

1993

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### Recommended Citation

Michael Z. Green *Preempting Justice through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 Loy. Consumer L. Rev. 112 (1993).

Available at: <https://lawcommons.luc.edu/lclr/vol5/iss4/4>

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## Preempting Justice through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?

by Michael Z. Green

**The rebellion comes when the injustice is perceived . . . . The biggest mistake rulers can make in this country, whether they have robes . . . money or executive suites, is to think that these injustices are not being registered in the minds of people.**

*Ralph Nader*<sup>1</sup>

### I. INTRODUCTION

As early as 1933, Judge Learned Hand, in *James Baird Co. v. Gimbel Bros.*,<sup>2</sup> noted that "in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." Although written sixty years ago and referring to the legal standards applicable in the enforcement of a commercial contract between merchants of equal bargaining power, these words still ring loud and true today. Such deferential standards are necessary to ensure that the power and freedom to contract remains a viable and legally enforceable mechanism for allocating risks in commercial transactions.<sup>3</sup>

However, Judge Hand also recognized that there were certain individual transactions where strict standards of contract interpretation would not apply or would be overcome.<sup>4</sup> When individual consumers with little or no bargaining power have not consented to particular contractual terms, the use of the courts and judicial interpretations may be the only way to promote justice and allow consumers to protect themselves. Unfortunately, the trend, as established in recent United States Supreme Court decisions, is to apply the deferential standards of enforcement from commercial transactions to situations involving adhesion contracts<sup>5</sup> be-

tween an individual consumer and a business entity where equal bargaining power is clearly lacking.<sup>6</sup>

Perhaps the most pervasive example of this trend has been the Supreme

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Court's zealous enforcement of arbitration<sup>7</sup> clauses under the Federal Arbitration Act ("FAA").<sup>8</sup> The increased use of arbitration, like many other forms of alternative dispute resolution ("ADR"), has become a preferred method for those who suggest that there might be "a better way" for resolving litigation disputes.<sup>9</sup> Concerns over this country's "litigation explosion"<sup>10</sup> may have fostered the growth of ADR; many foes of the litigation process are enrolling in the ADR movement.<sup>11</sup> The proponents of ADR suggest that arbitration is a fast, effective

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means for resolving disputes without the delays and exorbitant costs of litigation.<sup>12</sup> Because of these purported benefits, several jurists, scholars, and practitioners are joining the ADR ranks.<sup>13</sup> As a result, many new firms and businesses are surfacing to take advantage of the big money involved in ADR services.<sup>14</sup>

Section II of the Article defines the problem with adhesion agreements to arbitrate future consumer disputes. Section III of the Article provides a framework for analyzing these adhesion agreements and suggests appropriate responses to correct current problems in this area. Finally, this Article concludes that requiring knowing and voluntary consent to an arbitration clause is the only just method that gives both consumers and merchants a clear choice in determining the appropriate forum for resolving their disputes.

## II. THE DILEMMA: AGREEMENTS TO ARBITRATE FUTURE CONSUMER DISPUTES

When a business insists on an agreement to arbitrate any future dispute that may arise in a consumer transaction, it creates a difficult dilemma for an individual consumer. The commercial entity requires the consumer to sign the arbitration agreement as a condition of receiving the consumer goods. As a result, the consumer has a weakened bargaining position. Many times the consumer will not appreciate the ramifications of the arbitration clause and will not have any option to bargain over the terms even if he understands the clause. Therefore, the consumer must adhere to the agreement or lose the possibility of receiving the consumer goods or services from that merchant. By signing an adhesion agreement, the consumer assumes the risk that the future dispute will not arise. Once the dispute does arise, however, the consumer has lost the option of resolving the dispute through a judicial forum or any other forum aside from the arbitral forum.

### A. The FAA Clearly Supports Enforcement of Adhesion Contracts

When signing an adhesion agreement, the consumer may either *know* that the clause exists but not *voluntarily*

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assent to it or may *voluntarily* assent to the clause without *knowing* the clause's effect. In some instances, a consumer may neither know of the clause nor have voluntarily assented to it. There will also be situations, however, where a consumer is sophisticated enough to know the potential effect of the clause and still voluntarily agree to take that risk.

The circumstances of the situation should determine whether the parties did or did not freely contract to waive their substantive rights and agree to have any future disputes resolved by arbitration. Unfortunately, once a consumer has manifested assent by signing the agreement or some other conduct (even though that was not the intention as evidenced by the totality of the circumstances), courts will hastily enforce the arbitration clause under the FAA.<sup>15</sup>

#### 1. Mere Adhesion Contracts are not *per se* Unenforceable

The Supreme Court has determined that adhesion contracts under the FAA should be treated no differently than traditional contracts.<sup>16</sup> Therefore, traditional state contract doctrines rather than a *per se* rule against enforceability

are the appropriate means for addressing the problem of adhesion contracts.<sup>17</sup> Nevertheless, the courts continue to hold that state law adhesion contract principles may not be invoked to bar the arbitration of disputes under the FAA.<sup>18</sup> Furthermore, merchants may try to avoid the adhesion issue by providing some economic consideration to the consumer for agreeing to arbitrate all future disputes.<sup>19</sup>

It is doubtful that a typical merchant would provide some form of separate consideration because this detracts from the value of standard form agreements if an individual party is able to negotiate individual consideration for the arbitration clause. Still, if the merchant made the consumer aware of the arbitration clause and charged a uniform price for agreeing to include the arbitration clause, the merchant probably will have circumvented the adhesion agreement argument.

### 2. The Duty to Read Versus Knowing and Voluntary Consent

There is a fundamental clash of policies in most cases involving standard form adhesion agreements. Courts must balance the policy favoring the economic freedom of contract and legal enforcement of signed agreements with the policy of not holding individuals or parties liable for terms in an agreement to which the parties actually never assented.

The consistent requirement of the law is that a party has a duty to read everything that has been assented to by that party's signature.<sup>20</sup> Traditionally, courts have rigidly enforced a party's duty to read the terms of an agreement before signing it.<sup>21</sup> After signing the agreement, the party is held strictly accountable for all terms in the contract whether or not the terms were read and understood.<sup>22</sup> However, one must question whether the true intent of the parties really has been met in an adhesion agreement despite the court's determination to enforce these agreements under the freedom of contract policy.

Unequal bargaining positions suggest an unfairness in the arrangement that should be questioned rather than condoned.<sup>23</sup>

A consumer who lacks bargaining power has no real choice.<sup>24</sup> The imbalance of power and financial resources between a merchant and a consumer forces the use of arbitration which is "at odds with a conception of justice that seeks to make the wealth of the parties irrelevant."<sup>25</sup> Too many times courts summarily refer a dispute to arbitration. Some commentators have suggested that these court referrals, under the guise of supporting ADR, are merely an effort to clear crowded dockets without addressing the coercive nature of the agreement or the public concerns involved.<sup>26</sup>

### ***B. The FAA Can Preempt State Arbitration and Consumer Protection Laws that Effectively Limit Arbitration***

Any state that develops a consumer protection law, arbitration law, or any other law<sup>27</sup> that limits the ability of commercial merchants to create arbitration contracts with consumers will be faced with federal preemption problems under the FAA.<sup>28</sup> Although the FAA has no express preemption provision and was not intended by Congress to occupy the entire field of arbitration, a state arbitration law cannot "stand . . . as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA.<sup>29</sup> At one point, many litigators thought that individual state arbitration laws would apply more frequently than the FAA if choice of state law clauses were also used, but it has not worked out that way.<sup>30</sup>

In *Bernhardt v. Polygraphic Co. of America*,<sup>31</sup> the Court addressed one of the limitations of the FAA; the transaction must involve interstate commerce before the FAA applies.<sup>32</sup> Because the FAA does not provide an independent basis for federal jurisdiction, most federal courts are not in a position to address a consumer dispute involving

an arbitration clause.<sup>33</sup> Nevertheless, if the dispute involves a sum that is significant enough to obtain federal court jurisdiction between parties from different states or involves some other

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federal question, then a dispute involving interstate commerce most likely has occurred. This may explain why federal courts regularly provide a mere cursory analysis or no analysis of the interstate commerce issues before applying the FAA to the agreement involved.<sup>34</sup> If the contract involved amounts large enough to get into federal court between two parties who are at least domiciled in different states at the time the suit is filed, this may suggest that interstate commerce is involved.<sup>35</sup> If the plaintiff is seeking vindication through some federal statute, then the commerce power is more than likely the basis for that statute.

Accordingly, most issues regarding the scope of the FAA are determined by state courts. If the FAA does apply to the transaction, the state court must enforce the arbitration agreement regardless of any state laws that might make the agreement invalid. Because the commerce clause is broadly applied, most agreements will be subject to the FAA.<sup>36</sup> One commentator has suggested that "in light of the strong pro-federal attitude in the Supreme Court and the lower courts on matters relating to the scope of the Federal Arbitration Act, it appears likely that a court would conclude that even an intrastate . . . contract" is covered by the FAA.<sup>37</sup> There will be some situations, however, which are purely local and the FAA will not apply.<sup>38</sup>

The case of *Preston v. Kruezer*<sup>39</sup> is illustrative of the circumstances where a state's efforts to protect its consumers may be preempted by the FAA. In this case, the plaintiff was a widow with two dependent children who had only a modest income from periodic work as a grocery and drug store checker.<sup>40</sup> The plaintiff had little education or investment knowledge but she had received approximately \$22,000 and sought investment advice from the defendant, a stock broker, and manager of an investment firm.<sup>41</sup> The court determined that the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Act")<sup>42</sup> applied to the plaintiff's allegations of unfair and deceptive practices by the defendant in the sale of securities to her for investment.<sup>43</sup>

The court then determined, however, that the Consumer Act claim had to be dismissed and conducted under arbitration because the plaintiff had signed a General Account Agreement providing that "[i]f any controversy arises . . . it shall be settled by arbitration."<sup>44</sup> The court further determined that the FAA was designed to alleviate traditional judicial hostility toward arbitration and establish a federal policy favoring arbitration.<sup>45</sup> The court determined that Supreme Court cases interpreting the FAA<sup>46</sup> required the district court to compel arbitration of all state

***The FAA was designed to alleviate traditional judicial hostility toward arbitration and establish a federal policy favoring arbitration.***

claims even if it became necessary to maintain separate proceedings in different forums.<sup>47</sup>

The court then addressed the plaintiff's claims that the arbitration

clause in the General Account Agreement was "an unenforceable contract of adhesion."<sup>48</sup> The court found that if this were true, then the plaintiff's state law claims, including the Consumer Act claim, could not be arbitrated.<sup>49</sup> The court disregarded the plaintiff's argument, determining that although the contract was an adhesion contract, the "mere fact that one party to a contract enjoyed little relative bargaining strength . . . cannot alone render a contractual provision unenforceable."<sup>50</sup>

It is somewhat astonishing that the present Supreme Court, in interpreting the FAA, has been so decisive in its efforts to supersede and preempt state laws. The application of the Tenth Amendment to prevent congressional overreaching and encroachment upon the States is somewhat limited.<sup>51</sup> A 1991 case, *Gregory v. Ashcroft*,<sup>52</sup> suggests that federalism concepts are not dead. The Supreme Court recognized that states can prevent Congressional interference by utilizing the political process to pressure Congress into limiting the coverage of a federal statute.

The Court developed a "plain statement" rule that requires Congress to state plainly that it intends to override the normal constitutional balance between the two sovereigns so that it is "unmistakably clear" in the legislation.<sup>53</sup> Despite such strong statements on behalf of federalism, the Supreme Court's desire to foster arbitration in almost any circumstance has limited exceedingly the rights of states to set their own policy regarding the enforcement of contracts within their boundaries.

### C. Consumer Arbitration: Adhesion Agreements of the Future

Arbitration programs for consumer disputes have been available to businesses for years.<sup>54</sup> Probably the industry that has most utilized arbitration for resolving consumer disputes has been the automobile industry.<sup>55</sup> With the invocation of many "lemon laws," the availability of ADR systems grew.<sup>56</sup> These systems have gradually improved

the ability of a consumer to have a dispute quickly and effectively resolved. However, these systems are set up through the public process required by legal and statutory mandates and involve traditional dispute resolution organizations such as the Better Business Bureau and the American Arbitration Association ("AAA"). These programs foster voluntary involvement, encouraging consumer usage through education and awareness while not attempting to coerce individual consumers into the program through signed adhesion agreements.

***Arguments in favor of adhesion agreements are not as strong when consumers do not understand the ramifications of the arbitration clause and there is effectively no place "across the street" where consumers can go to retain their statutory and litigation rights.***

Unfortunately, the enforcement of adhesion agreements to arbitrate consumer securities disputes under the FAA has led to the expansion of adhesive arbitration agreements to other consumer areas. Now a homeowner who purchases a warranty contract may soon find that the resolution of any disputes must be by binding arbitration because the contract referred to the rules of the AAA.<sup>57</sup> Other examples of consumer adhesion agreements to arbitrate are emerging. One recent example involves the consumer banking industry and specifically the Bank of America.

The banking field often has applied the general principle that assent to all terms is implied by a person's signature and the corresponding duty to read the

contract.<sup>58</sup> Bank of America, a San Francisco-based bank and the nation's second largest, has recently announced that it will provide binding arbitration in disputes with its customers over deposit and credit card accounts.<sup>59</sup> Bank of America may be the first major money-center institution to include binding arbitration in its retail customer accounts.<sup>60</sup> Although the practice of using binding arbitration is commonplace for medical practitioners, construction companies, and stock brokers, the practice is relatively new for banks.<sup>61</sup>

Some consumer lawyers argued that Bank of America's agreements would not be binding because they lack the consumers' assent and provide classic examples of illegal adhesion contracts that coerce consumers into signing away legal rights to their detriment.<sup>62</sup> Bank of America responded through Winslow Christian, senior vice president and director of litigation, who said:

It is an adhesion contract, it clearly is, but an adhesion contract is not voidable unless it is [un]fair . . . [A] person has signed a document saying the terms of the contract can be amended at any time. The terms are then amended in accordance with that clause and they are notified of the change, *and if they don't like it they can go across the street.*<sup>63</sup>

Arguments in favor of adhesion agreements are not as strong when consumers do not understand the ramifications of the arbitration clause and there is effectively no place "across the street" where consumers can go to retain their statutory and litigation rights. Wells Fargo Bank, California's second largest bank, has already followed Bank of America's lead by instituting a mandatory ADR program for its customers.<sup>64</sup> Other banks are expected to follow their lead. A court challenge will most likely ensue. It is uncertain whether a California court would find

these arbitration clauses enforceable agreements to be bound by the bank's rules and regulations or merely "traps for the unwary."<sup>65</sup>

Recently, at least one California lawyer "has become permanently jaundiced about the wonders of alternative dispute resolution" for resolving an insurance consumer's dispute and is "disturbed about the idea of touting ADR as the savior of mankind."<sup>66</sup> Even one of the leading catalysts in increasing the use of arbitration, former Chief Justice of the Supreme Court, Warren Burger, stated that: "I do not suggest in any sense that arbitration can *displace* the courts . . . [but] arbitration should be an alternative that will *complement* the judicial systems [because t]here will *always* be conflicts which cannot be settled *except* by the judicial process."<sup>67</sup>

The problem is that the ADR movement has become so pervasive that almost nothing can stop it.<sup>68</sup> Advocates have singled out ADR as the "panacea" for resolving disputes without the delays and financial burdens of litigation.<sup>69</sup> Such altruistic aims are difficult to attack from a policy or political viewpoint. Nevertheless, it has been argued that ADR creates a two-tiered system of justice: one system for the "haves" and another system of lower quality for the "have-nots."<sup>70</sup> It also has been argued that ADR merely focuses on improved procedural steps while failing to offer the quality protection that substantive law affords individuals.<sup>71</sup>

### III. RESOLVING THE DILEMMA: LEVELING THE PLAYING FIELD

In general, fostering the use of arbitration or any other method for the quick resolution of disputes does not merit criticism or attack, in itself. The attack or criticism should focus on the coercion that occurs through the enforcement of adhesion agreements that fail to provide a meaningful choice of arbitral forum. Once a dispute arises between parties of unequal bargaining

power, the threat of litigation provides a level playing field to ensure that a decision to settle, arbitrate, litigate, or use any other dispute resolution method is clearly decided by the meaningful choice and agreement of both parties.

#### A. Equal Bargaining Power is the Hallmark of the FAA

The policy of preferring arbitration under the FAA developed from a desire to remove judicial scrutiny of agreements to arbitrate made by two commercial entities or merchants.<sup>72</sup> The Senate Committee Hearings to deter-

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mine the purpose of the FAA found that the bill which became the FAA was "intended [to] be . . . purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it . . ."<sup>73</sup>

Before the enactment of the FAA, courts had routinely declared agreements to arbitrate future disputes unenforceable because they improperly ousted the court's jurisdiction.<sup>74</sup> The FAA allowed merchants to agree that arbitration would be a "substitute" for litigation with limited judicial intervention.<sup>75</sup> The policy of the FAA requires minimal concern over bargaining power when two merchants are involved. Bargaining power between two commercial merchants is established from the economic resources of

the two entities and the ability to go elsewhere if a deal is not possible.

In its recent opinions addressing the FAA, the Supreme Court has glossed over the FAA's clear intention to enforce arbitration agreements between merchants of equal bargaining power.<sup>76</sup> Unfortunately, the only recent Supreme Court opinions that provide a thorough analysis of the legislative history and purpose of the FAA, as it pertains to bargaining power, are the dissenting opinions.<sup>77</sup> According to Justice Stevens' analysis of the legislative history in his dissenting opinion in *Gilmer*, the FAA was intended to remove judicial animosity toward commercial agreements to arbitrate damage claims made between two business entities or merchants, not between an employer and an employee.<sup>78</sup> Justice Stevens added some teeth to the inequality of bargaining argument by referring to the legislative history of the FAA:

When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to . . . form contracts between parties of unequal bargaining power . . . [T]he Court has...put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer . . . on the other.<sup>79</sup>

Given the underlying assumptions of equal bargaining power that dictated the policy of preferring arbitration in commercial disputes, it is disturbing that courts blindly approve arbitration agreements under the FAA where there is clear evidence of a lack of bargaining power. Unfortunately, courts have only given lip-service to the recognition that "arbitration remains a dispute resolution mechanism which is not imposed absent both parties' consent."<sup>80</sup> Lack of bargaining power between the individual consumer and the business entity or merchant requires a new analysis.

### ***B. Agreements to Arbitrate Future Consumer Disputes Should Be Presumed Unenforceable Under the FAA***

One commentator has argued that an agreement to arbitrate future disputes should not be upheld.<sup>81</sup> These agreements can create situations where individuals lose their day in court and are forced to arbitrate a dispute that may have been a subject for legitimate litigation. However, if an agreement is made after the event upon which the claim is based and the individual completes a "voluntary and knowing" waiver, this form of a post-event waiver or agreement to arbitrate should certainly be upheld.<sup>82</sup>

An agreement to arbitrate "all future disputes" should not be enforced in situations where the issue has been addressed by state statute unless there is a clear desire by both parties to waive their statutory rights.<sup>83</sup> This position is supported by the argument that the formation of a statute was required because these issues could not necessarily be resolved by contract in the private sector.<sup>84</sup> If an agreement to arbitrate future disputes is an adhesion contract where the consumer has little, if any, bargaining power, enforcement allows the private entity to coercively limit certain substantive rights that the state legislature sought to protect.

If both parties to an arbitration agreement truly have bargaining power, they can freely negotiate terms, seek legal advice, and specify how their legal rights will be enforced if a dispute occurs. Both sides freely give up certain rights in exchange for the certainty of the terms within their agreement. However, a large business or even an entire industry can circumvent a state's legislative and statutory process by establishing standard form terms limiting the substantive rights of individuals without any knowing and voluntary agreement to those terms by the individual. If a whole industry, e.g., the banking industry in California, adopts these terms in standard forms, it has become a quasi-legislature and has

changed the substantive rights normally guaranteed to individuals by state law.

Enforcement of adhesion agreements under the FAA when a state legislature has determined that the adhesive nature of the agreement makes them unenforceable, goes too far in the name of court reform and litigation alternatives. The roles of the state legislative system, the legal system, and the bench are being usurped by private agreements to arbitrate disputes. The public concerns that led to the enactment of a statute and the creation of substantive rights are being subsumed by a mentality that suggests arbitration or any alternative to litigation be employed at all costs.<sup>85</sup>

Therefore, if a private adhesion agreement lacks bargaining, involves coercion of individuals, and circumvents the judicial or statutory process, it should be presumed unenforceable.<sup>86</sup> The FAA was only enacted to protect merchants of equal bargaining power who found that they could not enforce their agreements to arbitrate.<sup>87</sup> Although the FAA was intended to remove the courts' antiquated notions that contracts should not be able to effect an "ouster" of a court's jurisdiction, it was never intended to allow businesses or whole industries to evade the public concerns addressed by a state's statute or any other legislative action. Once a clear dispute has arisen or equal bargaining exists, only then can the parties knowingly and voluntarily agree on whether they will settle, arbitrate, or litigate the dispute.

#### **1. Changing Judicial Interpretation and Analysis**

In adhesion agreements, concerns of unequal bargaining power are present whether the contract involves an individual consumer or an individual employee.<sup>88</sup> Older employees are one of the most likely groups to be coerced into an adhesion agreement which requires the arbitration of future disputes.<sup>89</sup> A decision by the Third Circuit, *Coventry v. United States Steel*

*Corp.*,<sup>90</sup> exemplifies the concern of unequal bargaining where individual employees are asked to waive age discrimination rights. The analysis espoused in this case suggests a model for application to consumer disputes.

This analysis requires a court to go beyond the traditional validity of contract analysis and look at "the totality of the circumstances" in determining whether a party's actions were knowing and voluntary.<sup>91</sup> By applying this analysis in his writing for the majority, Judge Higginbotham noted that an older employee is faced with a "Hobson's choice" or "take it or leave it" situation when asked to sign an agreement to waive age discrimination claims.<sup>92</sup> This dilemma for the older employee supported a finding that the decision to sign such an agreement "was not knowingly and willfully made" where the company had placed "unfair economic pressure" upon the individual employee to sign the agreement.<sup>93</sup>

This analysis of the totality of the circumstances in age discrimination waivers should be applied by courts as the federal common law under the FAA. The courts should remove the traditional and formalistic adhesion contract analysis from these issues and presume that these agreements are unenforceable until the drafter of the contract proves that the agreement is enforceable. Drafters of adhesion agreements to arbitrate could rebut the presumption by showing that the consumer's actions in signing the agreement were knowing and voluntary under the totality of the circumstances. This method does not create a *per se* rule invalidating all agreements to arbitrate future disputes but rather creates a framework of fairness and flexibility for courts analyzing such agreements under the FAA. Finally, the shifting of the burdens and presumptions to the drafter assures that true consumer choice and fairness will prevail and heal the wounds arising from perceived injustices associated with the coercion attendant to adhesion contracts.

### 2. Legislative Response

Despite the recent and drastic changes in the FAA's scope from what Congress intended in 1925, it is unclear whether today's Congress agrees with this presently expanded scope. Congress has endorsed the use of ADR in recent legislation<sup>94</sup> but has not suggested the coercive use of ADR that the Supreme Court has endorsed. Because the real expansion and overreaching in this instance has not developed through congressional action but through judicial interpretation, Congress can overrule and modify the Supreme Court's statutory interpretations of the FAA.<sup>95</sup> Certainly, Congress has acted before in response to judicial decisions that impaired state and local interests.<sup>95</sup>

Typically, advocacy or interest groups are unsuccessful in lobbying Congress to overturn Supreme Court decisions that solely hurt consumer interests.<sup>96</sup> Therefore, a coalition with other interest groups is essential to success. The greatest hope for consumer interest groups seeking a congressional override of the Supreme Court's endorsement of coerced arbitration is for States and Local Governments to join them in their fight.<sup>97</sup> Also, the National Association of Attorneys General might be willing to enter the debate if their states' consumer protection laws are being preempted by the FAA.<sup>98</sup> Certainly, consumer interest groups should unite with as many interests as possible in lobbying Congress for reforms to the FAA. With a strong showing, these groups could get Congress to amend the FAA so that it would be inapplicable to adhesion contracts and would not preempt state laws protecting potentially weaker parties involved in an adhesion agreement.

Recent developments in the law of age discrimination, pertaining to individual employee contracts, suggest an appropriate model for legislative response to the Supreme Court's present interpretation of the FAA. The Older Workers Benefit Protection Act ("OWBPA")<sup>99</sup> establishes procedures

for ensuring that an individual employee knowingly and voluntarily waives claims under the Age Discrimination in Employment Act ("ADEA").<sup>100</sup>

The OWBPA amended ADEA and

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created minimum standards for determining the validity of waivers of ADEA claims that are not supervised by the courts.<sup>101</sup> The OWBPA prevents an employer from foisting an arbitration agreement upon an employee without the employee fully understanding the ramifications of giving up the right to bring a statutory discrimination claim in court.

Under the OWBPA, an employee can only waive existing "rights or claims" under the ADEA, and therefore a waiver of future claims would be unenforceable.<sup>102</sup> At least one commentator has suggested, however, that employers may get around this requirement by arguing that an arbitration agreement is merely a procedural forum selection clause that does not waive a future substantive right or a future claim.<sup>103</sup> The argument is that the selection of a forum is a vested procedural right that accrues at the time the contractual relationship begins and does not depend upon the occurrence of future events.<sup>104</sup> If arbitration is merely another forum that does not affect the substantive rights of an individual, this argument may sur-

vive the OWBPA requirements.

Nevertheless, the measures in the OWBPA could easily be amended to the FAA. This would clearly establish that an arbitration agreement, whether it is considered a substantive or a procedural device, could only be enforced if the parties had knowingly and voluntarily agreed to it. Amending the OWBPA procedures to the FAA would ensure, by looking beyond just the signing of the agreement, that all parties had agreed to have the dispute resolved through arbitration. This would provide the justice desired by both consumers and merchants in resolving their disputes under arbitration agreements.

All those who believe that arbitration and ADR will save humankind from its litigious nature should be wary about its potential for abuse. History has shown that even good ideas can go too far. If the application of arbitration is abused, it could foster a backlash, with consumers and other groups seeking the type of statutory protection and amendment to the FAA as suggested in this Article.<sup>105</sup> Even advocates of the ADR movement should be critical of certain businesses or industries that abuse arbitration and coerce consumers to agree to it. If ADR is truly a better way, the parties will want to enter into it without the economic coercion inherent in adhesion contracts.

In past situations where the Supreme Court has significantly limited the rights of individuals through statutory interpretation of federal law, public and political pressure has forced Congress to respond and correct the Court's actions. These congressional responses may extend far beyond what would have happened if the Court had not tinkered with the statute at all. Businesses, merchants, and corporations should realize that by coercing consumers and other individuals with little bargaining power into using arbitration, they are providing the legislature with an open invitation to respond and amend the FAA. That legislative response may force even more restric-



tions on arbitration than were present before the Court's expansion of the FAA.<sup>106</sup> The focus should shift from coercing the forum to giving the consumer and business a choice between litigation and binding arbitration once a dispute arises.

## C. True Justice Will Provide Consumers with a Choice

When a person is coerced into an action, the lack of choice creates a perception of injustice. The assumption is that a business would not be trying to coerce consumers into certain actions unless it was beneficial to the business and probably harmful to the consumer. Whether this assumption is justified does not matter if human nature provides the impetus for the assumption. After all, "we must remember that the overarching goal of alternative dispute resolution is to provide equal justice to all."<sup>107</sup> A distinguished Supreme Court Justice once said that "the governing principle of a humane society and a good legal system . . . [is to] recognize the worth and importance of every person . . . [and] be *perceived by all the people* as providing equal justice."<sup>108</sup> Where a party is coerced into an adhesion agreement to arbitrate future disputes and the courts enforce that agreement quickly and without hesitation, it follows that the party will interpret these events as unfair.

A clear and unmistakable waiver with knowing and voluntary consent is the usual requirement before a court will enforce the waiver of a substantive right.<sup>109</sup> Certainly, it will be argued that an arbitration clause does not affect the substantive rights of a party because those rights can still be vindicated in the arbitral forum.<sup>110</sup> This argument disregards the substantive rights and public concerns that litigation options and statutory enforcement mechanisms tend to ameliorate.<sup>111</sup> Despite this argument, the Supreme Court has "long recognized that 'the choice of forum *inevitably* affects the scope of the substantive right to be vindicated.'"<sup>112</sup>

The protection of consumers, or any other individuals, who have signed a contract but have not assented to an arbitral forum is more than a visceral concern. Contracts are based on the assent of the parties, and deference is given to arbitration agreements due to the strong preference for resolving disputes by the parties' clearly chosen method. Deference to an arbitration clause is desirable for courts wanting to effectuate the intent of the parties. However, standard form agreements with forum selection clauses (including arbitration clauses) should not be enforceable *per se* when no true assent to the arbitral forum was ever given.

Deferential enforcement of arbitration clauses in adhesion contracts ef-

***The assumption is that a business would not be trying to coerce consumers into certain actions unless it was beneficial to the business and probably harmful to the consumer.***

fectuates the clear intent of only one of the parties, the merchant and drafter of the arbitration clause. By looking at the totality of the circumstances, the court can determine effectively whether the individual knowingly and voluntarily agreed to waive his substantive rights. These circumstances include the individual's education and experience, his role in deciding the inclusion or exclusion of the arbitration clause, the clarity of the terms in the arbitration clause, whether the individual used legal representation in negotiating the agreement, and whether there was valid consideration given for the release of the right to seek a judicial forum.<sup>113</sup>

## IV. CONCLUSION

This Article has not endorsed the pursuit of litigation over arbitration but has focused on giving a consumer and a business entity, as parties to a consumer transaction, a choice between the two alternatives once a dispute arises. The overwhelming desire by the courts and other commentators to use ADR systems, including arbitration, may be a noble and decent gesture. As this Article has explained, however, this worthy end of resolving disputes through quick and inexpensive arbitration should not be swallowed up by the means in which individual consumer disputes end up in arbitration.

Agreements to arbitrate future consumer disputes should not be enforceable when they consist of adhesion contracts lacking voluntary consent or any effective choice by the consumer. This is a policy argument and tends to go against the grain of recent Supreme Court precedent. Nevertheless, there is strong support for this viewpoint as evidenced by various state laws that have attempted to limit the use of arbitration and waiver of the judicial forum for certain disputes. The FAA should not be allowed to preempt state efforts at delivering justice to those individuals who, without these laws, would not be in a position to protect themselves. Either the courts should change their analysis to recognize the totality of the circumstances or Congress should amend the FAA to address these concerns.

Finally, consumer arbitration is a strong and effective dispute resolution tool *if* both sides knowingly and voluntarily agree to it *after* a dispute has arisen or when equal bargaining over terms is present. If the knowing and voluntary use of ADR provides consumers and businesses with quicker and less expensive methods for resolving disputes, true justice will have been achieved. Justice does not follow from a situation where consumers are forced to adhere to an arbitral forum and process that they would not have cho-

sen once the dispute arose. A coerced forum fosters the perception, which may be reality in some instances, that consumers are being treated unfairly. Even those who actively promote the use of ADR may one day see the negative consequences of the coercion, through an exploitation of the goals and purposes of the ADR movement, of individuals in consumer transactions. ♦

## ENDNOTES

- <sup>1</sup> Ralph Nader, *The Future of Tort Litigation in California*, 29 Santa Clara L. Rev. 503, 516 (1989).
- <sup>2</sup> 64 F.2d 344, 346 (2d Cir. 1933).
- <sup>3</sup> See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972); see also, *Northwestern Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) ("Ours is not a bazaar economy in which the terms of every transaction, . . . are individually dickered; . . . [f]orm contracts, and standard clauses in individually negotiated contracts, enable enormous savings in transaction costs..." and these terms should be analyzed under traditional doctrines unless "neither intended nor likely to be read by the other party..."); *United States v. Stump Home Specialties Mfg., Inc.*, 905 F.2d 1117, 1120 (7th Cir. 1990) ("Freedom of contract is alive and well"). Both of these decisions were written by Judge Richard A. Posner, who is widely known for economics scholarship in contractual law.
- <sup>4</sup> *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 760 (2d Cir. 1946) ("The release would still be invalid even though the plaintiff signed it without reading it, for he would have been justified in relying upon what his lawyer told him of the contents.")
- <sup>5</sup> Adhesion contracts are defined as agreements offered on a "take it or leave it" basis and evidencing no real choice or negotiation by the party who must adhere to the terms of the agreement or go elsewhere. See generally, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174, 1177 (1983); Jeffrey W. Stempel, *A Better Approach To Arbitrability*, 65 Tul. L. Rev. 1377, 1431 & n.258 (1991); *Northwestern Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990).
- <sup>6</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (an adhesion contract between individual consumers and a business entity with clearly unfair terms to the consumer is not *per se* unenforceable where the business entity has valid reasons for doing so and the savings are presumably passed on by lower rates).
- <sup>7</sup> For the purposes of this Article "arbitration" is defined as "the voluntary submission of a dispute to a disinterested person or persons for final and binding determination." Commercial Arbitration Rules 3 (American Arbitration Association May 1, 1992).
- <sup>8</sup> 9 U.S.C. § 1-14 (1988). The Supreme Court has recently enforced adhesion agreements to arbitrate future disputes between employees and employers. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).
- <sup>9</sup> See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (Mar. 1982) (hereinafter "A Better Way"). Former Chief Justice Burger was a leading advocate for the use of arbitration as an alternative to litigation. See, e.g., Warren E. Burger, *Using Arbitration to Achieve Justice*, 40 Arb. J. 3, 3 (Sept. 1985); Warren E. Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 83, 93-96 (1976).
- <sup>10</sup> Whether there truly is a "litigation explosion" has been contested. C.F. Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed The Lawsuit?* (Truman Talley Books -Dutton 1991) with Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).
- <sup>11</sup> See Olson, *supra* note 10, at 303 (advocating the use of arbitration and ADR). In 1991, former vice president Dan Quayle appeared at the American Bar Association's House of Delegates annual meeting to discuss proposed reforms to the civil justice system that would have increased the use of alternative dispute resolution. See *Quayle Raps Lawyers*, 77 A.B.A. J. 36, 36-37 (Oct. 1991).
- <sup>12</sup> Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425, 433-38 (1988) (discussing the benefits of arbitration).
- <sup>13</sup> See generally, *Essays on the Future of ADR: A Prospective Look From Three Viewpoints--Jurist, Educator, and Practitioner*, 14 Pepp. L. Rev. 769 (1987); Richard A. Salem, *The Alternative Dispute Resolution Movement: An Overview*, 40 Arb. J. 3, 3 (Sep. 1985).
- <sup>14</sup> *Business of Mediating Brings in Big Money*, Wall St. J., Mar. 22, 1993, at B1.
- <sup>15</sup> The FAA is broad legislation establishing substantive federal common law. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The FAA applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2 (1988). The Supreme Court has become increasingly determined to enforce arbitration agreements under the FAA regardless of the circumstances, including recent disputes involving individuals with large industries. The securities industry has been the impetus for many cases. See, e.g., *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).
- <sup>16</sup> *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230-31 (1987).
- <sup>17</sup> *Id.*; but see, Rakoff, *supra* note 5, at 1189 ("... the perception has become both widespread and overt that rigorous application of the traditional doctrines to contracts of adhesion generates in modern circumstances so many unjust results that it can no longer be justified . . .")
- <sup>18</sup> See, e.g., *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (state law adhesion principles may not be invoked to bar arbitrability of disputes under the FAA); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (state law adhesion contract principles cannot overcome the presumption of arbitrability under the FAA); *Bayma v. Smith Barney, Harris Upham & Co.*, 784 F.2d 1023, 1024-25 (9th Cir. 1986); *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984).
- <sup>19</sup> *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985) (consideration requires both parties agree to arbitrate "some...class of claims"); *Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F. Supp. 988, 995-96 (D. Minn. 1990) (if each party must arbitrate at least some claims, consideration is sufficient).
- <sup>20</sup> See generally, John D. Calamari, *Duty to Read—A Changing Concept*, 43 Fordham L. Rev. 341 (1974); 2 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 6:43 (4th ed. 1991).
- <sup>21</sup> See, e.g., *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 727 (8th Cir. 1977) ("the general rule of contract law" is that absent fraud "one who executes a contract cannot avoid it on the ground that he did not read it or supposed

- it to be different in its terms"); *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 811 (E.D. Pa. 1981) (same).
- <sup>22</sup> See, e.g., *Turner v. Johnson & Johnson*, 809 F.2d 90, 95-96 (1st Cir. 1986).
- <sup>23</sup> Courts typically address the unfairness issue under the doctrine of unconscionability but will clearly enforce an adhesion agreement where a party only had clearly inferior bargaining power. See, e.g., *Smith v. Navistar Intern. Transp. Corp.*, 957 F.2d 1439, 1445 (7th Cir. 1992); *Heller Financial, Inc. v. Midwhey Powder Co. Inc.*, 883 F.2d 1286, 1293 (7th Cir. 1989); *Veeder v. NC Machinery Co.*, 720 F. Supp. 847, 852 (W.D. Wash. 1989); *Edart Truck Rental Corp. v. B. Swirsky and Co. Inc.*, 579 A.2d 133, 138 (Conn. App. 1990); *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 912-13 (Del. 1989).
- <sup>24</sup> *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting) ("The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all.... Either you can make that contract or you can not make any contract.... A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all." (quoting Senator Walsh, Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess., 9 (1923)) (emphasis added).
- <sup>25</sup> Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984).
- <sup>26</sup> Cf. Fiss, *supra* note 25, at 1075 ("although dockets are trimmed, justice may not be done"); Lee Goldman, Comment, *My Way and the Highway: The Law and Economics of Choice and Form Contracts*, 86 NW. U. L. Rev. 700, 741 n.193 (1992) ("A cynic might suggest that the Court, obsessed with the size of the federal docket, viewed [the likely result that many meritorious suits will not be filed as] an ancillary benefit of its decision.") Public concerns may be missed by private ADR. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 Harv. L. Rev. 668, 675-82 (1986).
- <sup>27</sup> There is the possibility that a law pertaining to insurance agreements may be able to survive FAA pre-emption because of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1988). See Stephen Lamson, *The Impact of the Federal Arbitration Act and the McCarran-Ferguson Act on Uninsured Motorist Arbitration*, 19 Conn. L. Rev. 241 (1987). The McCarran-Ferguson Act provides that "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (1988).
- <sup>28</sup> See *Southland Corporation v. Keating*, 465 U.S. 1 (1984); *Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F. Supp. 988, 994 (D. Minn. 1990); See generally William G. Phillips, Annotation, *Pre-Emption by Federal Arbitration Act (9 USCS §§ et. seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. Fed. 180 (1992).
- <sup>29</sup> *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 477 (1989).
- <sup>30</sup> See Karen Donovan, *Lawyer After Fee Throws a Wrench in USX Arbitration*, Nat'l L.J., Feb. 8, 1993, at 21, 28 (statements of Robert B. von Mehren that because of the Supreme Court's holding in *Volt* many had thought that state arbitration articles would apply more frequently but that has not happened). Mr. von Mehren also stated, "As a general rule, I would say that the federal statute [FAA] controls, because it was meant to provide uniformity for transactions in interstate commerce." *Id.* at 28.
- <sup>31</sup> 350 U.S. 198 (1956) (FAA not applied because transaction does not involve commerce or engage in an activity affecting commerce).
- <sup>32</sup> See 9 U.S.C. § 2 (1988).
- <sup>33</sup> See Goldman *supra* note 26, at 712 n. 68.
- <sup>34</sup> See, e.g., *Pennsylvania Data Entry, Inc. v. Nixdorf Computer Corp.*, 762 F. Supp. 96, 98 (E.D. Pa. 1990); *Fairchild & Co., Inc. v. Richmond, F. & P. R. Co.*, 516 F. Supp. 1305, 1310 (D. D.C. 1981) (phrase "involving commerce" in § 2 of the FAA is broadly applied).
- <sup>35</sup> See, e.g., *McCormick-Morgan, Inc. v. Whitehead Elec. Co.*, 345 S.E.2d 53 (Ga. App. 1986) (if one party is not from out of state and the contract's materials are from out of state then FAA applies).
- <sup>36</sup> See, e.g., *William Gibson, Jr., Inc. v. James Graff Communications, Inc.*, 780 P.2d 1131 (Mont. 1989) (although employer's business was small the advertising services affected interstate commerce enough for the FAA to apply); *Hart v. Orion Insurance Co.*, 453 F.2d 1358 (10th Cir. 1971) (FAA applied to individual insurance contract because of interstate delivery of the policy). Since 1942 there have been broad applications of the commerce clause to intrastate activities based upon their cumulative effect on interstate commerce. See *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942); *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964). There is a legitimate argument that when Congress enacted the FAA in 1925, it did not intend the meaning of interstate commerce to be as broadly applied as later commerce cases required. See Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 597-98 (1954).
- <sup>37</sup> Lamson *supra* note 27, at 263.
- <sup>38</sup> See, e.g., *Ex parte Williams*, 555 So.2d 146, 148 (Ala. 1989) (where Alabama resident bought automobile from an Alabama dealer for consumer purpose and "not for commercial purpose" and the dealer has its only place of business in Alabama, the vehicle is delivered to the buyer in Alabama, and the obligations arising out of the contract are to be performed in Alabama, the FAA does not apply); *Ex parte Warren*, 548 So.2d 157 (Ala. 1989) (same); *Withers-Busby Group v. Surety Industries, Inc.*, 538 S.W.2d 198 (Tex. App. 1976) (lease agreements between lessees and corporation all within the state of Texas were not commerce between the states under the FAA).
- <sup>39</sup> 641 F. Supp. 1163 (N.D. Ill. 1986).
- <sup>40</sup> *Id.* at 1165.
- <sup>41</sup> *Id.*
- <sup>42</sup> Ill. Rev. Stat., ch. 121½, paras. 261-72 (1989) (815 ILCS 505/1-505/12).
- <sup>43</sup> *Preston*, 641 F. Supp. at 1168.
- <sup>44</sup> *Id.* at 1170.
- <sup>45</sup> *Id.*
- <sup>46</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).
- <sup>47</sup> *Preston*, 641 F. Supp. at 1170.
- <sup>48</sup> *Id.* at 1171.
- <sup>49</sup> *Id.*
- <sup>50</sup> *Id.*; see also *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984); *Finkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505, 1511 (S.D. N.Y. 1985).
- <sup>51</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

## Lead Articles

- <sup>52</sup> 111 S. Ct. 2395 (1991).
- <sup>53</sup> *Id.* at 2400.
- <sup>54</sup> Ronald J. Adams, *Consumer Complaint Arbitration: The Corporate View*, 43 Arb. J. 41, 42 (Dec. 1988).
- <sup>55</sup> See, e.g., Arthur Best, *Consumer Problems and ADR: An Analysis of the Federal Trade Commission-ordered General Motors Mediation and Arbitration Program*, 1990 J. Disp. Resol. 267; Richard Widdows, *Consumer Arbitration as a Dispute Resolution Mechanism in Customer-Seller Disputes over Automobile Purchases*, 42 Arb. J. 17 (Mar. 1987).
- <sup>56</sup> See Robert Abrams, *New York Lemon Law Arbitration Program: Annual Report — 1987*, 43 Arb. J. 36 (Sep. 1988); Paula W. Gold, *Massachusetts Lemon Law Arbitration Program: 1987 Report*, 43 Arb. J. 48 (Sep. 1988).
- <sup>57</sup> See *Rainwater v. National Home Insurance Co.*, 944 F.2d 190 (4th Cir. 1991). This case exemplifies the few instances where a business entity, instead of a consumer, is trying to show the arbitration agreement did not prevent further resolution by litigation.
- <sup>58</sup> WILLISTON & LORD *supra* note 20, at §§ 6.43, 471. ("Depositors at common law are generally held bound by references on signature cards and in passbooks to the conditions and limitations contained in a bank's bylaws, regardless of whether the customer has read the signature card or passbook in which the reference is contained.").
- <sup>59</sup> *Bank of America Adopts Binding Arbitration for Disputes*, UPI, June 2, 1992, available in LEXIS, Nexis Library, UPI File (BC cycle). Bank of America has about seven million credit card accounts and has as much as half of the deposit accounts in California following its merger with Security Pacific. *Id.*
- <sup>60</sup> *Id.*
- <sup>61</sup> *Bank of America Adopts Alternative Dispute Resolution*, Business Wire, June 2, 1992, available in LEXIS, Nexis Library.
- <sup>62</sup> Stephen G. Hirsch, *Arbitration Policy at Bof A Ignites Plaintiffs Lawyers*, The Recorder, June 4, 1992, available in LEXIS, Nexis library.
- <sup>63</sup> *Id.* (emphasis added).
- <sup>64</sup> Stephen G. Hirsch, *Wells Fargo Ventures Into ADR*, The Recorder, July 7, 1992, available in LEXIS, Nexis Library.
- <sup>65</sup> *Compare Larrus v. First Nat. Bank*, 266 P.2d 143 (Cal. App. 1954) (finding that plaintiffs had the opportunity to object to the bank's rules but failed to do so) with *Los Angeles Inv. Co. v. Home Sav. Bank*, 182 P. 293 (Cal. 1919) (statement was not signed nor clearly called to plaintiff's attention suggesting that the statement was a trap "for the unwary" and could not be enforced absent the consent of the plaintiff).
- <sup>66</sup> Victoria Slind-Flor, "Arb" Testimony Not Privileged, NAT'L L.J., Feb. 8, 1993, at 3, 29 (statements by Stephen F. Von Till, plaintiffs' lawyer, in a malpractice case where the plaintiff's health plan contract contained a mandatory arbitration clause).
- <sup>67</sup> See Burger, *A Better Way*, *supra* note 9, at 277 (emphasis added).
- <sup>68</sup> Cf. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1561 (1991) ("Because the mediation movement tends to regard negotiated settlements as morally superior to adjudication, [societal notions of justice and public] functions of adjudication may be easily overlooked") (emphasis added).
- <sup>69</sup> See Edwards, *supra* note 26, at 668 (beginning a general discussion of whether ADR is the panacea that most anticipated).
- <sup>70</sup> Jerold S. Auerbach, *Justice Without Law?* 144 (New York: Oxford University Press, 1983). Auerbach argues that ADR creates a system of justice merely for the poor and the weak with weaker procedures and protection because their claims are "small" and "minor"; whereas, the rich still have the power to pursue the legal system with its attendant procedural and substantive guarantees. *Id.*
- <sup>71</sup> Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tul. L. Rev. 1, 15-16 (1987).
- <sup>72</sup> See generally, Robert B. von Mehren, *From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 Brooklyn J. Int'l L. 583, 591-592 (1986) (The FAA was enacted to counter the judicial bias against contracts between private business entities that agreed to arbitrate future disputes about damages stemming from their business dealings).
- <sup>73</sup> *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting) (quoting Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess., 9 (1923)).
- <sup>74</sup> *Id.* at 1660.
- <sup>75</sup> See *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("In the commercial case, arbitration is the substitute for litigation.")
- <sup>76</sup> The arguments being addressed or accepted by the Supreme Court about the legislative purpose of the FAA "all seem infected by some historical naivete." See von Mehren, *supra* note 72, at 620.
- <sup>77</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1659 (1991) (Stevens, J., dissenting); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting).
- <sup>78</sup> 111 S.Ct. at 1659 ("There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.") (emphasis added).
- <sup>79</sup> *Id.* at 1661.
- <sup>80</sup> *Recond, S.A. de C.V. v. Monfort of Colorado, Inc.*, 893 F.2d 195, 197 (8th Cir. 1990) (citing, *Volt Information Sciences, Inc. v. Board of Trustees*, 109 S.Ct. 1248, 1255 (1989)).
- <sup>81</sup> See Stephen A. Mazurak, *Alternative Dispute Resolution of Employment Claims: Exclusivity, Exhaustion, and Preclusion*, 64 U. Det. L. Rev. 623, 639 (1987) (referring to employment claims).
- <sup>82</sup> *Id.* at 643. If a valid post-event waiver is executed, the claim would be subject to exclusive arbitration. Cf. *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir. 1987) (if the agreement occurred after the event in dispute and the individual made a knowing and voluntary waiver of the statutory claim then the waiver is valid).
- <sup>83</sup> Cf. Mazurak, *supra* note 81, at 639.
- <sup>84</sup> Mazurak, *supra* note 81, at 640; see also Fiss, *supra* note 25, at 1082-83; Edwards, *supra* note 26, at 676-78; Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 Hastings L.J. 239 (1987) (certain public interests must be protected when implementing private ADR methods).
- <sup>85</sup> Cf. Grillo, *supra* note 68, at 1610 (suggesting the dangers in forced or coerced use of mediation despite the growing belief "that even a misguided, intrusive, and disempowering system of mediation" is somehow better than the litigation process).
- <sup>86</sup> See Rakoff, *supra* note 5, at 1183, 1243.
- <sup>87</sup> See *supra* text accompanying notes 76-80 regarding the FAA's legislative history and assumptions of equal bargaining between merchants.
- <sup>88</sup> The legislative history of the FAA shows that concerns about the unequal bargaining power of individual consumers and employees were considered simultaneously. See *Gilmer*, 111 S. Ct. at 1659

(referring to comments about insurance contracts for individual consumers and employment contracts for individual employees).

<sup>89</sup> See *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 229 (3d Cir. 1989) ("Older employees who have invested many years of their career with a particular employer may lack any realistic option to refuse to sign a standard form arbitration agreement presented to them by their employers.")

<sup>90</sup> 856 F.2d 514 (3d Cir. 1988).

<sup>91</sup> *Id.* at 522-23.

<sup>92</sup> *Id.* at 524.

<sup>93</sup> *Id.* at n.12.

<sup>94</sup> See, e.g., The Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (authorizing and promoting the use of ADR by federal government agencies).

<sup>95</sup> See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 338 (1991) ("Congress frequently overrides or modifies statutory decisions by lower federal courts as well as those by the Supreme Court.")

<sup>96</sup> *Id.* at 344 n.30 (citing Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 Urb. L. 301 (1988)).

<sup>98</sup> *Id.* at 362.

<sup>97</sup> See *id.* at 348 (State & Local Governments is the fourth most successful group in getting Congress to override Supreme Court decisions). When State & Local Governments is combined with general citizenry they form the second most likely group, behind the United States & U.S. Departments, to persuade Congress to override the Supreme Court's adhesion contract analysis under federal laws. *Id.*

<sup>98</sup> Certainly enough states have some form of consumer protection and ADR program under the supervision of their State Attorneys General to pique the interest of the National Association of Attorneys General. See John W. Cooley, *Alternative Dispute Resolution and Consumer Protection: An "Odd-Couple" Thriving in the Offices of State Attorneys General*, 1 Loy. Consumer L. Rep. 1, 12-16 & n.55 (1988) (describing certain states, listed by the National Association of Attorneys General, that have ADR and Consumer Protection programs supervised by the Attorneys General Offices).

<sup>99</sup> P.L. 101-433, 104 Stat. 978 (Oct. 16, 1990).

<sup>100</sup> 29 U.S.C. §§ 621-634 (1988).

<sup>101</sup> P.L. 101-433, 104 Stat. 978 (Oct. 16, 1990). The OWBPA establishes, among other things, the following prerequisites: (1) the waiver must be written so that it can be understood by the individual or by the average person; (2) the waiver must specifically refer to rights or claims arising under ADEA; (3) *the individual does not waive rights or claims which may arise after the date the waiver is executed*; (4) rights or claims are waived only in exchange for "consideration" in addition to anything of value to which the individual already is entitled; and (5) the employer must advise the person in writing to consult with an attorney prior to executing the agreement. *Id.* (emphasis added).

<sup>102</sup> 29 U.S.C.A. § 626(f)(c) (West Supp. 1992).

<sup>103</sup> See Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 Harv. L. Rev. 568, 577 n.71 (1990) (discussing the OWBPA and suggesting the procedural distinctions that might allow enforcement of arbitration claims under ADEA despite the OWBPA's requirement of knowing and voluntary waiver).

<sup>104</sup> *Id.*

<sup>105</sup> Concerns about the backlash from pushing ADR in a too comprehensive manner have been expressed before. See Stephen G. Hirsch, *Arbitration Policy at BoFA Ignites Plaintiffs Lawyers*, The Recorder, June 4, 1992, available in LEXIS, Nexis Library (statements by Dean Jay Folberg, of the University of San Francisco Law School, suggesting that Bank of America's binding arbitration program may push ADR in such a comprehensive manner that it creates a backlash); *Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds*, Daily Lab. Rep. (BNA) No. 84, at A-16 (Apr. 30, 1992) (statements by individual employee's counsel that if ADR becomes "a one-way ratchet" or "is abused, it could foster a backlash, with employees seeking statutory protection in the same way that Congress enacted the Civil Rights Act of 1991 as a backlash against the Supreme Court's derailing of affirmative action laws").

<sup>106</sup> Admittedly, the requirements of the OWBPA which this Article suggests should be amended to the FAA are stricter than creating a presumption for judicial interpretation because the OWBPA creates a *per se* rule against any agreements made before the dispute arises.

<sup>107</sup> Edwards, *supra* note 26, at 684.

<sup>108</sup> *Mr. Justice Marshall Lives on in His Words*, Nat'l L.J., Feb. 8, 1993, at 8 (Statements by Justice Thurgood Marshall at the Eighth

Conference on the Law of the World, 1977) (emphasis added).

<sup>109</sup> See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 n.12 (1983) (waiver of rights under the National Labor Relations Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver of Title VII of the Civil Rights Act of 1964, employment discrimination rights); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) (waiver of rights under ADEA).

<sup>110</sup> See Note, *supra* note 103, at 577 n.71; see also, *Pierson v. Dean, Witter, Reynolds*, 742 F.2d 334, 340 (7th Cir. 1984) (enforcement of arbitration clause "only limits the remedy and changes the forum in which [plaintiffs] may air their common law complaints").

<sup>111</sup> Ralph Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 Gonz. L. Rev. 15, 20-21 & n.21 (1987) (referring to the value of litigation options, including the jury system, as a deterrence to further wrongdoing, and a communication vehicle to others by requiring the public admonition of the wrongdoer).

<sup>112</sup> *Alexander v. Gardner-Denver*, 415 U.S. 36, 56 (1974) (quoting *U.S. Bulk Carriers Inc. v. Arguelles*, 400 U.S. 351, 359-60 (1971)) (Harlan, J., concurring) (emphasis added).

<sup>113</sup> See *Coventry*, 856 F.2d at 521-25 (referring to waiver of statutory rights granted under ADEA).