COMMENTS

MAKING WAIVES: REINING IN CLASS ACTION WAIVERS IN CONSUMER CONTRACTS OF ADHESION

I. INTRODUCTION

You arrive home after a long day at work to discover the usual pile of junk mail. As you shuffle through the drab stack of envelopes, you realize that it is time to pay your monthly cell phone bill. You open and glance over the bill and are once again annoyed to discover that you have been double-billed for the unlimited text messaging service you signed up for a while back.[1] As you fume and grumble under your breath, you note in the back of your mind that if this is happening to other customers, your cell provider could be making a killing off of this "little" billing glitch, even though it only costs you alone a few dollars each month. Frustrated, but resigned to the fact that these things happen, you dutifully file away your bill and toss the envelope with its typical junk mail inserts into the trash can.

Now, lying at the bottom of your trash can, stuffed between an advertisement for the hottest new ringtones and an insert for a limited-time credit card offer, there rests a contract with the following terms:

> Revised Terms of Service:
>
> CLASS ACTION WAIVER. Whether in court or arbitration, a party to this contract may only bring claims against the other in an individual capacity and not as a class member in a class mechanism.
>
> Continued use of this service constitutes your acceptance of these terms.

Assuming you continue using your cell phone, you are now bound by this contract and probably a number of others like it. You have become a party to a consumer contract of adhesion.[2] In waiving your right to any type of class

1. This anecdote is inspired by the facts of *Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 U.S. Dist. LEXIS 49444, at *2 (E.D. Mich. July 20, 2006), which involved cell phone customers who were consistently double-charged a $4.99 fee over a number of months for a bonus service involving mobile features such as unlimited Internet and e-mail access.

2. Generally, contracts of adhesion are form contracts presented on a take-it-or-leave-it basis. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176-77 (1983). More specifically, a model contract of adhesion contains the following elements:

> (1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
>
> (2) The form has been drafted by, or on behalf of, one party to the transaction.
>
> (3) The drafting party participates in numerous transactions of the type represented by

mechanism for redressing grievances, you may have closed off the most effective and practical means of redressing small but substantial wrongs without even realizing what you have done.

The validity of class action waivers in consumer contracts of adhesion has been a hotly contested topic in contract law. There is a split in authority in both state and federal courts.[3] This split has allowed savvy business contract drafters to choose the law of business-friendly jurisdictions that would likely allow such terms, while the consumers, as the adhering parties, have relatively little say in the matter.

This Comment will examine the circuit split among federal courts on this issue and will argue for the adoption of a clearer and more uniform standard to protect consumers and deter businesses from engaging in careless or unscrupulous business practices. Part II of this Comment will review the circuit split existing among the federal courts on this issue. Part II.A.1 will pay particular attention to the reasoning of the Third Circuit in *Johnson v. West Suburban Bank*[4] and the supporting reasoning of other circuits following that case. This line of authorities has adopted the view that class actions are purely procedural, and, therefore, unless expressly preserved by Congress in the relevant statute, class actions can be contractually waived if the plaintiff is still "capable" of pursuing redress individually in an arbitral forum.[5] Part II.A.2 will analyze the reasoning of the recent First Circuit decision in *Kristian v. Comcast Corp.*[6] This reasoning involved a broader analysis of the policy goals of the statute at issue, the purpose of class actions, and contract doctrine.[7] Finally, Part II.B will discuss the parallel split among state courts on this issue and analyze the similarities and differences between state and federal court reasoning on both sides of the issue.

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the form and enters into these transactions as a matter of routine.

(4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.

(5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.

(6) The adhering party enters into few transactions of the type represented by the form — few, at least, in comparison with the drafting party.

(7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.

Id. at 1177 (footnote omitted). It is clear that businesses bound by many identical contracts with consumers can benefit as the drafting party of this model. *Id.* at 1222-24. It is also clear that consumers easily can be taken advantage of as the adhering party of this model. *Id.* at 1225-29.

3. See *infra* Parts II.A-B for a discussion of the split in federal and state authorities on the validity of class action waivers.

4. 225 F.3d 366 (3d Cir. 2000).

5. See *infra* notes 27-35 and accompanying text for a discussion of the reasoning in *Johnson*.

6. 446 F.3d 25 (1st Cir. 2006).

7. See *infra* notes 54-66 and accompanying text for a discussion of the reasoning in *Kristian*.

Part III.A of this Comment will discuss the strengths of the First Circuit's argument in using federal precedent and terminology to reach a holding consistent with important policy goals of class actions that state courts have addressed but previous federal court decisions have overlooked. Part III.B looks at some of the flaws in the reasoning of the Third Circuit decision and its progeny, which make the holdings of those cases less consistent with the purposes and policy goals of class action remedies. These goals include more than just ensuring the ability of an individual plaintiff to pursue redress for harm done; they also provide redress for others harmed in the same way and create a meaningful deterrent against similar offenses in the future. Part III.C explains why the policy of states routinely upholding class action waivers per se is inapplicable under a *Kristian* analysis. Finally, Part III.D proposes a legislative course of action that might help resolve certain difficulties in future application of the *Kristian* analysis.

II. CHOPPY WATERS: THE SPLIT IN AUTHORITY IN FEDERAL CIRCUIT COURTS AND BEYOND

The class action mechanism has experienced its fair share of roadblocks[8] and amassed a daunting collection of opponents in its lifetime,[9] but ultimately the mechanism, embodied in Federal Rule of Civil Procedure 23,[10] ostensibly has the endorsement of the highest court in the land. In *Amchem Products, Inc. v. Windsor*,[11] the Supreme Court highlighted the importance of allowing the aggregation of parties whose individual claims would yield such paltry recovery as to eliminate any incentive to bring an individual action.[12] Class actions also give attorneys a means of litigating claims that would be unreasonably costly to litigate on an individual basis.[13] Furthermore, class actions are a particularly essential tool in protecting consumers who might never even realize that they have been victims of illegal business practices without the notification of a class action suit brought by one informed consumer in their class.[14] Finally, the

8. *See, e.g.*, Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 380-88 (2005) (tracing demise of class action tort claims due to, among other things, tremendous pressure placed on defendants to settle, difficulty in applying various state tort laws to one action, and inability to weed out individual, unmeritorious claims).

9. Most recently, Congress passed legislation expanding federal jurisdiction over class actions and limiting state courts' (which have traditionally been more sympathetic to state consumers) ability to decide these cases on state law and policy grounds. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified in scattered sections of 28 U.S.C.).

10. FED. R. CIV. P. 23.

11. 521 U.S. 591 (1997).

12. *Amchem*, 521 U.S. at 617; *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (finding that defendant bank's scheme to avoid class liability was untenable because aggrieved persons would be without effective redress without class action device).

13. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (noting that class action mechanism provided means of litigating case that "[n]o competent attorney would undertake" otherwise).

14. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS.,

deterrent effect of class actions in preventing illegal business practices cannot be overstated.[15]

In recent years, however, with the now widespread use of consumer contracts of adhesion,[16] the class mechanism may face its greatest challenge yet. These contracts are used by credit lenders, banks, cell phone companies, and a variety of other corporations seeking to minimize liability by setting terms that tend to limit adherents' options in seeking recourse. Contracts of adhesion are known for introducing innovative new categories of contract clauses, which continue to push the limits of contract law.[17]

It therefore seems almost inevitable that consumer contracts of adhesion would eventually find a way to force consumers to pursue their causes of action on an individual basis by targeting class mechanisms. As long as class actions remain a viable choice for plaintiffs,[18] they pose a great threat to the ability of businesses to minimize their risk of liability. Thus, the late 1990s saw the advent of the class action waiver in consumer contracts, resulting in a number of circuit court decisions reaching different conclusions and yielding a circuit split.[19] Neither the Supreme Court nor Congress has directly confronted the issue.[20]

A. Federal Cases Addressing Class Action Waivers

Federal circuit courts have recently split on the issue of the validity of class action waivers in consumer contracts of adhesion. While both sides of the split

Winter/Spring 2004, at 75, 88-89.

15. *See* Gilles, *supra* note 8, at 378 (asserting that, in spite of risk of plaintiff abuse of class actions, procedural mechanism does more good than harm because it discourages corporate wrongdoing more than one-on-one litigation would).

16. See *supra* note 2 for a general description of a contract of adhesion. Although this Comment will focus on "consumer" contracts, the issues surrounding these adhesion contracts, particularly regarding class action waivers, are virtually the same in employee and franchisee contracts of adhesion.

17. Arbitration clauses, choice of law clauses, and clauses limiting remedies are some examples of ways that consumer contracts of adhesion limit businesses' exposure to liability. See generally William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1 (2006), for an exhaustive discussion of choice-of-law and forum clauses and the conflict-of-laws issues that arise in the context of adhesion contracts.

18. Presumably they still are a viable option, with the endorsement of the Supreme Court in *Amchem* and the endorsement of Congress, as well as the existence of Rule 23.

19. *Compare* Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (upholding class action waiver in consumer contract of adhesion), *with* Kristian v. Comcast Corp., 446 F.3d 25, 29 (1st Cir. 2006) (invalidating class action waiver because it prevented vindication of plaintiffs' substantive rights). Although a similar split over this issue exists on the state level, the federal circuit split is of particular interest because "most class actions are founded on federal questions, such as federal consumer, civil rights, antitrust, and securities statutes." Gilles, *supra* note 8, at 391. See *infra* Part II.B for a discussion of the analogous split facing state courts and legislatures.

20. The Supreme Court has expressly declined to pass judgment on the question of class action waiver when confronted with it, choosing to decide the case on other grounds. *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) (stating that, because court of appeals decided case based on general arbitrability and did not address class action waiver, Supreme Court need only adjudicate issues dealt with below).

agree that a class action waiver that denies a victim his day in court cannot be sustained, the disagreement arises over the way in which courts should evaluate whether such a denial has occurred. One side, laid out in *Johnson v. West Suburban Bank*,[21] narrowly argues that a class action waiver is valid as long as the "full range of [statutory] rights" are "capable of vindication" by the plaintiff.[22] The other side, most recently and thoroughly expounded in *Kristian v. Comcast Corp.*,[23] takes the broader view that, even though a consumer's rights may be literally capable of vindication on an individual basis, "'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'"[24] Therefore, the *Kristian* court emphasized that the procedural mechanism of class actions itself has substantive implications.[25]

1. Federal Cases Upholding Class Action Waivers

Most of the circuit cases upholding the waiver of class mechanism rights imposed by arbitration clauses were brought under claims of violations of the Truth in Lending Act ("TILA").[26] The Third Circuit was the first to confront the issue in *Johnson*, where the plaintiff sought class recovery under TILA.[27] The plaintiff argued that the terms of an adhesion contract arising out of a loan, which compelled arbitration to the exclusion of any possible class action, conflicted with Congress's intent in passing TILA.[28] Nonetheless, the Third Circuit disagreed and held that, in light of the Supreme Court's firm stance that the Federal Arbitration Act ("FAA")[29] created a presumption in favor of arbitration[30] and because TILA did not explicitly preserve plaintiffs' right to

21. 225 F.3d 366 (3d Cir. 2000).

22. *Johnson*, 225 F.3d at 373-74.

23. 446 F.3d 25 (1st Cir. 2006).

24. *Kristian*, 446 F.3d at 54 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)).

25. *Id.*

26. 15 U.S.C. §§ 1601-1667 (2000); *see also* Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 555 (7th Cir. 2003) (considering allegations that defendant lender's disclosure of terms violated TILA); Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 635 (4th Cir. 2002) (addressing plaintiff's allegations of violation of TILA for lender's rendering of illegal service fee); Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 815 (11th Cir. 2001) (examining alleged violations of TILA); *Johnson*, 225 F.3d at 370 (considering plaintiff's allegation that failure to disclose high interest rates violated TILA). *But see* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877-78 (11th Cir. 2005) (applying reasoning of *Johnson* and other TILA cases in holding that, because arbitration agreements allowed plaintiffs to vindicate all substantive rights in arbitration, inclusion of class action waiver did not render agreements substantively unconscionable).

27. *Johnson*, 225 F.3d at 368.

28. *Id.* at 368-69. The district court agreed with the plaintiff, holding that the arbitration clause's preclusion of a class action conflicted with TILA. *Id.* at 369.

29. 9 U.S.C. §§ 1-16 (2000).

30. *Johnson*, 225 F.3d at 369; *see also, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (stating that parties "agreeing to arbitrate" statutory rights are not waiving those rights but are simply submitting "'to their resolution in arbitral, rather than a judicial, forum'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))); *Mitsubishi*, 473 U.S. at 628 (holding that parties who have "made the bargain to arbitrate" should be held to that bargain, unless waiver of judicial remedy violates Congress's intent); Moses H. Cone Mem'l Hosp. v.

pursue class actions, that right was waivable.[31] The Third Circuit classified the right to class actions under Federal Rule of Civil Procedure 23 as strictly procedural and, therefore, found that compelled arbitration did not impede plaintiff's vindication of any substantive rights under TILA.[32]

Specifically, the *Johnson* court relied on the statutory text and legislative history of TILA to conclude that, although Congress expressly provided for the possibility of class actions under the Act, there is no "irreconcilabl[e] conflict[]" between the goals of TILA and an arbitration clause precluding class actions.[33] Congress has given no indication, argued the *Johnson* court, that "parties cannot choose to waive judicial remedies in favor of arbitration."[34] While recognizing that the unavailability of a class remedy could reduce the number of plaintiffs seeking to enforce TILA against offending creditors,[35] the court narrowly concluded that without a specific pronouncement on the part of Congress to preclude arbitration as a remedial forum, either in the text or legislative history of a specific statute, the choice of such forums and waiver of class remedies was permissible.

After *Johnson*, the Fourth, Seventh, and Eleventh Circuits heard similar cases and reached similar conclusions. In *Randolph v. Green Tree Financial Corp.*,[36] the Eleventh Circuit followed the reasoning of *Johnson* in holding that TILA did not expressly preserve class actions as a nonwaivable right and that TILA's public policy goals could be vindicated through arbitration.[37] Nevertheless, the *Randolph* court declined to address the plaintiff's contention that even if arbitration were enforceable, class arbitration would not be precluded by the contract.[38] Similarly, in *Snowden v. Checkpoint Check Cashing*,[39] the Fourth Circuit based the relevant part of its holding—sustaining

Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (noting that when facing questions of arbitrability, federal policy favoring arbitration must be considered).

31. *Johnson*, 225 F.3d at 369.

32. *Id.*

33. *Id.* at 374-75.

34. *Id.* at 376.

35. *Id.* at 374.

36. 244 F.3d 814 (11th Cir. 2001).

37. *Randolph*, 244 F.3d at 818. The Eleventh Circuit has subsequently invalidated a class action waiver in an arbitration provision of a consumer contract. Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007). *Dale* involved alleged violations under the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-573 (2000 & Supp. IV 2004), which did not provide for attorneys' fees or costs to the plaintiffs. *Id.* at 1222. Nevertheless, the *Dale* court relied extensively on the reasoning of *Kristian* to conclude that "[t]he cost of vindicating an individual subscriber's claim, when compared to his . . . potential recovery, is too great." *Id.* at 1224. Because the court adopted a "totality of circumstances" analysis, it remains to be seen how the Eleventh Circuit will rule in a case involving a statute that does provide for plaintiff attorney's fees. *Id.*

38. *Randolph*, 224 F.3d at 815-16 (stating that because plaintiff did not raise issue in timely manner, court would not address issue of whether contract that is silent on permissibility of class arbitration implicitly allows such mechanism).

39. 290 F.3d 631 (4th Cir. 2002).

the class action waiver—on *Johnson*.[40] On the basis of TILA's provision awarding attorney's fees to the prevailing party, the court rejected plaintiff's argument that she could not afford legal representation given the small potential damages award.[41] Finally, in *Livingston v. Associates Finance, Inc.*,[42] the Seventh Circuit faced a class arbitration waiver in a contract which compelled arbitration.[43] Again, under the provisions of TILA, the court rejected the plaintiffs' argument that the prohibitive costs of arbitration prevented them from bringing their claims individually.[44] Rather than rule one way or the other on the class arbitration clause, the court held that, because the arbitration agreement was enforceable, the court had an obligation to give full force to all of the terms of the agreement.[45]

2. Federal Cases Invalidating Class Action Waivers

Several circuits have taken a different approach to the problem and held the contested consumer class action waivers to be invalid. The Ninth Circuit, in *Ting v. AT&T*,[46] was the first circuit to strike down a class action waiver.[47] Superficially, the case was different than circuit cases upholding class action waivers, because *Ting* did not involve claims brought under TILA.[48] The analysis and holding were divergent from other circuits for a different reason, though: *Ting* was decided under California state law, and the court held the contract provision waiving class actions, among other provisions,[49] to be unconscionable under California law.[50] Over AT&T's objections to the contrary, the court held that state law evincing a strong public policy in support of class actions was not in conflict with Congress's Communications Act.[51] The Ninth Circuit's invalidation of AT&T's class action waiver was a beacon of hope for consumer class actions at a time when the situation, particularly in the federal courts, seemed dire for the mechanism. [52] *Ting* was decided in California, however, which was already

40. *Snowden*, 290 F.3d at 638-39.

41. *Id.* at 638. The court did not address, nor did the plaintiff challenge, the fact that the contract contained a class arbitration waiver. *Id.*

42. 339 F.3d 553 (7th Cir. 2003).

43. *Livingston*, 339 F.3d at 558-59.

44. *Id.* at 557-58.

45. *Id.* at 559.

46. 319 F.3d 1126 (9th Cir. 2003).

47. *Ting*, 319 F.3d at 1147-48.

48. *Id.* at 1130.

49. In addition to the class action waiver, the court held that an arbitration fee-splitting scheme and a confidentiality clause in the contract were also unconscionable due to their unilateral nature clearly favoring AT&T. *Id.* at 1151-52.

50. *Id.* at 1150.

51. *Id.* at 1138.

52. *See* Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 BUS. LAW. 1289, 1290-91 (2003) (noting that prior to 2003, federal courts had almost uniformly enforced arbitration clauses barring consumer class actions).

considered to be at the forefront of law and policy favoring class actions.[53]

Outside of California, the most recent decision on this issue, and perhaps the most important in providing a basis for invalidating class action waivers in consumer adhesion contracts, is the First Circuit's decision in *Kristian*.[54] That case was brought under state and federal antitrust law, and the relevant contract provisions were an arbitration clause and a class arbitration waiver.[55] The court invalidated the waiver on the ground that it barred the plaintiffs from vindicating their statutory rights to pursue their antitrust claims.[56] The court relied on the *Ting* court's reasoning to conclude that the potential cost of litigating an antitrust case would be so prohibitive on an individual basis that the class arbitration waiver would create a de facto liability shield for Comcast.[57] Not only would this preclude any chance of recourse for plaintiffs, but it would also violate the antitrust law's policy goals of deterring illegal anticompetitive practices by businesses.[58]

Furthermore, the *Kristian* court acknowledged the lack of any explicit provision in the antitrust statutes protecting the right to pursue class mechanisms.[59] In contrast to *Johnson*, however, the court did not find this absence to be determinative.[60] Instead, the court emphasized that the bar on a class mechanism seemed to conflict with the Federal Rules of Civil Procedure, which provide for class actions.[61] The court concluded that although the class action is "a procedure for redressing claims—and not a substantive or statutory right in and of itself—we cannot ignore the substantive implications of this procedural mechanism."[62]

Additionally, the court highlighted the "striking similarit[y]" between the "vindication of statutory rights" rationale for invalidating the waiver and the possible unconscionability analysis.[63] The court considered, but declined to analyze, the state unconscionability doctrine as it applied to the class arbitration waiver.[64] The court found that such an analysis would only repeat the reasoning

53. *See id.* at 1289 (labeling string of anti-class action waiver cases from California as "Gold Rush of 2002").

54. *See* Kristian v. Comcast Corp., 446 F.3d 25, 64 (1st Cir. 2006) (holding that arbitration agreement's bar on class actions would prevent vindication of statutory rights).

55. *Id.* at 53-60.

56. *Id.* at 61.

57. *Id.* at 60-61 (citing Ting v. AT&T, 319 F.3d 1126, 1130 (9th Cir. 2003)).

58. *Id.* at 61.

59. *Kristian*, 446 F.3d at 54.

60. *Compare id.* (noting that challenged arbitration agreements' lack of direct conflict with relevant statutes was not controlling), *with* Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (relying on lack of explicit preclusion of arbitration in relevant statutes to enforce arbitration clause barring class action suits).

61. *Kristian*, 446 F.3d at 54; *see also* FED. R. CIV. P. 23 (providing for class action suits).

62. *Kristian*, 446 F.3d at 54.

63. *Id.* at 63-64.

64. *Id.*

already expounded.[65] To highlight this redundancy, as well as the similarity between federal vindication of statutory rights analysis and state unconscionability doctrine, the court quoted the plaintiffs' unconscionability argument, which stated that the class mechanism bar was unconscionable "because it prevents [plaintiffs] from vindicating their statutory rights."[66]

Although the appellate courts from the other circuits have yet to weigh in on this topic, a recent district court case following *Kristian* provides some elucidating commentary about the attitude of courts as the class action waiver pendulum reaches its zenith and possibly begins its return to equilibrium.[67] In *Wong v. T-Mobile USA, Inc.*,[68] the U.S. District Court for the Eastern District of Michigan held that a class action waiver in the plaintiff's cell phone contract was invalid, as it prevented his vindication of statutory rights under the Michigan Consumer Protection Act[69] ("MCPA").[70] The facts of the case exemplify the precise type of situation in which class actions are essential. The defendant allegedly had "bilked its customers out of millions of dollars, though only a few dollars at a time."[71] Only through a class action could the plaintiff effectively vindicate his statutory rights and ensure that the defendant would be held accountable for millions of dollars reaped through unlawful billing practices.[72] Thus, the court held that because the class action waiver was in conflict with the MCPA and the plaintiff's ability to vindicate his rights under that Act, the waiver was not enforceable.[73]

B. State Cases Addressing Class Action Waivers

The split in authority in the federal courts is paralleled by a split among the state courts as well as varied legislative solutions on the permissibility of class action waivers in consumer contracts of adhesion.[74] In the courts, the issue generally has been approached with a consideration of the unconscionability doctrine under state contract law.[75] Generally, a contract term that is found to be procedurally[76] and substantively[77] unconscionable will be held invalid. Courts

65. *Id.*

66. *Id.*

67. Wong v. T-Mobile USA, Inc., No. 05-73922, 2006 U.S. Dist. LEXIS 49444 (E.D. Mich. July 20, 2006).

68. No. 05-73922, 2006 U.S. Dist. LEXIS 49444 (E.D. Mich. July 20, 2006).

69. MICH. COMP. LAWS. ANN. §§ 445.901-.922 (West 2002).

70. *Wong*, 2006 U.S. Dist. LEXIS 49444, at *12-13.

71. *Id.* at *12. The plaintiff's damages were only $19.74. *Id.* at *2.

72. *Id.* at *12-13; *see also* ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1171 (N.D. Cal. 2002) (holding class action waiver unconscionable under California law); Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (holding that class action waiver was invalid under MCPA, which expressly provides for class relief).

73. *Wong*, 2006 U.S. Dist. LEXIS 49444, at *25.

74. See *infra* Parts II.B.1-2 for a discussion of the split in state authority between courts that validate and those that invalidate class action waivers.

75. See *supra* Part II.A.2 for a discussion of the unconscionability doctrine in federal cases.

76. Contracts of adhesion inherently have many of the characteristics of procedural

weighing these considerations on a case-by-case basis have come to very different conclusions about the validity of class action waivers.[78]

1. State Cases Invalidating Class Action Waivers

Although a majority of state courts have not found class action waivers to be unconscionable and, therefore, have found them to be enforceable, a recent Wisconsin court, the first to decide on this issue in that state, gave some insight as to the direction the pendulum is swinging.[79] That court was "persuaded by what appears to be a growing minority of courts" that "have recognized that the availability of class-wide relief is often the only means of vindicating consumer rights."[80]

California law and policy strongly disfavor class action waivers. The California Supreme Court explained this outlook in *Vasquez v. Superior Court*.[81] The court stated that the class mechanism benefits three entities: (1) the consumer, whose individual recovery might otherwise be insufficient to justify bringing any action; (2) the courts by consolidating multiple individual actions all pertaining to the same dubious business practice and all involving similar fact patterns and evidence; and (3) business, by preventing those enterprises engaging in legitimate practices from having to compete with enterprises deriving an advantageous position by engaging in illegitimate practices.[82] Specifically addressing the topic of class action waivers, the court in *Szetela v. Discover Bank*[83] held that the class action waiver in question was not only unconscionable but it also violated the clear California public policies of allowing

unconscionability, e.g., inequality of bargaining power, standardized form contracts tending to favor the drafter, and little or no opportunity to negotiate terms. Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003). In fact, California courts have explicitly held contracts of adhesion to be procedurally, if not substantively, unconscionable. *See, e.g.*, Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 382 (Ct. App. 2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability.").

77. Substantive unconscionability typically involves harsh or oppressive terms. For example, the unilateral nature of a term may make it substantively unconscionable. *See, e.g.*, Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867-68 (Ct. App. 2002) (finding substantive unconscionability in class action waiver because, among other reasons, credit card companies do not expect to bring class action suits against their customers, making such clause one-sided); Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 97 (N.J. 2006) (stating that adhesion contracts always contain elements of procedural unconscionability, so particular attention must be paid to substantive unconscionability when addressing such contracts).

78. *Compare, e.g.*, *Szetela*, 118 Cal. Rptr. 2d at 868 (finding class action waiver to be not only unconscionable but also in violation of public policy favoring class actions), *with, e.g.*, Steinberg v. Prudential-Bache Sec., Inc., NO. CIV.A. 8173, 1986 WL 5024, at *5 (Del. Ch. Apr. 30, 1986) (holding that policy underlying arbitration is more strongly favored than policy underlying class actions).

79. Coady v. Cross Country Bank, Inc., 729 N.W.2d 732, 734 (Wis. Ct. App. 2007).

80. *Id.* at 746-47. The *Coady* court went on to hold that the class action waiver fulfilled the substantive prong of the state unconscionability analysis and ultimately held the class action waiver and arbitration clause unenforceable. *Id.* at 748.

81. 484 P.2d 964 (Cal. 1971).

82. *Vasquez*, 484 P.2d at 968-69.

83. 118 Cal. Rptr. 2d 862 (Ct. App. 2002).

class remedies, discouraging illegal business practices, and promoting judicial economy.[84] Much like the *Ting* court observed, the *Szetela* court noted "[t]he potential for millions of customers to be overcharged small amounts without an effective method of redress."[85]

Most recently, the California Supreme Court in *Discover Bank v. Superior Court*[86] declared that adhesive class action waiver clauses are unconscionable and unenforceable under California law.[87] The court emphasized that class actions should not be categorized as "merely procedural," because they are "often inextricably linked to the vindication of substantive rights."[88] Thus, although *Discover Bank* was ultimately decided under the doctrine of unconscionability, the court used a similar analysis to that of the First Circuit in *Kristian*.[89]

2. State Cases Upholding Class Action Waivers

In contrast, although recognizing and applying the doctrine of unconscionability under certain circumstances, Delaware courts routinely uphold the enforceability of class action waivers in consumer contracts of adhesion.[90] Unfortunately, many of these opinions have not been published.[91] In *Edelist v.*

84. *Szetela*, 118 Cal. Rptr. at 868.

85. *Id.*

86. 113 P.3d 1100 (Cal. 2005).

87. *Discover Bank*, 113 P.3d at 1109.

88. *Id.*

89. *Id.* On remand, the lower court decided the *Discover Bank* case under Delaware law, based on the contract's choice-of-law provision, and upheld the class action waiver under that state's law. Discover Bank v. Superior Court, 36 Cal. Rptr. 3d 456, 457 (Ct. App. 2005). *But see* Klussman v. Cross Country Bank, 36 Cal. Rptr. 3d 728, 740-41 (Cal. Ct. App. 2005) (holding contracts unconscionable and applying conflict-of-laws principles to conclude that application of Delaware law, called for by contracts, would undermine California policy); Am. Online v. Superior Court, 108 Cal. Rptr. 2d 699, 712-13 (Ct. App. 2001) (holding choice-of-Virginia-law clause to be invalid as violative of California law and policy favoring class actions because class actions are not recognized under Virginia law).

90. *See, e.g.*, *Klussman*, 36 Cal. Rptr. 3d at 735 (stating that Delaware will not invalidate arbitration clause merely because it contains class action waiver, and noting that Delaware courts routinely uphold such waivers). The reasoning for Delaware's policy of upholding class action waivers is explained in an amicus brief filed on behalf of the Delaware State Bank Commissioner in support of Discover Bank. Brief for Delaware State Bank Commissioner as Amicus Curiae Supporting Defendant and Petitioner at 10-23, Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (No. S113725), 2003 CA S. Ct. Briefs LEXIS 61. The brief explains that class action waivers provide Delaware Banks with "safety and soundness," insulating them from the potentially devastating effects of class actions. *Id.* at 1. This protection, explains the brief, allows for greater availability of consumer credit, a hallmark of Delaware banks and the state's economy in general. *Id.* at 10-12. See *infra* Part III.C for a discussion of the inapplicability of the reasoning supplied by Delaware and other state policy makers for upholding class action waivers.

91. *See, e.g.*, Pick v. Discover Fin. Servs., Inc., No. Civ.A. 00-935-SLR, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001) (stating that "it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions"); Westendorf v. Gateway 2000, Inc., No. 16913, 2000 WL 307369, at *1 (Del. Ch. Mar. 16, 2000) (compelling arbitration of plaintiff's claims even though arbitration precluded plaintiff from maintaining class action), *aff'd*, 763 A.2d 92 (Del. 2000); Steinberg v. Prudential-Bache Sec., Inc., No. 8173, 1986 WL 5024, at *5 (Del. Ch. Apr. 30, 1986)

MBNA America Bank,[92] however, the Delaware Superior Court upheld a class action waiver, finding that, because the term was "clearly articulated" in the contract, it was not unconscionable.[93]

3. Other State Court Approaches

Numerous other state courts have come down on either side of the class action waiver issue,[94] and some have declined to apply a blanket rule to all class action waivers and simply approach the facts of each case on an ad hoc basis.[95] Courts have also based their reasoning on the assertion that adhesive class action waivers conflict with state public policy in order to invalidate class action waivers.[96]

C. State Legislation Addressing Class Action Waiver

The validity of class action waivers also has been the subject of state legislation. In California, the Consumers Legal Remedies Act declares class action waivers (and all other waivers of consumers' rights established by the Act) to be unenforceable and in conflict with public policy.[97] In contrast, Utah now has a provision expressly permitting creditors to create contracts in which

(finding that policy underlying arbitration is favored more strongly than policy underlying class actions); Leason v. Merrill Lynch, Pierce, Fenner & Smith, No. 6914, 1984 WL 8232, at *3 (Del. Ch. Aug. 23, 1984) (holding that agreement to arbitrate cannot be evaded by asserting claims as class).

92. 790 A.2d 1249 (Del. Super. Ct. 2001).

93. *Edelist*, 790 A.2d at 1261.

94. *Compare, e.g.*, Leonard v. Terminix Int'l Co., 854 So. 2d 529, 538-39 (Ala. 2002) (holding that contract's class action waiver deprived plaintiffs of meaningful remedy and was therefore unfair and unconscionable), Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 278 (Ill. 2006) (holding class action waiver invalid where, in conjunction with arbitration provisions, cost of vindicating claim is so high that cost-effective remedy is only feasible through class mechanism), *and* State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 282 (W. Va. 2002) (holding that exculpatory provisions such as class action waivers appearing in contracts of adhesion, which would limit plaintiffs' ability to obtain statutory or common law relief, are unconscionable), *with, e.g.*, Walther v. Sovereign Bank, 872 A.2d 735, 751 (Md. 2005) (finding class action waivers to not be so one-sided or oppressive as to make them unconscionable). At the time the *Discover Bank* case was decided on remand, the court counted eight states in which the courts had upheld class action waivers under state law and four states where class action waivers had been held unconscionable. *Discover Bank*, 36 Cal. Rptr. 3d at 459 n.3.

95. An excellent example of the refusal to create a blanket rule comes from New Jersey. In two recent cases, decided on the same day, the Supreme Court of New Jersey held that the class action waiver in the contract in the first case was unconscionable, and the waiver in the second case was not unconscionable. *Compare* Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 100-01 (N.J. 2006) (holding that waiver prevented plaintiff from effectively pursuing rights under state consumer protection laws), *with* Delta Funding Corp. v. Harris, 912 A.2d 104, 115 (N.J. 2006) (noting that, because class action waivers are not unconscionable per se, where plaintiff is seeking damages of over $100,000 there is sufficient incentive to bring action individually).

96. *See* Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1179-80 (Ohio Ct. App. 2004) (distinguishing court's own finding of unenforceability based on public policy from bulk of state cases decided on grounds of unconscionability).

97. CAL. CIV. CODE §§ 1751, 1781 (West 2006).

debtors waive their rights to pursue class actions.[98]

D. Arbitration and Its Effect on Class Action Waiver

Although the consumer class action seems to be regaining some of its footing, particularly after the First Circuit's decision in *Kristian*, perhaps the greatest threat to the mechanism is the widely favored arbitration clause.[99] The use of arbitration clauses has garnered great and generally unwavering support from the Supreme Court since the passage of the FAA. Indeed, the reach of the arbitral arm was recently extended to all contract claims, both federal and state, arising out of contracts with an arbitration clause unless the claim relates to the validity of the arbitration clause itself.[100] This hurdle is compounded by the dicta in *Gilmer v. Interstate/Johnson Lane Corp.*,[101] where the arbitration clause challenged under the Age Discrimination in Employment Act ("ADEA") effectively precluded any chance of class relief.[102] In spite of the fact that the ADEA provides the possibility for class relief, the court concluded that such a provision does not mean that "individual attempts at conciliation were intended to be barred."[103] Although the language is somewhat vague and only tangential to the court's holding in the case, it could create a further liability shield for businesses, which now merely need to include valid arbitration clauses in their consumer contracts of adhesion. Then, even if the arbitral forum could provide class relief for the plaintiff, that would be for the arbitrator to decide, and each of those decisions would be made behind the closed doors of arbitration with no precedential or collateral estoppel effect.[104] Finally, it has been argued that,

98. UTAH CODE ANN. §§ 70C-3-104 to -4-105 (Supp. 2007); *see also* Press Release, Ballard Spahr Andrews & Ingersoll, LLP, Ballard Attorneys Pilot Unprecedented Utah Law (March 22, 2006) (on file with author), *available at* http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/03-22-2006/0004325466&EDATE= (describing policy rationale underlying this statute).

99. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (stating that federal policy favoring arbitration must play important role when considering questions of arbitrability).

100. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444-46 (2006). It is too soon to assess how businesses will respond to this decision in the course of drafting future contracts of adhesion. It is possible that a drafter might attempt to isolate a class action waiver provision in a separate part of the contract, rather than have the waiver expressly or implicitly included within the arbitration clause. The thinking might be that such isolation would render the class action waiver immune from any consideration of arbitrability in a court of law. Time will tell, but it seems unlikely that the Supreme Court meant to endorse this type of slippery drafting when it decided *Buckeye*.

101. 500 U.S. 20 (1991).

102. *See Gilmer*, 500 U.S. at 27-29 (noting that, because ADEA "did not explicitly preclude arbitration or other nonjudicial resolution of claims," statute allowed for arbitration of claims where provided by contract even though arbitration focuses on specific disputes between individual litigants).

103. *Id.* at 32 (quoting Nicholson v. CPC Int'l Inc., 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). Although the plaintiff in that case was not initially trying to bring his claim as a class action, this dicta by the court gives some idea of how the court would approach the issue and has provided support for many of the subsequent decisions to uphold arbitration clauses that preclude class actions.

104. *See* Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. 1991) (noting that principles of res judicata and collateral estoppel do not apply to arbitration decisions).

given the choice of various arbitration services available, business drafters of adhesion contracts will pick the more expensive services, thereby further discouraging individual action by aggrieved customers.[105]

Even in such a situation, however, there may yet be hope for the class mechanism and not necessarily from courts or legislatures. Recently, Judicial Arbitration and Mediation Services, Inc. ("JAMS"), one of the nation's most prominent arbitration administrators, announced a policy expressly invalidating all class action waivers in consumer arbitration agreements.[106] Although the JAMS policy was soon rescinded amidst the storm of controversy it created,[107] it may give some indication of things to come, especially in light of the ever-increasing predominance of arbitration clauses in consumer contracts of adhesion.

III. THE CHANGING TIDE: AN ARGUMENT FOR ADOPTING A BROADER STANDARD OF ANALYSIS OF CLASS ACTION WAIVER VALIDITY

The reasoning in *Kristian v. Comcast Corp.*,[108] which built on *Ting v. AT&T*,[109] as well as a number of state court decisions,[110] lays the groundwork for a fair and well-reasoned rule to resolve the circuit split facing the federal courts on the issue of class action waivers in consumer contracts of adhesion. The rule is simple to state: whenever any such waiver prevents plaintiffs from vindicating their substantive rights, that waiver must be invalidated. The difficulty is in determining whether plaintiffs have a reasonable opportunity to vindicate their rights individually or if a class is required. The Third, Fourth, Seventh, and Eleventh Circuits have applied flawed reasoning to reach the conclusion that, in the context of TILA, a plaintiff may vindicate his statutory rights without the help of a class mechanism.[111] The courts overlook the complexities and uncertainties facing the individual plaintiffs in each case, and they fail to discuss the rights of the other class members as well as the legal and ethical responsibilities of businesses.

105. PUBLIC CITIZEN, THE COSTS OF ARBITRATION 2 (2002).

106. Alan S. Kaplinsky & Mark J. Levin, *Is JAMS in a Jam over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, 61 BUS. LAW. 923, 924 (2006).

107. *Id.* at 924-25.

108. 446 F.3d 25 (1st Cir. 2006).

109. 319 F.3d 1126 (9th Cir. 2003).

110. *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1109 (Cal. 2005) (stating that class action waiver was unconscionable because class actions are "often inextricably linked to the vindication of substantive rights"); Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 100-01 (N.J. 2006) (holding that waiver prevented plaintiff from effectively pursuing rights under state consumer protection laws).

111. See *supra* Part II.A.1 and accompanying text for a discussion of the reasoning of the Third, Fourth, Seventh, and Eleventh Circuits.

A. The Overlapping Goals of Federal and State Methods of Evaluating the Validity of Contract Terms

The federal court proposition that a contract provision must not prevent a prospective litigant from effectively vindicating his statutory cause of action is based on the goal of serving both the remedial and deterrent functions of the relevant statute.[112] For this reason, the First Circuit in *Kristian* invalidated the class action waiver in that case.[113] But the court also noted the similarities in the policy interests and goals of this federal approach to the validity of class action waivers to those of the state contract law doctrine of unconscionability.[114] Indeed, a comparison of the unconscionability and "vindication of statutory rights" analyses reveals a common ground that serves as an excellent framework for federal courts to analyze whether class action waivers in consumer contracts of adhesion deprive plaintiffs of a reasonable opportunity to effectively vindicate their rights.

Procedural unconscionability focuses on factors of contract formation such as inequality of bargaining power, lack of opportunity for negotiation, modification or elimination of the drafters' terms,[115] and drafting of terms that are so difficult to find, read, or understand that a reasonable plaintiff is likely to be unaware of such terms.[116] Some states will find procedural unconscionability inherent in any contract of adhesion because these factors are so strongly pervasive in such contracts.[117] Take, for example, that "bill-stuffer" cell phone contract that is typically thrown out along with other junk mail. Concealed among other bill stuffers, that contract is difficult to find, let alone recognize as a modification of a binding agreement. Furthermore, even if the recipient found and read the contract, it is unlikely that even a well-educated consumer could fully appreciate the meaning and implication of all the contract terms drafted by experienced contract lawyers.[118] Finally, even if the recipient fully read and

112. *Cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc, 473 U.S. 614, 637 (1985) (stating that arbitration clause would be valid so long as that forum would allow effective vindication of plaintiff's rights). While the holding of the *Mitsubishi Motors* Court applied specifically to arbitration clauses, the same line of reasoning applies to class action waivers specifically. *See* Deposit Guar. Nat'l. Bank v. Roper, 445 U.S. 326, 339 (1980) (holding that defendant bank's scheme to avoid class liability was untenable because aggrieved persons would lack effective redress without class action device); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 278 (Ill. 2006) (invalidating class action waiver where cost of litigating individual claims, in conjunction with arbitration provisions, would be prohibitive without class mechanism).

113. *Kristian*, 446 F.3d at 64.

114. *Id.* at 63-64 (noting that it was unnecessary to consider plaintiffs' unconscionability arguments because they were just "reiterations of their vindication of statutory rights arguments"); *see also* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877-78 (11th Cir. 2005) (using earlier cases employing "vindication of rights" analysis to inform unconscionability analysis).

115. Ting v. AT&T, 319 F.3d 1126, 1148-49 (9th Cir. 2003).

116. *Kinkel*, 857 N.E.2d at 264 (quoting Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006)).

117. *See Ting*, 319 F.3d at 1148 (stating that finding of contract of adhesion is showing of procedural unconscionability under California law).

118. How much greater is the personal cost to pursue individual arbitration, as opposed to class

understood the contract, he would be virtually powerless to negotiate any of the "take-it-or-leave-it" terms.[119]

The elements of procedural unconscionability are echoed in federal courts' consideration of a plaintiff's ability to vindicate his statutory rights. Plaintiffs who have been deprived of the opportunity to negotiate or even become aware of specific terms of their contract of adhesion may be reluctant to seek redress even when they are aware that they have been victimized by the business with whom they have contracted.[120] Uncertainty as to one's own rights and inability to evaluate the cost-effectiveness of suing for relatively small monetary damages may create sufficient roadblocks that prevent consumers from seeking redress.[121] Moreover, it is likely that many members of the same victimized class will be equally deterred from pursuing individual lawsuits due to the cost of vindicating their rights, or they may simply be unaware that they have been victimized. To put it another way, unfair and deceptive business practices are "unlikely to come to the attention of individual consumers. They are most likely to be rooted out by attorneys, in consultation with experts, obtaining company documents through court discovery proceedings. In short, they can be remedied only through class action lawsuits."[122] Thus, the elements of procedural unconscionability alone may be enough to preclude consumers' reasonable opportunities to vindicate their rights effectively without a class mechanism.

Substantive unconscionability analysis relates even more directly to the analysis of plaintiffs' abilities to vindicate their rights. Substantive unconscionability focuses on the unfair one-sidedness of contract terms.[123] Contract terms that are completely unilateral are likely to be substantively unconscionable,[124] as are terms that result in litigation costs greater than any

arbitration? Which arbitration service is prescribed in the contract, and what are the costs and benefits of that particular service for an aggrieved consumer? How easy will it be to procure a lawyer to represent an individual aggrieved consumer? The average consumer is unlikely to have the answers to these and other similar questions.

119. For an interesting proposed solution to this problem, see generally William J. Woodward, Jr., Battle of the Forms: What You Can Do to Preserve Your Constitutional Right to Go to Court Against Businesses that Rip You Off (May 20, 2002), http://cexx.org/battle.htm.

120. *See* State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 275-76 (W. Va. 2002) (noting that exculpatory provisions in contracts of adhesion "substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief").

121. *See Kinkel*, 857 N.E.2d at 278 (holding that terms of adhesion contract were unconscionable because they limited cost-effective means for individuals to obtain remedy); *State ex rel. Dunlap*, 567 S.E.2d at 282 (stating that contract of adhesion with terms that may result in deterring plaintiffs from seeking to vindicate their rights and obtain relief are unconscionable); PUBLIC CITIZEN, *supra* note 105, at 1 (stating that, in context of arbitration, high costs may have such deterrent effect that potential claimant will often not even file case).

122. PUBLIC CITIZEN, *supra* note 105, at 45.

123. *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1109 (Cal. 2005) (noting that class action waivers are substantively unconscionable when they act as exculpatory clauses contrary to public policy).

124. *See* Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002) (noting that class action waiver in credit card contract was unilateral, even though it purported to apply to both sides, because credit card companies rarely sue their customers in class actions).

possible recovery of damages.[125] For example, when subjected to the class action waiver in the "bill-stuffer" cell phone contract, the potential damages may quickly be overtaken by the costs incurred pursuing an individual action. Furthermore, it is unlikely that a class of aggrieved cell phone providers will join forces to bring a class action lawsuit against an individual consumer, which means that the class action waiver is completely one-sided in its application.

These types of contract terms would not only discourage consumers from pursuing action against an offending business but could also discourage lawyers from taking such cases. This secondary effect is due to the substantial time and expense, as well as opportunity cost, of working on such a case that offers disproportionately small potential compensation in many situations.[126] Clearly, the resultant lack of sufficient legal and financial resources available to victimized consumers will hinder their ability to vindicate their statutory rights. Because of the close parallels between the goals of the "vindication of statutory rights" analysis and the state unconscionability analysis, federal courts should be looking at similar factors as state courts do when deciding if a class action waiver in a consumer contract of adhesion is invalid.

B. The Flaws of Johnson *and Its Progeny*

The four circuit courts that have upheld the validity of consumer class action waivers all derive their reasoning from the seminal case, *Johnson v. West Suburban Bank*.[127] Unfortunately, none of these courts sufficiently explored the "vindication of statutory rights" analysis.[128] First, the *Johnson* court incorrectly placed a great deal of emphasis on a questionable interpretation of the congressional intent underlying the class action provisions of TILA.[129] The opinion stated that a consumer class action waiver did not prevent the vindication of the plaintiffs' rights because the class action provision in TILA was not an enumeration of a substantive right.[130] Further, the court opined that

125. *See Kinkel*, 857 N.E.2d at 267-68 (discussing "cost-price disparity" (internal quotation marks omitted)).

126. *See* Kristian v. Comcast Corp., 446 F.3d 25, 58-59 (1st Cir. 2006) (noting that outlay of time and money along with uncertainty of success and potentially small compensation may discourage lawyers from taking consumer antitrust cases).

127. 225 F.3d 366 (3d Cir. 2000); *see also* Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003) (citing *Johnson*, 225 F.3d at 369, to uphold arbitration agreement effectively precluding class actions); Snowden v. Checkpoint Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (citing *Johnson*, 225 F.3d at 374, to reject argument that class action waiver is unenforceable); Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 818 (11th Cir. 2001) (noting that finding of arbitration clause that bars availability of statutory class action is "consistent" with *Johnson*, 225 F.3d at 369).

128. *See Johnson*, 225 F.3d at 373-74 (finding no conflict with statute's goals when rights provided by statute were "capable of vindication" in individual arbitration, although such forum would be less attractive to plaintiffs than class litigation, would reduce number of plaintiffs, would reduce the potential damages awarded to plaintiffs, and would ultimately provide less deterrence against violation of statute).

129. *Id.* at 373 (finding that, although Congress self-consciously promoted class actions in TILA amendments, no inherent conflict existed between TILA and arbitration precluding class actions).

130. *Id.* at 371.

the intent of Congress was merely to make the class action a procedural right, available when appropriate.[131] Nevertheless, as noted in *Kristian*, while it is correct that the "class action (and class arbitration) [is] a procedure for redressing claims—and not a substantive or statutory right in and of itself—we cannot ignore the substantive implications of this procedural mechanism."[132] That is, the consideration of the "vindication of statutory rights" analysis does not apply only to the class action provision when a class action waiver is being challenged. The vindication of *all* statutory rights must be possible, and when the class mechanism is the only way to vindicate those rights and obtain the prescribed remedy a class action waiver must be invalidated.[133]

The analysis in *Johnson* is further flawed in that it superficially explains how an individual plaintiff could vindicate his statutory rights under TILA even without a class action.[134] The court fails to consider the complex problems faced by an individual plaintiff—complexities that may be enlightened by keeping in mind the parallel considerations of the doctrine of unconscionability.

First, *Johnson* and the circuits following that case claim that the award of attorneys' fees and costs to the prevailing party under a TILA claim eliminates any financial roadblock to arbitration and therefore such expenses do not prevent the vindication of statutory rights.[135] Nevertheless, the courts fail to acknowledge several problems with that reasoning. First, there is complexity and uncertainty inherent in pursuing consumers' rights actions against businesses, particularly in the context of arbitration. There are no guarantees that, given the varying facts from case to case and the potential disparity among different arbitrators, a plaintiff will be the prevailing party, even if his action is reasonable and nonfrivolous. That uncertainty alone may be enough to deter potential plaintiffs from attempting to vindicate their rights. Plaintiffs will be unable or unwilling to meet the potential financial burden alone without the cost-spreading benefits afforded by a class mechanism.

Second, if a class action waiver is upheld, the rights of other potential plaintiffs in the class may never be vindicated. Without the benefit of notice of a class action, other class members may not ever know they have been victimized. Furthermore, even if they do know and decide to bring their own lawsuit, consumer contracts of adhesion generally include an arbitration clause.[136] Thus, potential plaintiffs will not have the benefit of res judicata or collateral estoppel, whereas the business, as a repeat player, will get a fresh start with each

131. *Id.*

132. Kristian v. Comcast Corp., 446 F.3d 25, 54 (1st Cir. 2006).

133. *Id.* at 54-55.

134. Johnson v. West Suburban Bank, 225 F.3d 366, 374 (3rd Cir. 2000).

135. Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002); Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 818 (11th Cir. 2001); *Johnson*, 225 F.3d at 373-74; *see also* Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 558 (7th Cir. 2003) (rejecting lower court's reasoning that leaving award of attorney's fees to arbitrator's discretion is in conflict with TILA provision).

136. To date, in all the federal appellate cases dealing with the validity of class action waivers, those waivers have appeared in the context of an arbitration clause.

individual claim brought.[137] This disadvantage to future plaintiffs is further augmented in the presence of strict confidentiality clauses present in many of these contracts.[138] Win or lose, consumers are silenced after they leave the arbitration proceedings, whereas the repeat-player business carries with it knowledge of the arbitration's likely outcome. This knowledge will be useful to the business in future arbitration proceedings on the same issue against new plaintiffs.

Johnson also finds significance in the fact that, in light of statutory caps on recovery imposed by TILA, the potential individual class member's recovery in a class action may be less than the recovery that each consumer could obtain if he brought a lawsuit on an individual basis.[139] The court argues that because of this, plaintiffs actually have greater incentives to bring individual actions.[140] Nevetheless, this argument ignores the benefits of cost-spreading in class actions, which may be the only thing enabling many plaintiffs to vindicate their statutory rights at all, regardless of the damages available. Also, these cases typically involve claims for relatively small dollar amounts, but that does not mean that an incensed and victimized consumer has any less of a statutory right to be made whole. Regardless, no matter how incensed the consumer, only a maniac would individually take on the enormous time and monetary costs of a lawsuit just to recover a few dollars.[141]

For the reasons discussed above, the difficulties faced by consumers forced to bring their claims on an individual basis allow careless, unfair, or unscrupulous business practices to continue with very little deterrent effect arising out of the possibility of individual consumer action, particularly in arbitration. "By requiring the adjudication of all claims through arbitration, and prohibiting participation in class actions, [a business] may effectively insulate itself from accountability."[142]

137. *See* Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. 1991) (noting that principles of res judicata and collateral estoppel do not apply to arbitration and therefore individual plaintiffs bringing same issues against same defendant would all be forced to litigate their claims fully).

138. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (finding that strict confidentiality clause adds to one-sidedness of contract "by ensuring that none of [defendant's] potential opponents have access to precedent while, at the same time, [defendant] accumulates a wealth of knowledge").

139. *Johnson*, 225 F.3d at 374.

140. *Id.*

141. *See* Thibodeau v. Comcast Corp., 912 A.2d 874, 885 (Pa. Super. Ct. 2006) (noting that most consumer complaints involve small claims that could not reasonably be litigated individually).

142. PUBLIC CITIZEN, *supra* note 105, at 45; *see also Dickler*, 596 A.2d at 867 (finding that individual arbitration provides little deterrence to businesses that know that few proceedings will be brought against them).

C. Inapplicability of the Reasoning of Policy Makers in States that Uphold Class Action Waivers

Because much of the strength of the *Kristian* approach lies in the broad analysis that recognizes the parallels to state unconscionability doctrine, it is worth confronting the policy goals and reasoning underlying the decisions of states that consistently uphold class action waivers.[143] While an in-depth analysis of the validity of the policy and reasoning in those states is beyond the scope of this Comment, it is important to give those states a passing mention and explain why their policies are, at best, very limited in application, merely relevant to those particular states and not to the *Kristian* analysis.

In Delaware, the portion of case law devoted to the validity of class action waivers is generally terse, and more importantly, unreported.[144] Thus, it is not surprising that a much more in-depth analysis of Delaware policy on this issue can be found in an amicus brief[145] filed on behalf of the Delaware State Bank Commissioner during the *Discover Bank v. Superior Court*[146] litigation. The brief states that the economy of Delaware depends on the safety and soundness of its banks. The liability protection provided by class action waivers allows for lower operational costs and greater availability of consumer credit.[147] However valid this assessment of Delaware policy may be, it must be understood in light of Delaware's unique economic dependence on legal stability and predictability for its corporations. Such a blanket, per se approach to the validity of class action waivers is much less compatible with the weight of policy outside of the state of Delaware and, therefore, should not be considered in a *Kristian* analysis.

Utah recently passed legislation declaring class action waivers valid in any consumer credit or loan agreement, making such waivers not unconscionable per se.[148] To quote Jerold G. Oldroyd, one of the lawyers responsible for promoting this legislation, "[t]his statute will serve as significant protection against unnecessary and unwarranted class action suits."[149] The problem with such legislation is that it also precludes the necessary and warranted class action suits. Even granting, for the sake of argument, that protection of finance and credit companies from class actions is a necessary policy measure to successfully maintain the social or economic fabric of Utah, the very purpose of the class action, hailed by the U.S. Supreme Court in *Amchem Products, Inc. v.*

143. See *supra* notes 90-93 and accompanying text for a discussion of the Delaware courts' consistent approval of class action waivers and note 98 and accompanying text for a discussion of the Utah statute validating class action waivers in a consumer context.

144. See *supra* note 91 for a list of a number of unreported Delaware cases tersely upholding class action waivers.

145. Brief for Delaware State Bank Commissioner, *supra* note 90.

146. 113 P.2d 1100 (Cal. 2005).

147. Brief for Delaware State Bank Commissioner, *supra* note 90, at 9-10.

148. UTAH CODE ANN. §§ 70C-3-104 to -4-105 (Supp. 2007).

149. Press Release, Ballard Spahr Andrews & Ingersoll, LLP, *supra* note 98.

Windsor,[150] would be undermined if this policy were given anything but the most narrow possible application.[151]

The Utah statute, like Delaware case law, should not be relied on to elucidate a *Kristian* analysis. *Kristian* stresses the protection of plaintiffs' ability to vindicate all of their statutory rights effectively, including those only meaningfully available through class mechanisms.[152] This approach requires a case-by-case analysis that reflects many states' unconscionability analyses but is not consistent with a bright-line rule stating that class action waivers are not unconscionable.

D. The Impact of Arbitration of the Viability of Class Action Waivers

One important aspect of the class action waiver cases that must be considered is that the waivers typically appear in the context of arbitration clauses. Following the guidelines of the FAA, the federal courts of appeal have consistently noted the strong federal policy favoring arbitration agreements.[153] In consumer contracts of adhesion, arbitration clauses that also contain class action waivers often amplify the factors that hinder plaintiffs' ability to vindicate their rights.[154] For example, arbitration costs are often higher than litigation costs under predispute arbitration clauses because there is no price competition among arbitration providers. This lack of competition results because companies seeking to discourage small claims by individual consumers will often seek out the higher-cost arbitration services,[155] which the companies themselves, with much deeper pockets, can much more easily bear the extra up-front costs. In spite of the Supreme Court's general support of arbitration as an acceptable alternative to litigation, many courts have begun to establish limits to that acceptability, as noted by the West Virginia Supreme Court:

> [A] host of federal cases . . . have recognized that if an arbitral forum substantially denies a party the rights and remedies that are provided by laws designed to protect and benefit the public, the FAA does not operate to require that those rights be surrendered. This rule must particularly apply to purported waivers of such rights and protections that are contained in a form contract of adhesion.[156]

Thus, forced arbitration on an individual basis, rather than as a class, may further discourage victims from seeking redress and provide an even more solid liability shield for businesses.

150. 521 U.S. 591 (1997).

151. Choice-of-law issues, of course, greatly broaden the potential impact of this statute.

152. Kristian v. Comcast Corp., 446 F.3d 25, 54-55 (1st Cir. 2006).

153. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

154. PUBLIC CITIZEN, *supra* note 105, at 2.

155. *Id.*

156. State *ex rel*. Dunlap v. Berger, 567 S.E.2d 265, 279 (W. Va. 2002) (citation omitted).

E. Proposed Congressional Rule to Further Clarify the Limits of Class Action Waivers

While *Kristian*'s use of the federal "vindication of statutory rights" test in light of many of the considerations of the doctrine of unconscionability provides a sound analysis for invalidating class action waivers in consumer contracts of adhesion under many circumstances, no court, state or federal, has held class action waivers are unconscionable per se.[157] In back-to-back cases on the same day, the New Jersey Supreme Court held one class action waiver unconscionable[158] and upheld the other as being valid.[159] The two situations were distinguished in large part because the second plaintiff's damages claim was for over $100,000, which would more than cover the cost of arbitration as well as compensate the plaintiff, especially in light of potential statutory multipliers.[160] Nevertheless, there is a gray area that exists between the two extremes exemplified by the New Jersey cases.[161] It is unclear how small a consumer's damages claim must be in order to require the availability of class proceedings and to invalidate any class action waivers to which the consumer is bound. Although this question can be answered on a case-by-case basis, such a process could result in a continued disparity of results between different circuits, judges, or arbitrators. An alternative to case-by-case judgment on where the damages line is drawn is that all claims below a certain amount, to be determined by Congress through exhaustive analysis of the cost of arbitration and litigation, may not be subject to class action waivers because of the cost, expenditure of time and effort, and uncertainty of outcome faced by victimized consumers.

The advantages of such a rule, as opposed to a case-by-case analysis, include clearer expectations for both parties before and after disputes arise. Additionally, this bright-line rule will better serve to deter business practices that deprive individual consumers of very small amounts that, when aggregated, result in substantial undeserved revenue for the business.[162]

157. *See* Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 278 (Ill. 2006) (stating that in some cases, as matter of economic theory, consumers may benefit from companies' use of class action waivers).

158. Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 100-01 (N.J. 2006).

159. Delta Funding Corp. v. Harris, 912 A.2d 104, 115 (N.J. 2006).

160. *Id.* (stating that plaintiff's claim was not "low-value" type of claim that could only be reasonably litigated in class proceeding).

161. *E.g.*, *Delta Funding*, 912 A.2d at 91 (awarding individual damages of $180).

162. Recall the $4.99 fee double-charged to plaintiffs in *Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 U.S. Dist. LEXIS 49444, at *2 (E.D. Mich. July 20, 2006), resulting in potentially millions of dollars of wrongfully reaped money for the defendant.

Among other possible benefits is the benefit that such a rule may force arbitration services that currently do not offer class arbitration to begin to do so to remain competitive. Alternatively, if a company's motivation for drafting an arbitration clause was simply to avoid class proceedings, when faced with a consumer class action the company may be disinclined to move to compel arbitration at all. Moreover, this type of bright-line rule would still protect businesses from frivolous or unnecessary challenges to class action waivers when a plaintiff's damages claim is great enough to ensure the opportunity to vindicate his statutory rights and obtain statutory relief sufficient to make the plaintiff whole.

IV. CONCLUSION

Consumer contracts of adhesion are simply a fact of life in modern commerce. Because consumers, by the very nature of contracts of adhesion, lack the means to keep the terms of such contracts in check, it is incumbent on courts to oversee this area of law. Class action waivers are becoming more prevalent in various types of service contracts from credit card contracts to cell phone contracts. Therefore, this area of contract law needs to be carefully addressed by courts and lawmakers. Nonetheless, the federal circuit split over the standard to be used to assess the validity of class action waivers may be leaving many consumers unprotected.

The analysis adopted in *Kristian v. Comcast Corp.*[163] lays out the most fair and comprehensive set of guidelines, very similar to the unconscionability analysis of many states, for assessing whether consumers' reasonable access to legal redress is impermissibly denied by a class action waiver.[164] If adopted by other courts, the *Kristian* analysis will be well served by legislative action setting specific lower limits on the dollar amounts of claims to which class action waivers may be applied.

In contrast, the Third Circuit and other courts following the *Johnson v. West Suburban Bank*[165] analysis would better serve the interests of justice by broadening their analysis of class action waivers.[166] Instead of focusing on whether an individual consumer has the capability of resolving his dispute and leaving the analysis at that, these courts should also consider the lack of motivation a consumer will have to act in the face of such a small potential recovery (even if attorney's fees and costs are available to the winning plaintiff). Furthermore, the *Johnson* analysis does not consider the rights of similarly situated class members who may not even realize the harm that is being done to them. Finally, the narrow *Johnson* analysis may not provide sufficient deterrence for businesses engaging in careless or unscrupulous business practices.

163. 446 F.3d 25 (1st Cir. 2006).

164. See *supra* notes 54-66 and accompanying text for a discussion of the analysis used in *Kristian* to decide the validity of class action waivers.

165. 225 F.3d 366 (3d Cir. 2000).

166. See *supra* Part III.B for a discussion of the shortcomings in the reasoning inherent in the *Johnson* analysis of the validity of class action waivers.

The onus is now on the courts to resolve the circuit split and limit the widespread use of class action waivers in consumer contracts of adhesion. Perhaps someday soon, instead of coming home to another cell phone bill with double-charged fees, you will find a notice in your mailbox that you are a member of a class that is soon to have its voice heard and its rights vindicated.

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