# Adhesive Contracts and Arbitration Agreements:

*Judicial Favoritism and the Contractual Relationship Between American Business and Non – Drafting Parties*

Gabriel Benjamin Herman

American University; Honors Program

General University Honors

Supervisor: Professor Michael Mass

***To My Parents –***

*Thank you for always "crossing my 'T's and dotting my 'I's.*
*As you were for me, I hope to one day be the same sounding board for intellectualism in the lives of my children.*

***My friends –***

*Through your camaraderie and perspective, I discovered the meaning of true brotherhood. Never stop celebrating being "young and stupid."*
*ΦΦKA*

***Professor Mass –***

*Thank you for the long leash during the capstone process!*
*The lessons from your colloquium have reaffirmed my interest and passion for legal studies.*

## *Abstract*

During the last century, dominating economic interest sparked an evolution of American contracting practices. Mass-market industries, including cell phone carriers, car industries, and hospitals enacted contractual practices that facilitated business agreements with thousands while judicial rulings empowered business interests. Today, businesses contract from a position of such superior bargaining power that the American non-drafting party is vulnerable to victimization.

The contractual relationship between empowered businesses and non-drafting consumers is the focus of this capstone. Through the analysis of judicial and legislative history, this note will explore where subversive contracts exist in society and what consumers need to be conscious of when contracting. This capstone will argue for the adoption of protectionary measures to shield consumers from overly empowered business contracts.

## Table of Contents

# I. Introduction

Dominating economic interest sparked an evolution in American contracting practices. Burgeoning industries serving mass markets and modern personal technologies add to the increasing list of Americans contracts. Commercial legal interests also shape the contractual structure of popular American agreements. Commercial contracts are designed to create predictability and serve the mutual benefit of all parties involved. Ultimately, however, the growth of American contracting has not been purely beneficial. Increasing caseloads are burdensome on the American legal system while new dangers are exist for contracting consumers.

Expanding legal fields have affected the ability for American courts to efficiently handle cases.[1] Today, litigating disputes has become increasingly time consuming and prohibitively expensive.[2] Some of America's most prominent leaders have noted the strain placed on the American legal system. Former President George W. Bush remarked that,

> [The] civil justice system is out of control. In the past 20 years the number of civil law suits filed in federal courts has more then doubled…in the past year alone, the number of cases pending for up to three years increased by nearly 15%.[3]

Chief Justice to the United States Supreme Court, Warren Burger, was more cynical stating that "all litigation is inherently a clumsy, time consuming business."[4]

The burden of litigating has encouraged many to seek forms of alternative dispute resolution (ADR) in order to more efficiently resolve disagreements.[5] Arbitration agreements, which are

[1] Matthew C. Bouchard, Arbitration Agreements, Randolph v. Green Tree Financial Corp.: Are Consumer Arbitration Agreements that Are Silent as To The Apportionment of Arbitral Expenses Enforceable, 4 N.C. Banking Inst. 319.
[2] Bouchard, *Supra*, 328.
[3] Anne Brafford, Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary 21 Iowa J Corp. 331.
[4] Warren Burger, Quotes and Comments, available at, http://www.legalreform-now.org/menu6_8.htm.
[5] Mathew Parrott, Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution, 74 Fordham L. Rev 2685.

frequently signed pre-dispute and included within a contract, are one of the most popular forms of ADR.[6] Arbitration agreements allow parties to voluntarily and more affordably solve disputes through the inclusion of a third party arbitrator charged with mediating disputes in an equitable fashion.[7]

Arbitration agreements are often presented to consumers within standard form contracts. When included in standard form contracts, arbitration clauses are often overlooked dubious. Alternatively known as boilerplate contracts, the drafter of a standard form contract presents terms and conditions that are pre-printed and essentially non-negotiable.[8] Contractual conditions presented in this style are described as on a take-it or leave-it basis.[9] Non-drafting parties have two options: (1) they may either accept the contract as it is without bargaining for terms (2) or reject the contract outright. All major cell phone carriers, medical care providers, and even certain employers use standard form contracts routinely. It is estimated that boilerplate contracts comprise ninety percent of all contracts formed today.[10]

Unfortunately, the reality exist that many standard form contracts are adhesive in nature and exploit both the power to bargain and legal knowledge of willing-to-contract consumers. An adhesion contract, which includes most standard form contracts, is said to subjugate one party to the dominant position of the drafting party by eliminating the opportunity to bargain over terms.[11] If an agreement is found to be adhesive, a court is able to void a contract following the discovery of procedural or substantive unconscionability.

---

[6] Parrott, *Supra*, 2686.
[7] Brafford, 333
[8] Daniel Barnhizer, Inequality of Bargaining Power, 76 U. Colo. L. Rev. 139.
[9] W. David Lawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 529 (1971).
[10] Lawson, *Supra*, 530.
[11] Allison E. McClure, The Professional Presumption: Do Professional Employees really have equal bargaining power when they enter into Employment-related Adhesion Contracts 74 U. Cin. L. Rev 1497

Although boilerplate contracts and arbitration agreements have supposedly evolved to better satisfy society's commercial needs, consumers have become vulnerable to corporate interest. Following judicial support for business contracts, consumers now need greater legal protections from predatory contractual practices. Expanded familiarity with adhesive arbitration agreements will aid consumers who often pay little attention to boilerplate contracts due to their proliferation in society. Contractually unsophisticated consumers risk overlooking forgone rights and agreeing to contracts that may ultimately threaten one's wellbeing.

As such, this note will explore arbitration agreements as they appear in a variety of impacting areas of law. The discussion will focus on the judicial history of arbitration agreements, standard form-adhesion contracts, and their contemporary coexistence. Associated legal history will discuss court rulings that are essential to understanding both the recommendations put forth in this note and where contemporary contractual dangers exist. This capstone will attempt to illustrate where boilerplate contracts are most predatory and what consumers need to be conscious of in order to protect their interest. Arbitration agreements will receive special attention as they have been the subject of legal scholarship and are used expansively across many industries by multiple courts.

# II. Adhesion Contracts

## A. History of Legal Theory

The California Court of Appeals defined adhesion as a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[12] A modern example of such a contract would be an agreement with a cell phone provider, such as AT&T, Verizon, or Sprint.

[12] Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172-73 (Cal. 1981).

The carrier creates a contract including an appropriation of minutes, features, and all essential conditions on a take-it or leave-it basis. The purchaser has no ability to negotiate specifics such as arbitration clauses, penalty for late payments, or options for dispute resolution. In adhesion contracts, it is paramount that one party's superior bargaining power affords the ability to determine all contractual terms while minimizing one's risk.[13] As with cell phone providers, the consumer may either accept the drafting parties requested terms or contract with any alternative distributer. Popular examples of standard form contracts include the Facebook user agreement, iTunes Terms & Conditions, and even American University's parking policy.

A French theory suggests that the practice of standard form contracts developed from multinational contracts organized centuries ago.[14] Historians believe that countries became desirous of joining existing international treaties that they were not initial signatories to and, subsequently, had failed to craft.[15] Despite the inability to bargain for terms, particular countries decided to opt into agreements by simply "adhering" to treaties as originally written.[16] Countries interested in joining existing agreements had the option to either accept contractual conditions as first written or not adhere at all. The quality of take-it or leave-it present centuries ago is identical to how it exist today.

University of Colorado Law School Professor, Edwin W. Patterson, first established the term adhesion contract in relations to standard form contracts in 1919.[17] Patterson used the term to describe life insurance contracts that were "drawn up by the insurer and the insured, which merely 'adheres' to it, has little choice as to its terms."[18] Although Patterson failed to speak to

[13] Barnhizer, *Supra*, 1501.
[14] Richard L. Barnes, Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability, 141.
[15] Barnes, *Supra*, 141.
[16] Barnes, *Supra*, 142.
[17] J.W. Looney, Adhesion Contracts, Bad Faith, and Economically Faulty Contracts, 4 Drake J. Agric. L. 177.
[18] McClure, *Supra*, 1500.

the enforceability of adhesion contracts, it is his description of life insurance contracts that was adopted nearly two decades later to describe standard form contracts generally.[19]

In 1943, Friedrich Kessler most famously addressed the enforceability of adhesion contracts. Kessler advocated that judges should be activists and rewrite unfair provision of adhesion contracts.[20] The Yale professor utilized Patterson's definition of adhesion to identify and explain the weakness of adhering parties.[21] According to Kessler, standard form adhesion contracts were purposefully used by parties with greater bargaining power against individuals either unable to shop for a better alternative or who were exposed to competitors using similarly one-sided terms.[22] Kessler's analysis expanded on existing commentary as he backed the enforcement of particular terms that satisfied or appealed to a legitimate social importance.[23] Like Kessler, American judges have displayed similar consideration to public policy when determining unenforceability or enforceability respectively.[24]

More recently, Todd Rakoff, Professor at Harvard Law School, established seven characteristics contained in all adhesion contracts.[25] According to Rakoff:

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 transaction of the types represented by the form and enters into those 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 singed by the adherent.

[19] Margaret M. Smith, Adhesion Contracts Don't Stick in Michigan: Why Rory Got it Right, 5 Ave Maria L. Rev. 237.
[20] Friedrich Kessler, Contracts of Adhesion - Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 636
[21] McClure, *Supra* 1501.
[22] McClure, *Supra* 1501.
[23] Kessler, *Supra*, 636
[24] Smith, *Supra*, 247.
[25] Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1179

6. The adhering party enters few transactions of the type represented by the form-few, at least in comparison with the drafting party.
7. The principle obligation of the adhering party in the transaction considered as a whole is the payment of money.[26]

Rakoff's theories are evident in essentially every case that investigates unconscionability.

Like prior scholars, Rakoff acknowledged that adhesion contracts feature both a dangerous power disparity between parties and a resulting uncertain legal assent.[27] Rakoff stated that the adhering party is "unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them."[28] Rakoff's seven qualities of adhesion are indicative of the contractual crafting bias only made possible by the gross imbalance of power.

Unequal contracting power is of undeniable detriment to the American consumer. Rakoff hinted that adhesive contracts are a threat to invalidate consent amongst non-drafting parties. Yet, adequate consent is a necessary feature in all contract formation. The legal consequences from inadequate bargaining power and consent are the foundation of many challenges to both adhesion contracts and arbitration agreements.

In *Guthman v. La Vida Llena*[29], the judiciary established three , the judiciary established three elements of adhesion.[30] All three elements must be found before adhesion can be determined.

1. The agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of the other,

2. The party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms,

[26] Rakoff, *Supra*, 1179.
[27] Rakoff, *Supra*, 1179.
[28] Rakoff, *Supra*, 1179.
[29] Guthman v. La Vida Llena, 709 P.2d (1985).
[30] Batya Goodman, Honey, I shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract, 21 Cardozo L. Rev. 319.

3. The contract must be offered to the weaker party on a take-it-or leave-it basis, without opportunity for bargaining.[31]

The triad of qualities identified in *Guthman* are evident across jurisdictions and echo Rakoff's initial findings.

### B. Unequal Bargaining Power

Modern contracts of adhesion, like the hypothetical cell phone contract discussed in the introduction, have developed alongside both mass-market industries and their desire to opperate efficiently. The main reason for this is that standard form contracts greatly decrease operational cost and time.[32] Rather than crafting unique agreement with each employer or purchaser, a company is able to design one contract and repeatedly use it. It would be impractical for vendors such as Amazon or AT&T, who facilitates thousands of essentially identical purchase agreements daily, to negotiate directly with each customer. This hypothetical process would force business to keep additional lawyers on retainer while also increasing bargaining time. The increased operational cost would be passed onto the consumer and could become a significant financial burden. It is argued that standard form contracts are inherently of public benefit because of the associated cost savings felt by consumers.

Standard form contracts also allow corporations to minimizing possible risk.[33] Lawyers drafting contracts for firms are charged with taking every step to ensure that business interests are maximally protected.[34] This goal is frequently achieved unbeknownst to non-drafting parties/consumers.[35] Business's ability to "call their shots" from a position of superior

[31] Guthman v. La Vida Llena, 709 P.2d at 678.
[32] Christopher M. Kaiser, Take It or Leave It: Monsanto v. McFarling, Bowers v. Baystate Technologies, and the Federal Circuits Formalistic Approach to Contracts of Adhesion. 80 Chi-Kent L. Rev. 487.
[33] Mo Zhang, Contractual Choice of Law In Contracts of Adhesion and Party Autonomy, 41 Akron L. Rev 124.
[34] Zhang, *Supra*, 125
[35] Zhang, *Supra*, 125

bargaining power has given rise to boilerplate contracts. Standard form contracts present terms on a take-it or leave-it basis and allow lawyers the least opposition to craft agreements in line with the drafting party's interest.[36]

The differential in contracting power has given rise to issues regarding the legality of adhesion contracts. Unequal contracting power threatens the idealistic qualities of a contract that is formed freely by parties on equal footing.[37] A party with superior bargaining power is able to exploit the weakness of non-drafting parties and dictate all terms without any "give and take." It is because of the tension between freely bargained for contracts and adhesion contracts that consumers are vulnerable and safeguards must be established.

It is a consequence of the imbalance in bargaining power that led to the creation of the doctrine of unconscionability and "reasonable expectations."[38] The existence of unconscionability can make both adhesion contracts and arbitration agreements unenforceable.[39]

### C. Enforceability Based on the Doctrine of Unconscionability

The doctrine of unconscionability is one of the most utilized arguments made by parties interest in rendering an adhesion contract unenforceable. Unconscionability may exist when unequal bargaining power led to the execution of contract that was not freely formed or "shocks one's conscious."[40] The underlying doctrine of unconscionable is to protect the exploitation of weaker parties.

Unconscionability is a judicial creation designed to protect individuals from overly oppressive contract practices and terms.[41] When identifying this doctrine, however, establishing

[36] Zhang, *Supra*, 125
[37] Zhang, *Supra* 125
[38] Smith, *Supra*, 237.
[39] Smith, *Supra*, 237.
[40] McClure, *Supra*, 1498.
[41] J. Kirkland Grant, Securities Arbitration: Is Required Arbitration Fair to Investors, 24 New Eng. L. Rev 389.

a contract as adhesive is insufficient in a courts ultimate determination of enforceability. [42] Rather, discovering adhesion is the beginning and not the end of the determination of enforceability.[43] The burden to prove unconscionability falls on whomever petitions the court.[44]

Unconscionability exists if the "bargain struck…denigrate[s] some significant policy to make them unacceptable as contracts."[45] While "significant policy" includes the analysis of all traditional contract features including duress, fraud, consent, and notice, the American judiciary has not expressed a standard definition of how an unenforceable unconscionable contract will formulaically violate traditional contract law.[46] However, the definition of unconscionability most frequently cited is from the Old English case of *Earl of Chesterfield v. Janssen.*[47] In *Janssen,* the court said that unconscionable contract is one that "no man in his senses and not under delusion would make on one hand, and no honest and fair man would accept on the other."[48]

In determining unconscionability, modern scholars and lawyers turn to the bifurcated analysis created by Professor Arthur Leff.[49] Leff was the first to have understood unconscionability in dual facets of procedural and substantive insufficiencies.[50] Leff's analysis serves as the foundation underpinning unconscionable legal theory.[51] Procedural unconscionability occurs when contractual defects occur when bargaining or forming a contract.[52] Examples that result from an unequal division of contractual powers include a failure

[42] Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981).
[43] Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981).
[44] Melissa Briggs Hutchens, At What Cost?: When consumers cannot afford the costs of arbitration in Alabama, 53. Ala. L. Rev 599.
[45] Barnes, *Supra*,140.
[46] McClure, *Supra*, 1501.
[47] McClure, *Supra*, 1502.
[48] McClure, *Supra*, 1502, (citing 28 Eng. Rep. 82, 100 (1750)).
[49] Barnes, *Supra*, 153.
[50] Barnes, *Supra*, 153.
[51] Barnes, *Supra*, 153.
[52] Grant, *Supra*, 457.

to adequately consent and a lack of legitimate contractual choice. Procedural unconscionable contracts are generally enforceable if it can be proven that sufficient bargaining or adequate notice existed.[53]

Procedural analysis includes whether a non-drafting party had the opportunity to bargain for terms, had any choice but to contract, and if any legitimate alternatives existed.[54] Frequently, the determination that a contract is adhesive is sufficient to show procedural unconscionability.[55] In *Flores v. Transamerica Home First*, the California Court of Appeal expressed this idea stating, "the procedural elements of an unconscionable contract generally take the form of a contract of adhesion."[56] Legal analysis is consistent that adhesion equates to a violation of procedural unconscionability. This relationship can be assumed as true in every case discussed in this paper and in most standard form contracts in reality.

A substantively unconscionable contract will have terms that are grossly one sided or overly harsh.[57] Judicial history suggests that courts are hesitant to invalidate a contract unless both procedural and substantive wrongdoing exists.[58] Courts have less consistently invalidated contracts where there is extreme evidence of one characteristic of unconscionability and an absence of the other.[59] However, it is not necessary for both factors of unconscionability to exist in equal degrees for a contract to be ruled as void.[60] Courts employ a "sliding scale" when imbalances in unconscionable qualities exist. [61] The greater the procedurally unconscionable

[53] Grant, *Supra*, 457.
[54] McClure, *Supra*, 1503.
[55] Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376, 381-82 (Cal. Ct. App. 2001).
[56] Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376, 381-82 (Cal. Ct. App. 2001).
[57] Grant, *Supra*, 457.
[58] Barnes, *Supra*, 155.
[59] Larry A. Dimatteo & Bruce Louis Rich, Consent Theory of Unconscionability: An Empirical Study of Law In Action, 33 Fla. St. U.L. Rev. 1067.
[60] Sierra David Sterkin, Challenging Adhesion Contracts in California: A Consumer's Guide, 44 Golden Gate U.L. Rev, 296.
[61] Sterkin, *Supra*, 300.

faults are, the less damning the substantive qualities must be to find unenforceability.[62] The converse relationship can hold the same outcome of unconscionability.

## D. Judicial History of Procedural & Substantive Unconscionability

### 1. Henningsen v. Bloomfield

*Henningsen v. Bloomfield Motors, Inc.* is an early example of a federal court finding a contract unenforceable due unconscionability. In *Henningsen,* the New Jersey Supreme Court developed an opinion of unconscionability while chastising the entire automotive industry for using procedurally and substantively unconscionable contract provisions. After considering Ford and Chevrolet automobiles, Mr. Henningsen purchased a Plymouth (Chrysler Motors Product). The purchase order was executed exclusively by Mr. Henningsen and was printed on a two-side single sheet of paper.[63] The font on front of the purchase order became increasingly small up until the signature line located at the bottom of the front page.[64]

Within the *Henningsen* contract, the two most contested paragraphs were printed in the smallest font and suggested no increased importance. The contested statement said:

> The front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized. I hereby certify that no credit has been extended to me for the purchase of this motor vehicle except as appears in writing on the face of this agreement.[65]

Mr. Henningsen admittedly failed to read the back of the contract, but was also never encouraged to do so by the dealership brokering the sales.[66] The unread condition stated:

[62] Zhang, *Supra*, 155.
[63] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 1960.
[64] Henningsen v. Bloomfield Motors, Inc., *Supra,* 69.
[65] Henningsen v. Bloomfield Motors, Inc., *Supra,* 70.
[66] Henningsen v. Bloomfield Motors, Inc., *Supra,* 71.

> It is expressly agreed that there are no warranties, express or implied, *made* by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished hereunder except as follows:[67]
>
> 'The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle *to the original purchaser* or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; *this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part*, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.[68]

Ten days after delivery, Mrs. Henningsen was driving the automobile when car veered uncontrollably off the road directly into a wall.[69] An experienced automotive insurance agent was unable to isolate the malfunctioning part but attested that there must have been a hardware malfunction within the steering column.[70]

The Henningsens sued Bloomfield Motors and Chrysler for automotive repairs and personal injuries suffered during the accident.[71] Chrysler unsuccessfully argued that they were only liable to pay for the specific part within the steering column that malfunctioned and none of damage resulting from its failure.[72] Chrysler also lost the argument that they were not liable for damages because the executed warranty was only between Chrysler and the primary purchaser,

[67] Henningsen v. Bloomfield Motors, Inc., *Supra,* 71.
[68] Henningsen v. Bloomfield Motors, Inc., *Supra,* 71.
[69] Henningsen v. Bloomfield Motors, Inc., *Supra,* 72.
[70] Henningsen v. Bloomfield Motors, Inc., *Supra,* 72.
[71] Henningsen v. Bloomfield Motors, Inc., *Supra,* 71.
[72] Henningsen v. Bloomfield Motors, Inc., *Supra,* 74.

Mr. Henningsen.[73] Chrysler asserted that contractual privity existed solely with Mr. Henningsen.[74] Chrysler argued that no implied warranty existed between the manufacturer and Mrs. Henningsen who was injured.[75]

In addition to ruling against Chrysler, the court condemned the automobile industry as a whole for exploiting their ability to craft warranties from a position of superior bargaining power. The court commented that the auto industry proved that standard form contracts are used "primarily by enterprises with strong bargain power and position."[76] The court elaborated that a "traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality."[77]

A relationship existing on equal economic footing was not present in *Henningsen.* The courts language is analogous to the writings of professor Kessler and Leff who identified particular situations when adhesion contracts would grow and in what situations courts must intervene. Given that AMA's warranty was deemed to violate public policy, Leff would approve of the courts intervention into this policy.

The climate that Mr. Henningsen was shopping in was not one of alternatives or "equal footing." The warranty offered was identical to that of all members from the Automobile Manufacturers Association (AMA*).*[78] The court was persuaded to rule against Chrysler because AMA member represented 93.5% of total automobiles on the road and all used the same

[73] Henningsen v. Bloomfield Motors, Inc., *Supra,* 74.
[74] Henningsen v. Bloomfield Motors, Inc., *Supra,* 74.
[75] Henningsen v. Bloomfield Motors, Inc., *Supra,* 74.
[76] Henningsen v. Bloomfield Motors, Inc., *Supra,* 75.
[77] Henningsen v. Bloomfield Motors, Inc., *Supra,* 73.
[78] Henningsen v. Bloomfield Motors, *Supra,* 71.

warranty. A marketplace situation existed that where no genuine alternative to contract over warranty conditions existed.[79]

Mr. Henningsen did not freely bargain with the executing dealership nor was he encouraged to read impacting conditions.[80] Mr. Henningsen's contract was on a take-it or leave-it format and the obfuscation of important contractual conditions indicated to the court that the dealership had vested interest in avoiding communication.[81] The New Jersey Supreme Court reasoned that the dealership was desirous of avoiding communication that could encourage Henningsen to bargain.[82] The court made the ruling that the dealership was avoiding the bargaining process and manipulating their position of bargaining superiority to consciously strip their clientele of contractual power. [83]

The AMA's ability to control warranty terms and return all liability back onto the consumer indicated the exploitation of the non-drafting party. The court decided that the facts created an occurrence that was a threat to public policy and both procedurally and substantively unconscionable.[84] Public policy was breached because Henningsen's demand for an automobile forced his consent to overly burdensome contractual terms regardless of what dealership he visited and car he purchased. Case specific analysis conducted by the New Jersey Supreme Court indicated that Henningsen required a car and had no true choice other than to contract with an the AMA member.

The New Jersey Supreme Court's ruling that the AMA's warranties were not enforceable has had beneficial effects on the auto industry today. Competition within the automotive industry over warranty terms has created a market for bargaining and inter-industry alternatives

[79] Henningsen v. Bloomfield Motors, *Supra,* 71.
[80] Barnhiser, suppra, 147
[81] Barnhizer, *Supra*, 148.
[82] Barnhizer, *Supra*, 148.
[83] Barnhizer, *Supra*, 148.
[84] Barnhizer, *Supra*, 147.

that benefit consumers. Additional consumer benefit includes the inception of third party private insures who have created a modern niche market not existing decades ago.

Although standard form contract may decrease cost and expedite contracts, *Henningsen* demonstrates the damaging collusive nature that occurs when business interest grow communally unchecked and out of hand. Free market competition was nurtured following the New Jersey Supreme Court's ruling and is of benefit. Today similar public benefits could result if other sectors with similar commercial contracts are closely monitored or even encouraged to compete. It could be advantageous for commercial interest and/or public policy to encourage organizations that control a super majority of sales within in single industries to compete over factors in addition to price.

### 2. Williams v. Walker-Thomas Furniture

Another leading case in the development of unconscionability is *Williams v. Walker-Thomas Furniture Co.*[85] decided in 1965. The definition of procedural unconscionability mentioned in *Williams* is still referenced today.[86] In *Williams,* the court's opinion regarding procedural unconscionability was that the primary "concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made."[87] Such circumstances included education level, economic standing, and social factors. DiMatteo and Rich go so far as to call *Williams* the "seminal" case in deciding unconscionability. The pair wrote that:

> For the most part, the unconscionability cases follow Williams v. Walker-Thomas and look for two factors: (1) unfairness in the formation of the contract, and (2) excessively

[85] Williams v. Walker-Thomas Furniture Company, 350 F.2d 445; 121 U.S. App. D.C. 315; 1965
[86] Kenneth R. Davis, The Arbitration Claws: Unconscionability in the Securities Industry, 78. B.U.L. Rev 255.
[87] Williams v. Walker-Thomas Furniture Company, 350 F.2d 445; 121 U.S. App. D.C. 315; 1965.

> disproportionate terms . . . . Most courts have looked for a sufficient showing of both factors in finding a contract unconscionable.[88]

Walker-Thomas Furniture Company operated a retail furniture store in a low-income area of Washington, D.C.[89] Between 1957 and 1962 Williams purchased a variety of items from Walker-Thomas for which payment was to be made in installments.[90] Within the contract was the condition that:[91]

> The amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; *and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts* due the Company by [purchaser] at the time each such payment is made.[92]

The effect of this clause was that Walker-Thomas furniture kept a balance open and due on all items bought regardless of when purchased. This cumulative balanced remained open until the complete balance owed on every item was liquidated. When Williams defaulted on the payment plan, Walker-Thomas had the contractual ability to reposes all items that had been purchased. It was this clause and resulting consequences that was challenged in court as unconscionable.

In analyzing whether the installment contract agreed to was unconscionable, the United States Court of Appeals for the District of Columbia stressed the disparity of bargaining power that existed between Walker-Thomas Furniture and their customers.[93] After heeding specific attention to financial wellbeing, education level, and resulting inability to understand contract

[88] Sitogum Holdings, Inc., 800 A.2d at 921.
[89] Williams v. Walker-Thomas Furniture Company, *Supra*, 318.
[90] Williams v. Walker-Thomas Furniture Company, *Supra*, 318.
[91] Williams v. Walker-Thomas Furniture Company, *Supra*, 317.
[92] Williams v. Walker-Thomas Furniture Company, *Supra*, 318.
[93] Williams v. Walker-Thomas Furniture Company, *Supra*, 317.

terms, the court found that consent could truly not exist due enormous difference in bargaining abilities.[94]

The courts opinion hinged on the procedural unfairness due to a disparity in contracting abilities.[95] The court believed that the inability to legitimately assent occurred during the formation of the contract and indicated procedural unconscionability.[96] The Appeals court stated that Walker-Thomas' customers had such little bargaining power due to education and economic levels that "it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[97]

*Williams v. Walker-Thomas Furniture* satisfied a substantive violation through unfair or overly harsh contractual terms. The court found that William's ability to pay $1,400 of $1,800 could not be "condemn too strongly" or enough to warrant complete repossession of all purchased items.[98] Walker-Thomas's policy that inhibited Williams and other individuals from low socio-economic standing from ever owning a single purchased item was perceived as a predatory business practice that exploited weak consumers.[99]

Judge Wright's opinion discussed unconscionability occurring in the formation of a contract when he warned of "important terms hidden in a maze of fine print and minimized by deceptive sales practices."[100] Many similarities exist between *Williams* and the contractual dispute that occurred between Henningsen and Chrysler. Mr. Henningsen missed many of the most important and contract altering terms due to inconspicuous print and little font. Had the terms Henningsen agreed to be more obvious he may have been unlikely to purchase the car or

[94] Williams v. Walker-Thomas Furniture Company, *Supra*, 317..
[95] Davis, *Supra*, 281.
[96] Williams v. Walker-Thomas Furniture Company, *Supra*, 319.
[97] Williams v. Walker-Thomas Furniture Company, *Supra*, 319.
[98] Williams v. Walker-Thomas Furniture Company, *Supra*, 319.
[99] Barnes, *Supra*, 157.
[100] Williams v. Walker-Thomas Furniture Company, *Supra*, 317.

allow his wife to drive. Judge Wright's statements are not solely germane to the *Williams* ruling but today as well as certain Internet contracts are notorious for hiding terms.

Despite the landmark ruling in *Williams*, many standard form contracts continue to use inconspicuous print and hide terms within "mazes." Evolving mediums of contract formation are repeating the legal transgressions made by Walker-Thomas furniture. Contractual terms not adequately presented within electronic contracts have been challenged as threatening consent when consumers are forced, frequently unknowingly, to actively search for conditions. Today, this uncertainty arises in discussion of browse-wrap and click-wrap agreements; the two most popular and employed forms of electronic contracts. Claims are made that a contract is unenforceable because terms were insufficiently presented. However, because electronic merchants in particular are continuing to hide terms and force contracts in manners that suggest unconscionability, non-drafting parties must be active in searching for terms until uniform measures that protect consumer interest are enacted. The discussion of online contracts will be expanded later in this paper.

### 3. Additional Court Rulings

The court addressed the substantive unconscionability and the existence of overly harsh terms in *Campbell Soup Co v. Wentz*. Campbell Soup contracted to purchase Wentz's red carrots for a price between $23 and $30 per ton depending on date of delivery.[101] Wentz, a farmer with limited crops compared to other industry growers, notified Campbell that, due to a steep increase in the price of red carrots and virtual non-existence on the open market, the carrots would be sold elsewhere.[102] Campbell sued Wentz upon failure to deliver the carrots. [103]

[101] Barnes, *Supra*, 156.
[102] Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).

Substantive violations were at the center of the determination of unconscionability. The court specifically found a clause allowing Campbell to refuse carrots over 12 tons, but not allowing Wentz to sell carrots without first receiving Campbell's permission overly harsh.[104] The court chastised the more powerful Campbell for "carrying a good joke too far."[105]

The court's conscience was shocked due to the one sided nature of the agreement and lack of alternative options Wentz was granted. Wentz was unable to control his produce without the permission of Campbell who could have had competing interest including preventing competitors from obtaining Wentz's goods. A disparity in recouping damages was also evident. Campbell was able to pursue liquidated damages while Wentz was not contractually provided any remedy to obtain damages in the event that Campbell breached their agreement.[106] Cambells had the ability to suggest one sided terms and conditions due to their superior drafting powers.

Campbell Soup's attempt to protect personal interest when drafting their contract is an example of the motives that popularized standard form contracts. As demonstrated in *Campbell Soup,* that desire is often harmful to non-drafting parties. Although the court ruled in favor of Wentz, 60 years later it seems unlikely that the same ruling would result as fraud in the inducement did not occurred and Wentz knowingly violated their accepted agreement. This ruling seems dated and in conflict with modern legal opinions. Consumers and defendants should not expect courts to find in their favor following actions that explicitly and intentionally violate contractual terms.

---

[103] Barnes, *Supra*, 156.
[104] Barnes, *Supra*, 156.
[105] Campbell Soup Co. v. Wentz, *Supra,* 81.
[106] Campbell Soup Co. v. Wentz, *Supra,* 81.

## F. Contracting Outside Reasonable Expectations

Considered to exist on the fringe of unconscionability, certain jurisdictions explore whether contractual conditions are outside the reasonable expectations of a party when determining enforceability of an adhesion contract.[107] The California Supreme Court explored this issue in *Allan v. Snow Summit Inc.* In *Allan,* the defendant sued for injuries sustained during a ski lesson.[108] Allan argued that the liability release signed pre-lesson was an unenforceable adhesion contract and that the terms were outside his reasonable expectations.[109]

The court ruled against Allan finding that the liability release was clearly printed and not outside his reasonable expectations.[110] Allan's admittance that he recognized skiing to be a dangerous sport diminished what could have outside his scope of expectations.[111] Allan admittance that he understood the risk of skiing should have encouraged him to read the contract.

The court reasoned that determining what is within one's expectations is directly related to the "notice and the extent to which the contract affects the public interest."[112] Furthermore, the court concluded that because Allan had looked at the contract long enough to sign it, he had seen the contract long enough to notice the liability conditions.[113] The combination of identifying skiing as a dangerous act and being able to notice the liability condition made his degree of reasonable expectation expansive. The California court importantly noted that a party could not argue for terms being outside of their reasonable expectations if they specifically failed to read a contract when given sufficient opportunity to.[114]

---

[107] Sterkin, *Supra*, 295.
[108] Allan v. Snow Summit, 51 Cal. App. 4th 1358
[109] Sterkin, *Supra*, 295.
[110] Sterkin, *Supra*, 295.
[111] Allan v. Snow Summit, *Supra,* 1358
[112] Allan v. Snow Summit, *Supra,* 1358
[113] Allan v. Snow Summit, *Supra,* 1358
[114] Sterkin, *Supra*, 295

In *Allan,* violations to substantive unconscionability were not sufficient and no argument claiming the existence of procedural unconscionability was made. Duress did not occur and the defendant was offered an opportunity to pursue an alternative ski source. The Ski resort actually encouraged Allan to read the contract; an act that actually increased Allan's opportunity to comprehend the agreement. The court further noted that Skiing is an act essentially "within one's own contract" due to an ability to control all personal actions.[115] Furthermore, skiing in the manner discussed, was found to have no serious relation to public policy.[116]

The *Allan* ruling applied to modern cases could have harsh consequences for individuals arguing against the enforceability of a contract. The California Court essential ruled that that an individual who has time to sign a contract also has time to read it. This idea threatens to limit the degree that terms "hidden in a maze" may sufficiently challenge enforceability. The unexplored relationship between hidden terms and the significance of one's signature may alter what is legally predictable. One contemporary question that may eventually be raised is whether an electronic signature carries the same implicit understanding of terms that a tangible signature does. Do contracts executed online and facilitated with a computer carry the same legal power as the contract signed by Allan? The effect of the ruling relating to what form of contract is public policy is also uncertain.

The California Supreme Court again addressed the issue of reasonable expectation in *Graham v. Scissor-Tail, Inc*.[117] In *Graham,* a contract promoter agreed to facilitate four performances by the band Scissor-Tail.[118] Graham signed four concert specific contracts that were identical in every aspect less "wage agreed upon" and "hours of employment".[119] The

[115] Allan v. Snow Summit, *Supra,* 1360
[116] Allan v. Snow Summit, *Supra,* 1359
[117] Graham v. Scissor-Tail, 28 Cal. 3d 807
[118] Graham v. Scissor-Tail, *Supra,* 807.
[119] Graham v. Scissor-Tail, *Supra,* 807.

contracts stated that all disputes would be handled through arbitration of a referee selected by the Scissor-Tail's labor Union.[120] Graham sued Scissor-Tail arguing losses from a first concert should be offset against profits from a second planned concert.[121] Graham alleged that this was industry practice.[122] The California Supreme court would ultimately find in favor of Graham for reasons that echo the language from *Henningsen.*

The court found that the contract's arbitration clause was within Graham's reasonable expectation.[123] The most damming fact was that Graham should have been familiar with the caveats of the contract signed with Scissor-Tail. The courts determination followed Graham admitting to being "party to literally thousands…of contracts containing a similar provisions."[124] The court further noted that Graham had contracted with Scissor-Tail over 15 times and with contracts containing similar arbitration agreements.[125] Graham had helped draft the contracts and frequently used similarly phrased agreements in his regular business practices.[126]

The court found the contract unconscionable as Graham was subject to overly harsh arbitration provisions.[127] Graham was forced to stand in judgment before a biased arbiter.[128] Graham was determined to be adherent to the contract as a large majority of bands including Scissor-Tail used the same union-written contract. Much like Henningsen had no true alternative other than to accept the AMA warranty, so to, did Graham have no option other than to accept the Union contract selected by Scissor-Tail.[129] .

[120] Graham v. Scissor-Tail, *Supra,* 808.
[121] Graham v. Scissor-Tail, *Supra,* 808.
[122] Graham v. Scissor-Tail, *Supra,* 809.
[123] Graham v. Scissor-Tail, *Supra,* 807.
[124] Graham v. Scissor-Tail, *Supra,* 821.
[125] Graham v. Scissor-Tail, *Supra,* 821.
[126] Graham v. Scissor-Tail, *Supra,* 821.
[127] Graham v. Scissor-Tail, *Supra,* 825.
[128] Graham v. Scissor-Tail, *Supra,* 825.
[129] Graham v. Scissor-Tail, *Supra,* 825.

The court eventually determined that substantive conditions restricting the arbiter were so great as the hold the contract unconscionably unenforceable. The arbiter in this case was a former member of the same union as Scissor-Tail and, according to the court, biased enough to deny Graham "the fair opportunity to present his side of the dispute." The court believed that Graham's inability to argue his case effectively violated the "minimum levels of integrity" needed to pass judicial muster and mutuality at the essence arbitration.[130]

Although Graham may have escaped judgment from a one-sided referee, both parties were encouraged to cooperate for arbitration. The Supreme Court stated that in "light of the strong public policy of this state in favor of resolving disputes by arbitration…we do not believe that the parties herein should be precluded from availing themselves of non-judicial means of settling their difference."[131] This ruling re-affirms the courts preference for keepings cases within the realm of arbitration even following violations that stem from lack of mutuality and violations of unconscionability. The court in their opinion state the benefit to the public that arbitration creates.

Unique to *Graham* is that both parties were from commercial sectors. We learn from the ruling in *Graham* that the judiciary has an analogous preference for arbitration regardless of whether one individual is a consumers or if both parties are commercial. Additionally, and despite being deemed professionals, a lack of contractual mutuality existed amongst businesses. *Graham* also reaffirms that organizing unions, as the AMA was in *Henningsen,* can negatively affect contractual relationships when insufficiently monitored.

[130] Graham v. Scissor-Tail, *Supra,* 826.
[131] Graham v. Scissor-Tail, *Supra,* 831.

## G. Public Policy Exceptions

Courts may consider standard form contracts unenforceable if their terms violate jurisdictionally established public policy.[132] This burden of proof is much greater and rarely do court void a contract citing a violation of public policy alone.[133] The Supreme Court weakened one's ability to make a public policy defense iterating the high burden of proof one must satisfy.[134] The Court held that "refusal to enforce an award for contravention of public policy is only justified when such policy is well defined and dominant, as ascertained by reference to laws and legal precedents, rather then general considerations of supposed public interest."[135]

It is more typical that unconscionability leads to a violation of public policy. *Henningsen* and *Allan* demonstrated opposite results from unconscionability on public policy. Often, contracts that occur in the private sector and for good or services that are not essential are not going to have much effect on public policy. The list of public policy exceptions is exhaustive and a complete discussion of its history and existences is not of significance for this paper. Many contract policies favor commercial interest and run contrary to consumer rights thought of us "public interest." American courts have historically sided in favor of business interest finding standard form contracts enforceable even when they may be harmful to individual interest.[136]

It is essential for individuals believing that public policy has been violating to piggyback on more supportable defenses. This may take the form of insufficient notice or procedural unconscionability as a threat to public policy. Prior court statement and judicial history reinforce the need for consumer awareness and preemptive measures to hedge against oppressive

[132] Ty Tasker & Daryn Pakcyk, Cyber-Surfing on the High Seas of Legalese: Law and Technology of internet Agreements, 18 Alb. L.J. Sci & Tech 79.
[133] Tasker & Pakcyk, *Supra*, 82.
[134] Grant, *Supra*, 457.
[135] Hoellering, Arbitral Finality, in ARBITRATION & THE LAW 1987-88, 32, 37 (AAA Office of General Counsel ed. 1988).
[136] Kaiser, *Supra*, 490.

contracts. Ultimately, as will be further affirmed, public interests have been repeatedly found subordinate to the desire to promote interest deemed beneficial to business.

# III. Arbitration

## A. General

Arbitration has existed in the United States for centuries.[137] Much like businesses utilized standard form contracts to decrease financial cost, so, too, did pre-dispute arbitration become popular as a means of protecting both personal assets and business interest.[138] Historically, however, the ability to arbitrate was denigrated by individuals in legal circles and within legislative arenas.[139]

The tendencies not to enforce arbitration agreements can be traced back to English Common Law where animosity was documented in 1609.[140] English courts officials refused to enforce arbitration agreements fearing that doing so would result in their being ousted from their judicial post.[141] As legal thought first developed in the United States, American courts were reluctant to enforce arbitration agreements for the same reasons.[142]

A clear shift occurred in American legal thought in 1925 when Congress passed the Federal Arbitration Act (FAA). Congress passed the FAA as a means of ending "judicial hostility" towards arbiters and making arbitration agreements legally enforceable.[143] Congress's goal was to place arbitration agreements "upon the same footing as other contracts."[144] The FAA

[137] Elizabeth K. Stanley, P{Arties' Defenses to Binding Arbitration Agreements in the Health Care Field & the Operations of the McCarran-Ferguson Act, 38 St. Mary's L.J. 591.
[138] Stanley, *Supra*, 592.
[139] Stanley, *Supra*, 593.
[140] Rebecca Olson, Aguillard v. Auction Management Corp.: Louisiana Adopts a Presumption Favoring the Enforcement of Arbitration Agreements, 80 Tulane L. Rev. 1482.
[141] Olson, *Supra*, 1480.
[142] Olson, *Supra*, 1480.
[143] Stanley, *Supra*, 593.
[144] Olson, *Supra*, 1483.

provided that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[145]

Before the passage of the FAA, the judicial inability to enforce arbitration agreements allowed contracting parties to ignore awards decided by arbitrators.[146] Even arbitration agreements that satisfied all necessary characteristics of traditional contract law were unenforceable.[147] Simply, parties who had agreed to arbitrate through an otherwise legally binding contract could ignore the terms of the agreement without facing any legal repercussion.

Cohen and Bernheimer are likely the most successful pioneers of arbitration. In 1920, the pair spearheaded New York State's adoption of the first modern arbitration agreement.[148] The 1920 law made all arbitration agreements enforceable, including agreements to arbitrate future disputes.[149] The tandem's success was limited to intra – New York state contracts. On the heels of their success in New York, the two set out to encourage congress to pass a federal law making arbitration agreements legally enforceable.

In front of Congress Cohen argued that arbitration would benefit both contracting parties and an overburdened legal system. Cohen claimed that legal arbitration "saves time, saves trouble, saves money…it preserves business friendships…it raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts."[150] Cohen, the father FAA, designed the Act to solve three evils that remain germane today:

1. Long delays caused by congested courts and excessive motion practice

---

[145] Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568
[146] Margaret L. Moses, Saturory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 Fla. ST. U.L. Rev. 99
[147] Moses, *Supra*, 100
[148] Olson, *Supra*, 1483.
[149] Olson, *Supra*, 1483.
[150] Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 16 (1924) [hereinafter Joint Hearings] (statement of Julius Cohen).

2. The expense of litigation, and

3. the Failure through litigation to reach a decision regarded as just.[151]

All derived benefit to public policy originates from ameliorating the three evils above.

Cohen stressed that the act was not intended to aid in the enforcement of arbitration agreements included in adhesive contracts.[152] Cohen designed the FAA to have limited scope and limited intended uses. The act was meant to be enforced only in situation of voluntary agreement that he believed were separate of adhesively formed contracts.[153] Cohen stated that the action of arbitration is "entirely voluntary" and that the new law "is merely a new method for enforcing a contract freely made by the parties hereto."[154]

When the FAA was enacted it was viewed simply as "pro-agreement" rather than "pro-business."[155] Nonetheless, historic judicial opinions tend to support the view that the FAA favors the courts authority to support arbitration agreement contrary to the legislative intentions of the act's enactors. Scholars who argue that the FAA has been inappropriately applied cite the conflict between the judicial interpretation and original legislative intent.

## B. Features of the Federal Arbitration Act

Sections 1 and 2 are at the center of the FAA and have been most judicially scrutinized since enactment in 1925.[156] Section 1 mandates the enforcement of both maritime transactions and agreements involving interstate commerce.[157] Section 1:

> Maritime transactions, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy,

[151] Moses, *Supra*, 103.
[152] Moses, *Supra* 108.
[153] Moses, *Supra* 108.
[154] Arbitration
[155] Brafford, *Supra*, 334.
[156] Brafford, *Supra*, 334.
[157] Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568

> would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. Incorporation of the term.[158]

"Interstate commerce" has been applied broadly in American history. Ultimately, this development allowed the court to expand the scope of the act through congress's constitutional power to monitor interstate commerce.[159]

Section 2 of the FAA outlines the necessary features of an enforceable arbitration agreement and includes the language that has been adopted to allow the FAA to preempt state laws.[160] Section 2 states:

> 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[161]

The three essential qualities of an enforceable arbitration agreement set out in section 2 are that (1) parties must have enter a written agreement to submit to arbitrator, (2) the existing dispute is covered under the arbitration agreement, and finally (3) applicable state must not invalidate the existing arbitration agreement.[162]

---

[158] Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568
[159] Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568
[160] Brafford, *Supra*, 334.
[161] Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568
[162] Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568

## C. Supreme Court's Expansion of the FAA

The transformation of the FAA from the limited tool envisioned by Cohen and Bernheimer to the expansive doctrine, and possibly one of unjust empowerment, occurred through several stages. Federal Courts have developed precedent that greatly favors the pre-emption of the FAA over state law while also siding with business interest. Extensive judicial opinions empowering Congress's authority over interstate commerce greatly impact non-drafting parties today.

### 1. Prima Paint Corp. v. Flood & Conklin Mfg. Co.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., the Supreme Court first found that the FAA pre-empts state law.[163] This 1967 ruling sparked a judicial trend expanding the enforceability of arbitration agreements through the FAA.[164] The Supreme Court made a break from precedent while expanding the enforceability of the FAA when confronted with the issue of whether " a federal court should resolve a claim of fraud in the inducement of an entire contract" or whether such a claim "should be referred to arbitration."[165] The Supreme Court ruled that "parties agreement to arbitrate any controversy or claim arising out of or relating to" contracts involving the sale of a business fell within section 2's scope because the contract's fact pattern made the agreement one "evidencing a transaction in interstate commerce."[166]

*Prima Paint* involves the interstate sale of a business and how the court would rule on the matter of legal diversity. In 1964, Prima Paint, a New Jersey company, agreed to purchase Flood and Conklin Mfg, a Maryland company that produced paint products.[167] In the purchase

[163] Brafford, *Supra*, 337.
[164] Brafford, *Supra*, 337.
[165] Jon R. Schumacher, The Reach of the Federal Arbitration Act: Implications on State Procedural Law, 70 N. Dak. L. Rev. 459.
[166] Pittman, *Supra*, 485
[167] Prima Paint v. Flood & Conklin. Mfg. Co., 388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750

agreement, Prima Paint agreed to pay to Flood & Conklin a percentage of annual profits.[168] Flood & Conklin went bankrupt one week after the contract was executed.[169] After paying the first installment, Prima notified Flood's lawyer that they deemed the contract breached believing that fraud in the inducement had occurred.[170] Two arbitration agreements existed in the executed contract.[171]

The court ruled that if fraud was alleged while forming the contract, that procedurally an arbitrator would determine what had factually occurred.[172] This opinion was contrary to what would have procedurally occurred in New York, where a court would have made the decision.[173] The court was forced to decide, in light of differing procedural outcomes, would the federal court apply the FAA or allow state contract law to rule.[174] The court's rational for making the determination that the FAA, a federal enactment was applicable, was contrary to the opinioons of those who enacted the FAA.[175] The Supreme Court ruled that, "based upon and confined to Congress' interstate commerce and admiralty powers," the congressionally enacted FAA pre-empted state contract law.[176]

Since *Prima Paint*, legal scholars have debated whether the court erred in making this judgment. M. Lowrey is critical of the Supreme Court believing their ruling was meant to aid an overburden judiciary:

> One can conclude that Prima Paint is just another case of the Court's "evolutive" interpretation in favor of a broad all-encompassing application of the FAA that serves the

[168] Prima Paint v. Flood & Conklin. Mfg. Co 388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750
[169] Prima Paint v. Flood & Conklin. Mfg. Co 388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750
[170] Prima Paint v. Flood & Conklin. Mfg. Co388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750
[171] Prima Paint v. Flood & Conklin. Mfg. Co 388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750
[172] Schumacher, *Supra*, 460.
[173] Moses, *Supra*, xxx
[174] Moses, *Supra*, xxx
[175] Moses, *Supra*, xxx
[176] Moses, *Supra*, xxx

> Court's own desires to reduce the workload in the courts even if such a desire is contrary to Congressional intent.[177]

Regardless of legal convictions or beliefs, following *Prima Paint,* a clear shift favoring enforcing of arbitration agreements occurred.

Important to the ruling of *Prima Paint* is the recognition of the doctrine of "Separability."[178] "Separability" is feature in every courts determination unconscionability in arbitration disputes. The court held that,

> Arbitration clauses as a matter of federal law are "separable" from the contracts in which are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. [179]

The court created a practice of viewing arbitration clauses separately from the container contract so long as the arbitration clause is agreed to freely. If fraud is claimed in the inducement of the containing contract but not the arbitration agreement, then an arbiter is charged with determining the issue of whether fraud actually occurred.

### 2. Southland Corp v. Keating

*Southland Corp. v. Keating*[180] provided the Supreme Court the opportunity to articulate the FAA's ability to preempt state statues designed to nullify arbitration agreements.[181] In their ruling, the court effectively allowed the United States arbitration laws to "guarantee the 'unobstructed enforcement' of arbitration agreements."[182] Post *Southland,* the FAA has been

[177] M. Lane Lowrey, Arbitration or Adjudication?: The Trial and Tribulaiton of the Federal Circuit Split over Arbitration of Employment Discrimitation Claims, 40 S. Tex. L Rev. 993.
[178] Stephen J. Ware, Rethinking the Federal Arbitration Act: Examination of Whether and How the Statute Should be Amended: Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. V. Cardegna, 8 Nev. L.J. 107.
[179] Prima Paint v. Flood & Conklin. Mfg. Co 388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750
[180] Southland v. Keating, 465 U.S. at 3-4
[181] Brafford, *Supra*, 339.
[182] Thomas E. Carbonneau, Cases and Materials on the Law and Practice of Arbitration 162 (2d ed. 2000).

held to preempt state law numerous times in almost all situations.[183] This ruling was noticed by many in business circles and lead to a wide adoption of arbitration agreements due to perceived enforceability.[184] Tom Spipanowich describes the resulting wide spread use of arbitration agreements in consumer and employment contracts as the "consumerization" of arbitration and a direct consequence of the *Southland* verdict.[185]

Southland Corporation was a franchisor of 7-11 convenient stores in California and executed licensing contracts that contained arbitration agreements.[186] A class action suit comprising franchise owners was brought by Richard D. Keating alleging that Southland had misrepresented invaluable information regarding franchise sales.[187] Keating made the argument that Southland violated the California Franchise Investment Law that restricted arbitration and class action.[188] Southland responded filing a petition to compel arbitration relying on a clause in the 7-11 franchise agreement.[189] Before the Supreme Court granted certiorari, The California Court of Appeals reversed the trial courts earlier ruling and compelled arbitration on all matters.[190]

After being issued certiorari, the Supreme Court reinforced the national policy of arbitration espoused in *Prima Paint.* The court determined that (1) the FAA applied in state courts and (2) that anti-arbitration clauses were pre-empted by the FAA through Congress's Supremacy Clause.[191] The court made a distinction between state laws that provide a defense

[183] Christopher R. Drahozal, In Defense of Southland: Reexaming the Legislative History of the Federal Arbitration Act, 78 Notre Dame L. Rev 101.
[184] Drahozal, *Supra*, 110.
[185] Thomas J. Stipanowich, Punitive Damages and the Consumerization of Arbitration, 92 Nw. U. L. Rev. 1, 9 (1997)
[186] Southland v. Keating, 465 U.S. at 3-4
[187] Drahozal, *Supra*, 110.
[188] Brafford, *Supra*, 339.
[189] Drahozal, *Supra*, 110.
[190] Drahozal, *Supra*, 110.
[191] Brafford, *Supra*, 339.

from arbitration agreements and others that were hostile reminiscent of prior judicial attitudes towards arbitration.[192]

Both the majority opinion and Justice O'Connor's dissent were concerned with the legislative history backing the FAA.[193] Additionally, the decision in *Southland* was made easier by Southland's defense assuming the FAA applied to states. The defense made this assumption based on how the Supreme Court applied the commerce clause in *Prima Paint.*[194] The court agreed with the determination in *Prima Paint* that "the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the act were to apply in the state was well as federal courts."[195] As long as transactions meet the modern broad test of what qualifies and affects interstate commerce, federal law requires the application of the FAA.[196] Rapid advancements in transportation and technology are increasing the arena of interstate commerce and resulting fields the FAA is applicable within.

Dissatisfaction with the Supreme Court's ruling in *Southland* was immediate. Commentators hold animosity towards the *Southland* ruling claiming the decision grossly misinterpreted original legislative thought.[197] Paul Carrington and Paul Haagen claim that "the opinion of the Court was an extraordinarily disingenuous manipulation of the history of the 1925 Act."[198] The pair continue that "the Court relied almost wholly on its bogus legislative history" in holding the FAA applicable in state court.[199] Carrington and Haagen are far from alone. Edward Brunet states "the Southland decision is remarkable for its preemption holding that

[192] Brafford, *supra,* 339.
[193] Drahozal, *Supra*, 111.
[194] Moses, *Supra*, 126
[195] Moses, *Supra*, 128,
[196] Barnes, 51 S. Tex. L. Rev. 41, 56.
[197] Drahozal, *Supra*, 111
[198] Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 380
[199] Carrington & Haagen, *Supra*, 380

blatantly ignores legislative intent.[200] Vouching for public protections, Justice Stevens in dissent stated that he would have upheld California's Franchise law against arbitration as a protection to public policy because it was "grounds as exist at law or in equity for the revocation of any contract."[201]

A one-two punch harming consumer protectionism and misinterpreting the FAA was cemented following *Southland.* Initial misapplication occurred in *Prima Paint* while *Southland* culminated the slippery slope of judicial misapplication of the FAA.[202] The combination of the *Prima Paint* and *Southland* ruling created an environment that assured business arbitration agreements would be enforced regardless of virtually all state laws hostile towards arbitration or protective of consumers.[203] Ultimately, the judiciary would explicitly state its opinion in favor of arbitration in *Moses H. Cone Hospital v. Mercury Construction Corp.*[204] In *Moses* the court stated that the FAA established a "liberal federal policy favoring arbitration agreements."[205] This policy was spawned following *Prima Paint* and legitimized by a judicial disregard for legislative intent.

It is at this historic juncture that arbitration agreements and adhesive contracts co-mingled to the detriment of consumers. Both arbitration agreements and adhesive contracts have been repeatedly validated in courts and recognized by businesses as a useful tool for protecting commercial interest. Because the judiciary seldom overturns both adhesion contracts and arbitration agreements separately and when together, the two contracts can be utilized coercively to force non-drafting parties into agreeing to one-sided contracts. Businesses weighing the "pros"

[200] Edward Brunet, Toward Changing Models of Securities Arbitration, 62 Brook. L. Rev. 1459, 1469 n.33 (1996)
[201] Southland v. Keating, 465 U.S. at 35
[202] Moses, *Supra*, 131
[203] Brafford, *Supra*, 339
[204] Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 696 Before the Joint Comm. of Subcomms. on the Judiciary, 68th Cong. 15 (1924) (Citing from Moses H. Cone Memorial Hospital v. Mercury Construction Corp. 460 U.S. a; 103 S. Ct. 927; 74 L. Ed. 2d 765; 1983)
[205] Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 696 Before the Joint Comm. of Subcomms. on the Judiciary, 68th Cong. 15 (1924)

and "cons" of using questionably unenforceable arbitration contracts seem smart to take the legal risk given all tendencies and rulings that suggest the judiciary will side with business.

# IV. Contracts of Adhesion and Arbitration Clauses

## A. Arbitration Clauses & Unconscionability

The same tests used to determine unconscionability are applied when looking at the enforceability of arbitration agreements. However, proving a disparity in bargaining power will only be successful in the impediment of a arbitration agreement if terms are "inherently unfair or oppressive and leave the consumer effectively remediless."[206] Making matters more difficult for defense, arbitration clauses are rarely held to violate public policy due to perceived mutual benefit for both consumers and businesses. As stressed earlier, legal opinion characterizes arbitration as more equitable and affordable than traditional litigation.

### 1. Comb v. Paypal

In *Comb v. Paypal* both prongs of unconscionability where found to have been violated in an executed arbitration agreement.[207] In *Comb,* the plaintiff sued on behalf of a nationwide class for having funds erroneously removed from his bank account by Paypal.[208] Paypal facilitates online national and international financial transactions. Comb argued that, as a result of Paypal's admitted wrongful withdrawal of funds from his account, he incurred overdraft fees from his bank.[209] Comb asserts that paypal was unable to handle business growth that occurred in

[206] Brafford, *Supra*, 350.
[207] Zhang, *Supra*, 155.
[208] Comb v. Paypal, 218 F. Supp. 2d 1165: 2002 U.S. Dist.
[209] Comb v. Paypal, 218 F. Supp. 2d 1165: 2002 U.S. Dist.

2004.[210] Paypal allegedly provided inadequate customer service that made dispute and return of wrongfully withdrawn money virtually impossible.

Included in Paypal's user agreement was a clause mandating arbitration. The clause specified venue and prohibited the consolidation of claims. The United States District Court for the Northern District of California denied Paypal's motion to compel arbitration against Comb finding their agreement both substantively and procedurally unconscionable.[211]

Both the arbitration agreement and user agreement satisfied the definition of adhesion the court referred too. [212] The definition of adhesion the court applied was "a standard contract, which, imposed and drafted by the party of superior bargaining strength, regulates to the subscribing party only the opportunity to adhere to the contract or reject it."[213] The court rejected Paypal's assertion that the contract failed to satisfy procedural unconscionability because it did not "concern essential items such as food or clothing and because the Plaintiff has meaningful alternatives."[214] The court's ruling was not affected by whether Comb had an ability to pursue other commercial venues to transfer monies.

The court identified four overly harsh terms that made the arbitration clause substantively unconscionable.[215] The four unconscionable conditions included (1) the lack of mutual opportunity for remedy that existed as the defendant (paypal) was the only party able to make final decision on dispute, (2) the plaintiff was prohibited from consolidating other terms, (3) the contract was able to enforce prohibitively expensive arbitration fees, and (4) arbitration was

[210] Comb v. Paypal, 218 F. Supp. 2d 1165: 2002 U.S. Dist.
[211] Zhang, *Supra*, 155.
[212] Zhang, *Supra*, 155
[213] Comb v. Paypal, 218 F. Supp. 2d 1165; 2002 U.S. Dist.
[214] Comb v. Paypal, 218 F. Supp. 2d 1165; 2002 U.S. Dist.
[215] Amy J. Schmitz, Rethinking the Federal Arbitration Act: An Examination of Whether and How the Statute Should be Amended: Article: Dangers of Deference to Form Arbitration Provisions, 8 Nev. L.J.37.

forced to occur in close proximity to Paypal regardless of plaintiff's locus.[216] The four factors subjugated the weaker class to dominant power of the drafting power and selected interest. The court was slighted by these conditions that were detrimental to consumer interest and the result of a disparity in bargaining power.

Had paypal's base remained localized to California, the unconscionable nature of forcing clients to arbitrate in California would likely not have threatened contract enforcement. *Paypal* and *Campbell's Soup* are similar in that both drafting parties attempted to strip adhering parties of legal remedies. Non-drafting parties can learn from the reoccurring violations of what potentially injurious contracts include. Individuals who question what rights or legal remedies are being forgone prior to agreeing to a contract may be able to anticipate contractual problems during dispute resolution.

Despite Comb's success overturning Paypal's arbitration agreement, most courts are formulaic in their enforcement of the FAA Today the application both state and federal statutes are protective of business interest rather than those of consumers. States favor of business rights was displayed when California upheld U-Haul's arbitration provision that required employees to waive their right to class or representative damages.[217] The detriment to public policy by forbearing class actions waiver's include a loss of the ability to pursue certain cases and a failure for wronged consumers to every gain notice.

### B. Arbitration Agreement and Forbearance of Class Actions

Particular arbitration agreements preclude non-drafting parties from engaging in class action suits. Banks, credit lenders, cell phone companies, Paypal, and a variety of other mass-market corporations seek to limit liability by preventing consumers from organizing into more

[216] Schmitz, *Supra*, 43
[217] Schmitz, *Supra*, 42

powerful aggregates.[218] Forgoing this right occurs unbeknownst to consumers through the presentation of standard form contracts containing undistinguished arbitration clauses.

Consumers significantly decrease their legal power when they forgo their right to organize into classes.[219] Class actions allow attorneys to pursue cases that would be financially unfeasible with the resources of only one defendant.[220] Additionally, consumers are afforded protection when notified of illegal or dangerous business practices that are revealed through class actions.[221] Class action may also dissuade business from committing wrongs.

The Supreme Court recognized the public benefit of class actions suits when allowing defendants to organize in *Amchem Products, Inc. v. Windsor.*[222] In *Amchem*, the families of nine individuals filed a suite for alleged physical injuries suffered due to occupational exposure to asbestos.[223] The court stated that individuals not initially enjoining in the suit are benefitted from class action because persons "may not even know of their exposure, or realize the extent of the harm they may incur."[224] Justice Ginsberg wrote in his opinion that class action suits "provide the most secure, fair, and efficient means of compensating victims."[225] Any potential benefit from class actions is forgone when consumers knowingly or unsuspectingly waive this right in a standard form arbitration clauses.

Parties challenging the enforceability of arbitration agreements that waive one's right to class action claim that such conditions violate the Truth in Lending Act.[226] Consumers argue that the ability to file as a class action provides an attractive alternative that deters business

---

[218] Michael C. Duffy, Making Waives: Reining in Class Action Waivers in Consumer Contracts of Adhesion, 80 Temp. L. Rev. 847.
[219] Duffy, *Supra*, 847.
[220] Duffy, *Supra*, 847.
[221] Duffy, *Supra*, 847
[222] (Citing Amchem Products, Inc., et al., Petitioners v. George Windsor, et al., 521 U.S. 591; 117 S. Ct. 2231; 138 L. Ed. 2d 689; 1997)
[223] Amchem Products, Inc. v. Windsor, 521,U.S. 591, 1189.
[224] Amchem Products, Inc. v. Windsor, 521, U.S. 591, 2252.
[225] Amchem Products, Inc. v. Windsor521, U.S. 591, 2260.
[226] Duffy, *Supra*, 852.

abuses.[227] The Truth in Lending Act (TILA) was passed in 1968 by congress to aid consumer's understanding of credit transactions and terms.[228] Benefit created by the TILA is undermined by the pre-empting jurisdiction of the FAA and seeming federal preference for protecting business interest. The FAA's development in favor of business and pre-emption to TILA is another illustration of the ingrained federal preference to aid business interest at the cost of personal protections.

### 1. Johnson v. West Suburban Bank – Enforcement

In *Johnson v. West Suburban Bank* the court was charged with deciding whether to force arbitration or to allow class action suit. The consumer failed to convince the court that allowing class actions substantially outweighed the use of arbitration nor would class actions pre-empt the FAA.[229] The plaintiff specifically failed to meet the burden of proof that congress meant to preclude arbitration through the FAA from TILA.[230]

The plaintiff in *Johnson v. West Suburban Bank* was not able to prove unconscionability or the existence of overly harsh terms. The ability for the defendant to re-coop attorney fees was not overly harsh or a violation to substantive unconscionability.[231] This fact made the contract substantively acceptable but also indicative of what courts look for when determining the enforceability of an arbitration contract that waives one's right to class action. We learn from *Johnson* that courts search for substantive unconscionability more carefully when class action has been waived. Unless harsh terms exist that further jeopardized public policy, it is unlikely class action waivers alone will satisfy substantive unconscionability.

---

[227] Elwin Griffith, The Truth and Nothing But the Truth: Confronting the Challenge in the Truth in Lending Ac and Regulation Z, 40 Hous. L. Rev. 345.
[228] Griffith, *Supra*, 398.
[229] Griffith, *Supra*, 398
[230] Griffith, *Supra*, 398
[231] Daniel R. Higginbotham, Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers, 58 Duke L.J. 103.

### 2. Ting v. AT&T – Unenforceable Class Action Waivers

*Ting v. AT&T* is a rare example of an arbitration agreement found unenforceable due to unconscionability. Ting, as a the representative of a class action, asserted that AT&T had "sent plaintiff Ting and its other customers a 'Consumer Service Agreement' ("CSA") that would eliminate their ability to obtain compensation for most wrongs AT&T might commit."[232] The Plaintiff asserted that AT&T's CSA violated (1) their substantive right by decreasing the statute of limitations, (2) conflicted with a California Supreme Court ruling allowing the participation in class actions, (3) insufficient explanation of contractual terms was given, (4) terms were one-sided and drafted by lawyers who principally represented corporations in defending actions brought by individuals, (5) the new CSA was conspicuously hidden within monthly documents without clearly notifying customers of forced adherence, and (6) demanded secrecy by preventing consumers the "right to public, open and/or reviewable dispute resolution." [233] Many of these claims were similar to what was made in *Campbell's Soup* and in *Paypal.*

The terms established in AT&T's CSA are one-sided and appear designed to protect business interest while diminishing all benefits in class action suits. Judge Zimmerman held that all six complaints were unconscionable individually and together. Alluding to the idea of "separability," procedural qualities were violated because there was no bargained for exchange during the formation of the arbitration agreement.[234] The U.S. Court of Appeals also found the contract procedurally unconscionable as a contract of adhesion.[235]

The court disagreed with AT&T contention that judicial hostility existed towards arbitration. The court stated that the court was not hostile towards arbitration, but "hostile to the

[232]Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Ca. 2002)
[233]Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Ca. 2002)
[234] Eric Weiner, Even in Victory: Darcy Ting Defeated AT&T, Yet the Consumer-at-large, again has lost, 4 Cardozo J. Conflict Resol. 2.
[235] Ting v. AT&T, 319 F.3d 1126; 2003 U.S. App.

adhesive and oppressive nature of the CSA, not to the particular forum." [236] The oppressive nature of the CSA is indicative of a contract that shocks one's conscience.

AT&T's attempt to dissuade customers from seeking meaningful choice was an extreme violation of unconscionability.[237] AT&T contended that Verizon, the third largest cell phone provider, was a meaningful alternative because they did not have an arbitration agreement.[238] However, when AT&T customers complained about the new arbitration clause within the CSA, they were issued a inaccurate letter stating that "all other major long distance carriers have included an arbitration provision in their services agreement." [239] The court determined that AT&T was purposefully attempting to hoodwink existing customers from seeking alternatives.

### C. Arguing Arbitration through the Separability Doctrine

Individuals arguing against the enforceability of an arbitration agreement will be unsuccessful if their defense attacks the validity of a contract as a whole.[240] As established in *Prima Paint,* a court's ruling to overturn an arbitration clause frequently hinges on a violation occurring during the formation to the arbitration agreement. During this determination, the court separates the arbitration agreement from the container contract in order to individually investigate the arbitration clause. Procedurally the doctrine of "separability" means that when allegations of fraud are brought against the arbitration agreement, the dispute is settled within a court and not by an arbitrator.[241] When fraud unrelated to arbitration is argued, the arbitration clause continues to dictate the specifics of dispute resolution.[242]

---

[236] Ting v. AT&T, 319 F.3d 1126; 2003 U.S. App.
[237] Ting v. AT&T, 319 F.3d 1126; 2003 U.S. App.
[238] Ting v. AT&T, 319 F.3d 1126; 2003 U.S. App.
[239] Ting v. AT&T, 319 F.3d 1126; 2003 U.S. App.
[240] Griffith, *Supra*, 399.
[241] Griffith, *Supra* 399.
[242] Griffith, *Supra*, 400.

The Fifth Circuit's decision in *Lawrence v. Comprehensive Business Services*[243] and the Sixth Circuits ruling in *Burden v. Check Into Cash of Kentucky*[244] narrowed the theory of "separability" established in *Prima Paint.*[245] Both cases affirmed the need for parties arguing against arbitration clauses included in boilerplate contracts to raise specific challenges to the enforceability of the arbitration agreement.[246] The court expanded on prior rulings dealing with procedural situations in both *Lawrence* and *Burden*. [247] In *Lawrence* and *Burden,* it was ruled that a contract argued to be *void* will become the legal determination of a court and not an arbitrator.[248] Any allegations that a contract is simply *voidable* remain within the jurisdiction of an arbitrator to decide.[249]

*In Burden,* the consumer argued for the unenforceability of an entire agreement including the arbitration clause. [250] The appellee alleged that the specified interest rate was usurious and resultantly substantively unconscionable.[251] However, no specific allegations were raised to the legality of the arbitration agreement. Although the defendant questioned the substance of the agreement, the "separability" doctrine prevailed forcing the arbitration and container contract to be analyzed individually. The dispute was directed to an arbiter after assent and other issues that could have jeopardized the arbitration were decided sufficient. Had the party failed to sufficiently assent to the arbitration clause, a court rather than an arbitrator would have had to determine this issue.

[243] Lawrence, et al. v. Comprehensive Business Services Company, et al. 833 F. 2d 1159; 1987
[244] Burden, et al. v. Check Into Cash of Kentucky, LLC., 267 F.3d 483; 2001)
[245] Andre V. Egle, Back to Prima Paint Corp v. Flood & Conklin Manufacturing Co.: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement, 78 Wash. L. Rev. 199.
[246] Egle, *Supra*, 216.
[247] Egle, *Supra*, 216.
[248] Egle, *Supra*, 216.
[249] Egle, *Supra*, 216.
[250] Weiner, *Supra*, 4
[251] Weiner, *Supra*, 4

# V. Analysis and Modern Existence

## A. General

Modern businesses continue to operate on the fringe of unconscionability. Prosperous businesses and corporations remain reliant on adhesive contracts that subvert consumer bargaining power and subtly include arbitration clauses. Burgeoning fields utilize their operating venue to create contracts of adhesion in areas that were previously non-existent and where little legal analysis has be conducted. The technological boom and birth of certain business fields create new questions and unprecedented challenges in the spectrum of contract law.

## B. Click-Wrap & Browse Wrap Agreements

The emergence of the Internet as the predominant social and financial marketplace has been coupled with the expansion of Internet law. Today, the American legal system identifies two basic forms of online contracts – click-wrap and browse-wrap agreements – as a means of characterizing the primary methods by which contracts are presented. [252] Click-wrap agreements require users to actively click on a dialogue box that indicates acceptance of terms before the website provides its portion of the contract.[253] Browse-wrap agreements are fundamentally different from click-wrap contracts in that users are able to obtain service or agree to contracts without explicitly clicking on an "I accept" dialogue.[254] Both Click-Wrap and Browse-Wrap agreements are adhesive contracts that present conditions through a unilateral list of terms on a "take-it or leave-it" basis. [255]

[252] Ryan J. Casamiquela, V. Business Law: A. Electronic Commerce: Contractual Assent and Enforceability in Cyberspace, 17 Berkeley Tech. L.J. 476.
[253] Tasker & Pakcyk, *Supra*, 79
[254] Tarra Zynda, Ticketmaster Corp. V. Tickets.com, Inc.: Preserving Minimum Requirements of Contracts on the Internet, 19 Berkeley Tech L.J. 504.
[255] Casamiquela, *Supra*, 477.

The legal scholarship surrounding internet contractsis two fold. When determining enforceability it is necessary to ascertain whether sufficient notice of contractual terms is presented and if the consumer legitimately assents to the agreement. Click-wrap contracts are genuinely more enforceable because assent occurs explicitly in the form of an "I Accept" prompt. In *Hotmail Corp. Van Money Pie* the court stated that a user's ability to notice contractual terms increase the likelihood that assent and the "accepted" contract will be enforceable.[256] Because Click-Wrap agreements are generally binding, consumers should take efforts to read and understand all terms listed in the contract. This legal analysis is similar to the underpinnings of *Allan v. Snow Summit Inc.* Consumers should assume that when one has the ability to sign one's name or click-accept, the likelihood that notice and acceptance occurred is increased. Click-wrap contracts are the most comparable to traditional paper contracts are terms are presented and the action of consent is purposeful. Substantive unconscionability is a legitimate defense for overly harsh terms online.

Browse-Wrap agreements are different from click-wrap because assent is not definitive. Browse-Wrap agreements allow consumers to receive the benefit of the agreement or product potentially without explicitly accepting or gaining knowledge of terms. The courts recognize three factors that question enforceability including, whether (1) the user was clearly required to affirm assent before completing the transaction, (2) did the user assent before the contested violation, and (3) did the user's complaint arise prior to the opportunity to assent.[257] Scholars and courts question the legality of browse-wrap agreements and whether an unsuspecting individual can knowingly and sufficiently assent to terms that a reasonable viewer may not notice.[258]

[256] Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, 22 Berkeley Tech. L.J. 580.
[257] Alyssa N. Knutson, Proceed with Caution: How Digital Archives Have been Left in the Dark. 24 Berkeley Tech. L.J. 437.
[258] Knutson, *Supra*, L.J. 437.

Browse-wrap agreements pose the most threats to consumers regarding internet contracts of adhesion and arbitration. Virtually every case discussed earlier and every problem that effects contract law is relevant that consumers often do not know what they are agreeing to let alone whether they are contracting. This raises challenges to what is one reasonable expected to know, where terms sufficiently presented, and what forms of electronic consent are sufficient. No other area of law is more dubious and full of potential pitfalls than internet adhesion contracts. Enforceability is uncertain and is only complicated by factors of adhesion, arbitration, and insufficiently defined unconscionability.

Internet contracts are becoming more popular and resultantly may pose increasing dangers if insufficiently regulated. Justice Zimmerman's analysis of conspicuous terms in *Ting v. AT&T* is germane here. Consumer assent must be made clear while terms must also be presented. Current court precedent does not go far enough to ensure the occurrence of (1) assent and (2) sufficient notice. The electronic venue is made more dangerous because the argument of unconscionable is essentially non-applicable online. Generally, in the realm of Internet agreements, consumers are deemed to have virtual complete freedom of choice because the Internet marketplace is perceived as expansive[259] The internet provides a variety of opportunities to acquire or garner any needed services that burdensome contracts do not need to be agreed to The relationship between the internet and the FAA is relatively undefined and in an infant stage.

### C. Medical Arbitration

Both doctors and patients are affected by binding arbitration agreements latent in adhesive contracts. Individuals requiring immediate medical attention are left with no option but

[259] Schmitz, *Supra*, 61.

to sign an adhesive contract in order to gain admittance into a hospital. Doctors are mandated to acquire malpractice insurance that includes arbitration clauses that specify financial compensations.

Courts should protect individuals from burdensome contract terms and rights signed away in the pursuit of obtaining medical aid. Gross mental deficiency aside, an individual who requires serious medical treatment has no option but to accept any contract placed before. Furthermore, in critical medical situations the ability to bargain over terms or even what options are available is not presented. There is little time to negotiate when treatment is needed while weighing differing hospital contract provisions seems impractical.

Even if patients forced to sign an adhesive contract ultimately win during litigation or arbitration, time and court resources wasted due to unchecked hospital contracts. Pre-emptive intervention and guidelines would aid the court system while cutting down on costly legal fees. Given the recent government intervention in healthcare, congress may have the opportunity to enact legislation mandating particular admittance and exist paperwork for patients. This recent development could have created the ability for congress to protect consumers in an area where bargaining power is at times highly disproportionate.

### D. Employment Contracts

The judiciary has ignored the original intent of FAA not to apply to employment agreements.[260] This misapplication has occurred through the contested interpretation of FAA Section 1 that states, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engages in foreign or interstate

[260] Moses, *Supra*, 105.

commerce."[261] Explaining the misapplication of Section 1, Justice Stevens' dissent in *Gilmer v. Johnson/Interstate Lane, Corp* alluded to the exclusionary language that he felt should be interpreted broadly to apply to all modern employment agreements.[262] This opinion, if adopted by the majority, would weaken the FAA and make it inapplicable in most employment disputes. Contrary to Steven's opinion, Courts have interpreted this section narrowly and held the FAA enforceable in virtually all instances of employee discrimination suits filed under Title VII of the Civil Rights Act of 1991, American with Disabilities Act, and The Age Discrimination in Employment Act (ADEA).[263]

A rational for not enforcing the FAA in employment agreements is that employment contracts are not freely bargained for and no true alternatives exist for individuals seeking jobs. Most employers have the upper hand to determine all contractual conditions. Furthermore, as discussed in preceding sections, mandatory arbitration threatens one's right freedom to contract, organize, and a variety of other potential rights of public benefit. When dipsutes arise, individuals claiming discrimination are most successful claiming the occurrence of duress, lack of consideration, and fraud.[264] Few other legal remedies exist to avert arbitration and force a jury to decide whether civil rights have been violated.[265]

A major area of contractual subversion has developed between employees characterized as "professionals" and employers drafting employment contracts. This display illustrates the imbalance in contractual power that has been fostered and threatens even educated Americans. Individuals who are characterized "professional" assume a greater degree of legal accountability

[261] Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568

[262] Lowrey, *Supra* 1002
[263] Lowrey, *Supra* 995
[264] Lowrey, *Supra* 995
[265] Lowrey, *Supra* 996.

that increases the enforceability of a contract.[266] Courts have determined "professionals" to be practicing dentist, registered architects, engineers, and millions of business people.[267]

Although the distinction of "professional" has been deemed aindicate equal contractual bargaining power, the reality is contrary to this determination.[268] The fact that someone has gained success in a field alternate to law does not indicate legal confidence or an inherent ability to bargain. As stated throughout this note, equal bargaining power is a factor in determining both adhesion and unconscionability. It is an oversimplification to equate success in one field with general legal competency especially when the sufficient ability to bargain is essential when contracting. Just as it would be wrong to ask a lawyer for engineering advice, so, too, would it be rash to ask an engineer to a definitive voice in legal matters. Given the importance of bargaining power, this legal assumption threatens many individuals who are likely unfamiliar with contract law.

The courts misapplication of the FAA and enforcement of an Arbitration agreement in an employment contract was evidenced in *Circuit City Stores, Inc, v. Adams.* [269] In *Circuit City*, the court ruled that through the language of Section 1, the FAA was only non-applicable to employee contracts involving seamen, railroad workers, and other individuals involved in interstate commerce.[270] An originalist interpretation of the FAA would have better protected individuals. "Professionals" is an overly broad term that covers too many people and applies too much legal responsibility to people from a variety of backgrounds. A clarifying challenge to the legal meaning of "professional" would be useful to help determine what is actually within one's reasonable expectations.

[266] McClure, *Supra*, 1498.
[267] McClure, *Supra*, 1498.
[268] McClure, *Supra*, 1498.
[269] Moses, *Supra*, 884.
[270] Moses, *Supra*, 884.

## E. Forum Selection

Included in many arbitration agreements are conditions that select a particular forum for dispute resolution. This was a tenant at issue in *Combs v. Paypal* and ultimately a condition that lead the determination of unconscionability. Although the *Paypal* verdict found a venue selection clause to be substantively unfair, courts have since found in favor of forum selection clauses within adhesive agreements.

The Supreme Court famously upheld a forum selection clause in *Carnival Cruise Lines, Inc. v. Shute.*[271] In *Carnival,* the Shutes, residents of Washington State, purchased a week long vacation aboard a Carnival Ship.[272] Carnival, a company based out of Florida, sent the Shutes a contract ticket that featured a forum selection clause stating that all disputes would be litigated in Florida.[273] Mrs. Shute was injured during the cruise and sued Carnival in Washington State federal district court.[274]

The Supreme Court emphasized that forum selection clauses are subject to judicial scrutiny for fundamental fairness.[275] The greatest impact of the courts ruling was that the Supreme Court overturned an earlier ruling that non-negotiated forum selection clauses were never enforceable as a result of not being bargained for.[276] For consumers, the *Carnival* ruling that forum selection clauses were binding when reasonable is of definitive importance. Much like *Prima Paint* opened the door for the enforcement of Arbitration Agreement, *Carnival Cruise Line* open the door for business's to rely on venue selection clauses more consistently.

Later court rulings incorporating the opinions from *Bremen v . Zapata Off-Shore Co.,* would determine that courts should honor choice of law provision and venue selection clauses

[271] Zhang, *Supra*, 127.
[272] Carnival Cruise Line, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522.
[273] Carnival Cruise Line, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522.
[274] Carnival Cruise Line, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522.
[275] Zhang, *Supra*, 127.
[276] Zhang, *Supra*, 128.

unless they can be show to as "unreasonable and unjust." Today this ruling is dangerous because it may have created an ability for courts to hold valid "non-freely-bargained for" contracts. [277] Of further detriment to non-drafting parties, this analysis is conducted on a case by case basis and provides little predictability for consumers. The potential allowance of contracts "not freely bargained for" could have destructive repercussions on consumers, especially involving online contracts where the judiciary has yet to specifically establish a preference for business interest.

## VI. Discussion & Recommendations

The legal culture that has expanded in the United States over the last century is disadvantageous for average non-drafting parties. The enforceability of adhesion contracts and the judicial preference for the Federal Arbitration Act has spawned a legal tool that dangerously empowers drafting parties. Too few court opinions recognize the limited legal knowledge that average consumers have, while insufficient pre-emptive public safeguards are placed on businesses crafting adhesive contracts. The ability for mass-market contracting businesses to operate should not be mutual exclusive from the need to protect consumers. Rather, from cases researched including *Henningsen v. Bloomfield Motors,* it appears that when courts chastise industry and establish protections for consumers, free market conditions create long lasting consumer benefits. The only perk the most optimist consumer could claim is that adhesive arbitration agreements are grossly predictable in that business interest are habitually protected.

An effective step towards protecting consumers would be the adoption of legislation designed to shield non-drafting parties from one-sided contract terms. Particular care should be taken to allow for consumer protectionism and the continued existence of contracts of adhesion.

[277] Zhang, *Supra*, 157.

Any legislative act that severely restricts the formation of adhesion contracts would likely bring about negative financial and commercial consequences for consumers. Business would be forced to staff highly paid bastions of layers that would raise operational cost. This increased cost would eventually trickle down to the consumer. Online purchases that occur with ease would also be complicated if adhesion contracts were done away with.

Although the idea of an active court is threatening to persons involved with government, intuitive law scholars have requested the judiciary police adhesive contracts for decades. In the mid-twentieth century, Professor Kessler thought it the court's role to rewrite unfair provisions.[278] Courts need to expand this practice while being more sympathetic to personal interest. Especially in the field of electronic contracting where judicial precdent can still be developed, courts should be active and rule in favor of safe guards for consumers while dissuading business from exploiting non-drafting individuals. Congressional action should precede court rulings and encourage legislation that established protocols for consumer protections through commercial guidelines.

The analysis employed by the DC Court Appeals in *Walker-Thomas Furniture* should provide guidance fort courts testing the unconscionability of contracts and the legal knowledge of individuals today. Courts assume individuals across industries and outside the legal field are contractually competent. More leniency should be given by courts regarding an individuals understanding of the contracting practice. Although educational and financial wellbeing may indicate a degree of general talents, such a identification of a sufficient understanding of contractual practices.

Congress should take action similar to what was done in 1968 with creation of the Truth in Lending Act (TILA). TILA was designed to facilitate consumer understanding of lending

[278] Smith, *Supra*, 632.

contracts by requiring clear disclosure of lending arrangements and cost. While certain lending practices may have been changed, the importance of the act was the increased the amount of knowledge gained by consumers. Active steps should be taken to demand the creation of contracts that are less onerous while also being more easily understood. Such an act could help define and what qualities are needed for a legally sufficient contract and ensure conscionable practices.

A hypothetical "*Fairness in Contracting Act*" ("FICA") would help solve many of the problems identified and found unconscionable in cases discussed before. Consumer deficiencies in the contracting practice include inability to bargain, inability to assent, insufficient notice, and even an inability to accept due to limited knowledge. All threes problems could all be solved through the enactment of a law that clearly defines and demand what features a drafting party must incorporate into a standard form contract. In many ways, legislation aimed to mimic the TILA would serve the ultimately public good of allowing both business and non-drafting parties to more equitably and predictably contract. It is necessary for any act designed alleviate the burden of arbitration to pre-empt the FAA in certain or all situations. Any act would be of little public benefit if it were routinely pre-empted by the FAA.

Just as the TILA demands a clear disclosure of terms, FICA would be inefficient without an analogous section. Mandating a clear disclosure of terms would prevent predatory mailing practices as demonstrated by AT&T and currently evolving online. Congress could also use such a section to decrease confusion and deceptive electronic contracting practices that will surely exist for decades. Browse-wrap agreements that require active searching for contract provisions would have to become more like Click-wrap agreements were conditions are easily apparent and presented for definitive understanding.

A government agency policing contracting practices could provide benefit to the public. Mandated government approval of contracts that affect a certain percentage of the population could preemptively protect public interest from damaging contracts. Mandating that business reiterate particular contract terms deemed essential before execution, such as arbitration clauses, payments clauses, and venue specifications, would explain meaning to the public while helping to assure acceptance. The determination of what contract need to be explained could hinge on price or the perceived impact to public policy.

Government action that would increase the predictability of contracting would alleviate an over crowded court system much like arbitration agreements were initially intended to do. By increasing the knowledge and contractual footing of non-drafting parties, the number of contract disputes would be decrease. Consumers would be less likely to assent to dangerous contracts while corporations would know what illegal actions would likely lead to litigation.

A certification system that indicates what individuals qualify as "responsible contractors" would aid general bargaining practices. A seal identifying a good contractor would have dual benefits. Consumers would be encouraged to contract with individuals who have garnered the "responsible contractor" seal while businesses would aspire to gain the accreditation. This form of certification could lead to more straightforward contracting practices, as business would be desirous of becoming accredited in order of gaining additional customers. This is recommendation is most favored as it limits government intervention while allowing capitalist practices to remain dominant.

Despite the suggestions above, judicial precedent favoring arbitration and adhesion contracts has been reaffirmed consistently. The court has even failed to correct early misinterpretations when the opportunity has become available. The most realistic suggestion and

protection that has become apparent is that non-drafting parties must truly work to understand what contracts they are getting involved with and never overlook an agreement that may become entered into.

## VII. Bibliography


9 U.S.C. ß 2 (2000). (FAA)

Allan v. Snow Summit, 51 Cal. App. 4th 1358

Allison E. McClure, The Professional Presumption: Do Professional Employees really have equal bargaining power when they enter into Employment-related Adhesion Contracts 74 U. Cin. L. Rev 1497

Alyssa N. Knutson, Proceed with Caution: How Digital Archives Have been Left in the Dark. 24 Berkeley Tech. L.J. 437.

Amchem Products, Inc. v. Windsor, 521,U.S. 591, 1189.

Amy J. Schmitz, Rethinking the Federal Arbitration Act: An Examination of Whether and How t he Statute Should be Amended: Article: Dangers of Deference to Form Arbitration Provisions, 8 Nev. L.J.37.

Anne Brafford, Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary 21 Iowa J Corp. 331.

Andre V. Egle, Back to Prima Paint Corp v. Flood & Conklin Manufacturing Co.: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement, 78 Wash. L. Rev. 199.

Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary, 68th Cong. 16 (1924) [hereinafter Joint Hearings] (statement of Julius Cohen).

Batya Goodman, Honey, I shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract, 21 Cardozo L. Rev. 319

Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948)

Carnival Cruise Line, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522.

Christopher M. Kaiser, Take It or Leave It: Monsanto v. McFarling, Bowers v. Baystate Technologies, and the Federal Circuits Formalistic Approach to Contracts of Adhesion. 80 Chi-Kent L. Rev. 487

Christopher R. Drahozal, In Defense of Southland: Reexaming the Legislative History of the Federal Arbitration Act, 78 Notre Dame L. Rev 101.

Comb v. Paypal, 218 F. Supp. 2d 1165: 2002 U.S. Dist.

Daniel Barnhizer, Inequality of Bargaining Power, 76 U. Colo. L. Rev. 139.

Daniel R. Higginbotham, Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers, 58 Duke L.J. 103.

Edward Brunet, Toward Changing Models of Securities Arbitration, 62 Brook. L. Rev. 1459, 1469 n.33 (1996)

Elizabeth K. Stanley, P{Arties' Defenses to Binding Arbitration Agreements in the Health Care Field & the Operations of the McCarran-Ferguson Act, 38 St. Mary's L.J. 591.

Elwin Griffith, The Truth and Nothing But the Truth: Confronting the Challenge in the Truth in Lending Ac and Regulation Z, 40 Hous. L. Rev. 345.

Eric Weiner, Even in Victory: Darcy Ting Defeated AT&T, Yet the Consumer-at-large, again has lost, 4 Cardozo J. Conflict Resol. 2.

Federal Arbitration Act, http://www.adr.org/sp.asp?id=29568

Friedrich Kessler, Contracts of Adhesion - Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 636

Flores v. Transamerica Homefirst, Inc., 113 Cal. Rptr. 2d 376, 381-82 (Cal. Ct. App. 2001).

Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172-73 (Cal. 1981)

Guthman v. La Vida Llena, 709 P.2d at 678

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, *; 161 A.2d 69, **; 1960 .

Hoellering, *Arbitral Finality*, in ARBITRATION & THE LAW 1987-88, 32, 37 (AAA Office of General Counsel ed. 1988).

J. Kirkland Grant, Securities Arbitration: Is Required Arbitration Fair to Investors, 24 New Eng. L. Rev 389.

J.W. Looney, Adhesion Contracts, Bad Faith, and Economically Faulty Contracts, 4 Drake J. Agric. L. 177.

Jon R. Schumacher, The Reach of the Federal Arbitration Act: Implications on State Procedural Law, 70 N. Dak. L. Rev. 459.

Kenneth R. Davis, The Arbitration Claws: Unconscionability in the Securities Industry, 78. B.U.L. Rev 255.

Larry A. Dimatteo & Bruce Louis Rich, Consent Theory of Unconscionability: An Empirical Study of Law In Action, 33 Fla. St. U.L. Rev. 1067.

M. Lane Lowrey, Arbitration or Adjudication?: The Trial and Tribulaiton of the Federal Circuit Split over Arbitration of Employment Discrimitation Claims, 40 S. Tex. L Rev. 993.

Margaret L. Moses, Saturory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 Fla. ST. U.L. Rev. 99

Margaret M. Smith, Adhesion Contracts Don't Stick in Michigan: Why Rory Got it Right, 5 Ave Maria L. Rev. 237.

Matthew C. Bouchard, Arbitration Agreements, Randolph v. Green Tree Financial Corp.: Are Consumer Arbitration Agreements that Are Silent as To The Apportionment of Arbitral Expenses Enforceable, 4 N.C. Banking Inst. 319.

Mathew Parrott, Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution, 74 Fordham L. Rev 2685.

Melissa Briggs Hutchens, At What Cost?: When consumers cannot afford the costs of arbitration in Alabama, 53. Ala. L. Rev 599.

Michael C. Duffy, Making Waives: Reining in Class Action Waivers in Consumer Contracts of Adhesion, 80 Temp. L. Rev. 847.

Mo Zhang, Contractual Choice of Law In Contracts of Adhesion and Party Autonomy, 41 Akron L. Rev 124.

Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, 22 Berkeley Tech. L.J. 580.

Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 380

Prima Paint v. Flood & Conklin. Mfg. Co., 388 U.S. 395; 87 S. Ct. 1801; 18 L. Ed. 2d 1270; 1967 U.S. LEXIS 2750

Rebecca Olson, Aguillard v. Auction Management Corp.: Louisiana Adopts a Presumption Favoring the Enforcement of Arbitration Agreements, 80 Tulane L. Rev. 1482.

Richard L. Barnes, Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability, 141.

Ryan J. Casamiquela, V. Business Law:  A. Electronic Commerce: Contractual Assent and Enforceability in Cyberspace, 17 Berkeley Tech. L.J. 476.

Sierra David Sterkin, Challenging Adhesion Contracts in California: A Consumer's Guide, 44 Golden Gate U.L. Rev, 296.

Sitogum Holdings, Inc., 800 A.2d at 921.

Southland v. Keating, 465 U.S. at 3-4

Stephen J. Ware, Rethinking the Federal Arbitration Act: Examination of Whether and How the Statute Should be Amended: Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. V. Cardegna, 8 Nev. L.J. 107.

Tarra Zynda, Ticketmaster Corp. V. Tickets.com, Inc.: Preserving Minimum Requirements of Contracts on the Internet, 19 Berkeley Tech L.J. 504.

Thomas E. Carbonneau, Cases and Materials on the Law and Practice of Arbitration 162 (2d ed. 2000).

Thomas J. Stipanowich, Punitive Damages and the Consumerization of Arbitration, 92 Nw. U. L. Rev. 1, 9 (1997)

Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Ca. 2002)

Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1179

Ty Tasker & Daryn Pakcyk, Cyber-Surfing on the High Seas of Legalese: Law and Technology of internet Agreements, 18 Alb. L.J. Sci & Tech 79.

W. David Lawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 529 (1971)

Warren Burger, *Quotes and Comments,* available at, http://www.legalreform-now.org/menu6_8.htm.

Williams v. Walker-Thomas Furniture Company, 350 F.2d 445; 121 U.S. App. D.C. 315; 1965