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Class Arbitration Questions

by

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A. Who Decides Whether a Class Action Can be Heard in Arbitration?

1. Not the Arbitrators, Applying Their Views of Public Policy

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010), held that an interim arbitration award ordering classwide arbitration must be vacated under the F.A.A. where the arbitral panel exceeded its powers by failing to base its decision on New York law or maritime law as to the proper construction of an arbitration agreement that is silent as to class arbitration, and instead donning the mantle of a common-law court in deciding what is the best public policy in such situations. The Court stated at 673-75:

> Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case. . . . The panel was not persuaded by "court cases denying consolidation of arbitrations," by undisputed evidence that the Vegoilvoy charter party had "never been the basis of a class action," or by expert opinion that "sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." . . . Accordingly, finding no convincing ground for departing from the post-*Bazzle* arbitral consensus, the panel held that class arbitration was permitted in this case. . . . The conclusion is inescapable that the panel simply imposed its own conception of sound policy.

(Footnotes omitted.) The Court held at 684-86:

> From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue . . .. The critical point, in the view of the arbitration panel, was that petitioners did not "establish that the parties to the charter agreements intended to preclude class arbitration." . . . Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.
>
> In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that "'procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide." . . . This recognition is

> grounded in the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Restatement (Second) of Contracts* § 204 (1979).
>
> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. . . . But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. . . . *Cf. First Options, supra*, at 945 (noting that "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate" contrary to their expectations).

Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justice Ginsburg dissented, joined by Stevens and Breyer. Justice Sotomayor did not participate.

2. The Effect of *Stolt-Nielson*

Jock v. Sterling Jewelers Inc., 646 F.3d 113, 115, 112 Fair Empl.Prac.Cas. (BNA) 1137 (**2d Cir.** 2011), reversed the decision of the district court and upheld the arbitrator's decision to treat the dispute as a class arbitration although the agreement was silent on whether class arbitration was allowed. The court held that an absence of an explicit agreement did not mean that the parties did not have an implicit agreement for class arbitration, and that the arbitration agreement was broader than that in *Stolt-Nielson*. The arbitrator approached the question under the then-current law as whether anything in the agreement expressly prohibited class arbitration, held that there was no such prohibition, and ordered class arbitration. The court held that that was the question the parties had submitted to the arbitrator, that the arbitrator thus had jurisdiction to decide the question, and that the district court erred in deciding whether the question had been decided correctly. Judge Winter dissented. *Id.* at 127-33.

A substantial number of class arbitrations have been ordered by arbitral panels under *Stolt-Nielson*, and upheld when challenged in court.

3. Delegations to the Arbitrator

Rent-a-Center West v. Jackson, 561 U.S. 63 (2010), a § 1981 case, involved an arbitration agreement that delegated to the arbitrator any question of the validity of the arbitration agreement. The Court stated: "The Agreement provided for arbitration of all 'past, present or future' disputes arising out of Jackson's employment with Rent-A-Center, including

'claims for discrimination' and 'claims for violation of any federal ... law.' . . . It also provided that '[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.'" *Id.* at 65-66. Plaintiff challenged the agreement as unconscionable under Nevada law because of the requirement that he pay half the fees. The Court held that the agreement met the heightened standard of clear and unmistakable evidence that the parties intended to delegate to the arbitrator the issue of arbitrability, but that the heightened showing did not mean that the party seeking to enforce arbitration had to show by clear and unmistakable evidence that the agreement was not unconscionable. *Id.* at 69 n.1. The Court held that the agreement to arbitrate is enforceable under 2 of the FAA without regard to the enforceability of the underlying contract, and that a court must therefore determine the enforceability of the agreement to arbitrate even if all other questions under the agreement are to be resolved by the arbitrator. The Court held that it made no difference that the agreement to arbitrate here involved the delegation provision as to arbitrability, and that the remainder of the agreement was the broad arbitration agreement. "Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72. Justice Scalia wrote the opinion of the Court, joined by the Chief Justice and Justices Kennedy, Thomas, and Alito. Justice Stevens dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.

Oxford Health Plans LLC v. Sutter, --- U.S. ----, 133 S. Ct. 2064, 2066 (2013), a unanimous decision with a concurrence, stated:

> Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. See *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.* We conclude that the arbitrator's decision survives the limited judicial review § 10(a)(4) allows.

As to judicial review, the Court reasoned:

> But Oxford misreads *Stolt–Nielsen*: We overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a "sufficient" one. The parties in *Stolt–Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. See 559 U.S., at 668–669, 673, 130 S.Ct. 1758. In that circumstance, we noted, the panel's decision was not—indeed, could not have been—"based on a determination regarding the parties' intent." *Id.*, at 673, n. 4, 130 S.Ct. 1758; see *id.*, at 676, 130 S.Ct. 1758 ("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement. *Id.*, at 673, 130 S.Ct. 1758. Instead, "the panel simply imposed its own conception of sound policy" when it ordered class proceedings. *Id.*, at 675, 130 S.Ct. 1758. But "the task of an arbitrator," we

stated, "is to interpret and enforce a contract, not to make public policy." *Id.,* at 672, 130 S.Ct. 1758. In "impos[ing] its own policy choice," the panel "thus exceeded its powers." *Id.,* at 677, 130 S.Ct. 1758.

> The contrast with this case is stark. In *Stolt–Nielsen,* the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But § 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. *Stolt–Nielsen* and this case thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.

Id. at 2069-70 (emphasis in original).

Most Quotable Citation to *Oxford Health Plans*: "A federal court's authority to defenestrate an arbitration award is extremely limited. *See Oxford Health Plans LLC v. Sutter,* — – U.S. ——, 133 S.Ct. 2064, 2068, 186 L.Ed.2d 113 (2013) … ." *First State Ins. Co. v. Nat'l Cas. Co.*, 781 F.3d 7, 11 (1st Cir. 2015) (Selya, J.). *First State* also stated: "In its view, the payment protocol fashioned by the arbitrators is ultracrepidarian since it obligates National to pay billings that may not fall within the terms and conditions of any applicable agreement." *Id.*

Southern Communications Servs., Inc. v. Thomas, 720 F.3d 1352, 1359-60 (11th Cir. 2013), upheld an arbitrator's determination that classwide arbitration was authorized in the arbitration agreement:

> Here, however, the briefest glance at the Partial Final Clause Construction Award reveals that the arbitrator in this case arguably "interpreted the parties' contract." … The arbitrator began his award by recounting the text of the contract's arbitration clause. He acknowledged that the contract is "silent with respect to class actions" and went on to examine the text of AAA Supplementary Rule 3, which was incorporated by reference into the contract by the parties' choice, stated in the arbitration clause, to "conduct the arbitration ... pursuant to applicable Wireless Industry Arbitration Rules of the American Arbitration Association." … After parsing the language of that rule, the arbitrator went on to consider the meaning of the words "any disputes" in the clause itself. … He then, in a section headed "Application of Georgia Contract Construction Law," interpreted the meaning of silence as to class arbitration within the clause and determined that "it is fair to conclude that the intent [of the clause] was not to bar class arbitration." ….
>
> Engaging as he did with the contract's language and the parties' intent, the arbitrator did not "stray[ ] from his delegated task of interpreting a contract" … for he was "'arguably construing' the contract" … . It is not for us to opine on whether or not that task was done badly, for "'[i]t is the arbitrator's construction [of the contract] which

was bargained for ....' The arbitrator's construction holds, however good, bad, or ugly." …

(Citations omitted.)

4. What If the Agreement is Silent?

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685-87 (2010), set forth the reasons why an arbitration clause silent on the arbitrability of class claims should not be presumed to cover class arbitration:

> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. … But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. …
>
> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure … no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. … Under the Class Rules, "the presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations," see Addendum to Brief for American Arbitration Association as *Amicus Curiae* 10a (Class Rule 9(a)), thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. … And the commercial stakes of class-action arbitration are comparable to those of class-action litigation … even though the scope of judicial review is much more limited … . We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.
>
> The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what "procedural mode" was available to present AnimalFeeds' claims. … If the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. … But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was "no

agreement" on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.

(Citations and footnote omitted; emphasis in original).

Oxford Health Plans LLC v. Sutter, 133 S. Ct. at 2068, reserved the "gateway" question:

… So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.FN2/

_____

FN2/ We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions—which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"—are presumptively for courts to decide. *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion). A court may therefore review an arbitrator's determination of such a matter *de novo* absent "clear[ ] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). *Stolt–Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. See 559 U.S., at 680, 130 S.Ct. 1758. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. See Brief for Petitioner 38, n. 9 (conceding this point). Indeed, Oxford submitted that issue to the arbitrator not once, but twice—and the second time after *Stolt–Nielsen* flagged that it might be a question of arbitrability.

5. Silent Agreements, but The Third, Sixth, and Ninth Circuits Place a Heavy Judicial Thumb on the "Gateway" Scale

Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 329 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015), stated: Because of the fundamental differences between classwide and individual arbitration, and the consequences of proceeding with one rather than the other, we hold that the availability of classwide arbitration is a substantive "question of arbitrability" to be decided by a court absent clear agreement otherwise. The court held that the burden of overcoming this presumption is onerous:

It is presumed that courts must decide questions of arbitrability "unless the parties clearly and unmistakably provide otherwise." *Howsam,* 537 U.S. at 83, 123 S.Ct. 588 (internal quotation marks and citation omitted). The burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator. *See Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs,* 357 F.3d 272, 280–81 (3d Cir.2004). Silence or ambiguous contractual language is insufficient to rebut the presumption.

Id. at 335.

Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013), held: "We therefore hold that the question whether an arbitration agreement permits classwide arbitration is a gateway matter, which is reserved 'for judicial determination unless the parties clearly and unmistakably provide otherwise.'"

Eshagh v. Terminix Int'l Co., L.P., 588 F. App'x 703, 704 (9th Cir. 2014), stated:

> Finally, the district court did not err in striking Eshagh's class claims. Issues that "contracting parties would likely have expected a court to have decided" are considered "gateway questions of arbitrability" for courts, and not arbitrators, to decide. *Momot v. Mastro,* 652 F.3d 982, 987 (9th Cir. 2011). The Supreme Court has made it clear that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 685, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010); *see also Concepcion,* 131 S.Ct. at 1750–52 (emphasizing the "fundamental" changes implicated in the shift from bilateral to class-action arbitration).

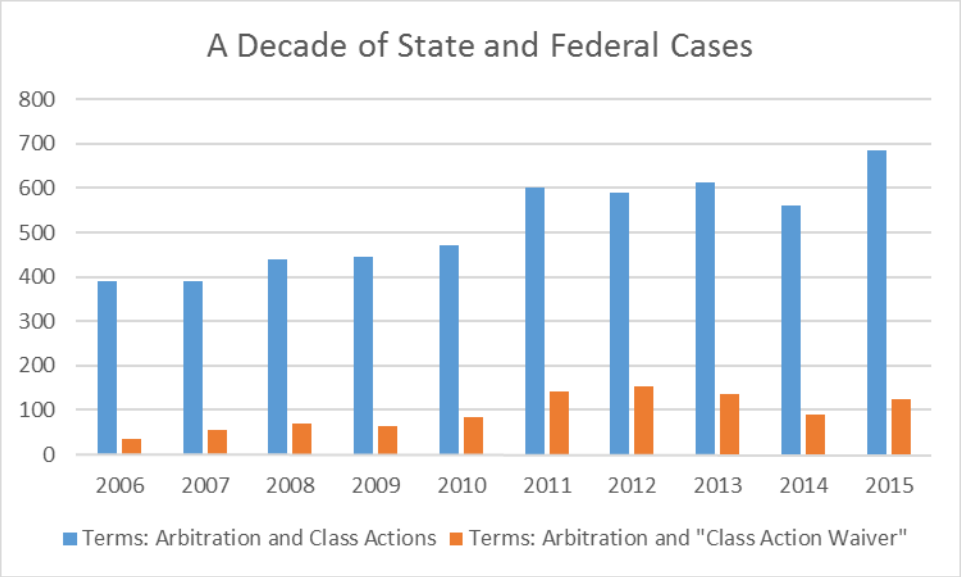
B. Judicial Cases Mentioning Arbitration, Class Actions, and Class Waivers

On February 22, 2016, I did a WestLaw search over all State and Federal judicial cases, to try to get the number of cases in which both the terms "class action" and "arbitration" were used. In theory, this provides an approximate number of cases in which class actions in arbitration were at issue. The number is only approximate because multiple decisions in the same case are indistinguishable from multiple cases, and because the fact that a case mentions both terms does not necessarily mean that the case involved the question of arbitrating a class action. It is, however, the best analogue to the data of interest that I could devise.

I repeated the search on the same date, but this time I substituted the term "class action waiver" to get an approximate number of arbitration cases discussing class action waivers.

Year	Terms: "Arbitration" and "Class Actions"	Terms: "Arbitration" and "Class Action Waiver"	Percentage of "Arbitration" Cases with "Class Action Waivers"
2006	391	36	9.2%
2007	389	55	14.1%
2008	440	69	15.7%
2009	445	65	14.6%
2010	470	83	17.7%
2011	601	141	23.5%
2012	589	153	26.0%
2013	613	137	22.3%
2014	561	89	15.9%
2015	684	125	18.3%

The following graph enables us to visualize the small proportion of "arbitration" cases involving class-action waivers:



Overall, the results were surprising. The number of court cases mentioning both "arbitration" and "class actions" is increasing even as the Supreme Court has been trying to throttle class arbitrations, and the number and percentage of arbitration cases mentioning class action waivers are far fewer than the publicity over the development would suggest.

I next looked at the number of decisions using the term "class action waiver" but not using the term "arbitration." This demonstrates that waivers of class actions are pretty much limited to situations in which there are arbitration clauses:

Year	Terms: "Arbitration" and "Class Action Waiver"	Terms: "Class Action Waiver," but Not "Arbitration"	Percentage of Non-"Arbitration" Cases with "Class Action Waivers"
2006	36	0	0.0%
2007	55	1	1.8%
2008	69	0	0.0%
2009	65	4	6.2%
2010	83	3	3.6%
2011	141	3	2.1%
2012	153	3	2.0%
2013	137	2	1.5%
2014	89	3	3.4%
2015	125	2	1.6%

C. The Supreme Court's Class-Action Waiver Decisions

1. The Bait-and-Switch of *Concepcion*

a. The Decision

AT&T Mobility LLC v. Concepcion, __ U.S. __, 131 S.Ct. 1740 (2011), upheld a consumer arbitration "agreement" that included a ban on class arbitrations. The Ninth Circuit, applying California law, had held the provision unconscionable. The Supreme Court reversed in a 5-4 decision written by Justice Scalia. The details of the question before the Court are important in determining its effect. The Court began by stating: "We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." It ended by holding that the process of arbitration was unsuited for the resolution of class claims. The arbitration agreement, as unilaterally revised by AT&T, "required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" *Id.* at 1744. It also barred the arbitrator from consolidating more than one person's claims, and barred the arbitrator from presiding "over any form of a representative or class proceeding." *Id.* at 1744 n.2. The process of arbitration, and the rights accorded to claimants against AT&T in arbitration, were unusual:

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT & T's Web site. AT & T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT & T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.FN3/
>
> _____
>
> FN3/ The guaranteed minimum recovery was increased in 2009 to $10,000. . . .

Id. at 1744. The Court's description of the district court's approach is also important:

> In March 2008, AT & T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT & T's motion. It described AT & T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was "quick, easy to use" and likely

> to "promp[t] full or ... even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. . . . Nevertheless, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT & T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. . . .

Id. at 1744-45. The Court rejected respondents' argument that the California law barring exculpatory provisions and holding class action waivers unconscionable applied to litigation as well as arbitration, and could thus be reconciled with the FAA. It stated at 1747:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." *Id.*, at 493, n. 9, 107 S.Ct. 2520.
>
> An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. *See Discover Bank*, *supra*, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1109 (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.
>
> Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had

> manifested itself in "a great variety" of "devices and formulas" declaring arbitration against public policy. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (C.A.2 1959). And although these statistics are not definitive, it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, *An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006); Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L.Rev. 185, 186–187 (2004).

The Court described at 1747-48 a concession by respondents:

> "Rules aimed at destroying arbitration" or "demanding procedures incompatible with arbitration," they concede, "would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." Brief for Respondents 32. The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" . . .

The majority stated:

> We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. . . . As we have said, a federal statute's saving clause "'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" . . .

Id. at 1748. However, the Court held that the requirement of class proceedings was just such an element incompatible with arbitration: "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* The Court made clear that classwide arbitration was available by consent, but that requiring it under *Discover Bank* was incompatible with arbitration and the FAA:

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

Id. at 1750-51. The Court held that a main advantage of arbitration is informality, and that class arbitration requires formality. "For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the

class." *Id.* at 1751. It then accepted the common argument of defendants that the stakes in class litigation are so high that defendants are compelled to settle. The Court then turned a logical cartwheel, turned its back on the use of arbitration to resolve large commercial disputes and its past reliance on that practice to impose arbitration in the employment context, and stated that class arbitration is unsuitable because arbitration is generally for small amounts:

> Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail . . . and class arbitration would be no different.
>
> Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award ... was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review . . . . We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision. FN8/
>
> FN8/ The dissent cites three large arbitration awards (none of which stems from classwide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. *Post,* at 7–8. Those examples might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the cases prove is that arbitrators can give huge awards—which we have never doubted. The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.

Id. at 1752. Finally, the Court addressed the argument that only class treatment would result in relief to persons with small claims:

> The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post,* at 9. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT & T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT & T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole, 584 F.3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT & T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." . . . .

Id. at 1753 (emphasis in original). Justice Thomas joined the majority opinion and also wrote a concurring opinion. Justice Breyer filed a dissenting opinion, joined by Justices Ginsberg, Sotomayor, and Kagan.

b. How Wrong One Man Can Be: My 2011 Take on the Decision

[From a paper delivered to the Arizona State Bar in 2011]: *RTS Comment on AT&T Concepcion v. Mobility:* This is not a workmanlike product. The Court's reasoning ignores the history, purpose, and application of the Federal Arbitration Act, and pulls out of thin air—and contrary to reality—the proposition on which it actually decided the case: that arbitration is only for small claims. However, it seems to me that the Court's approach will turn out to be self-limiting.

I do not think that this result will affect EEO class litigation seeking systemic injunctive relief where there are arbitration "agreements" with class action bans. The Court has permitted arbitration agreements to be enforced only where they do not interfere with the substantive rights of litigants, and one of the most important substantive rights in systemic EEO class litigation is an injunctive decree changing the employer's personnel practices for the future. Such decrees can be obtained only in class actions, because individuals suing as individuals do not have the standing necessary to obtain broad injunctive decrees that will not benefit them personally. Thus, enforcement of a class action waiver would effectively immunize the employer from one of the most important aspects of relief and repeal the injunctive provisions of the EEO laws. Since this cannot be done, the arbitration agreement must either fall so that the class claims can be heard in court, or the class claims must be heard in arbitration. There is no room for *AT&T Mobility* in EEO class litigation seeking systemic injunctive relief.

Nor do I think that *AT&T Mobility* will have any effect in the normal consumer case. AT&T's plan made its customers individually better off in ADR and arbitration than they would have been if they litigated the case in court and obtained all the relief allowable. That is extraordinarily rare. The Court' emphasized this "better off" feature both at the beginning and at the end of its decision. In the 99.99% of all consumer cases where there are no such elements, and where application of AT&T Mobility would in effect preclude the ability to obtain even

individual relief because the damages are small, the Fifth Amendment stands as a bar to class action waivers. The Court had no occasion to consider the practical denial of due process, or the status of AT&T as using state action under the FAA to deprive customers of property interests without due process of law, because such a question cannot arise where the agreement leaves individuals with an incentive to proceed and a means of paying counsel. The question does arise in the more typical consumer situation.

2. Due-Process Goes Un-Argued in *Italian Colors*

American Express Co. v. Italian Colors Restaurant, __ **U.S.** __, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), is an extraordinary case because the down-to-the-ground issue was whether the judicial enforcement of a class-action waiver is unconstitutional under the Due Process Clause of the Fifth Amendment where it makes substantive rights unenforceable, and neither the respondents nor the majority opinion nor the dissent mentioned it.

The Court upheld a class-action waiver in a commercial case, notwithstanding evidence that the plaintiff merchants did not individually have enough at stake to warrant proceeding with their challenge to petitioner's fees, and that class treatment was the only effective means for the enforcement of their rights. The Court summarized its holding:

> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

Id. at 2312. Justice Kagan's dissent, joined by Justices Ginsburg and Breyer, is remarkable. It begins:

> Here is the nutshell version of this case, unfortunately obscured in the Court's decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.
>
> And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.

Id. at 2313.

3. The Special Problem of Class Action Waivers in § 1981, Title VII, ADA, ADEA, and GINA Cases

Courts have commonly held that broad systemic injunctive decrees are the most important remedies in cases involving patterns of discrimination. *E.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364-65 (1977):

> Thus, the Court has held that the purpose of Congress in vesting broad equitable powers in Title VII courts was "to make possible the 'fashion(ing) (of) the most complete relief possible,'" and that the district courts have "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle*, supra, 422 U.S., at 421, 418, 95 S.Ct., at 2373. More specifically, in Franks we decided that a court must ordinarily award a seniority remedy unless there exist reasons for denying relief "'which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered.'" 424 U.S., at 771, 96 S.Ct., at 1267, quoting *Albemarle*, supra, 422 U.S., at 421, 95 S.Ct., at 2373.

Even if individual plaintiffs prove pervasive classwide discrimination in the course of proving their individual claims, however, the absence of class certification jeopardizes or bars the kind of systemic injunction that will prevent future wrongs. Many courts have held that broad injunctive relief is prohibited to the extent that it exceeds what is needed to give individual relief to the named plaintiffs.[1]

D. Practical Problems with Class Arbitration

1. Is There Really a Problem with Confidentiality?

The Supreme Court assumes that confidentiality is an essential characteristic of arbitration, but it is only a custom. The parties are free to make their own rules on confidentiality as well as on all other topics.

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[1] *E.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Brown v. Trustees of Boston University*, 891 F.2d 337, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986), *approved on rehearing*, 809 F.2d 979, 982 n.1 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766–67 (4th Cir. 1998), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999), *reaff'd*, *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 437 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000); *Hollon v. Mathis Independent School District*, 491 F.2d 92, 93 (5th Cir. 1974) (*per curiam*); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993); *Zepeda v. INS*, 753 F.2d 719, 727–29 (9th Cir. 1983); *Nat'l Center for Immigrant Rights v. INS*, 743 F.2d 1365, 1371–72 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987); *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987); *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996).

The Court's concern with confidentiality is strange, because neither the Court nor the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, have ever defined the term "arbitration."

The courts have had little difficulty in finding that certain extreme arbitration programs are improper and therefore not binding, such as those that deprive the nondrafting party of an impartial arbitrator, or of a choice of arbitrators. For example, *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999), stated:

> We hold that the promulgation of so many biased rules-especially the scheme whereby one party to the proceeding so controls the arbitral panel-breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration-a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.
>
> Moreover, Hooters had a duty to perform its obligations in good faith. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); … Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a. Bad faith includes the "evasion of the spirit of the bargain" and an "abuse of a power to specify terms." Id. § 205 cmt. d. By agreeing to settle disputes in arbitration, Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck. Thus we conclude that the Hooters rules also violate the contractual obligation of good faith.
>
> Given Hooters' breaches of the arbitration agreement and Phillips' desire not to be bound by it, we hold that rescission is the proper remedy. Generally, "rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." … As we have explained, Hooters' breach is by no means insubstantial; its performance under the contract was so egregious that the result was hardly recognizable as arbitration at all. We therefore permit Phillips to cancel the agreement and thus Hooters' suit to compel arbitration must fail.

(Footnote omitted.) However, the courts have limited themselves to saying that certain extreme examples are not "arbitration" as the term is used in the FAA, and have not affirmatively stated the essential properties of a valid arbitration scheme.

2. Is There Really a Problem Binding Parties Not Consenting to Arbitration?

The argument that some members of a proposed class have not consented to arbitration should not detain us for long. They can bring a parallel class action in court, just as present and former employees who miss the deadline for joining an FLSA collective action commonly bring

a new and parallel action, or be invited to join the arbitration and thereby consent. The argument is theoretic only, and can be handled practically.

3. Is There Really a Problem with the Absence of Appeal Rights?

Again, the asserted problem with the absence of appeal rights is more theoretic than real. Both the AAA and JAMS allow appeals to an appellate arbitral panel of decisions made by the arbitrator(s) who heard the case. Both organizations can readily amend their rules to allow automatic appeals of arbitral awards in class actions.

4. Is There Really a Potential Problem with Non-Law-Trained Arbitrators Handling Class Claims?

Certainly, but it is curable. While any reputable arbitration services provider can limit its class-action panel to attorneys, or even better, to attorneys with class-action experience, no law requires arbitrations to be handled under the auspices of these organizations. I am currently handling a non-administered case as an arbitrator, and have done so before. The parties can select whomever they want to handle an arbitration, and have the power to impose—or not to impose—a requirement that the arbitrator of a class or collective-action claim be an attorney.

The issue is most likely to occur in a class or collective-action arbitration under a collective bargaining agreement. The Supreme Court has held that a union's clear and unmistakable consent to the arbitration of statutory claims binds its then members: "We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009).

The Supreme Court has previously recognized that many labor arbitrators are not law-trained. *E.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 n.18 (1974):

> Significantly, a substantial proportion of labor arbitrators are not lawyers. See *Note, The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1194 n. 28 (1968). This is not to suggest, of course, that arbitrators do not possess a high degree of competence with respect to the vital role in implementing the federal policy favoring arbitration of labor disputes.

Accord, *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 n.21 (1981).

The cure, of course, is to encourage both labor and management to choose only law-trained arbitrators to handle class actions.

5. Is It Fundamentally Unjust to Expose Employers to Serious Consequences?

In *dicta*, the Supreme Court has suggested that it would be unjust to expose large corporations to the serious consequences that might arise from applying their cram-down-employees'-and-customers'-throats arbitration systems because employers could not be assumed

to have intended to expose themselves to serious consequences when they drafted their cram-down arbitration clauses.

It is laudable that the Court is concerned with fundamental justice, but its concern is easily dispelled by considering whether employees and consumers intended to expose themselves to the serious consequences of having rights without remedies, because of the agreements they signed.

The Court has often held that there can be no right without a remedy:

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur(e) complete justice,' *Brown v. Swann*, 10 Pet. 497, 503, 9 L.Ed. 508 (1836); see also *Porter v. Warner Holding Co.*, 328 U.S. 395, 397—398, 66 S.Ct. 1086, 1088—1089, 90 L.Ed. 1332 (1946). '(W)here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms 'complete justice' and 'necessary relief' have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, 'the (district) court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). And where a legal injury is of an economic character, '(t)he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L.Ed. 752 (1867).

Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).

The doctrine of "Equal Justice Under Law" requires that what is important to the victim of the cram-down agreement be given weight at least equal to that of the entity cramming the agreement down.

E. Diving, Ducking, and Dodging: Corporate Efforts to Game the System

The result of barring class arbitrations and collective-action arbitrations is that an employer may face multiple individual arbitrations. Under the AAA's Employment Rules for employer-promulgated arbitration programs, the employee pays only a filing fee and the employer is responsible for all AAA and arbitrators' fees, and these may not be re-allocated if the employer wins.

In one case in which I served as arbitrator, three employees had identical claims, the employer had an individual-claims-only clause in the arbitration agreement, and this meant that

three arbitrations occurred on the same issue. Three Case Management Conferences, three motions to compel the same discovery, three responses, three hearings, and three different orders with which to comply. The risk of inconsistent results increases as the issues become closer. I have heard of such cases with more than 1,600 claims in more than 1,600 arbitrations, before large numbers of arbitrators—perhaps before more than 1,600 arbitrators—and one would give a great deal to be a fly on the wall when the employer asks its counsel why it recommended such a financially ruinous strategy.

The question is whether individual employment cases will still be pursued if group treatment is denied. This is hard to predict in advance because it depends in part on the claim, and in part on the facts, and in part on the employees' mood and their perceptions of the employer. Yet it's "one size fits all" in the arbitration agreement.

A case in point is *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2012 WL 3757486 (N.D.Calif. July 5, 2012) (No. 06-0715-SC). There, the district court initially approved a nationwide collective action and later decertified it. This is what happened next:

> This matter originated as a putative Fair Labor Standards Act ("FLSA") collective action centered on allegations that Defendants 24 Hour Fitness USA, Inc., and Sport and Fitness Clubs of America, Inc. (collectively, "24 Hour") had improperly denied overtime pay to certain employees outside California. Following this Court's preliminary certification of two plaintiff classes totaling nearly 1,200 employees and its subsequent decertification of the classes in 2011, both the employees and 24 Hour have evinced agreement that the next step in adjudicating each employee's claims should be private arbitration via hundreds of individual proceedings.
>
> What they cannot agree on is where these proceedings should take place. 24 Hour says that each employee's arbitration should be held in the place where the employee's claims arose. To further this position, 24 Hour has filed Petitions to Compel Arbitration in more than twenty district courts spread over a dozen states (the "out-of-district Petitions"). Plaintiffs, on the other hand, say all the arbitrations should occur within the geographic boundaries of the Northern District of California. Accordingly, Plaintiffs have brought 273 individual Petitions to Compel Arbitration (the "273 Petitions") before this Court. In sum, an FLSA collective action seeking substantive relief in the form of money damages has, following decertification, splintered into hundreds of individual cases seeking procedural relief in the form of an order compelling arbitration, with each side vying for its preferred location.

Id. at p. *1 (footnotes omitted). It got worse:

> In the Decertification Order, the Court noted that 24 Hour professed a willingness to arbitrate each former class member's claims, which would allow the class members to pursue their claims without filing individual suits. *Id.* at 40. 24 Hour represented that if the class were decertified, then it "would arbitrate each individual claim [and] the courts would not be overburdened with 400 separate claims-any claims would be handled easily and efficiently through arbitration." ECF No. 410 at 14.

> Unfortunately, the arbitration process has been anything but easy and efficient. More than sixteen months have passed since decertification, yet not a single claim has been arbitrated. Instead, counsel's meet-and-confer process has devolved into a volley of mutual recriminations and allegations of bad faith. Each side accuses the other of drawing out the proceedings with procedural games aimed solely at gaining leverage for settlement. Counsel's dysfunctional relationship eventually culminated in a declaration of "war." ECF No. 463–5 at 34 (Dec. 9, 2011 emails). Their war, with its predictable collateral damage to the judicial system, has unfolded as follows.
>
> When the classes were decertified in February 2011, they did not disperse. Instead, in March 2011, former class counsel filed demands for arbitration on behalf of 983 individual Claimants (the "983 Claimants") at the San Francisco location of JAMS, a private dispute resolution service. *See* Dec. 2, 2011 Order at 2. The 983 Claimants consisted of former opt-in class members and some named Plaintiffs. *Id.* Their demands sought arbitration pursuant to an arbitration clause contained in the 2001 version of 24 Hour's employee handbook (the "2001 Agreement"). *Id.* at 3.
>
> 24 Hour refused to proceed with arbitration in San Francisco, insisting that it should take place elsewhere. *See id.* They argued, for the first time, that not every former class member's claim was governed by the 2001 Agreement and that three different arbitration agreements were in play. . . . Their position has since evolved further. Now 24 Hour contends that, because the decertified classes encompass persons who had worked for 24 Hour as far back as 1998, *five* different arbitration agreements may apply, depending on when the particular employee worked for 24 Hour. . . . In addition to the 2001 Agreement, 24 Hour now points to two earlier versions of the arbitration agreement (respectively, the "1998 Agreement" and the "2000 Agreement"), as well as subsequent amendments to the 2001 Agreement that 24 Hour published in 2005 and 2007 (respectively, the "2005 Amendment" and the "2007 Amendment").
>
> The 1998 and 2000 Agreements provide that disputes shall be settled according to the arbitration laws of the state where the employee last worked for 24 Hour, or, if there are no such laws, by the rules of the American Arbitration Association ("AAA"). The 2001 Agreement moves away from state law by providing that any disputes will be settled according to the Federal Arbitration Act ("FAA"). The 2005 and 2007 Amendments add a provision stating that the arbitrator shall be selected from the geographic vicinity of the place where the dispute arose or where the claimant last worked for 24 Hour.

Id. at pp. *2-*3. The court ultimately held that all the arbitrations should take place in the Northern District of California.