers simply don't have many claims. If consumers are not aggrieved there is no reason for them to bring claims in arbitration or anywhere else. Surely we do not want to encourage claiming (or griping) merely for the sake of claiming. Second, even if it may be true that arbitration is not, currently, an ideal forum in which consumers might file their claims, perhaps with some fairly minor "tinkering" we might improve the suitability of the arbitral forum. We explore these alternative explanations below.

#### 1. Do Consumers Simply Not Have Claims or Grievances?

Some may contend that consumers simply do not have claims or grievances, but the empirical record suggests otherwise. While few consumers are filing claims in arbitration, many consumers are claiming, grieving, or griping in other settings. For example, major on-line vendor eBay and payment collection service PayPal report handling sixty million consumer disputes in a given year.<sup>78</sup> (This is not a typo!) Consumers also make complaints directly to various government agencies, such as the Federal Trade Commission.<sup>79</sup> The FTC handled nearly 1.8 million complaints in 2011.<sup>80</sup> As well, consumers may make complaints to their

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78. Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. (forthcoming 2012) (manuscript at 2) (on file with author). Note that author Colin Rule was the Director of Online Dispute Resolution for eBay and PayPal from 2003–2011. *Id.* The article reports on an empirical study concluding that customers who had a dispute handled through the eBay or PayPal online dispute resolution system were more likely to make future purchases through the company, whether or not they won their claim. Perhaps not surprisingly those who got favorable results increased their purchase rate even more than those who got unfavorable results. Only when the dispute resolution process was frustratingly slow were users less likely to make future purchases through the company. Rule hypothesizes that users who were satisfied with the dispute resolution process, whether or not they won their claim, had increased trust in the system and thus felt more comfortable making future purchases through the company. *Id.*

79. For discussion of the history and role of the FTC see FEDERAL TRADE COMMISSION, <http://ftc.gov> (last viewed Aug. 25, 2012). The FTC derives its authority from the Federal Trade Commission Act, 15 U.S.C. § 41 (2006).

80. *FTC Releases Top Complaint Categories of 2011*, FEDERAL TRADE COMMISSION (Feb. 28, 2012), <http://ftc.gov/opa/2012/02/2011complaints.shtm>.



credit card company, for purchases made on the card, seeking that the charges be reversed if a product or service did not meet expectations.<sup>81</sup> This practice, called “chargebacks,” is used quite frequently by consumers.<sup>82</sup> Indeed, while estimates of the number of chargebacks are hard to find, one source reported “[c]hargebacks currently average about two-tenths of a percent . . . of overall transaction volume. That means there are about 30 million chargebacks per year in the United States.”<sup>83</sup> Another commentator “conservatively” estimated that consumers make \$15 billion of chargebacks per year.<sup>84</sup> In short, we can see that the low number of claims filed by consumers in arbitration is not likely due to the fact that no consumers are dissatisfied with products or services they receive. Finally, consumers often present claims simply by calling a customer service number, and may informally get relief in that fashion.<sup>85</sup>

It is also significant to consider how many consumers at least used to be covered by class actions.<sup>86</sup>

Examples:

- Two California lawsuits brought against Career Education Corp., for making fraudulent representations as to post-school employment prospects, lead to settlement of \$40 million whereby the company agreed to reimburse 8,500 students up to \$20,000 apiece;<sup>87</sup>
- *Wolf v. Nissan Motor Acceptance Corp.*,<sup>88</sup> a suit on behalf of members of the armed service regarding car leases, would have

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81. Neil M. Peretz, *The Single Euro Payment Area: A New Opportunity for Consumer Alternative Dispute Resolution in the European Union*, 16 MICH. ST. J. INTL L. 573, 585 (2008) (citing Mark Betz, *Chargebacks and Consumer Behavior*, TRANSACTION WORLD (Oct. 2003)), <http://web.archive.org/web/20050323104030/http://www.transactionworld.net/articles/2003/October/coverstory.asp>.

82. *Id.* at 582-83 n.48, 585-86.

83. *Id.* at 585.

84. TOM CAIN, *RISKY BUSINESS: BEST PRACTICES FOR MANAGING CARDHOLDER DISPUTES AND CHARGEBACK PROCESSING IN CHALLENGING TIMES 2* (2008), available at <http://www.tsys.com/Downloads/upload/TSYS-WP-DisputeChargeback.pdf>.

85. For example, cell phone carrier AT&T Mobility “dispensed over \$1.3 billion in credits for customer concerns and complaints” between February 2007 and January 2008. Opening Brief of AT&T Mobility LLC at 10, *Laster et al. v. AT&T Mobility LLC*, No. 08-56394 (9th Cir. Jan. 5, 2009), 2009 WL 2494186.

86. One law firm alone states that while in the past it has represented “tens of millions of Americans who have been the victims of corporate fraud and wrongdoing in hundreds of consumer protection lawsuits,” after *Concepcion*, many of its successes might no longer be possible. Letter from David Stellings, Lief, Cabraser, Heimann & Bernstein, to Monica Jackson, Executive Secretary, Consumer Financial Protection Bureau (June 22, 2012), available at <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0017-0052>.

87. JUSTICE DENIED, *supra* note 6, at 10.

88. No. 10-3338, 2012 WL 1079340, at \*2, \*6 (D. N.J. Mar. 29, 2012).

included more than 1,000 service members but was defeated when the court upheld the arbitral class action ban;<sup>89</sup>

- Three lawsuits brought against some North Carolina payday lenders included approximately 350,000 class members. These class members received payments ranging from \$10 to hundreds of dollars;<sup>90</sup>
- *Curry v. Fairbanks Capital Corp.*, a claim brought on behalf of approximately 600,000 consumers alleging pattern and practice of unlawful/deceptive practices regarding servicing of residential mortgage loans, settled in 2003 simultaneous with agreements with FTC and HUD, helped transform Fairbanks' mortgage servicing procedures and also provided monetary relief;<sup>91</sup>
- Class action suits brought on behalf of over a million African-American and Latino car buyers with respect to discriminatory auto lending yielded settlements providing non-monetary relief;<sup>92</sup>
- A class action suit against American Honda Motor Company, due to misrepresenting the gas mileage of their Civic Hybrid cars to consumers, led to a settlement giving 200,000 Civic Hybrid owners \$100 to \$200 plus a rebate if they purchased new Honda vehicles.<sup>93</sup>
- A multi-district class action brought against more than fifty banks claimed that they used improper practices to maximize overdraft fees at their customers' expense.<sup>94</sup>

Thus, it is clear that consumers do in fact suffer wrongs, even though they don't typically file claims in arbitration.

## 2. Can We Redesign Arbitration to Make it More Hospitable to Consumer Claims?

Some might consider the information provided above and use it to argue that we can redesign arbitration processes to make them more hospitable to consumer claims. If millions upon millions of consumers are filing claims with eBay and PayPal perhaps we just need to make

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89. JUSTICE DENIED, *supra* note 6, at 14–15.

90. *Id.* at 20.

91. See Settlement Agreement and Release, *Curry et al. v. Fairbanks Capital Corp.*, No. 03-10895-DPW 1-4 (Dist. Mass. Nov. 14, 2003), available at [http://www.ftc.gov/bcp/cases/fairbanks/classact\\_agrmt.pdf](http://www.ftc.gov/bcp/cases/fairbanks/classact_agrmt.pdf).

92. JUSTICE DENIED, *supra* note 6, at 23–25.

93. *Honda Wins Reversal of Civic Hybrid Small-Claims Judgment*, HUFFINGTON POST (Apr. 20, 2012), [http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit\\_n\\_1441913.html](http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit_n_1441913.html).

94. See Statement of Robert C. Gilbert, *supra* note 76. Although the statement does not specifically mention how many bank customers would have been represented in these cases, clearly the number is huge.

arbitration cheaper and more accessible in order to find a good substitute for class actions. For example, Professor Amy Schmitz has urged that by improving on-line dispute resolution processes we can greatly assist consumers who wish to present claims effectively,<sup>95</sup> and has suggested that on-line dispute resolution can be superior to either beefed up government regulation or costly litigation.<sup>96</sup>

This question of whether and how consumer dispute resolution might be redesigned is very current. Beginning in mid-2011 some academics and legal practitioners attended a Roundtable Discussion geared to foster a “structured, facilitated discussion among thoughtful people about the current state of U.S. policy and practice regarding consumer and employment dispute resolution.”<sup>97</sup> The group, including this author, gathered for three days in February 2012 to consider what we know about the resolution of consumer disputes in the United States, what else we would like to know, and how we might improve how consumer disputes are currently resolved.<sup>98</sup> The topic of consumer dispute resolution is receiving a great deal of attention in Europe as well.<sup>99</sup>

To some extent it is no doubt true that we can design consumer arbitration processes more effectively, and that such system redesigns will, in some instances, allow individual consumers to file individual claims that might not otherwise have been possible. Systems designers might take into account a variety of factors in trying to construct a process that is sufficiently accessible, efficient and just.<sup>100</sup> They could try to ensure that

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95. Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 324 (2012) [hereinafter Schmitz, *Access to Consumer Remedies*]; Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 205–06 (2010) [hereinafter Schmitz, “Drive-Thru” Arbitration].

96. Schmitz, *Access to Consumer Remedies*, *supra* note 95, at 330.

97. See ROUNDTABLE SUMMARY REPORT, *supra* note 71, at 4. Although participants in the Roundtable agreed that the proceedings would be covered by modified “Chatham House Rules” on confidentiality, whereby specific remarks cannot be attributed to particular attendees, neither the identities of the attendees nor the general subjects discussed are protected by confidentiality. *Id.* at 5.

98. This Article is in part inspired by those discussions, and designed to contribute to that enterprise.

99. See European Commission, *Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)* COM (2011) 793 final (Nov. 29, 2011), available at [http://ec.europa.eu/consumers/redress\\_cons/docs/directive\\_adr\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/docs/directive_adr_en.pdf).

100. See, e.g., LISA BLOMGREN BINGHAM, JANET K. MARTINEZ, AND STEPHANIE SMITH, *DISPUTE SYSTEMS DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* (Menlo Park, CA: Stanford University Press, forthcoming 2012). See also Schmitz, “Drive-Thru” Arbitration, *supra* note 95, at 223 (urging that ODR should be convenient, cost-effective, engender trust, and provide expertise); Thomas J. Stipanowich, *The Third Arbitration Trilogy*: Stolt-Nielsen, Rent-a-

consumers can file claims in arbitration without paying a high (or perhaps any) filing fee, without leaving the comfort of their home (on-line), and without having to negotiate complicated forms. Some may suggest that once we develop a system that would allow consumers to file claims cheaply and easily on their own, class actions will not be needed.<sup>101</sup> Unfortunately, while I believe that on-line dispute resolution systems can be very useful, and that they can provide great improvements over existing dispute resolution systems, I do not believe they can adequately resolve many of the kinds of consumer problems currently being handled by class actions, for the reasons set out in Sections III and IV.

### III. A TAXONOMY—TWO TYPES OF CONSUMER CLAIMS

As we examine whether individual arbitrations can provide an adequate substitute for consumer class actions it is helpful to consider two main categories of consumer claims.<sup>102</sup> I have devised a taxonomy to distinguish two categories: “procedurally easy” (“PE”) and “procedurally difficult” (“PD”). These names are meant to illustrate that certain consumer claims, apart from their merits or likelihood of success, are harder to identify and present than are others.<sup>103</sup>

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center, *Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 427–34 (2012), available at <http://ssrn.com/abs=1919936> (considering means of making consumer arbitration more fair and just).

101. Amy Schmitz at least comes close to taking this position. Urging that “the internet and computer-mediated communication provide hope for consumers to break free from the barriers of the squeaky wheel system [whereby only some consumers make complaints and receive relief],” Schmitz urges further reliance on online dispute resolution to “increase consumers’ awareness and remedy resources without increasing litigation or government oversight that will augment public and private costs.” Schmitz, *Access to Consumer Remedies*, *supra* note 95, at 319, 330.

102. This Article will not consider the potential benefits of arbitration as a means for companies to bring claims *against* consumers. We saw, in the NAF era, that arbitration could be immensely popular as a means for companies to bring collections actions against consumers. Two reports by Public Citizen showed that companies were, during that era, filing thousands upon thousands of claims against consumers in arbitration and generally enjoying great success. PUBLIC CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>; PUBLIC CITIZEN, *THE COSTS OF ARBITRATION* (2003), available at <http://www.citizen.org/documents/ACF110A.PDF>. See also FEDERAL TRADE COMMISSION, *REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION* (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>. However, with the demise of NAF it appears arbitration is no longer popular as a collection tool and, moreover, this alternative use of arbitration is tangential to the question of whether individualized consumer arbitration might serve as an adequate substitute for class actions. See *supra* note 64 for further discussion of the demise of NAF.

103. See Chavez & Gertler LLP, *supra* note 76, at 3 (observing that while arbitration may be an efficient tool to resolve certain individual claims “it is not an effective way to remedy business

### A. *Procedurally Easy Claims*

“Procedurally easy” claims have four elements:<sup>104</sup>

- (i) consumers know they have been harmed;
- (ii) consumers know that the harm is possibly or likely legally actionable;
- (iii) the claim is not particularly complicated or costly to present, relative to the likely recovery; and
- (iv) the consumer seeks individualized monetary relief.

If any of these elements are not met a claim that would have been PE likely becomes PD.

Let’s consider some examples of “procedurally easy” claims. The consumer bought a hair dryer at a local retail store that does not work. Or, the consumer ordered a bicycle on-line that arrived in pieces or not at all. Perhaps the consumer was charged for a long distance phone call to China that she knows she did not make. Possibly the consumer was substantially overcharged by her dentist. Or, the moving company broke consumer’s antique dresser.

While the consumer might or might not prevail on these claims, they are at least fairly easy to present from a procedural standpoint. In each instance the consumer not only likely knows she was harmed, but also has good reason to believe that harm was legally actionable. When a product that is purchased does not work, arrives broken, or never arrives, the consumer knows right away she has a problem. While the dentist’s or phone company’s alleged overcharges may not be noticed, if they are small, a large overcharge will likely be caught. The consumer knows that

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practices that commonly affect hundreds or thousands of consumers”). The mere fact that certain consumer claims are difficult to present does not resolve the question of who should bring such claims. Well-funded government agencies could help protect consumers with procedurally difficult claims. See also J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1176–1217 (2012), available at <http://scholarship.law.wm.edu/wmlr/vol53/iss4/3> (exploring whether private parties, or instead government regulators, are best positioned to present particular claims). Glover suggests that public regulators will generally have “informational advantages” for claims such as those pertaining to consumer finance or housing discrimination in which a “fairly large set of data is needed for the illumination of potential wrongdoing, . . . comparative analysis of the factual information is desirable; or the relevant information is complex and thus “not easily understandable by non-experts.” *Id.* at 1180. Individuals, by contrast, may have a comparative advantage to pursue a simpler claim such as whether they were denied overtime pay. *Id.* at 1183–84. For a discussion of the possibility of beefed up government enforcement see *infra* Part IV.B.

104. A fifth element could be that the company has an incentive to please the consumer. Companies that expect repeat business from customers or that fear customers may malign the company’s reputation have good reason to accommodate the customer’s concerns, which means it will be easier, procedurally, for the customer to present the claim and receive relief.

products should arrive as promised, and should work or fit, and that service providers should not overcharge, so she has a good sense that she may have a viable legal claim when these aspirations are not met. As to presentation and evidence, these claims are straightforward as well. The consumer herself can explain or testify as to the nature of the problem. She can in some cases use a photograph or video to document the claim. While a win is not guaranteed, if the consumer is not believed, the consumer can at least present her case, individually, reasonably effectively. Finally, the consumer in these situations simply wants monetary or in-kind compensation.

Procedurally easy claims can be presented in various ways. Customers can simply write or call the company's customer service department, seek relief through their credit card provider (or in the case of the dentist their health insurance company), or pursue arbitration or even small claims litigation. The consumer merely needs a venue in which he or she can tell the story. If, as is often the case, the company has an incentive to do right by the consumer, such disputes can frequently be resolved by contacting customer service.<sup>105</sup> And, if the company is playing hardball the consumer will often obtain relief through a chargeback or perhaps through arbitration or small claims litigation.<sup>106</sup>

Of course, even procedurally easy claims are often not presented by consumers who believe they have been wronged. As Amy Schmitz details "[b]usinesses understand that most consumers do not exert the time and energy necessary to pursue their purchase complaints."<sup>107</sup> But, at least it is not conceptually difficult to devise a system that will allow motivated consumers to assert their claims. Most of the sixty million claims currently being handled by eBay and PayPal on an annual basis<sup>108</sup> are probably procedurally easy.

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105. As Amy Schmitz has explained, the squeaky wheels (here the consumers who take the time to complain) often get the grease they demand. Schmitz, *Access to Consumer Remedies*, *supra* note 95, at 280.

106. See *supra* text accompanying notes 81–84 for discussion of chargebacks. Of course small claims court is another venue in which consumers can potentially explore their claims.

107. Schmitz, *Access to Consumer Remedies*, *supra* note 95, at 291 (attributing some of consumers' failure to raise claims to inertia, over-optimism and rule-following tendencies). See also Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 712 (1976) (concluding that only 39.7% of customers surveyed took some kind of action to complain about perceived problems).

108. See Rule, *supra* note 78 and accompanying text.

## B. *Procedurally Difficult Claims*

### 1. The Nature of Procedurally Difficult Claims

Procedurally difficult claims, in turn, present greater problems. Such claims possess one or more of the following elements:

- (i) the consumer does not realize she has potentially been injured;
- (ii) the consumer does not realize that an injury she has suffered may be legally cognizable;
- (iii) the consumer's claim is difficult and expensive to present, relative to the anticipated recovery;<sup>109</sup> or
- (iv) the consumer seeks injunctive or other group relief.<sup>110</sup>

When any or several of these features are present, it becomes difficult if not impossible for consumers to present their claims individually, whether through customer service, chargebacks, arbitration, or other individual means.

Let us consider some examples of PD claims. Daniel Rodriguez applies for a car loan in Los Angeles. Daniel is offered a loan by the bank, but the interest rate is higher than the bank offers to similarly situated Caucasians.<sup>111</sup> Discrimination on the basis of race or ethnicity is illegal, and Daniel could potentially file a lawsuit under the Equal Credit Opportunity Act.<sup>112</sup> However, Daniel has a PD claim. Although he may be aware of the interest rate he was offered, he may well not know that others

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109. See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 77 (2008) (observing that the harm caused by consumer credit products is typically a high-probability, low magnitude harm for which individual litigation is not effective, and that companies use arbitration to elude class actions which otherwise might change their economic incentives).

110. See Charles S. Mishkind & V. Scott Kneese, *The Big Risks: Class Action and Pattern and Practice Cases*, in PRACTICING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, 637 PLI/Lit 339, 398 (2001) ("injunctive relief is an important part of resolving a class action—often the most important part, as injunctive relief often changes the way a company does business").

111. Public Justice, a national public interest law firm specializing in socially significant civil litigation, has noted that whereas in the early 2000s "several large class actions were settled against auto finance lenders such as GMAC, Ford Motor Credit, etc., involving shocking disparities in the finance charges to white and African-American borrowers," resulting in injunctive relief that largely eliminated this problem, car dealers have subsequently begun to use arbitration clauses to shield lenders from such suits. Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements 8 (June 23, 2012), available at <http://www.regulations.gov/#!docketDetail;ct=FR%252BPR%252BN%252BO%252BSR;rpp=25;po=0;D=CFPB-2012-0017>. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818-19 (1991) (discussing study showing that car dealers discriminate with respect to price on the basis of gender and race).

112. 15 U.S.C. § 1691 (2006).

were offered lower rates nor certainly that rates may depend on race or ethnicity. Daniel also may not know that the injury he suffered is legally cognizable. Without knowing about the race and ethnicity of other loan applicants, and without being aware of details of their loan applications, Daniel has little or no reason even to suspect discrimination.<sup>113</sup> As one attorney put it, “The majority of [loan applicants] are not even aware that they paid or continue to pay extra for their . . . loans.”<sup>114</sup>

Even if Daniel suspected discrimination, perhaps because of a newspaper story, word of mouth, or publicity by a government agency on the subject, he likely could not effectively bring a claim individually. While Daniel’s damages may be significant, from his personal standpoint, they likely are not sufficient to induce an attorney to take his claim on a contingent fee basis. Perhaps the loan Daniel got was for \$30,000. Had he gotten a somewhat lower interest rate, how much better off would he have been than he is now? A few hundred dollars? A few thousand? An attorney cannot afford to take a case on a contingent fee basis if the damages are that low, even where attorney fees are available to prevailing parties, as is the case with ECOA.<sup>115</sup> Nor can Daniel likely afford to hire an attorney by the hour. He probably has no substantial savings he can use for that purpose. And, without an attorney it will be virtually impossible for

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113. Along similar lines, researchers recently found that bankruptcy attorneys were apparently steering clients towards particular types of bankruptcy based on their race. Tara Siegel Bernard, *Blacks Face Bias in Bankruptcy, Study Suggests*, N. Y. TIMES, Jan. 21, 2012, at A.1, available at <http://www.nytimes.com/2012/01/21/business/blacks-face-bias-in-bankruptcy-study-suggests.html> (finding bankruptcy attorneys were far more likely to steer blacks than whites into more expensive Chapter 13 bankruptcies, even when members of the two races had identical financial situations).

114. Austin Kilgore, *Wells Fargo Suit Gets Class Action in Los Angeles*, HOUSINGWIRE (Sep. 1, 2009), <http://www.housingwire.com/news/wells-fargo-suit-gets-class-action-los-angeles> (discussing home loans).

115. Virtually no case is enough of a “sure thing” to warrant taking it on a mere chance of being reimbursed for one’s time. See Gilles & Friedman, *supra* note 18, at 21–22 (“The main problem [with consumers pursuing individual arbitration] will be attracting plaintiffs’ counsel: rational lawyers will be deterred by prohibitive disincentives. The availability of attorneys’ fees under fee-shifting statutes is not a realistic inducement in consumer cases.”); Glover, *supra* note 103, at 1184 (“The fee-shifting mechanism is unlikely to provide sufficient enforcement incentives for anyone other than individuals possessing high-value claims . . .”); Statement of Robert C. Gilbert, *supra* note 76, at 7 (explaining difficulties of securing counsel to represent consumers in individual disputes regarding retail banking fees). See Jean R. Sternlight, *The Supreme Court’s Denial of Reasonable Attorneys’ Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535, 537–39 (1989) (discussing how Supreme Court’s attorneys’ fee decisions have “ensured that attorneys receive far less than is necessary to compensate them reasonably,” and that for that reason “many civil rights plaintiffs with colorable claims cannot find attorneys willing to represent them.”). For discussion of remedies available in ECOA claims see *Equal Credit Opportunity*, FED. TRADE COMM’N, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm>.



Daniel to win a claim like this.<sup>116</sup> To prevail he would need to conduct substantial and complicated discovery regarding the loan policies at the Bank, and how they were applied to a broad range of people. He would need to send out document requests, deal with objections thereto, and conduct numerous depositions. He probably would need to retain at least one expert witness.

The example is not purely hypothetical. One law firm, which successfully handled class actions of this nature and secured monetary and nonmonetary relief for the class, stated that:

The [class] litigation [we handled] would not be possible in the wake of *Concepcion*. Individual arbitration would not protect consumers in cases involving discrimination because: (1) consumers are generally unaware that their rights have been violated; (2) individual litigation is prohibitively expensive, given the data analysis, depositions, document review, and sophisticated legal work required to prove a claim; and (3) an arbitrator would be unlikely (and defendants would argue, unable) to order nationwide injunctive relief in an individual case to stop this practice.<sup>117</sup>

But such discrimination claims are not that exceptional, and instead merely exemplify PD claims. Other PD claims might include claims that Facebook is misusing its customers' private information,<sup>118</sup> banks are refusing to refund members of the armed services certain payments to which they are entitled in the event they have to end a car lease early because of being called to active duty,<sup>119</sup> payday lenders were subjecting customers to excessive interest fees,<sup>120</sup> food a consumer ate was harmful,<sup>121</sup>

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116. While a government agency could potentially help enforce the rights of Daniel or other wronged consumers, such agencies are not currently sufficiently well-funded to represent all the Daniels in the United States. See *infra* Part III.B.1.

117. Letter from David Stellings, *supra* note 86, at 5.

118. Somini Sengupta, *To Settle Lawsuit, Facebook Alters Policy for Its Like Button*, N. Y. TIMES, June 22, 2012, at B2, available at <http://www.nytimes.com/2012/06/22/technology/to-settle-suit-facebook-alters-policies-for-like-button.html> (discussing settlement of a class action lawsuit brought against Facebook to change practice whereby Facebook was using customers' names and photos to advertise products without receiving express permission from those customers).

119. Matthew Wolf, a captain in the Judge Advocate General Corps of the Army Reserves, attempted to present such a claim under the Servicemembers Civil Relief Act on behalf of a class of similarly situated members of the armed services. However, the federal district court disallowed his class action on the ground it was precluded by an arbitral class action prohibition. See *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-3338 (NLH/KMW), 2012 WL 1079340 (D.N.J. Mar. 29, 2012). See also Segal, *supra* note 25 (reporting on Wolf's situation and the impact of *Concepcion* on prospective class actions).

120. See, e.g., *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 442, 449 (2006) (finding, in putative class action brought against payday lender on usury grounds, that arbitrator, not court must determine whether arbitration clause was illegal and therefore void *ab initio*); *Robinson v. Title Lenders*, No. SC 91728, 2012 WL 724669 (Mo. Mar. 6, 2012) (finding in

a particular car has a tendency to tip over on tight turns,<sup>122</sup> banks were charging customers excessive overdraft fees,<sup>123</sup> a school made fraudulent promises as to students' employment prospects,<sup>124</sup> a computer lacks the promised gigabyte capacity,<sup>125</sup> claims that a cell phone provider could not

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putative class action brought against payday lender that the arbitration clause was not unconscionable based on the class waiver).

121. *E.g.*, *Levy v. Keystone Food Products*, No. 07-5502, 2008 WL 4115856 (E.D. Pa. Aug. 28, 2008) (class action alleging damages due to alleged mislabeling of food as "low-fat" and containing only 120 calories); *Peet v. Sweet Onion, Inc.*, No. 251736, 2005 WL 624895 (Mich. App. Mar. 17, 2005) (putative class action claiming damages due to food poisoning at a wedding anniversary party).

122. *E.g.*, *Am. Suzuki Motor Corp. v. Super. Ct.*, 44 Cal. Rptr. 2d 526, 527 (Dist. Ct. App. 1995) (class action lawsuit against Suzuki due to the alleged tendency of its Samurai SUVs to roll-over under ordinary driving conditions); *In the Matter of Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002) (class action brought against Bridgestone/Firestone for highly defective tires).

123. Statement of Robert C. Gilbert, *supra* note 76 (discussing handling of Multidistrict Litigation No. 2036, *In Re: Checking Account Overdraft Litigation*, in which 70 law firms successfully represented millions of American banking customers with claims that banks used improper practices to maximize overdraft fees, and concluding that following *Concepcion* a number of banks will be able to continue their improper practice as class actions won't be possible and individual claims along these lines are infeasible). The statement explains that individual arbitrations could not secure relief with respect to the overdraft practices because, *inter alia* plaintiffs need to rely on substantial expert testimony and discovery, because many consumer arbitrations are required to be completed in thirty days without substantial discovery, and because the costs of these claims would be prohibitive in light of individual prospective gains. *Id.*

124. *Are Law Schools the "Next Tobacco" for Class Action Lawyers?*, FORBES (Mar 16, 2012), <http://www.forbes.com/sites/wlf/2012/03/16/are-law-schools-the-next-tobacco-for-class-action-lawyers/> (reporting on class action claims brought against law schools that allegedly published exaggerated employment rates); Terence Chea, *Culinary School Grads Claim They Were Ripped Off*, ASSOCIATED PRESS (Sep. 14, 2011), [http://www.huffingtonpost.com/2011/09/06/culinary-school-grads-ripped-off\\_n\\_950107.html](http://www.huffingtonpost.com/2011/09/06/culinary-school-grads-ripped-off_n_950107.html) (discussing class actions suits brought against Career Education Corp., alleging that some of its for-profit Le Cordon Bleu culinary schools misrepresented graduates' earnings potential and job prospects, and noting that settlement will provide students as much as \$20,000 each); Tom McNichol, *Learning the Hard Way: For-profit Colleges Pay Dearly for their Students' Discontent*, CALIFORNIA LAWYER (Oct. 2011), <http://www.callawyer.com/clstory.cfm?eid=918229> (discussing class actions filed against for-profit schools, such as Westwood College's subsidiary Westwood Apex, for misrepresenting its true cost of attendance, accreditation, and job placement rates, due to deceptive recruitment practices); *Kilgore v. KeyBank*, Nat. Ass'n, 673 F.3d 947 (9th Cir. 2012) (mandating that claims against private for-profit colleges for engaging in deceptive practices in an effort to attract students be resolved in individualized arbitration); *Bernal v. Burnett*, 793 F. Supp. 2d 1280 (D. Colo. 2011) (same).

125. *E.g.*, *Goldberg v. Apple Computer, Inc.*, No. BC302530, 2004 WL 4979232 (Cal. Super. Mar. 30, 2004) (discussing class action lawsuit attempted against Apple, Gateway, Dell, and other major computer manufacturers for misrepresenting the size of their computers' hard drives); *Safier v. Western Digital Corp.*, No. 05-03353 BZ, 2006 WL 735056 (N.D. Cal. Feb. 1, 2006) (class action lawsuit attempted against Western Digital Corporation for misrepresenting the hard drive sizes of its computers); *see also Western Digital Settles Hard-Drive Capacity Lawsuit*, FOXNEWS.COM (June 28, 2006), <http://www.foxnews.com/story/0,2933,201269,00.html> (describ-

slow down or eliminate customers' access to the "unlimited data plan" provided for in their contract,<sup>126</sup> or claims that a seller failed to disclose radon on a property.<sup>127</sup>

With respect to some of these potential claims, the consumer may not even realize she has been harmed. Consumers who do not peruse their bills extremely carefully may be subjected to interest charges or other fees that they may not notice.<sup>128</sup> And, it is well known that most of us do not read the fine print.<sup>129</sup> An individual who is exposed to tainted food<sup>130</sup> or a toxic chemical in the home<sup>131</sup> or in a product they purchased<sup>132</sup> may have no way

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ing terms of the settlement in *Safier*, including giving free software to a million previous consumers).

126. See JUSTICE DENIED, *supra* note 6, at 12–14 (discussing class action brought by T-Mobile customer Trent Alvarez, and explaining that post-*Concepcion* the court rejected plaintiff's attempt to void the arbitral class action waiver contained in the contract).

127. *E.g.*, Casale v. Segal & Morel at Lopatcong, LLC, No. A-1879-10T4, 2011 WL 2306906 (N.J. Super. App. Div. May 12, 2011) (class action claiming sellers and radon mitigation system installers provided malfunctioning radon mitigation systems that did not pass radon detection tests); see also State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders, 717 S.E.2d 909, 913 (Va. 2011) (class action against new-home constructor for injuries from radon gas leaking into new homes due to alleged poor construction of houses).

128. CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668 (2012) (attempting to bring class action against credit card company which allegedly assessed fees of which consumers were unaware, thereby impairing consumers' credit ratings).

129. *E.g.*, Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that is Yet to be Met*, 45 AM. BUS. L.J. 723, 730-31 (2008) (empirical evidence shows that most consumers do not read [standard form contracts]); Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 160 (2007) ("consumers rarely read or understand" arbitration agreements); Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 09-40, 2009), available at <http://ssrn.com/abstract=1443256> (concluding that just one or two among a thousand online shoppers reviewed terms provided by online merchants). See also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217 (2003).

130. *E.g.*, *In re* Pet Food Prods. Liab. Litig., 629 F.3d 333 (3d Cir. 2010) (class action brought with regard to contaminated pet food).

131. *Smith v. Behr Process Corp.*, 54 P.3d 665 (Wash. Ct. App. 2002) (alleging through class action that household products intended for use on exterior wood surfaces caused mildew damage in homes); *German v. Fed. Home Loan Mortg. Corp.*, No. 93 Civ. 6941 (MBM), 1998 WL 812478, at \*1 (S.D.N.Y. Nov. 16, 1998) (bringing class action against manufacturers of hazardous lead paint and owners and managers of apartment buildings who allegedly knew the paint had been used in the buildings but did not warn tenants).

132. *E.g.*, *Ford v. Toys R Us, Inc.*, No. W2005-01117-COA-R3-CV, 2006 WL 561865 (Tenn. Ct. App. Mar. 9, 2006) (bringing class action against Toys R Us, Inc. for allegedly selling children's necklaces made entirely from lead); *Jones v. Allercare, Inc.*, 203 F.R.D. 290 (N.D. Ohio 2001) (bringing class action lawsuit against producer of household products alleging that ingredients caused adverse medical reactions amongst consumers); *Harding v. Tambrands Inc.*, 165 F.R.D. 623 (D. Kan. 1996) (attempting class action lawsuit against manufacturers of tampons for allegedly causing toxic shock syndrome in consumers).

of knowing their health has been endangered. Nor will it immediately be evident that a computer lacks the promised capacity.<sup>133</sup>

Further, even consumers who know they have been billed or otherwise harmed will often not know that inflicting the harm is illegal. Financial institutions may impose interest and late fees. Which such charges are impermissible?<sup>134</sup> Some cars are just more prone to tip than others, all brakes and tires inevitably give out, and everyone knows not all medical expenses are reimbursable. Which of these problems is likely to lead to a victory in court for the consumer?

Some may contend that if a consumer does not realize he has been harmed then surely he has not been harmed in any significant way. Yet, the examples above and many others defeat this contention. Why should we protect only those consumers who realize they have been harmed? A consumer who has been defrauded or poisoned or victimized by discrimination has been harmed, whether or not they are cognizant of that harm.

Consumers' claims may also be procedurally difficult, even when consumers know or reasonably believed they have been wronged by illegal conduct, if it is not feasible for them to bring a claim in any forum. That is, the costs of complaining about a supposed problem may exceed the likely benefits of making the complaint. This problem, of costs exceeding likely gains, is well recognized in the litigation context.<sup>135</sup> "Negative value" suits are those in which the likely cost of pursuing relief exceeds the likely payoff.<sup>136</sup> As Justice Breyer noted, dissenting in *Concepcion*, "The realistic

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133. See *Goldberg*, 2004 WL 4979232; *Safier*, 2006 WL 735056; *Western Digital Settles Hard-Drive Capacity Lawsuit*, *supra* note 125.

134. The author, for example, has a bill from her cable provider showing fees for "FCC access charge," "FCC Fee," "franchise fee," "Federal Excise Tax," "Local Telecommunications Tax," "Telecommunications Relay," "Federal USF," "Carrier Cost Recovery Fee," "State Universal Service Fund Fee," and "Federal Universal Service Fund." These mysterious fees total almost \$15 per month, and thus almost \$200 per year.

135. See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 293 (2010) ("Both sides recognize that entrepreneurial litigation enables negative value claims to be litigated . . .").

136. See Lucian A. Bebchuk & Alon Klement, *Negative-Expected-Value Suits*, in *PROCEDURAL LAW AND ECONOMICS* (Chris Sanchirico ed., 2011), available at <http://ssrn.com/abstract=1534703>; see also Coffee, *Litigation Governance*, *supra* note 135, at 292 ("'[N]egative value' claims—that is, those claims that, while meritorious, have an enforcement cost in excess of their individual value."); *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”<sup>137</sup>

Yet, the problem of “negative value” can arise not only in litigation, but in other forums as well. While the high cost of discovery and the formality of litigation obviously create the possibility that the cost of pursuing a remedy will exceed the likely payoff, this relationship is possible as well when pursuing a claim in arbitration or even just with customer service.<sup>138</sup> Similarly, although the cost of pursuing a claim in arbitration or with customer service may be less than the cost of pursuing that claim in litigation, the cost of pursuing a claim is never zero.<sup>139</sup> Even in the rare case where the monetary costs were zero, because there was no filing fee and the consumer could file without leaving her home or retaining representation, the consumer would still want to take account of non-monetary costs such as lost time or frustration.

Further, some small claims, by their nature, are complex and difficult to prove. Unlike the PE claims described above, where the consumer can essentially tell her story and hope to prevail, PD claims will often require a claimant or her representative to amass, understand and organize complicated facts; to conduct legal research; to offer expert testimony; or to write complex legal arguments. That is, except in very unusual circumstances it is highly unlikely that a consumer could present a PD claim on her own, unrepresented by an attorney.<sup>140</sup> Consider how a consumer might go about trying to prove that he was charged excessive interest by a payday lender, or that a check-bouncing fee was too high. Unless the consumer happened to have a background in accounting or law, the task seems impossible, and even with that background the consumer

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137. *AT&T Mobility v. Concepcion*, 563 U.S. 1740, 1761 (2011) (Breyer, J., dissenting) (quoting *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.)).

138. Schmitz, *Access to Consumer Remedies*, *supra* note 95, at 294-95. (arguing that companies make it difficult to pursue claims so that the time and expense needed to battle with customer services representatives is not worthwhile).

139. Even those consumers who initially file claims may well give up at some point along the way, as they run out of time and resources. Schmitz, *Access to Consumer Remedies*, *supra* note 95, at 309 nn.237-38; See also Marco B.M. Loos, *Individual Private Enforcement of Consumer Rights in Civil Courts in Europe* (Ctr. For the Study of Eur. Contract Law Working Paper Series, Paper No. 2010/01), available at <http://ssrn.com/abstract=1535819> (finding that almost half of consumers who filed an initial complaint gave up on the claim without reaching an agreement or resolution).

140. See Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 *FORDHAM URB. L.J.* 381 (2010) (arguing that individuals may have as great a need for representation in ADR processes as they do in litigation).

might not be able to meet the challenge.<sup>141</sup> Or, consider a consumer who was disappointed by her new phone's tendency to lose reception.<sup>142</sup> The monetary damages are small, but proving that the phone is dropping too many calls will likely require technical expertise and perseverance. Is the problem really the phone? The customer's location? Something the customer is doing when she speaks on the phone?

Moreover, even larger claims can be too costly to bring in informal settings as well as in litigation. To prevail in a loan discrimination claim a consumer would have to not only show that she met the relevant test for obtaining a loan at a particular rate, but also that she had presented those facts to the lender, and that the lender when faced with similar applications from members of other ethnic or racial groups handled the applications differently.<sup>143</sup> To prevail in a claim alleging that food, a home or a product was somehow contaminated the consumer would need to prove the contamination, prove that the contamination was medically harmful, and prove that the defendant was aware of the contamination and failed to take adequate steps to prevent that harm.<sup>144</sup> Whether the consumer asserts such claims to customer service, on-line, or in arbitration she will need to gather substantial legal and factual evidence and will likely need to present expert opinion. It is virtually impossible to imagine a consumer presenting such a claim on her own, without legal representation.

Finally, claims that seek injunctive relief, rather than individual compensation or damages, are often procedurally difficult. When a consumer merely asks to receive a refund or an alternative product or service a dispute is far simpler than when the consumer seeks to change a company's rules and procedures. Consumers who seek such injunctive relief must typically prove more and often must also deal with greater

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141. Statement Robert C. Gilbert, *supra* note 76, at 6 (observing that plaintiffs in class action bank overdraft cases "have only been able to determine which overdrafts were wrongful by having an expert examine the banks' computer data and run an algorithm that deconstructs precisely which transactions caused which overdraft fees").

142. See Charlie Sorrel, *iPhone 4 Loses Reception When Antenna Band Is Touched*, WIRED (June 24, 2010, 8:30 AM), <http://www.wired.com/gadgetlab/2010/06/iphone-4-loses-reception-when-antenna-band-is-touched-firmware-issue/>; Jason O. Gilbert, *Users' 8 Biggest Problems With Apple's iPhone 4S*, HUFFINGTON POST (Oct. 17, 2011, 5:42 PM), available at [http://www.huffingtonpost.com/2011/10/17/iphone-4s-problems-issues-complaints\\_n\\_1015538.html](http://www.huffingtonpost.com/2011/10/17/iphone-4s-problems-issues-complaints_n_1015538.html).

143. See James Sacher, *Housing Discrimination Litigation*, 28 AM. JUR. TRIALS 1 (1981).

144. Jonathan Harr's book, *A CIVIL ACTION*, describes litigation involving a claim that two companies' chemical disposal policies polluted the water of Woburn MA and caused residents to get cancer. JONATHAN HARR, *A CIVIL ACTION* 6, 295, 456 (Vintage Books, 1996). This litigation lasted more than eight years and bankrupted plaintiffs' attorneys. See Jerome P. Facher, *The View from the Bottomless Pit: Truth, Myth, and Irony in A Civil Action*, 23 SEATTLE U. L. REV. 243, 243 (1999) (defense attorney Jerry Facher, was involved in the litigation for over 8 years).

resistance from the company. While a company may be willing to relieve one consumer of a particular charge, it would be far more costly to take this action as to all consumers.

## 2. Can Procedurally Difficult Claims be Brought Individually in Arbitration?

The question at the heart of this Article is whether it is feasible to devise an individualized dispute resolution process that could effectively handle procedurally difficult claims. Can we, for example, design flexible, cheap, accessible on-line processes and use these to resolve claims that would otherwise be procedurally difficult? Would that it were so!

Unfortunately, however, for the most part it does not seem feasible to use inexpensive accessible individualized processes to resolve procedurally difficult claims. While inexpensive accessible processes are desirable, they do not solve the problems linked to procedurally difficult claims. Consider each of the elements of PD claims, and you will see that they are not easily solved by inexpensive accessible individualized processes.

First, consider the consumer who does not realize she has been harmed, or who does not realize she has been harmed in an impermissible way. As the consumer does not realize she has been harmed, or harmed illegally, she will not file a claim, no matter how easy it might be to file a claim. In other words, making a dispute resolution procedure cheaper or more accessible does not solve the problem of consumers who do not know they were harmed, or do not realize that the harm was illegal.

Are there ways to improve individualized arbitration as a tool to bring procedurally difficult claims? Can we use the Internet or other measures to overcome some or all of the challenges of procedurally difficult claims? Can we provide attorneys with fees or other incentives to support bringing such claims? At first glance, this all sounds promising, and to a limited extent this likely can work. Attorney Heather Peters gained a lot of national attention when she opted out of a class action settlement and brought and won almost \$10,000 in a lawsuit on her own behalf in small claims court against Honda, alleging that her hybrid car did not provide the fifty miles per gallon that was promised.<sup>145</sup> Some commentators stated, at the time of her victory, that it might spark a new means of litigating consumer claims other than through class actions.<sup>146</sup> Indeed, a number of other consumers

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145. See Jerry Hirsch, *Honda Loses Small Claims Court Suit Over Civic Hybrid Fuel Economy*, L.A. TIMES (Feb. 2, 2012), available at <http://articles.latimes.com/2012/feb/02/business/la-fi-autos-honda-lawsuit-20120202>.

146. *Id.* Indeed Ms. Peters had opted out of a class action settlement that would have brought her a few hundred dollars and coupons she could use towards buying another Honda. She urged

followed Ms. Peters' example and filed their own small claims suits against Honda.<sup>147</sup>

Yet, while this approach might succeed in a few instances, for the most part it seems implausible. In the end, Ms. Peters lost her case on appeal and was required to pay Honda \$75 in court costs.<sup>148</sup> More generally, one problem with using the Internet to replace class actions is that before sending out a notice to all consumers that they may have been wronged by an improper charge, an inflated price, a defective product, or a contaminated food, someone would have to figure out that a wrong had been committed. But who would that someone be? If an individual consumer, how would they figure it out? And, would their posts to the Internet be seen and credited or instead ignored by other consumers?

Maria Glover puts the issue well:

[W]ithin the area of consumer welfare, where harm is frequently hidden and widely dispersed, the availability of arbitration pursuant to such fee-shifting clauses is insufficient to bring about private enforcement of wrongdoing. Rather, the ferreting out of misconduct like consumer fraud requires expertise frequently not in the hands of consumers; they are thus unlikely, on their own, to possess or process relevant information in such a way that would motivate them to arbitrate. Moreover, it is inconceivable that a private attorney, who might be sufficiently expert in consumer fraud, would have the economic incentive to root out consumer fraud if the only economic gain is to be had through individual arbitrations; the significant investment of resources required to identify wronged individuals and to pursue their small claims one-by-one likely would not justify any eventual gains.<sup>149</sup>

Perhaps individual attorneys could make posts on the Internet regarding problems they had identified, and then ask consumers who felt they had been aggrieved to call the attorney's office and become a client. Under one variant of this idea, the attorneys might even buy potential legal claims from consumers, although the law regarding sale of claims is quite

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other consumers to opt out of the settlement as well. See also Jerry Hirsch, *Honda Wins Reversal of Civic Hybrid Small-Claims Judgment*, L.A. TIMES (May 9, 2012), available at <http://www.latimes.com/business/money/la-fi-mo-honda-civic-lawsuit-20120509,0,3088344.story>.

147. *Honda Wins Reversal of Civic Hybrid Small-Claims Judgment*, HUFFINGTON POST (Apr. 20, 2012, 6:07 PM), [http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit\\_n\\_1441913.html](http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit_n_1441913.html) (stating that out of 200,000 class action members, 1,700 were spurred by Ms. Peters to opt out of the settlement as of April 2012, presumably to bring claims on their own).

148. Hirsch, *supra* note 145 (Honda reported it won all but one of the other eighteen lawsuits brought against it on these grounds as well).

149. Glover, *supra* note 103, at 1210.



disparate.<sup>150</sup> We already have this system partially in place.<sup>151</sup> Attorneys do advertise potential problems with particular drugs, for example, and ask people to call in if they feel they have been adversely affected by that drug.<sup>152</sup> For those consumers who may at least suspect they have a claim, attorneys also have also created web sites to provide more information and attract the consumer as a client.<sup>153</sup> Could this same system be used to help consumers aggrieved by excessive interest fees or anti-competitive behavior?

Certainly attorneys already do make use of the Internet to identify potential clients. Surely this can be effective in some cases, for example when consumers' claims are large enough and easy to identify. However, it does not seem likely that they can use this approach to replace class actions. First, while attorneys may advertise potential wrongs it is quite unclear how many consumers will see those ads, know that the ads apply to them, or choose to respond. Consumers may be quite aware that they own a particular Honda hybrid, but they are far less likely to be aware that they are subjected to particular small but incorrect charges on their cell phone bill. Second, we all suffer from information overload as it is. How many of us have ever even looked at the websites that already list ongoing class actions from which one might seek relief,<sup>154</sup> much less taken any steps to benefit from such a website?

Apart from the limited extent to which the Internet can be used to inform consumers of possible claims, it also seems unlikely that the Internet can help many consumers *win* their claims. Bringing a claim is one thing, and winning that claim yet another. Even if a consumer learned, through

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150. For discussion of the state of the law regarding the permissibility of selling legal claims see Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005).

151. *Id.* at 699-700 (discussing the states' different approaches to barring and permitting alienation).

152. See BowersoxLawFirm, *PRADAXA Injury Lawyer—Small injuries could equal death*, YOUTUBE (Mar. 21, 2012), <http://www.youtube.com/watch?v=R37zL-qekeQ> (ad regarding alleged negative effects of blood-thinning medication Pradaxa); Goodlegaladvicenow, *Antidepressants Effexor, Paxil, Zoloft and Wellbutrin Linked To Birth Defects*, YOUTUBE (Mar. 24, 2011), <http://www.youtube.com/watch?v=SQvMqMQkpec>. (ad regarding anti-depressants potentially causing birth defects); MSInternetConsulting, *Yaz Side Effects Lawsuit*, YOUTUBE (Sept. 17, 2009), <http://www.youtube.com/watch?v=Q73-6mMQ9a0> (ad regarding alleged negative effects of Yaz birth control pills).

153. See *Seroquel Lawyers*, VILES & BECKMAN, <http://www.vilesandbeckman.com/seroquel.asp> (attorney website regarding potential for filing claims due to taking antipsychotic medication Seroquel) and *Yasmin & Yaz Lawyers: Yasmin Lawsuits*, FORTHEPEOPLE.COM, <http://www.forthepeople.com/yasmin-and-yaz-lawyers-yasmin-lawsuits—11-2508.html> (attorney website regarding potential for filing claims due to taking Yaz and Yasmin birth control pills).

154. *E.g.*, CLASS ACTION WORLD, <http://classactionworld.com/>; TOP CLASS ACTIONS, <http://www.topclassactions.com/>.

the Internet, that she possibly had a viable claim that she was a victim of discrimination, excessive check bouncing fees, or that the pet food she had purchased was contaminated, she would have to present sufficient law and facts to prevail on that claim. As Ms. Peters (herself an attorney) discovered when she brought her claim against Honda in small claims court, winning large claims against a company is not easy in any setting. Without the assistance of an attorney it would be particularly difficult or impossible for a consumer to prevail on many claims, though she might of course recover on a very simple claim such as a mistaken charge on her cell phone bill. Internet or not, if a consumer wants to bring a claim involving complex facts or law, or which requires gathering of data on other consumers' experiences, it seems that someone must devote substantial resources to the claim. Whether that someone be a government agency, a plaintiffs' class action firm, or a State AG, it does not seem that individual consumers will be up to the job of proving claims of discrimination, tainted products, or complex financial charges.

#### IV. THE PRESENTATION OF PROCEDURALLY DIFFICULT CLAIMS

##### A. *Class Actions as a Device to Present Procedurally Difficult Claims*

While class actions may potentially be faulted on other grounds, the class action device seems perfectly devised to help resolve procedurally difficult consumer claims. First, class actions can solve the problem of consumers not knowing they were harmed, or not knowing they were harmed in an illegal way.<sup>155</sup> Class actions are representative claims.<sup>156</sup> Under the version of class actions covered by Federal Rule of Civil Procedure 23, named plaintiffs can represent other similarly situated persons who do not know they have been harmed, and who do not even know, at least initially, that a class action has been filed on their behalf.<sup>157</sup> Absent class members generally need not "opt in" to the class, and instead can recover as part of the class without needing to take any action

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155. Coffee, *supra* note 135 (discussing the representative nature of class actions in the United States and the advantages and disadvantages to the class with the opt-out model).

156. *Id.* The opt-out model for class actions used in the United States allows consumers who do not know they were harmed to learn of the harm and receive the benefits of the action without needing to take an affirmative action. *Id.*

157. Fed. R. Civ. P. Rule 23 permits a class to be certified so long as it meets the Rule 23(a) requirements of numerosity, typicality, commonality, and adequacy of representation, and so long as it falls into one of the Rule 23(b) categories. *See* Walmart v. Dukes, 131 S. Ct. 2541, 2548 (2011).

whatsoever.<sup>158</sup> Thus, a class action could be filed on behalf of persons who had been harmed by discriminatory lending or charged excessive fees or exposed to harmful chemicals even if the vast number of the members of the class had no idea they had been harmed, or harmed illegally. Only the named plaintiff and the attorney for the named plaintiff would necessarily have to be aware of the fact that the class members were allegedly harmed, or harmed in violation of the law.<sup>159</sup>

Second, class actions also offer a solution to the problem of claims that are too difficult or expensive to present, given their likely payout. In litigation as in life, there is often strength in numbers. When numerous persons join together in a class their prospective joint gains, even if quite small individually, are sufficient to permit attorneys to handle the case on a contingent fee basis.<sup>160</sup> The joint litigation also allows attorneys to provide the resources necessary to hire experts, do substantial discovery and legal research, and present a complex case.

Finally, class actions provide a vehicle whereby groups of consumers can assert claims for injunctive relief, as well as for damages. Whereas an individual consumer could, at most, expect to obtain a refund or a new product, a group of consumers suing as a class can and often does demand that a manufacturer or service provider change its practices.<sup>161</sup>

### *B. Are Class Actions the Only Means of Presenting Procedurally Difficult Claims?*

Few people, and certainly not this author, would claim that class actions are a perfect procedural device. Even groups that are great fans of the benefits of class actions may recognize that at times they are flawed.<sup>162</sup>

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158. Coffee, *supra* note 135 (discussing the U.S.'s preferred and only method of opting out, in contrast to Europe's opting in method).

159. With the U.S.'s method of opting out, not all members of the class need to know that they were harmed to be included in the class action. *Id.* at 296-97.

160. See Jeffrey I. Shinder, *In Praise of Class Actions*, NAT'L L.J. 39 (2010) (discussing how class actions can allow "little guy" consumers to join together to bring claims against credit card merchants).

161. See *Levy v. Keystone Food Products*, No. 07-5502, 2008 WL 4115856 (E.D. Pa. Aug. 28, 2008) (class action attempting to change the labels on food deemed "low-fat"); See also sources cited *supra* note 124 (class actions attempting to transform how for-profit schools represent employment prospects for students); sources cited *supra* note 125 (class actions attempting to alter the way computer manufacturers advertise the size of computer hard drives); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012) (class action attempting to modify credit card company's method of assessing fees).

162. For example, the organization Public Justice, which describes itself as America's public interest law firm, fights both to preserve class actions and also to curb their abuse. See *Class*

First, class actions can fairly be criticized for potentially allowing unethical class counsel to enter into settlements that provide greater benefit to plaintiffs' counsel or named plaintiffs than to absent class members.<sup>163</sup> If not properly supervised, class actions create this possibility for exploitation because by definition absent class members are not actively involved in the lawsuit and thus cannot necessarily adequately protect their own interests.<sup>164</sup>

Second, some also criticize class actions for supposedly providing too much leverage to the plaintiffs, and putting defendants in class actions under substantial pressure to settle even claims in which they would likely prevail. Critics espousing this position argue that class actions are simply so burdensome and expensive that they create a great incentive to settle, regardless of the merits.<sup>165</sup> The Supreme Court majority in *AT&T Mobility v. Concepcion* seemed quite sympathetic to this argument.<sup>166</sup>

From the author's perspective, these critiques are overblown. While class actions may at times have their flaws, what in this life is perfect? If flaws exist let us work to reform rather than entirely eliminate class actions. Still, it is at least worth exploring what alternative procedural tools might be useful for helping consumers bring procedurally difficult claims. We will first briefly examine government enforcement and then examine some additional more creative alternatives.

### 1. Government Enforcement as a Means to Assert Procedurally Difficult Claims

Government agencies are in many ways well suited to protect consumers who cannot easily protect themselves. Such agencies will, at least potentially, have the resources to identify harms that may not be apparent to individual consumers. Whereas an individual consumer may

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*Action Preservation*, PUBLIC JUSTICE, <http://www.publicjustice.net/Key-Issues-Cases/Access-To-Justice/Class-Action-Preservation.aspx>.

163. For literature discussing this problem see Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581 (2003); Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308 (1984).

164. Of course, Fed. R. Civ. P. 23(e) and its state rule equivalents are designed to require courts to notify all class members of prospective settlements and to require judges to approve only those settlements that are "fair, reasonable and adequate."

165. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3167313, at \*7; see also *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

166. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

not realize he has been victimized by loan discrimination, a government agency may gather statistics showing that an inordinate proportion of the persons denied loans or charged a high rate are racial or ethnic minorities.<sup>167</sup> Similarly, although individual consumers do not have the resources to test their foods or toys for toxic contents government agencies can possibly perform these tests.<sup>168</sup> Thus, government agencies can both help consumers who do not know they have been harmed, and also help consumers who do not know they have been harmed in an illegal fashion.

Government agencies can also protect consumers in situations where extensive resources are needed to present and prove a claim. They can hire experts, gather data, analyze statistics, and so on. Thus, agencies such as the Department of Housing and Urban Development,<sup>169</sup> the Federal Trade Commission,<sup>170</sup> or the newly created Consumer Financial Protection Bureau,<sup>171</sup> can potentially protect consumers who are unable to protect themselves.<sup>172</sup>

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167. People who believe they have been victimized by housing discrimination can file an online complaint with the Department of Housing and Urban Development. *Housing Discrimination*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/topics/housing\\_discrimination](http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination). Those who believe they have been victimized by FHA discrimination could file a claim with the Office of Fair Housing and Equal Opportunity. *Fair Housing—It's Your Right*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/yourrights](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights). For ECOA discriminatory claims, one files with the Federal Trade Commission. Equal Credit Opportunity, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm>.

168. The Agency for Toxic Substances and Disease Registry “serves the public by using the best science, taking responsive public health actions, and providing trusted health information to prevent harmful exposures and diseases related to toxic substances.” *Agency for Toxic Substances and Disease Registry*, ATSDR, <http://www.atsdr.cdc.gov/>. Also, the Environmental Protection Agency does testing on things such as radon, water pollution, bed bugs, mold, and lead. See U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/>.

169. See *Mission*, HUD.GOV, <http://portal.hud.gov/hudportal/HUD>. HUD aims to ensure everyone has access to robust communities and worthwhile, affordable houses. It does so by solidifying “the housing market,” filling the demand for “quality affordable rental homes,” using housing as a way of “improving quality of life,” building “inclusive and sustainable communities free from discrimination,” and changing “the way the HUD does business.” *Id.*

170. See *About the Federal Trade Commission*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/ftc/about.shtm>. The FTC works to avert monopolistic, deceptive, and/or unfair business practices, as well as help consumers and the public at large be more informed. It strives to achieve these goals without excessive inconveniences on commerce.

171. See *Learn about the Bureau*, CFPB, <http://www.consumerfinance.gov/the-bureau/>. The CFPB focuses on mortgage applications, credit cards, and other financial products for consumers. It provides consumers with information regarding those areas, supervises financial companies (including banks and credit unions), enforces federal consumer finance laws, and obtains and analyzes information regarding consumers, financial service providers, and consumer financial markets.

172. For an A to Z list of United States agencies geared to protect consumers, see *Consumer Guides and Protection*, USA.GOV, <http://www.usa.gov/Citizen/Topics/Consumer-Safety.shtml>.

While it is clear that government agencies are potentially well able to protect consumers who assert procedurally difficult claims, it is far less clear that United States government agencies will be provided with the funding necessary to permit them to effectively play this role in the foreseeable future. As numerous commentators and scholars have observed, whereas European countries have chosen to use a bureaucratic model of consumer protection,<sup>173</sup> the United States, at least until recently, had elected to empower consumers to protect themselves.<sup>174</sup> Even if, in theory, government agencies could do a great job of protecting consumers, poorly funded government agencies cannot.<sup>175</sup>

## 2. State AG Actions as a Means to Bring Procedurally Difficult Claims

If government agencies are poorly funded and class actions are eliminated, is all hope lost for enforcing consumer claims? We should, at least, consider a few more possibilities. Myriam Gilles and Gary Friedman have recently suggested that *parens patriae* actions brought by state attorneys general (“AGs”) could potentially fill part of the void left by class actions.<sup>176</sup> They urge that the state AGs could join together with former plaintiffs’ class action attorneys who, working on a contingent fee basis, could bring lawsuits on behalf of the AG’s office for the benefit of the citizenry.<sup>177</sup> In theory at least the idea is brilliant. The AG’s office and plaintiffs’ class action attorneys, working together, certainly would be capable of both identifying and also bringing procedurally difficult claims.

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173. For comparison of United States and European approaches to consumer protection see FABRIZIO CAFAGGI & HANS-W. MICKLITZ, EDS., *NEW FRONTIERS OF CONSUMER PROTECTION: THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT* (2009).

174. See, e.g., SEAN FARHANG, *THE LITIGATION STATE* (2010) (arguing that the United States moved sharply to rely on private rather than governmental enforcement beginning in the 1960s, and attributing this shift substantially to “legislative-executive ideological polarization.” See also ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9 (2001) (observing that “American way” of law enforcement emphasizes actions by individual litigants).

175. See Glover, *supra* note 103, at 1150, 1153 (noting that Congressional limitation of funding for the Department of Labor negatively impacted the Department’s enforcement of the Fair Labor Standards Act and that government agencies in general have limited resources which are often not sufficient to perform enforcement tasks); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 *LAW & CONTEMP. PROBS.* 137, 137 (2001) (noting importance of private enforcement to supplement public agencies that may be underfunded, or also subject to regulatory capture).

176. Gilles & Friedman, *supra* note 18, at 660.

177. *Id.* at 670, 673.

Further, companies likely could use neither arbitral class action exclusions nor restrictions on class actions to limit state AGs' actions.<sup>178</sup>

Yet, while I hope state AGs take Gilles and Friedman's suggestion and begin to bring these claims, I am not holding my breath. The companies that do not appreciate being regulated by government or sued in class actions also will not appreciate being sued by state attorneys general. These companies will likely work hard to defeat the election of any state attorney general who would boldly apply the Gilles/Friedman idea. The *Citizens United*<sup>179</sup> decision, having defeated many limits on election spending, will give companies great power to defeat state AGs of whom they do not approve.

### 3. Social Media Assisted Endeavors as a Means to Bring Procedurally Difficult Claims

Some have suggested that social media and the internet might be used to help multiple consumers bring claims against companies without resort to class actions. Indeed quite recently, in direct response to the Supreme Court's decision in *Concepcion*,<sup>180</sup> several consumer advocates formed an organization, Consumers Count, designed to do just this.<sup>181</sup> The website and Facebook page for Consumers Count invite consumers to complain about unfair company practices.<sup>182</sup> The site states that once a "critical mass" of consumers have complained about the same practice, Consumers Count will "spring into action" and refer the complaints to a law firm which can then enter into fee agreements with the multiple consumers and attempt to pursue their claims whether in court, in arbitration, through referral to a government agency, or in the press.<sup>183</sup>

The idea of programs such as Consumers Count is intriguing. Certainly the Internet and social media can be useful to join together people with common problems. If law firms can then contact many people with common problems they can potentially represent them, albeit individually,

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178. *Id.* at 668.

179. *Citizens United v. Fed. Election Comm'n.*, 130 S. Ct. 876, 886, 917 (2010).

180. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

181. *See* Consumers Count, [www.consumerscount.org](http://www.consumerscount.org) (last visited Oct. 12, 2012).

182. *Id.*; *Consumers Count*, FACEBOOK, [www.facebook.com](http://www.facebook.com) (last visited Oct. 12, 2012).

183. Consumers Count, [www.consumerscount.org](http://www.consumerscount.org) (last visited Oct. 12, 2012). The website is also clear that part of the purpose of the organization is to teach consumers and others about the negative aspects of mandatory arbitration. As one founder puts it in his blog, "Consumers Count is dedicated to creating a consumer movement to end arbitration in consumer contracts." *Id.* Indeed, an amusing video on the website explains the impact of the *Concepcion* case on consumers' ability to protect themselves from corporate misdeeds. *Id.*

in a relatively efficient manner. They can potentially use knowledge or expertise gained in one claim to help other claimants.

In one way the idea of consumers joining together to file individual claims may even be highly intimidating to companies. When consumers file small claims, companies' own clauses or arbitration provider rules often require the company rather than the consumer to pay the bulk of administration costs and arbitrator fees.<sup>184</sup> Although these fees and costs may be low per individual claim, they can become quite high when many claims are brought. If the arbitration filing fees and costs were just \$1000 (a quite low estimate) and ten thousand consumers were to file individual claims against the company, the company would have to pay ten million dollars in filing fees and administrative costs alone.<sup>185</sup>

Yet, while social media and the Internet may at times help consumers bring mass claims, this approach cannot adequately replace class actions' success with procedurally difficult claims. First, consumers who do not know they have been harmed cannot file claims on social media sites. Thus, victims of hidden charges, discrimination, contaminated food or antitrust violations exemplify consumers who will not be aware they ought to file a claim. While one might suggest that the internet or social media could be used to educate consumers that they have been harmed, it simply is not feasible to inform consumers of all of the ways they may have been harmed. No one has time to investigate all the possible harms in one's life, even by visiting websites or Facebook pages. Second, even to the extent consumers become aware of possible harms they will often lack time, energy or initiative to pursue those claims, even through a social media site. Third, even to the extent consumers become aware of claims and choose to file those claims the logistics and economics for law firms to pursue these claims will be quite difficult. Even entering into fee agreements with thousands of clients is daunting, not to mention fielding all of their questions, filing their claims, proceeding with discovery, and trying to

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184. For example, the American Arbitration Association procedures for resolving consumer-related disputes require that for claims under \$10,000 the consumer pays only \$125 and the company pays the remaining fees and costs. *Consumer*, AMERICAN ARBITRATION ASSOCIATION, <http://www.adr.org/aaa/faces/aoe/gc/consumer> (last visited Oct. 12, 2012).

185. See *supra* note 27 and accompanying text for a discussion of this "Sorcerer's Apprentice" scenario. Perhaps for this reason financial services attorneys Alan Kaplinsky and Mark Levin have expressed outrage at the formation of the new organization Consumers Count. Alan S. Kaplinsky and Mark J. Levin, *Consumer Advocates Form "Anti-Arbitration" Organization*, BALLARD SPAHR, LLP, available at <http://www.ballardspahr.com/alertspublications/legalalerts/2012-10-09-consumer-advocates-form-anti-arbitration-organization.aspx> (last visited Oct. 13, 2012) ("The attempted use of mass arbitration to destroy consumer arbitration does a great disservice to consumers who stand to benefit from the efficiencies and economies inherent in the arbitral process.").



negotiate settlements or present those claims. One can be fairly sure that companies will resist plaintiffs' attempts to use expert evidence and testimony in multiple disputes. Thus, it is likely that many or most procedurally difficult claims will remain difficult, even when tackled with the Internet and social media.

## V. CONCLUSIONS

In sum, by allowing companies to prevent consumers from suing them in class actions the Supreme Court's decision in *AT&T Mobility v. Concepcion*<sup>186</sup> prevents consumers from bringing procedurally difficult claims. Claims in which consumers previously succeeded, in class actions, are now failing due to class action prohibitions.<sup>187</sup> Thus, it is now clear that arbitration clauses have defeated class actions,<sup>188</sup> and that arbitration is therefore serving as a corporate tool, rather than a panacea.<sup>189</sup>

Nor can individualized arbitration serve as an adequate replacement for class actions. While some consumers occasionally do and will continue to bring claims in arbitration, these will likely be the more simple claims—such as a product that arrived broken or did not arrive at all. Or, if consumers choose to bring the more difficult claims in individual arbitration they will likely fail. Individualized arbitration is generally not a viable venue to allow consumers or others to bring claims as to injuries of which they are not aware, or injuries they are not aware may result from

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186. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

187. See Statement of Robert C. Gilbert, *supra* note 76, at 2 (comparing bank overdraft cases in which consumers succeeded, in litigated class actions, to those in which they have failed, due to arbitral class action waivers); Alliance for Justice et al., *supra* note 3, at 4 (discussing class action claims which have been “tossed out by courts,” post-*Concepcion*, and in which claims of absent class members have therefore “simply disappeared, as opposed to being resolved in arbitration”); *Consumer Attorney's Report*, *supra* note 3, at 14 (comparing lower settlements afforded to class members covered by arbitral class action prohibition to higher settlement afforded to class members not covered by such a prohibition); Finkelstein Thompson LLP's Comments to Bureau of Consumer Financial Protection re: Docket No. CFPB-2012-0017 8-11 (June 22, 2012), available at <http://www.regulations.gov/#!docketDetail;dt=FR%252BPR%252BN%252BO%252BSR;rpp=25;po=0;D=CFPB-2012-0017> (comparing recoveries available in class actions that were and were not covered by arbitral class action prohibitions); Barnes Law Group, Public Comment on the Inappropriate Use of Binding Mandatory Arbitration Agreements in Financial Services Consumer Agreements 3–4 (June 22, 2012), available at <http://www.regulations.gov/#!docketDetail;dt=FR%252BPR%252BN%252BO%252BSR;rpp=25;po=0;D=CFPB-2012-0017> (discussing payday loan cases regarding excessive interest rates brought by firm and observing that “[t]he lenders whose loan agreements did not contain binding mandatory arbitration provisions promptly agreed to settle . . . [h]owever, lenders who did insert arbitration provisions are very different matter”).

188. See *Mandatory Binding Arbitration*, *supra* note 12.

189. See *Panacea*, *supra* note 1.

illegal conduct. Nor is individual arbitration a viable venue in which consumers can present claims that are factually or legally complex, for example because they require comparisons of many consumers' experiences or presentation of expert testimony. Thus, whether or not consumers do well in the few arbitrations they bring, the point is that mandatory arbitration provisions containing class action prohibitions are preventing consumers from presenting procedurally difficult claims.

Some may not mourn the demise of consumer class actions. Even those who see some benefit in class actions may decide that the negative aspects of class actions were always greater than any positive benefits they might bring.<sup>190</sup> It is commonly argued that class actions bring far more benefit to consumers' attorneys than to consumers.<sup>191</sup> As well, some may also believe that state or federal agencies have or can obtain sufficient resources to protect consumers whose claims would be procedurally difficult to present individually.<sup>192</sup> Or, those who do not believe consumers ought to be protected from fraud, contaminated food, antitrust violations, discrimination, etc. will similarly lose no sleep over the elimination of class actions.

As Professor Maria Glover aptly explains, the problem is that "Americans have a love-hate relationship with private enforcement of their laws."<sup>193</sup> On the one hand, our system often relies heavily and explicitly upon enforcement by private parties to achieve public regulatory objectives. Whereas European nations regulate the conduct of their citizens largely using *ex ante* regulations promulgated by a centralized bureaucracy, we frequently rely upon *ex post* law enforcement, much of which is brought about by private suits rather than by governmental actions. At the same time, Americans have a great distrust of private regulation in general and private litigation in particular.<sup>194</sup>

For this author, however, the demise of consumer class actions is very disturbing. I do believe that laws protecting consumers ought to be enforced. While I am not necessarily wedded to class actions as the means to bring procedurally difficult claims, I do not see that any realistic

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190. As I observed, *supra* note 35 and accompanying text, I believe Congress, not private companies, should be privileged to decide whether consumer protection laws should be enforced and whether class actions should be eviscerated. To the extent the Supreme Court has taken positions that allow companies to shield themselves from class actions I urge Congress to reject those decisions.

191. See *supra* notes 25-27 and accompanying text.

192. This author is quite skeptical that in the remotely foreseeable future our country would allocate substantial resources to government enforcement agencies.

193. Glover, *supra* note 103, at 1140.

194. *Id.*

alternatives currently exist. Federal and state agencies certainly could, in theory, be funded at a level where they could bring such claims, but in my opinion they are not currently so funded.<sup>195</sup> And I do not see a move at present to increase the size of federal and state enforcement agencies. Nor do I believe that anyone has yet devised a means whereby the Internet, exciting as it is, can be used to bring procedurally difficult claims of the sort discussed in this article. While I favor continued brainstorming and creativity, we should not hold out undue hope that individual consumers can bring complex claims on their own, even with the assistance of the Internet or other consumers.

Instead, those of us who believe in consumer protection must, in my view, fight as hard as we can for the restoration of consumer class actions. We must make clear that unless our society is willing to either greatly increase funding for state and federal agencies or relegate consumer protection laws to the trash, class actions are a necessary means to bring procedurally difficult claims. While we can accept critique of the class action device, and seek to revise it to make it more fair and effective, we cannot accept its total elimination. Thus, it is important to advocate for the administrative or legislative reversal of *Concepcion*.

The Consumer Financial Protection Board has been empowered to both investigate and potentially restrict uses of mandatory arbitration that impact consumer financial products or services.<sup>196</sup> That agency has begun this effort by issuing a notice asking for suggestions on data that already exists or should be gathered that might be used in its study.<sup>197</sup> This CFPB effort is very important. The agency has the power to eliminate arbitral class action

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195. See also Glover, *supra* note 103, at 1146–53 (discussing Congressional choice to rely on private rather than public enforcement); FARHANG, *supra* note 174 (same). Of course, some disagree with this author’s opinion that federal and state agencies are not currently adequately funded to protect consumers from companies’ wrongdoing. See, e.g., Daniel Fisher, *supra* note 28 (quoting banking attorney Alan Kaplinsky as stating that the CFPB itself has “almost unlimited resources” to rein in his clients, and that “[m]y clients are a lot more scared about what the CFPB might be doing than being sued in a class action”).

196. Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 authorizes the agency to report on or potentially regulate or eliminate “the use of agreements providing for arbitration of any future dispute between covered persons and consumers,” with respect to “consumer financial products or services.” Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1028 (2010). For a good discussion on the potential role of the Bureau see Laetitia L. Cheltenham, Note, *The Consumer Financial Protection Bureau and Class Action Waivers after AT&T v. Concepcion*, 16 N.C. BANKING INST. 273 (2012).

197. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25148 (Apr. 27, 2012), available at <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0017-0001>. Indeed this Article has cited a number of the comments submitted in that process.

prohibitions in one important setting, as well as to issue a study shedding light on the problem. At the same time the CFPB has not been authorized to address all consumer issues. And, if the CFPB takes aggressive action to protect consumer class actions, companies are bound to fight back.<sup>198</sup>

Congress, of course, has greater power to roll back the *Concepcion* decision than does the CFPB. It may, if it chooses, adopt federal legislation that would prevent companies from using mandatory arbitration clauses to eliminate class actions.<sup>199</sup> Or, Congress could even adopt the Arbitration Fairness Act,<sup>200</sup> which has now been proposed for several years, and which would prevent companies from requiring consumers or employees to resolve claims against the company in arbitration rather than in litigation.<sup>201</sup>

In short, it is time to face reality with respect to the enforcement of procedurally difficult consumer claims. If we want to protect consumers from fraud, discrimination, antitrust violations and so on, we need to provide a means by which these laws can be enforced. Now that the Supreme Court has helped companies insulate themselves from class actions we must either reverse the *Concepcion* decision legislatively, limit it administratively, or greatly improve the funding of federal and state enforcement agencies. If we do not take one of these steps to counteract *Concepcion* we will through our inaction abandon the enforcement of procedurally difficult consumer claims. I fervently hope we continue to ensure that all consumers, even those with procedurally difficult claims, have access to justice.

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198. Companies might, for example, seek to trump such a decision administratively or legislatively. The CFPB itself has recognized that it is “subject to substantial oversight and limitations on its activities and authorities.” *Building the CFPB*, CONSUMER FINANCIAL PROTECTION BUREAU 32 (July 18, 2011), [http://www.consumerfinance.gov/wp-content/uploads/2011/07/Report\\_BuildingTheCfpb1.pdf](http://www.consumerfinance.gov/wp-content/uploads/2011/07/Report_BuildingTheCfpb1.pdf) (recognizing that CFPB is constrained not only by normal constraints of the Administrative Procedures Act and judicial review, but also that its determinations can be overruled by a council of other federal agencies).

199. Cole, *supra* note 1, at 498–99 (advocating passage of a Consumer Class Action and Class Arbitration Waiver Reform Act, in lieu of the Arbitration Fairness Act).

200. S. 987, 112th Cong., 1st Session (2011).

201. S. 987, § 3. See also David Lazarus, *Bill Aims to Restore Consumers’ Right to Sue*, L.A. TIMES (Oct. 18, 2011), available at <http://articles.latimes.com/2011/oct/18/business/la-fi-lazarus-20111018>.