

CLASS ACTION ARBITRATION

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Class action arbitrations are a relatively recent phenomenon in the United States, but the number of such arbitrations is expanding at a rapid rate. As of August 2008, the American Arbitration Association (“AAA”) has administered 246 class action arbitrations and Judicial Arbitration and Mediation Services, Inc. (“JAMS”), another major U.S. arbitral institution, has also administered a substantial number of class arbitrations.

Most such arbitrations are exclusively between domestic parties and often arise out of arbitration clauses inserted in the fine print of consumer or employment contracts. In some cases, however, foreign companies have entered into what may have appeared to them to be simple, single-party arbitration clauses, only to find themselves embroiled in class action arbitrations. For example, one arbitration panel issued a Clause Construction Award which permitted a corporate claimant’s antitrust claims against a foreign shipping company to proceed in arbitration as a class action.¹ Another Clause Construction Award allowed Harvard University to bring a class arbitration on behalf of all investors in a Russian oil and gas company.² Another pending class arbitration, *CBR Enterprises, LLC v. Blimpie Int’l, Inc.*³ involves several U.S. defendants with substantial international holdings that could be subject to international enforcement orders, and *Bagpeddler.com*

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¹ *Stolt-Nelsen, SA v. Animalfeeds Int’l Corp.*, 435 F. Supp. 2d 382 (S.D.N.Y. 2006) (reversing award on appeal as being “in manifest disregard of the law,” but the case is now on further appeal to the Second Circuit (Docket No. 06-374-CV) (oral argument heard on June 2, 2008)).

² *Harvard Coll. v. Surgutneftegaz*, AAA Docket No. 11 168 T 01654 04 (2007) (Cronheim, Arb.). The award was affirmed on appeal, *JSC Surgutneftegaz v. Harvard Coll.*, 2007 WL 3019234 (S.D.N.Y. 2007), but is now on further appeal to the Second Circuit (Docket No. 07-5097-CV). Proceedings before the Second Circuit have been stayed pending the decision in the *Animalfeeds* case, *supra* note 1.

³ *CBR Enterprises, LLC v. Blimpie Int’l, Inc.* (AAA Case No. pending).

*v. U.S. Bancorp*⁴ could include non-U.S. plaintiffs as part of its class of several hundred thousand internet vendors. It, therefore, behooves international arbitration practitioners to be aware of class action arbitration law and procedures in New York and in the United States generally.

Class actions have been employed in numerous contexts including cases involving civil rights actions,⁵ securities fraud claims,⁶ and consumer and environmental claims.⁷ Some commentators have praised class actions as providing a means of vindicating individual rights in situations where the claims would be too small to bring economically if each person were required to assert his claim on an individual basis.⁸ Others have condemned class actions as too often abused by plaintiffs' attorneys, who sometimes bring suits of questionable merit, but are able to force settlement from defendants because of the potentially huge exposure (even if discounted for likelihood of success) arising from the ability to aggregate an enormous number of individual claims.⁹ Any comment on the merits or demerits of class actions, however, exceeds the limited purpose of this article.

I. THE U.S. SUPREME COURT'S DECISION IN *BAZZLE*

In *Green Tree Financial Corp. v. Bazzle*,¹⁰ the U.S. Supreme Court reviewed a decision from the Supreme Court of South Carolina.¹¹ The South Carolina case involved two couples, the Bazzles and the Lackeys. The Bazzles entered into a boiler-plate form financing agreement with Green Tree Financial Corporation for a home improvement loan. The financing agreement contained an arbitration clause which provided, in pertinent part, that claims

⁴ *Bagpeddler.com v. U.S. Bancorp*, AAA Case No. 11 181 00322 04 (2004).

⁵ See, e.g., *Hall v. Werthan Bag Corp.*, 251 F. Supp 184 (M.D. Tenn. 1966) (discussing discrimination in employment claims); *Gantt v. Clemson Agric. Coll. of S.C.*, 320 F.2d 611 (4th Cir. 1963) (discussing discrimination in education claims).

⁶ See, e.g., *Gary Plastic Packaging Corp. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. N.Y. 1990).

⁷ See, e.g., *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997) (involving consumer claims for violation of the Fair Debt Collection Practices Act); *Mejdrech v. Met-Coif Sys Corp.*, 319 F.3d 910 (7th Cir. 2003) (involving environmental pollution claims).

⁸ John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 *NOTRE DAME L. REV.* 1419 (2003).

⁹ Gary L. Sasso, *Class Actions: De Minimis Carat Lex?*, 31 *LITIG.* 16 (2005).

¹⁰ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

¹¹ *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002).

“relating to ‘*this* contract . . . will be resolved by binding arbitration by an arbitrator selected by us with the consent of *you*.’”¹² The Lackeys entered into a similar boiler-plate form agreement containing a similar arbitration clause in order to finance the purchase of a mobile home.

The Lackeys and the Bazzles subsequently filed separate class action lawsuits alleging that Green Tree had failed to comply with applicable law that required that certain attorney and insurance preference forms be included with the loan application. Green Tree moved to stay both cases and to compel separate arbitrations. Eventually, the two cases were consolidated on appeal, and when the matter reached the Supreme Court of South Carolina, it posed the issue before it as “whether class-wide arbitration is permissible when the arbitration agreement between the parties is silent regarding class actions.”¹³ After noting that the law of South Carolina, unlike that of many jurisdictions, permits the consolidation of arbitrations without the parties’ express consent, the court ruled that a silent arbitration clause was ambiguous and as such should be construed against the drafter so as to permit a class arbitration. The court explained that “[i]f we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement.”¹⁴

When the case reached the U.S. Supreme Court, the Court fractured along several lines, resulting in a plurality, rather than a majority opinion. The Chief Justice’s opinion was that the question of to *whom* to submit the arbitration was closer to the question of *what* should be submitted. The Chief Justice concluded:

Arbitration under the [FAA] is a matter of consent, not coercion. Here, the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen. It did not enforce the “agreement to arbitrate . . . according to [its] terms.” I would therefore reverse the judgment of the Supreme Court of South Carolina.¹⁵

Justice Breyer, writing the lead opinion on behalf of himself and three other Justices, framed the issue at the outset as follows:

¹² *Id.* at 352 n.3.

¹³ *Id.* at 351.

¹⁴ *Id.* at 360.

¹⁵ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (citations omitted).

This case concerns contracts between a commercial lender and its customers, each of which contains a clause providing for arbitration of all contract-related disputes. The Supreme Court of South Carolina held (1) that the arbitration clauses are silent as to whether arbitration might take the form of class arbitration, and (2) that, in that circumstance, South Carolina law interprets the contracts as permitting class arbitration. We granted certiorari to determine whether this holding is consistent with the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*¹⁶

After framing the issue, Breyer then proceeded to discuss the matter, noting that:

Green Tree argued [before the court below], as it argues here, that the contracts are not silent—that they forbid class arbitration. And we must deal with that argument at the outset, for if it is right, then the South Carolina court’s holding is flawed on its own terms; that court neither said nor implied that it would have authorized class arbitration had the parties’ arbitration agreement forbidden it.¹⁷

Justice Breyer took note of the Chief Justice’s dissenting view that the language of the contract, which uses the singular to describe the claimant and respondent, forbids class arbitration, but concluded that “the answer to this question is not completely obvious.”¹⁸ At the same time, Breyer indicated that he could not automatically accept the South Carolina Supreme Court’s resolution of this contract-interpretation question, nor reach the issue of whether its decision was pre-empted by the FAA, concluding that “the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.”¹⁹ In reaching this conclusion, Breyer noted the parties had definitely agreed on arbitration, and the only issue was what kind of arbitration.

Justice Stevens wrote a separate opinion concurring in the judgment and dissenting in part. He noted that the South Carolina Supreme Court had “held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue.”²⁰ He expressed the opinion that, “[t]here is nothing in the Federal Arbitration Act that precludes either of

¹⁶ *Id.* at 447 (citation omitted).

¹⁷ *Green Tree Fin. Corp.*, 539 U.S. at 450.

¹⁸ *Id.* at 451.

¹⁹ *Id.*

²⁰ *Id.* at 454 (citation omitted).

these determinations,”²¹ and stated that “[b]ecause the decision to conduct a class-action arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decision-maker, there is no need to remand the case to correct that possible error.”²² He concluded by stating that he would prefer simply to affirm the judgment, but observed, “[w]ere I to adhere to my preferred disposition of the case . . . there would be no controlling judgment of the Court. In order to avoid that outcome, and because Justice Breyer’s opinion expresses a view of the case close to my own, I concur in the judgment.”²³

Finally, Justice Thomas wrote a separate dissent expressing his idiosyncratic view that the FAA does not apply to proceedings in state court. For that reason, he concluded, the FAA cannot be a ground for pre-empting a state court’s interpretation of a private arbitration agreement.²⁴

II. THE CLASS ARBITRATION RULES ESTABLISHED BY THE AAA AND JAMS FOLLOWING *BAZZLE*

A. AAA Class Arbitration Rules

Following the Supreme Court’s remand of the cases in *Bazzle*, the AAA had to decide how to administer such proceedings. It therefore adopted the American Arbitration Association Policy on Class Arbitrations (“Policy”)²⁵ and a set of Supplementary Rules for Class Arbitrations (“Rules”).²⁶

The AAA’s Policy states that, in light of the *Bazzle* decision:
[T]he American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules

²¹ *Id.* at 454–55 (citation omitted).

²² *Green Tree Fin. Corp.*, 539 U.S. at 455.

²³ *Id.*

²⁴ *Id.* at 460.

²⁵ AM. ARBITRATION ASS’N., AAA POLICY ON CLASS ARBITRATIONS (2005), available at <http://adr.org/sp.asp?id=28779>. Alternatively, go to <http://www.adr.org>; click on “Arbitration”; then click on “Commercial Rules”; next click on “Class Arbitration”; and then click on “Policy on Class Arbitrations” in the right-hand column.

²⁶ AM. ARBITRATION ASS’N., AAA SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), available at <http://adr.org/sp.asp?id=21936> [hereinafter AAA Class Arbitration Rules]. Alternatively, follow the instructions in footnote 25 and for the last step click on “Supplementary Rules for Class Arbitrations” in the right-hand column.

for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement *prohibits* class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.²⁷

It explained the latter position by noting that:

The Association's determination not to administer class arbitrations where the underlying arbitration agreement *explicitly precludes* class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law. Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable (as a matter of public policy) is one for the courts to make, not the arbitrator.²⁸

Having set forth its Policy, the AAA's Rules then provide that class arbitrations shall proceed in three separate stages. Rule 3 provides that as a threshold matter the arbitrator(s) shall determine in a reasoned, partial final award whether the applicable arbitration clause permits the arbitration to proceed on behalf of a class. This clause construction award is then published under the name of the case on the AAA's online Class Arbitration Case

²⁷ AAA POLICY ON CLASS ARBITRATIONS, *supra* note 25.

²⁸ *Id.*

Docket.²⁹ Any party has thirty days thereafter to appeal the clause construction award if it wishes to do so.³⁰

If the matter remains alive after any appeal, or after the time to appeal has expired without any party taking an appeal, Rule 5 provides that the arbitrator(s) shall then take evidence and issue a second, reasoned, partial final award determining whether the case meets the standards for proceeding as a class action. These standards are set forth in Rule 4, which are similar to the standards established by Rule 23 of the Federal Rules of Civil Procedure for class action proceedings in a court. This award is likewise posted on the AAA's website, and either party is given thirty days to appeal.

If the case remains alive after this stage, Rule 7 provides that the arbitrator(s) shall issue a final award on the merits, which shall be reasoned and shall define the class with specificity. The final award also is posted online, and the parties have the normal right to appeal.

Although arbitration awards are normally confidential, one assumes that the AAA took the unusual route of posting each of the awards on its website and providing the parties with three separate opportunities to appeal because class arbitrations, unlike individual arbitrations, are invested with a public interest and often affect a large number of potential class members beyond the named class representative who is purporting to represent their interests.

B. JAMS Class Arbitration Rules

Following the Supreme Court's decision in *Bazzele*, JAMS also created its own supplementary set of class arbitration rules, called the JAMS Class Arbitration Procedures ("JAMS Procedures").³¹ Like the AAA Rules, the JAMS Procedures provide for three separate stages of a class arbitration, allowing time for "immediate court review" after each stage. The three-part process of class arbi-

²⁹ The AAA Class Arbitration Docket can be found at <http://adr.org/sp.asp?id=25562>. Alternatively, follow the steps in footnote 25 and for the last step click on "Searchable Class Arbitration Docket." Cases are listed in the docket alphabetically by the name of the first listed respondent in each case.

³⁰ Rule 3 also states that, "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis."

³¹ JAMS, Class Action Procedures (2005), http://www.jamsadr.com/rules/class_action.asp [hereinafter JAMS Procedures].

tration under the JAMS Procedures, like that of the AAA, is composed of the Construction of the Arbitration Clause,³² Class Certification,³³ and the Final Award.³⁴

Although the JAMS Procedures do not categorically reject class arbitrations where there is language in the relevant arbitration clause explicitly precluding class actions, arbitrators acting under the aegis of JAMS are asked to decide whether arbitral clauses allow class arbitrations. In the Clause Construction stage, “the Arbitrator shall determine as a threshold matter whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”³⁵ Subsequently, at the Class Certification stage the arbitrator is guided to allow the class certification only where the arbitral clause was deemed to allow class arbitrations or where a court has ordered that a class arbitration may be maintained.³⁶

Once this threshold requirement has been met, class certification requires satisfaction of rules that, like the AAA’s Rules, are based on Rule 23 of the Federal Rules of Civil Procedure.³⁷ Notice to the certified class is required, and the guidelines for said notice are also modeled after the notice required by Rule 23, with the additional condition that the identities of and biographical information about the arbitrators, class representative(s), and class counsel shall be included in said notice.³⁸

The final stage of a class arbitration performed in accordance with the JAMS Procedures, the Final Award, shall be on the merits and reasoned, and it shall contain a specified definition of the class and a description of: (1) those to whom notice of the action was directed; (2) those whom the arbitrators have determined comprise the class; and (3) those who had opted out of the class.³⁹ Finally, Rule 6 of the JAMS Procedures delineates the procedure and guidelines for arbitrators’ approval of settlements, voluntary dismissals, and compromises between the parties.⁴⁰

³² *Id.* at Rule 2.

³³ *Id.* at Rule 3.

³⁴ *Id.* at Rule 5.

³⁵ *Id.* at Rule 2.

³⁶ *Id.* at Rule 3.

³⁷ JAMS Procedures, *supra* note 31, at Rule 3; Fed. R. Civ. P. 23.

³⁸ *Id.* at Rule 4(7).

³⁹ *Id.* at Rule 5.

⁴⁰ *Id.* at Rule 6.

Interestingly, with the exception of the Final Award (which uses the language “shall”),⁴¹ the JAMS Procedures state that “the Arbitrator *may* set forth his or her determination[s] in a partial final award subject to immediate court review,”⁴² which suggests that a written Award may not be required at the Clause Construction and Class Determination phases.

III. THE EFFECT OF *HALL STREET ASSOCIATES v. MATTEL* ON CLASS ARBITRATIONS

As discussed above, the AAA rules of arbitration provide for a three-stage process of review of awards; JAMS rules allow, but do not mandate, multiple-stage review.

The scope of judicial review of arbitral awards under the FAA is very limited. The only statutory grounds for vacatur and modification in the courts are provided through FAA §§ 10 and 11. FAA § 10 allows vacatur in the following instances: (1) where there is corruption, fraud, or undue means in the procurement of the award; (2) where there is evident partiality or corruption in an arbitrator; (3) where the rights of a party are prejudiced by an arbitrator’s misconduct; and (4) where an arbitrator exceeds her powers or failed to submit a final award.⁴³ FAA § 11 provides grounds for modification or correction of an award in the following instances: (1) where there is an evident material miscalculation of figures or material mistake in the description of anything referred to in the award; (2) where an arbitrator awards upon a matter not submitted to arbitration; and (3) where an award is imperfect in a matter or form not affecting the merits of the controversy.⁴⁴

In addition to these statutory grounds, there is a common law ground for vacatur for “manifest disregard for the law.”⁴⁵ However, the test is very stringent. For example, the Second Circuit, which encompasses New York, requires one to show that: (1) the tribunal had actual knowledge of a governing legal principle and refused to apply it, and (2) the governing legal principle is well-defined, explicit, and clearly applicable to the instant case.⁴⁶

⁴¹ *Id.* at Rule 5.

⁴² *Id.* at Rules 2–3 (emphasis added).

⁴³ 9 U.S.C. § 10 (2007).

⁴⁴ *Id.*

⁴⁵ *See, e.g.,* Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004).

⁴⁶ *Id.* at 189; *See also,* Duferco Int’l. Steel Trading v. T. Klaveness Shipping A/S, 333 F.2d 383 (2d Cir. 2003); Hoefl v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003); Westerbeke Corp. v.

Because class actions are invested with the public interest and because the AAA rules provide for review at three separate stages of a class action proceeding, at least one arbitrator has suggested that courts should consider the possibility of expanding their level of review in these unique circumstances in order to give arbitrators guidance as to whether they are deciding correctly clause construction and class certification issues.⁴⁷

On March 25, 2008, however, the Supreme Court eliminated this possibility by its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*⁴⁸ The issue before the Court was whether parties could contractually expand judicial review of arbitral decisions. The Court held that in actions subject to the FAA, which would include most any class arbitration, FAA Sections 10 and 11 provide the exclusive grounds for vacatur or modification of an award.⁴⁹

In *dicta*, the Court also cast at least some doubt on the continued viability of “manifest disregard of the law” as a common-law supplement to the FAA statutory grounds of review. Plaintiff Hall Street had argued that because “manifest disregard of the law” had been recognized as an additional common-law ground of review ever since the case of *Wilko v. Swan*,⁵⁰ there was no reason why the Court should not permit private parties also to contract for an expanded level of review. In response, the Court stated:

[T]his is too much for *Wilko* to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator’s legal errors. Then there is the vagueness of *Wilko*’s phrasing. Maybe the term “manifest disregard” was meant to name a new ground of review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded

Daihatsu Motor Co., Ltd., 304 F.3d 200 (2d Cir. 2002); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28, (2d Cir. 2000). The test in other circuits is also similar. See, e.g., *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 74–75 (1st Cir. 2008); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 878–79 (9th Cir. 2007); *B.L. Harbert Int’l, L.L.C. v. Hercules Steel Co.*, 441 F. 3d 905, 910 (11th Cir. 2006).

⁴⁷ *Scher v. Oxford Health Plans, Inc.*, AAA Case 11 193 00548 05 (Mar. 7, 2006) (Baker, W., dissenting).

⁴⁸ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

⁴⁹ *Id.* at 1401.

⁵⁰ *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953).

their powers.” . . . We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment . . . and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.⁵¹

At a minimum, the Supreme Court seems to be saying it has never expressly decided whether “manifest disregard” is an additional common-law standard of review, or simply another way of referring to the more limited statutory grounds of review.

Elsewhere in the *Hall Street* opinion, although not expressly referring to “manifest disregard,” the Court also notes that FAA § 9 provides that a court “must” confirm an award “unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title.”⁵² Noting that there is “nothing malleable about the words ‘must grant,’” the Court states that “[i]nstead of fighting the text, it makes more sense to see the three provisions, §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”⁵³

In any event, regardless of the precise future status of “manifest disregard of the law” as an additional common-law standard of review, the decision in *Hall Street* means that courts will not be able to use the extra interim appeals—mandated in the AAA rules and permitted under the JAMS rules—to provide any substantive guidance to arbitrators regarding Clause Construction and Class Determination Awards. In a way, this leaves parties in class arbitrations worse off than parties in class actions in court. In the latter situation, parties can at least obtain a review on the merits as to whether the court below decided correctly issues relating to class certification and the like.

It should be noted, however, that although parties will not be able to obtain expanded judicial review of clause construction and class certification awards, parties can provide in their contract for appellate review on the merits of any interim or final arbitration award, whether in a class arbitration or not, by an appellate tribunal within the arbitral institution. Recommended clauses for expanded review within both the AAA and JAMS institutional schemes are provided on their respective websites.

⁵¹ Hall St. Assocs., 128 S.Ct. at 1404 (internal citations omitted).

⁵² *Id.* at 1405.

⁵³ *Id.*

IV. FEDERAL CIRCUIT COURT AND STATE COURT DECISIONS
REGARDING CONSOLIDATION OF ARBITRATIONS AND
CLASS ARBITRATIONS BEFORE *BAZZLE*

Before the *Bazzle* Court ruled that it was for the arbitrator to decide whether separate arbitrations could be consolidated or treated as a class, the vast majority of federal circuit courts, as noted above, had held that arbitrations could not be consolidated in the absence of an express agreement among all the parties. For example, the Second Circuit has stated that concerns of efficiency and inconsistent determinations

do not provide us with the authority to reform private contracts which underlie this dispute. If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party.⁵⁴

Similarly, all of the federal circuit courts considering whether separate arbitrations could be treated as class arbitrations held that they could not do so in the absence of an express agreement among all the parties.⁵⁵ However, a number of state court decisions,

⁵⁴ *Gov't of U.K.*, 998 F.2d at 74. See also, *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 207, 108 (6th Cir. 1991) (“[A] district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, *when the agreement is silent regarding consolidation*” (emphasis added)); *Baesler v. Cont'l Grain Co.*, 900 F.2d 1193, 1194 (8th Cir. 1990) (affirming a refusal to consolidate arbitrations here “[t]he single issue before us is whether a district court has the power to consolidate arbitration proceedings *when the arbitration clause of the parties' agreement is silent regarding consolidation*” (emphasis added)); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989) (vacating the lower court's consolidation of arbitrations where the parties never agreed to it); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987). But see *Pedcor Mgmt. Co. v. Nations Pers. of Tex.*, 343 F.3d 355, 363 (5th Cir. 2003) (noting that *Bazzle* had effectively overruled *Del E. Webb* to the limited extent of holding that the question of arbitrability is to be decided by the arbitrator, not the court); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984) (affirming lower court's refusal to consolidate two arbitrations and noting that “arbitration is a creature of contract, and that [a]n agreement to arbitrate before a special tribunal is, in effect, a specialized forum selection clause that posits not only the sites of suit but also the procedure to be used in resolving the dispute” (internal quotations omitted)). But see *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) (permitting the consolidation of two arbitrations in a contract subject to the FAA).

⁵⁵ See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (“We find no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration. We thus adopt the rationale of several other circuits and hold that *section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration is silent on the matter*” (emphasis added)); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001) (“[B]ecause the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to

mostly in California, had held that an arbitration silent clause did not bar class arbitrations.⁵⁶

In his dissenting opinion in *Cable Connections, Inc. v. Hughes Elecs. Corp.*, arbitrator Richard Chernick noted that California's state arbitration statute was different from that of most other states and, therefore, the rulings in *Keating* and *Blue Cross* were inapplicable to a proceeding governed by the FAA:

The basis for the right of a court to order the consolidation of separate proceedings into a class-wide arbitration is the California Arbitration Act's provision permitting consolidation of cases where the disputes arise out of the same transaction or series of related transactions and where common issues of law or fact create the possibility of conflicting rulings. Cal. Code Civ. Proc. § 1281.3. There is no obligation of a court under this provision to consider whether the parties intended the consolidation of their separate claim with other, similar claims; and there is no element of contractual consent required by the *Keating* or *Blue Cross* analyses or holdings. Thus, the California jurisprudence on this subject is not only superseded by *Bazzle* and the AAA Supplemental Class Action Rules, but it is inapplicable in any event as a procedural rule inapplicable to this proceeding which is governed by the FAA.⁵⁷

arbitration as individuals."); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000) ("[E]ven if plaintiffs who sign valid arbitration agreements lack the procedural right to proceed as part of a class, they retain the full range of rights created by TILA [The Truth In Lending Act]. These rights remain available in individual arbitration proceedings."); *Deiulemar Compagnia di Navigazione Spa v. M/V Allegra*, 198 F.3d 473, 482 (4th Cir. 1999) (explaining that where the parties did not include in their agreement an express term providing for class arbitration, the case must proceed as non-class arbitration).

⁵⁶ See, e.g., *Blue Cross of Cal. v. Superior Court of L.A. County*, 67 Cal. App. 4th 42, 60 (Cal. Ct. App. 1998) (ordering class arbitration where the arbitration clause was silent); *Keating v. Southland Corp.*, 31 Cal. 3d 584, 609 (Cal. 1982) (remanding the case to the lower court for consideration of whether a silent clause should be construed to permit class arbitration and noting that "[i]f the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial").

⁵⁷ *Cable Connections, Inc. v. Hughes Elecs. Corp.*, AAA Case No. 11 145 00752 04 (Feb. 2, 2005) (Chernick, dissenting).

V. CLAUSE CONSTRUCTION DECISIONS BY ARBITRAL PANELS
ADJUDICATING CLASS ARBITRATIONS AFTER *BAZZLE*

After the Supreme Court in *Bazzle* held that it was up to arbitrators rather than the courts to decide whether a silent clause permits class arbitration, sixty-seven arbitrators or panels in arbitrations being administered under the AAA's class arbitration rules have issued clause construction awards as of August 2008. In every single case except two, the arbitrator or tribunal held that a silent clause permits class arbitration. This is in marked contrast, as noted above, to the fact that the vast majority of federal circuits in the pre-*Bazzle* era had ruled that arbitrations could not be consolidated or treated as a class if the arbitration clause was silent on the issue.

In one case, which held that the silent clause under consideration did not permit a class action arbitration, *Rich v. Rent-a-Center, Inc.*,⁵⁸ the arbitrator, Judge Bechtle, opted to utilize "traditional principles of contract construction to determine the intent of the parties as to whether or not those procedures should apply."⁵⁹ The arbitrator found that the parties had not expressly contracted for the option of class action proceedings in the event of a dispute. Also, the parties were referred to in the singular rather than in the collective throughout the contract, never suggesting the possibility of a class arbitration. The arbitrator also noted that the AAA's Supplementary Rules for Class Arbitrations had not yet been drafted at the time of the parties' contracting. Because the AAA's Supplementary Rules for Class Arbitration did not exist at the time of contracting, the arbitrator found the parties could not have had such rules in mind when they agreed to the arbitration clause. Finally, the arbitrator observed that the contract allowed for consultation with an attorney, and the putative class representative had availed himself of this opportunity at the signing of the contract. For these reasons, the arbitrator found that the parties had not contracted with the intent to include class arbitrations as a possible form of dispute resolution, and therefore, denied the putative class' claim.

The other case which held that the silent clause before it did not permit a class action arbitration is *John Ivan Sutter v. Limited*

⁵⁸ *Rich v. Rent-a-Center, Inc.*, AAA Case No. 11 160 01833 04 (2005) (Bechtle, Arb.).

⁵⁹ *Id.* at 4.

Health Care Insurance Company.⁶⁰ The arbitrator in that case, retired Judge Marina Corodenus, noted that most federal and state courts in the pre-*Bazzle* era did not permit class actions where the pre-dispute resolution clause was silent on class actions, and that the concept of class actions outside of court began in California with the case of *Keating v. Supreme Court*.⁶¹ The arbitrator noted that the AAA's Supplementary Rules for Class Arbitration required the arbitrator to determine if silence in the arbitration clause "permits" class action. The arbitrator concluded that silence under applicable federal and New Jersey law could not be translated into a contractual agreement to permit class arbitration and, therefore, held the arbitration clause did not permit class action treatment.

Three other cases were dismissed at the class award stage but for reasons other than the existence of a "silent clause." In *Warrior Transportation v. FFE Transportation Servs., Inc.*,⁶² the tribunal found that the broadly-drafted, silent arbitration clause allowed class arbitrations. However, the tribunal also found that a subparagraph of the clause, requiring that notice of an arbitration claim be given within sixty days, was impermissibly and unconscionably short, and therefore invalid. The tribunal further found that this clause could not be severed from the remainder of the arbitration clause. Therefore, the tribunal found the entire arbitration clause to be invalid, and dismissed the case for lack of jurisdiction.

In *Parham v. Am. Bankers Ins. Co. of Florida*,⁶³ the tribunal was faced with an arbitration clause which was silent as to class arbitration. The tribunal found that the broad language of the clause, construed against the drafter (in accordance with Alabama law), must allow a class arbitration, and it therefore entered a clause construction award in favor of the class. Upon respondents' appeal to an Alabama circuit court, however, the court concluded that Alabama law dictated that "silence in an arbitration clause on class arbitration means no class arbitration." Therefore, the arbitrator was directed to enter a new clause construction award in accordance with Alabama law.

⁶⁰ John Ivan Sutter v. United HealthCare Ins. Co., AAA Case No. 11 195 02075 06 (Nov. 11, 2007) (Barrett, Arb.).

⁶¹ *Keating v. Supreme Court*, 31 Cal. 3d 584, 645 P.2d 1192 (Cal. 1982).

⁶² *Warrior Transportation v. FFE Transportation Servs., Inc.*, AAA Case No. 11 118 00365 05 (2005) (England, Arb.).

⁶³ AAA Case No. 11 195 00157 07 (2007) (Max, Arb.).

In *Cummings v. AT&T Corp.*,⁶⁴ the claimant had previously sought to have a court determine that a clause barring class action arbitrations was unconscionable. The Court declined and referred the matter to arbitration, where the claimant then tried to raise the same argument. The arbitrator noted, among other things, that the court had already rejected claimant's arguments. The arbitrator also noted that under applicable New York law, a contractual prescription against class actions is neither unconscionable nor violative of public policy, citing *Tsadilas v. Providian National Bank*.⁶⁵ The arbitrator, therefore, ruled that the matter could not proceed as a class arbitration.

With respect to those decisions, which held that a "silent" clause permitted class arbitration, twenty-six of the awards relied in whole or in part on California case law, including the *Blue Cross* and *Keating* decisions noted above.⁶⁶

Some of the other clause construction awards have been based on idiosyncratic facts. For example, two of the awards were based

⁶⁴ AAA Case No. 11 181 02586 04 (2006) (Farber, Arb.).

⁶⁵ *Tsadilas v. Providian National Bank*, 786 N.Y.S.2d 478 (1st. Dept. 2004).

⁶⁶ *Dealer Computer Servs., Inc. v. Randall Ford, Inc.*, AAA Case No. 11 117 Y 002788 06 (2008) (Widman, Arb.); *Flaxman v. Terminex, Inc.*, AAA Case No. 11 434 00701 07 (2008) (Dineen, Arb.); *Fannan v. Technisource, Inc.*, AAA Case No. 11 160 01881 06 (2007) (Hodge, Arb.); *Orea v. Tavistock Rests. LLC*, AAA Case No. 11 160 01982 06 (2007) (Hodge, Arb.) (citing *Ting v. AT&T Corp.*, 319 F.3d 1126, 1150 (9th Cir. 2003)); *Armstrong v. Ameriquest Mortgage Co.*, AAA Case No. 11 160 Y 01652 06 (2007) (Widman, Arb.); *Nichols v. Fanfare Media Works, Inc.*, AAA Case No. 11 160 Y 01780 06 (2007) (Dineen, Arb.); *Hlas v. Menard*, AAA Case No. 11 160 00131 07 (2007) (Barnes, Arb.); *Krastel v. TES Franchising, L.L.C.*, AAA Case No. 11 114 00320 05 (2006) (Silberberg, Arb.) (citing *Gray v. Conesco, Inc.*, No. SA CV 00-322-DOC (Eex), 2001 U.S. Dist. LEXIS 21696 at 7-8 (C.D. Cal. 2001)); *Salcedo v. Cintas Corp.*, AAA Case No. 11 160 00018 06 (2006) (Lynch, Arb.); *Jost v. Sizzler USA Rests., Inc.*, AAA Case No. 11 160 01721 05 (2006) (Cohill, Arb.); *Ali v. Morton's of Chicago/Sacramento, Inc.*, AAA Case No. 11 160 02015 05 (2006) (Hodge, Arb.); *Sanchez v. Corinthian Colls., Inc.*, AAA Case No. 11 181 00286 5 (2005) (Hodge, Arb.); *Groves v. Hemet Mfg. Co., Inc.*, AAA Case No. 11 160 00194 05 (2005) (Dewitt, Arb.); *Olson v. Rent-A-Center, Inc.*, AAA Case No. 11 160 01831 04 (2005) (Brandt, Arb.); *Grayson v. Rent-A-Center, Inc.*, AAA Case No. 11 160 01823 04 (2005) (Meanor, Arb.); *Medina v. G.M.R.I., Inc.*, AAA Case No. 11 160 02409 04 (2005) (Christianson, Arb.); *Anderson v. Check 'N Go of California, Inc.*, AAA Case No. 11 160 03021 04 (2005) (Slater, Arb.); *Hayes v. M.S. Carriers, Inc.*, AAA Case No. 11 118 02907 04 (2005) (Fleming, Arb.); *Mitchell v. G.M.R.I., Inc.*, AAA Case No. 11 160 02939 03 (2005) (Meyerson, Arb.); *Sidhu v. G.M.R.I., Inc.*, AAA Case No. 11 160 02273 04 (2005) (Meyerson, Arb.); *Allen v. Sport & Fitness Clubs of Am., Inc.*, AAA Case No. 11 160 03041 04 (2005) (Sochynsky, Arb.); *Cable Connection, Ins v. Direct, Inc.*, AAA Case No. 11 145 00752 04 (2005) (Arabica, Arb.); *Hamilton v. Rent-A-Center, Inc.*, AAA Case 11 160 01825 04 (2005) (Corcoran, Arb.); *Milstein v. Protection One Alarm Servus, Inc.*, AAA Case 11 110 00270 04 (2004) (Jones, Arb.); *Cole v. Long John Silver's Rests., Inc.*, AAA Case 11 160 00194 04 (2004) (Hodge, Arb.); *Goldstein v. Ibase Consulting of Fairfield County, LLC*, AAA Case No. 11 160 02760 03 (2004) (Garrison, Arb.).

on the fact that the respondent assured the court that if the matter were transferred to arbitration, it would not assert that the arbitration clause precludes class claims.⁶⁷ One decision relied on the fact that at least several of the arbitration clauses expressly permitted class arbitrations,⁶⁸ and four merely affirmed stipulated agreements not to contest clause construction.⁶⁹ Another case simply considered the state court's referral of the class's claims to arbitration as a binding decision that the clause allowed class actions.⁷⁰ The remaining thirty-seven decisions relied on various other reasons.⁷¹

⁶⁷ *Cotton v. Rent-A-Center, Inc.*, AAA Case No. 11 160 01819 04 (2005) (Sullivan, Arb.); *Cook v. Rent-A-Center, Inc.*, AAA Case No. 11 160 01815 04 (2005) (Todd, Arb.).

⁶⁸ *Harris v. Tele Tech Holdings, Inc.*, AAA Case No 11 160 02701 04 (2005) (Barnes, Arb.).

⁶⁹ *Brown v. Cellco P'ship*, AAA Case No. 11 494 01274 05 (2005) (Farber, Arb.).

⁷⁰ *Francis v. United El Segundo*, AAA Case No. 11 160 00267 07 (2007) (Cochran-Bond, Arb.).

⁷¹ *Blackwell v. 24 Hour Fitness USA, Inc.*, AAA Case No. 11 196 02299 07 (2008) (Brewer, Arb.); *Adame v. Fleetwood Enters., Inc.*, AAA Case No. 11 181 01292 07 (2008) (O'Leary, Arb.); *Walters v. Palm Harbor Homes, Inc.*, AAA Case No. 11 421 002782 06 (2008) (Dinneen, Arb.); *Morton v. Championcomm.net of Tuscaloosa, Inc.*, AAA Case No. 11 199 00704 07 (2007) (Page, Arb.); *Fox Valley Ford v. Dealer Computer Servs., Inc.*, AAA Case No. 11 117 01929 06 (2007) (Barnes, Arb.); *Hausner v. United Healthcare of Texas, Inc.*, AAA Case No. 11 193 Y 00447 07 (2007) (Zimmerman, Arb.); *Kinkel v. Cingular Wireless, L.L.C.*, AAA Case No. 11 494 02 646 06 (2007) (Love, Arb.); *Louisiana Health Serv. Indem. Co. v. DVA Renal Healthcare, Inc.*, AAA Case No. 11 193 02297 06 (2007) (Schwartz, Arb.); *Harvard Coll. v. JSC Surgutneftegaz*, AAA Case No. 11 168 T 01654 04 (2007) (Croheim, Arb.); *Stokes v. AWSM Technology, L.L.C.*, AAA Case No. 11 147 02374 06 (2007) (Hare, Arb.); *Crawford v. Labor Ready Northwest, Inc.*, AAA Case No. 11 160 02264 06 (2007) (Brewer, Arb.); *Champion Ford Lincoln Mercury, Inc. v. Dealer Computer Servs., Inc.*, AAA Case No. 11 117 01935 06 (2007) (Pratt, Arb.); *Travis v. Rhodes Colls., Inc.*, AAA Case No. 11 199 01827 06 (2007) (Pratt, Arb.); *Zacharias v. Cypress Commc'ns, Inc.*, AAA Case No. 11 181 00004 06 (2006) (Wilkson, Arb.); *Tomeldon Co. v. Medco Health Solutions, Inc.*, AAA Case No. 11 193 00546 06 (2006) (Hare, Arb.); *Bandler v. Charter One Bank, N.A.*, AAA Case No. 11 148 02801 04 (2006) (Bandler, Arb.); *Terrapin Express, Inc. v. Airborne Express, Inc.*, AAA Case No. 11 199 01536 05 (2006) (Hodge, Arb.); *Hoffman v. Arthur Anderson L.L.P.*, AAA Case No. 11 180 01410 05 (2006) (Farber, Arb.); *Scher v. Oxford Health Plans, Inc.*, AAA Case No. 11 193 00548 05 (2006) (Baker, Arb.); *Hamilton v. Rent-A-Center, Inc.*, AAA Case No. 11 160 01825 04 (2005) (Cocoran, Arb.); *Jones v. Genus Credit Mgmt. Corp.*, AAA Case No. 11 181 00295 05 (2005) (Green, Arb.); *Addleman v. Ryland Group, Inc.*, AAA Case No. 11 181 001524 05 (2005) (Dreier, Arb.); *Petsch v. Orkin Exterminating Co.*, AAA Case No. 11 181 02541 04 (2005) (Green, Arb.); *Warrior Transp. v. FFE Transp. Servs., Inc.*, AAA Case No. 11 118 00365 05 (2005) (Barnes, Arb.); *Fortuna v. Snap-on Tools Co., L.L.C.*, AAA Case No. 11 114 01818 04 (2005) (Slater, Arb.); *Rhodes Coll., Inc. v. Michael Satz*, AAA Case No. 11 18102217 04 (2005) (Zimmerman, Arb.); *Alexander v. G.M.R.I., Inc.*, AAA Case No. 11 160 02018 05 (June 20, 2005); *Hobby v. Snap-on-Tools Co., L.L.C.*, AAA Case No. 11 114 01884 04 (2005) (Matthews, Arb.); *Awe v. I & M Rail Link, L.L.C.*, AAA Case No. 11 160 00026 05 (2005) (Blair, Arb.); *Levitt v. Lipper Holding, L.L.C.*, AAA Case No. 11 168 00663 04 (2005) (Ash, Arb.); *Barton v. Cottage Homesteads of Am., Inc.*, AAA Case No. 11 115 02967 04 (2005) (Remele, Arb.); *Smith v. Tele Tech. Holdings, Inc.*, AAA Case No. 11 160 02726 04 (2005) (Meyerson, Arb.); *Garrett v. Rollins, Inc.*, AAA Case No. 11 181 01663 04 (2005) (O'Leary); *Le v. Toshiba Am. Info. Sys., Inc.*, AAA Case No. 11 160 02033

It should be noted that most of the cases to date have involved arbitration clauses embedded in the fine print of consumer contracts under circumstances where the consumers had no real opportunity to negotiate or change the clauses. Clauses contained in such contracts of adhesion involve special considerations. If there is an arbitration clause in such a contract, it has the effect of prohibiting the consumer from bringing any action in court, including a class action. If a silent arbitration clause is then interpreted as prohibiting a class action in arbitration, the consumer is left without any forum in which to bring class claims. An understandable desire not to want to leave a consumer without any forum to assert class claims inasmuch as class actions, in the absence of an arbitration clause, have by this point in time become an accepted part of U.S. jurisprudence.

To the extent that the above is a valid concern, the answer might lie in narrowly tailored legislation dealing with arbitration clauses in consumer contracts of adhesion.⁷² The danger of trying instead to arrive at what may seem to be a just result by stretching principles of contractual construction is that the case law created has a way of finding its way into situations that involve neither consumers nor contracts of adhesion. For example, in the *Animalfeeds International* case, cited in the second paragraph of this article, an arbitration panel held that a silent arbitration clause in a contract with a foreign shipping company permitted a corporation (not a consumer) to act as a class representative on behalf of other corporations in an antitrust class arbitration, despite the fact that the foreign company had never expressly consented to a class arbitration procedure.

04 (2005) (Paul, Arb.); *Beazury v. Arbor Homes, L.L.C.*, AAA Case No. 11 148 02161 04 (2005) (O'Leary, Arb.); *Budner v. Oats*, AAA Case No. 11 181 00828 04 (2004) (Zimmerman, Arb.); *Bagpeddler.com v. U.S. Bancorp*, AAA Case No. 11 181 00322 04 (2004) (Farber, Arb.); *Hearthside Rest., Inc. v. Quest Dex, Inc.*, AAA Case No. 11 147 00357 04 (2004) (Flinn, Arb.); *Sutter v. Oxford Health Plans, Inc.*, AAA Case No. 18 193 20593 02 (2003) (Barrett, Arb.).

⁷² There is, in fact, legislation pending in Congress on this subject. See Section VII, *infra*. As will be discussed below, however, this legislation is not narrowly tailored and may have substantial, unfortunate consequences for international arbitration in the U.S. if it passes in its present form.

VI. CLASS CERTIFICATION DECISIONS BY ARBITRAL TRIBUNALS AFTER *BAZZLE*

Following a decision that the arbitration clause permits class arbitration, the arbitral tribunal must decide whether the standards governing class certification have been satisfied. Class certification in a class arbitration, as discussed above, involves criteria similar to that of a class action in the United States district courts. The rules for class certification in arbitrations performed under the aegis of both the AAA and JAMS are modeled after Rule 23 of the Federal Rules of Civil Procedure (“FRCP”), and the decisions in arbitrations in those institutions often rely on relevant state and federal case law in their reasoning. As noted, in order to certify a class, the tribunal must first find that the elements of Rule 23(a) have been satisfied. These are: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy of class representative(s), and (5) adequacy of claimant(s)’ counsel. In addition to the requirements of Rule 23(a), the AAA and JAMS rules have a sixth requirement, namely, that the arbitration agreements signed by each member of the class are substantially similar to that signed by the class representative. Once those requirements have been met, the “predominance” and “superiority” requirements of FRCP Rule 23(b) must also be met.

As of August 2008, the AAA had overseen twenty-seven arbitrations that had entered class certification awards (numerous other arbitrations have passed the clause construction phase and are awaiting a hearing or ruling on class certification). The class-certification awards are split much more evenly than the clause-construction awards. Fifteen decisions have granted class certification⁷³ and twelve have denied it.⁷⁴ No cases have yet reached the

⁷³ Associated Pathology Consultants, S.C. v. United Healthcare of Ill., Inc., AAA Case No. 11 195 00971 06 (2008) (Jeutes, Arb.); McGraw v. Morton’s Rest. Group, Inc., AAA Case No. 11 60 02171 06 (2008) (Bissell, Arb.); Maslo v. Oak Pointe Country Club, Inc., AAA Case No. 11 181 02243 06 (2008) (Esshaki, Arb.); Kaplan v. Citibank, N.A., AAA Case No. 111 148 1007 07 (2008) (Lamothe, Arb.); Brown v. Celco P’ship, AAA Case No. 11 494 01274 05 and 11 494 0032 05 (2008) (Foster, Arb.); Wolf v. Lakewood Homes, Inc., AAA Case No. 111 181 Y 01244 06 (2007) (Brent, Arb.); Bagpeddler.com v. U.S. Bancorp, AAA Case No. 11 181 00322 04 (2007) (Farber, Arb.); Weller v. Sprint Commc’n Co., AAA Case No. 11 181 00070 06 (2007) (Thompson, Arb.); Johnson v. Morton’s Rest. Group, Inc., AAA Case No. 11 160 01513 05 (2007) (Golick, Arb.); Bryant v. Joel Antunes, L.L.C., AAA Case No. 111 160 01783 05 (2007) (Pratt, Arb.); Smith v. Tele Tech Holdings, Inc., AAA Case No. 11 160 02726 04 (2006) (Meyerson, Arb.); Addleman v. Ryland Group, Inc., AAA Case No. 11 181 01524 05 (2006); Cole v. Long John Silver’s Rest., Inc., AAA Case No. 11 160 00194 04 (2005) (Hodge, Arb.); Barton v. Cottage Homesteads of Am., Inc., AAA Case No. 11 115 02967 04 (2005) (Remele, Arb.); Sutter v. Oxford Health Plans, AAA Case No. 18 193 20593 02 (2003) (Barrett, Arb.).

stage of hearing on the merits, there being a tendency for many cases to settle after the class certification award.

A quick review of the bases on which the twenty-seven cases have made their class certification decisions is instructive.

A. Numerosity

Satisfaction of the numerosity requirement, which stipulates that the putative class must be “so numerous that joinder of separate arbitrations on behalf of all members is impracticable,”⁷⁵ has rarely been denied by AAA arbitrators. Certified putative classes in AAA arbitrations have ranged from thousands of members⁷⁶ to as few as eighteen members.⁷⁷ A class of thirty to fifty persons is “generally viewed” to be the range of claimants necessary to certify a class.⁷⁸ Regardless of the size of the putative class, some tribunals have stated that joinder of claims is impossible in AAA arbitrations because there is no joinder device available under AAA procedures, and, therefore, the numerosity requirement is necessarily fulfilled.⁷⁹ Circumstances where the numerosity requirement was not fulfilled only arose where there was no evidence to suggest there was another potential class member besides the claimant;⁸⁰ there was no unambiguous, definable class to name;⁸¹ or where the

⁷⁴ *Levitt v. Lipper Holdings*, AAA Case No. 11 168 00663 04 (2008) (Ash, Arb.); *Partners Two, Inc. v. Adecco N. Am., L.L.C.*, AAA Case No. 11 114 03042 04 (2007) (Hodge, Arb.); *Groves v. Hemet Mfg. Co., Inc.*, AAA Case No. 11 160 00194 05 (2007) (Dewitt, Arb.); *Cummings v. Fla. Mag Enter., Inc.*, AAA Case No. 11 188 00203 07 (2007) (England, Arb.); *Haro v. NCR Corp.*, AAA Case No. 11 160 1962 05 (2007) (Widman, Arb.); *Awe v. I & M Rail Link, L.L.C.*, AAA Case No. 11 160 00026 05 (2006) (Blair, Arb.); *Hayes v. M.S. Carriers, Inc.*, AAA Case No. 11 118 02907 04 (2006) (Fleming, Arb.); *Bezaury v. Arbor Homes, L.L.C.*, AAA Case No. 11 148 02161 04 (2006) (O’Leary, Arb.); *Garret v. Rollins, Inc.*, AAA Case No. 11 181 01663 04 (2006) (Lone, Arb.); *Tarek, L.L.C. v. Kinkade*, AAA Case No. 11 Y 114 00578 04 (2005) (Mainland, Arb.); *Milstein v. Protection One Alarm Servs., Inc.*, AAA Case No. 11 110 00270 04 (2005) (Jones, Arb.); *Chavez v. Rent-a-Center, Inc.*, AAA Case No. 11 160 01817 04 (2005) (Wright, Arb.).

⁷⁵ AAA Class Arbitration Rules, *supra* note 26, at Rule 4(a)(1).

⁷⁶ *See, e.g., Sutter v. Oxford Health Plans*, AAA Case No. 18 193 20593 02 (2003) (Barrett, Arb.).

⁷⁷ *See Groves v. Hemet Mfg. Co., Inc.*, AAA Case No. 11 160 00194 05 (2007) (Dewitt, Arb.).

⁷⁸ *Bryant v. Joel Antunnes LLC*, AAA Case No. 11 160 01783 05 (Sept. 17, 2007).

⁷⁹ *See, e.g., Levitt v. Lipper Holdings*, AAA Case No. 11 168 00663 04 (2008) (Ash, Arb.); *Awe v. I & M Rail Link, L.L.C.*, AAA Case No. 11 160 00026 05 (2006) (Blair, Arb.).

⁸⁰ *Cummings v. Fla. Mag Enter., Inc.*, AAA Case No. 11 188 00203 07 (2007) (England, Arb.).

⁸¹ *Chavez v. Rent-A-Center, Inc.*, AAA Case No. 11 160 01663 04 (Aug. 18, 2005).

tribunal decided to consider the numerosity, commonality, and typicality requirements jointly and found that the entirety had not been fulfilled.⁸²

B. Commonality

The commonality element, requiring that there be “questions of law or fact common to the class,”⁸³ is also normally satisfied. It is not necessary that all issues of fact and law are common. The standard is, in fact, a very lax one—commonality “requires only that there *be* [common] questions of law or fact common to the class, not that such issues predominate as required by the more rigorous standard in [FRCP] Rule 23(b)” and AAA Supplementary Rules for Class Arbitrations Rule 4(b).⁸⁴ Therefore, most tribunals have held that one common issue among the class is sufficient.⁸⁵ Commonality has been denied in AAA arbitrations only where the tribunal considered the predominance and commonality requirements in conjunction with each other and the common issues did not predominate,⁸⁶ where the claimant’s situation was so unique that a class could not be defined,⁸⁷ or where the arbitral clause of a nationwide putative class stipulated that the choice of law was the law of the state where each cause of action arose (thereby making the legal issues necessarily different among the class).⁸⁸

C. Typicality

The requirement of the typicality element is that “the claims or defenses of the representative parties are typical of the claims or

⁸² See, e.g., *Partners Two, Inc. v. Adecco N. Am., L.L.C.*, AAA Case No. 11 114 03042 04 (2007) (Hodge, Arb.).

⁸³ AAA Class Arbitration Rules, *supra* note 26, at Rule 4(a)(2).

⁸⁴ *Tarek, L.L.C. v. Kinkade*, AAA Case No. 11 Y 114 00578 04 (2005) (Mainland, Arb.).

⁸⁵ See, e.g., *Maslo v. Oake Pointe Country Club, Inc.*, AAA Case No. 11 181 002243 06 (2008) (Isshaki, arb.); *Hayes v. M.S. Carriers, Inc.*, AAA Case No. 11 118 02907 04 (2006) (Felm-ing, Arb.).

⁸⁶ See, e.g., *Groves v. Hemet Mfg. Co., Inc.*, AAA Case No. 11 160 00194 05 (2007) (Dewitt, Arb.).

⁸⁷ *Cummings v. Fla. Mag Enter., Inc.*, AAA Case No. 11 188 00203 07 (2007) (England, Arb.).

⁸⁸ *Haro v. Rollins, Inc.*, AAA Case No. 11 160 1962 05 (2007) (Widmar, Arb.).

defenses of the class.”⁸⁹ Tribunals have held this requirement met where there is no material difference between the named claimants’ claims and those of the balance of the class.⁹⁰ However, the standard is generally a lax one: “[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met regardless of varying fact patterns which underlie individual claims.”⁹¹ Some tribunals have stated a two-part rule: (1) the claims of the representatives must arise from the same practice or course of conduct giving rise to the claims of all other class members; and (2) the claims of the representative and the class members are based upon the same legal theory.⁹² Those circumstances leading to a tribunal’s denial of the typicality requirement were found where differences between the representative’s factual or legal claims were deemed to be material differences.⁹³

D. Adequacy of Class Representative(s)

In order to be an adequate representative of a class, the tribunal must conclude that “the representative parties will fairly and adequately protect the interests of the class.”⁹⁴ This element generally requires two things: (1) the absence of conflicting interests between the class representatives and the unnamed class members; and (2) an assurance of vigorous prosecution on the class’ behalf.⁹⁵ In order to assure the tribunal of vigorous prosecution of the class’ claims, diligence in bringing the claim and preparing for the litiga-

⁸⁹ AAA Class Arbitration Rules, *supra* note 26, at Rule 4(a)(3).

⁹⁰ *See, e.g.*, McGraw v. Morton’s Rest. Group, Inc., AAA Case No. 11 60 02171 06 (2008) (Bissell, Arb.).

⁹¹ *Cole v. Long John Silver’s Rest., Inc.*, AAA Case No. 11 160 0019404 at 22 (2003) (Hodge, Arb.) quoting NEWBERG ON CLASS ACTIONS, § 3.13, 4th ed. (2002). *See also* Wolf v. Lakewood Homes, Inc., AAA Case No. 11 181 02243 06 (2007) (Brewer, Arb.) (certifying a class even though the defense had raised unique defenses against the named claimant).

⁹² *See, e.g.*, Hayes v. M.S. Carriers, Inc., AAA Case No. 11 118 02907 04 (2006) (Fleming, Arb.) (citing *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996)).

⁹³ *See, e.g.*, Tarek, L.L.C. v. Kinkade, AAA Case No. 11 Y 114 00578 04 (2005) (Mainland, Arb.); Haro v. Rollins, Inc., AAA Case No. 11 160 1962 05 (2007) (Widmar, Arb.); Garrett v. Rollins, Inc., AAA Case No. 11 181 01663 04 (2005) (O’Leary, Arb.).

⁹⁴ AAA Class Arbitration Rules, *supra* note 26, at Rule 4(a)(4).

⁹⁵ *Johnson v. Morton’s Rest. Group*, AAA Class No. 11 160 01513 05 (2007) (Golick, Arb.).

tion are factors that weigh strongly in favor of certification.⁹⁶ Often, a failure to meet the adequacy of representation element is a function of the failure to meet another element (e.g., the named claimant's claims not being typical of the class because a resulting conflict of interest would limit the representative's ability to protect adequately the class' rights).⁹⁷ Other circumstances in which this requirement was not met relied on facts suggesting a conflict of interest or of a lack of vigorous prosecution that were very fact-specific.⁹⁸

E. Adequacy of the Class Representative(s)' Counsel

The most rarely denied, not to mention the most rarely disputed, element of FRCP Rule 23 and the AAA and JAMS class certification rules is the requirement that "counsel selected to represent the class will fairly and adequately protect the interests of the class." As of August 2008, only one AAA class arbitration had found this requirement unmet. In *Milstein v. Protection One Alarm Services, Inc.*,⁹⁹ the class representative's chosen legal counsel was the law firm where his son was a partner. The firm was given unfettered discretion over the case, to the point that the class representative was not entirely familiar with the claim or his attorneys at the time of the hearing. Due to the appearance of divided loyalties of counsel, as well as counsel's failure to even recognize the possible disadvantage to the remaining members of the class, the tribunal denied certification in part on these grounds. In the remainder of the arbitrations, tribunals have accepted claimant's counsel's adequacy based on personal knowledge or reputation of counsel's practice,¹⁰⁰ counsel's performance throughout the arbitral

⁹⁶ See, e.g., *Maslo v. Oak Pointe Country Club, Inc.*, AAA Case No. 11 181 02243 06 (2008) (Esshaki, Arb.); *Weller v. Sprint Commc'ns Co.*, AAA Case No. 11 181 00070 06 (2007) (Thompson, Arb.).

⁹⁷ See, e.g., *Tarek, L.L.C. v. Kinkade*, AAA Case No. 11 Y 114 00578 04 (2005) (Mainland, Arb.); *Haro v. Rollins, Inc.*, AAA Case No. 11 160 1962 05 (2007) (Widmar, Arb.); *Garrett v. Rollins, Inc.*, AAA Case No. 11 181 01663 04 (2005) (O'Leary).

⁹⁸ See, e.g., *Milstein v. Protection One Alarm Servus, Inc.*, AAA Case 11 110 00270 04 (2004) (Jones, Arb.) (denying the adequacy of representation claim where claimant's son's law firm represented the class and was given unfettered discretion to the claims and where claimant had little or no knowledge regarding the suit).

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *Barton v. Cottage Homesteads of Am., Inc.*, AAA Case No. 11 115 02967 04 (2005) (Remele, Arb.).

proceedings,¹⁰¹ submissions regarding experience in class actions,¹⁰² or due to a lack of challenge to counsel's representation by the opposing party or the tribunal.¹⁰³

F. Substantial Similarity of Arbitration Agreements

The only AAA and JAMS class certification element not modeled after FRCP Rule 23 is the similarity-of-arbitral-agreement element, requiring that "each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members."¹⁰⁴ Because a class is not defined prior to a class certification hearing, arbitral tribunals have substantial leeway in assessing this requirement. Many tribunals will, where a difference between arbitral clauses arises, simply define the class in a way that excludes those putative class members whose agreements are not similar and would otherwise prevent class certification.¹⁰⁵ Especially where the arbitration clause is part of a larger contract of adhesion, a tribunal may construe the contract and its terms against the drafter in order to interpret the clauses as substantially similar.¹⁰⁶ Circumstances under which a tribunal has found that this requirement was not fulfilled include a situation where there was a lack of evidence that any valid arbitration agreement existed between claimant and respondent at all,¹⁰⁷ and where the differences among the contracts were so substantial that the tribunal declined jurisdiction over the matter.¹⁰⁸

¹⁰¹ See, e.g., *Maslo v. Oak Pointe Country Club, Inc.*, AAA Case No. 11 181 02243 06 (2008) (Esshaki, Arb.).

¹⁰² See, e.g., *Bagpeddler.com v. U.S. Bancorp*, AAA Case No. 11 181 00322 04 (2004) (Farber, Arb.).

¹⁰³ See, e.g., *Wolf v. Lakewood Homes, Inc.*, AAA Case No. 111 181 Y 01244 06 (2007) (Brent, Arb.).

¹⁰⁴ AAA Class Arbitration Rules, *supra* note 26, at Rule 4(a)(6).

¹⁰⁵ See, e.g., *Sutter v. Oxford Health Plans*, AAA Case No. 18 193 20593 02 (2003) (Barrett, Arb.); *Barton v. Cottage Homesteads of Am., Inc.*, AAA Case No. 11 115 02967 04 (2005) (Remele, Arb.); *Bagpeddler.com v. U.S. Bancorp*, AAA Case No. 11 181 00322 04 (2004) (Farber, Arb.).

¹⁰⁶ *McGraw v. Morton's Rest. Group, Inc.*, AAA Case No. 11 60 02171 06 (2008) (Bissell, Arb.).

¹⁰⁷ *Cummings v. Fla. Mag Enter., Inc.*, AAA Case No. 11 188 00203 07 (2007) (England, Arb.).

¹⁰⁸ See *Milstein v. Protection One Alarm Servus, Inc.*, AAA Case 11 110 00270 04 (2004) (Jones, Arb.) (declining jurisdiction over the arbitration where some arbitral clauses indicated

G. Predominance and Superiority of Claims

The key requirement of class certification is the predominance and superiority requirement of FRCP Rule 23(b), AAA Supplementary Rules of Class Arbitration Rule 4(b), and JAMS Class Action Procedures Rule 3(b). AAA Supplementary Rules of Class Arbitration Rules 4(b) states:

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

- (1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
- (2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;
- (3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and
- (4) the difficulties likely to be encountered in the management of a class arbitration.

AAA Class Arbitration Rules, Rule 4(b).¹⁰⁹

Predominance is the crucial question in a class certification determination, because it meaningfully ties together all of the previous requirements, particularly numerosity, commonality, and typicality. Most tribunals state the requirement simply, requiring that the arbitration be predominated by general, common issues of the class, not individualized issues, such that efficiency would be gained through class arbitration without substantially limiting rights protection.¹¹⁰ Tribunals have clarified this by holding that in order to satisfy the predominance requirement there need be at

that the governing arbitral institution would be AAA, some indicated JAMS, and still others indicated the National Arbitration Forum).

¹⁰⁹ AAA Class Arbitration Rules, *supra* note 26, at Rule 4(b).

¹¹⁰ See *Maslo v. Oak Pointe Country Club, Inc.*, AAA Case No. 11 181 02243 06 (2008) (Esshaki, Arb.).

least one single common issue that is overriding.¹¹¹ However, the fact that separate evidence may be required from each claimant regarding matters such as proof or amount of damages generally will not defeat a predominance claim.¹¹² Where standardized proof is sufficient to prove the claims of the whole class, this is a factor that usually signals the claim is a predominant one.¹¹³ Arbitrations that do not satisfy the predominance requirement are those that would require extensive individualized factual determinations or legal argument. Where a class arbitration would require individualized “mini-trials” to determine whether the respondent is liable to each member of the class, predominance is unlikely to be found.¹¹⁴

Factors considered when determining the superiority of class action include rights protection and efficiency;¹¹⁵ the manageability of a class in comparison to separate adjudications is a secondary consideration.¹¹⁶ Often, a finding of lack of predominance correlates to a lack of superiority, because the necessity of individual proof for each individual claim eliminates the arbitration’s most beneficial aspects such as expediency and efficiency.¹¹⁷

VII. ARBITRAL CLAUSES PROHIBITING CLASS ACTIONS AND PUBLIC POLICY ARGUMENTS AGAINST SUCH CLAUSES

As noted previously, given the number of clause construction arbitration awards in the post-*Bazzle* era which have found that a “silent” clause permits class arbitration, one would be wise to put in a clause expressly prohibiting class action arbitrations if one would like to avoid this result. Even if one does insert a no-class-action arbitration clause, however, such a clause may still be held invalid as against public policy. Whether a contract violates public

¹¹¹ See *Smith v. Tele Tech. Holdings, Inc.*, AAA Case No. 11 160 02726 04 (2005) (Meyerson, Arb.).

¹¹² See *Cole v. Long John Silver’s Rests., Inc.*, AAA Case 11 160 00194 04 (2004) (Hodge, Arb.).

¹¹³ See *Bagpeddler.com v. U.S. Bancorp*, AAA Case No. 11 181 00322 04 (2004) (Farber, Arb.).

¹¹⁴ See, e.g., *Garrett v. Rollins, Inc.*, AAA Case No. 11 181 01663 04 (2005) (O’Leary); *Tarek, L.L.C. v. Kinkade*, AAA Case No. 11 Y 114 00578 04 (2005) (Mainland, Arb.); *Hayes v. M.S. Carriers, Inc.*, AAA Case No. 11 118 02907 04 (2006) (Fleming, Arb.).

¹¹⁵ See *Zobrist v. Verizon Wireless*, AAA Case No. 11 494 01274 05, 11 494 0032 05 (2008) (Farber, Arb.).

¹¹⁶ *Harris v. Tele Tech Holdings, Inc.*, AAA Case No 11 160 02701 04 (2005) (Barnes, Arb.).

¹¹⁷ See *Tarek, L.L.C. v. Kinkade*, AAA Case No. 11 Y 114 00578 04 (2005) (Mainland, Arb.).

policy is an issue of contract law and has historically been thought to be governed by state law. Until recently, most federal circuits had held that a clause prohibiting class arbitration is not against public policy,¹¹⁸ but recently federal courts have begun to find such prohibitions unconscionable.¹¹⁹ Research has revealed no New York federal district courts which have addressed this public policy issue, nor any Second Circuit opinion on the subject, but state courts in New York, have held that a clause prohibiting class action arbitrations is not against public policy.¹²⁰

In the post-*Bazzle* era, however, many other state courts, in what appears to be an emerging majority, have held that such no-class-action clauses are against the public policies of their respective states.¹²¹ Those state courts which have voided no-class-action

¹¹⁸ *Jenkins v. First Am. Cash Advance of GA, LLC*, 400 F.3d 868 (11th Cir. 2005); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018 (N.D. Cal. 2007); *Livingston v. Asters Pin, Inc.*, 339 F.3d 553, 558 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin Corp-Ala.*, 244 F.3d 814, 818–19 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 377 (3rd Cir. 2000).

¹¹⁹ *See, e.g.*, *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007); *Rollins, Inc. v. Garrett*, 176 Fed. Appx. 968, 968 (11th Cir. 2006); *Muhummad v. County Bank of Rehobeth Beach*, 912 A.2d 88 (N.J. 2006); *Kristian v. Comcast Corp.*, 446 F.3d 25, 53–61 (1st Cir. 2006) (holding a class arbitration ban unconscionable and unenforceable in cases asserting antitrust violations); *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003) (deciding that a clause barring class action arbitration was unconscionable under California state law); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002), *cert. denied*, 537 U.S. 1226 (2003).

¹²⁰ *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d. 478, 480 (N.Y. App. Div. 2004) (citing *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (N.Y. App. Div. 2003) (“[W]e are in accord with authorities holding that a contractual proscription against class actions, such as contained in the Agreements, is neither unconscionable nor violative of public policy.”)); *cf.* *Flynn v. Labor Ready, Inc.*, 751 N.Y.S.2d 721, 722 (N.Y. Sup. Ct. 2002) (sending plaintiffs to arbitration despite finding that “[b]ecause plaintiffs would be precluded from acting as a class in arbitration, the costs they would each incur in arbitration would far outweigh any potential recovery.”).

¹²¹ *See, e.g.*, *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002); *Gentry v. Superior Court*, 64 Cal. Rptr. 3d 773 (Cal. Ct. App. 2007); *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007); *In re Cingular Cases*, No. D047608, 2007 WL 93229 (Cal. Ct. App. Jan. 16, 2007); *Firchow v. Citibank (South Dakota), N.A.*, No. B187081, 2007 WL 64763 (Cal. Ct. App. Jan. 10, 2007); *Mandel v. Household Bank (Nevada)*, 129 Cal. Rptr. 2d 380 (Cal. Ct. App. 2003); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002), *cert. denied*, 537 U.S. 1226 (2003); *Betts v. McKenzie Check Advance of Fla.*, Case No. CL 01-320 AI (Fla. Cir. Ct. 2008); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 820 (Ill. App. Ct. 2005); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 313–14 (Mo. Ct. App. 2005); *Muhummad v. County Bank of Rehobeth Beach*, 912 A.2d 88 (N.J. 2006); *Tillman v. Commercial Credit Fla. Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007); *Thibodeau v.*

clauses have typically reasoned that enforcing a prohibition on class arbitration would be unconscionable because it would put the arbitral forum out of reach for low-dollar claimants. For example, in *Tillman v. Commercial Credit Loans, Inc.*, two plaintiffs with limited financial resources obtained loans from the defendant company, and were unaware of the exact terms of the arbitration clause contained in the loan agreement.¹²² When the plaintiffs brought a suit alleging violations of state consumer protection law, the lender attempted to compel arbitration pursuant to the arbitration clause contained in the loan agreements. The agreements, which were drafted by defendants, imposed financial barriers to borrowers seeking to bring claims by specifying that borrowers could not arbitrate claims for less than \$15,000, that the non-prevailing party would pay for the arbitration proceeding to the extent it exceeded eight hours, and joinder of claims and class actions were prohibited. The trial court found the terms of the arbitration agreement substantively unconscionable because the cost of arbitrating was prohibitively high. The appellate court affirmed, also noting that the prohibition against class action arbitration was a deterrent to plaintiffs seeking to bring a claim against the defendant, as the cost of bringing a claim would inevitably be high, yet the costs could not be shared with other plaintiffs. Other state courts have also held prohibitions against class action arbitrations unconscionable for largely the same reasons.¹²³

Other courts which have held that no-class-action clauses are against public policy have referred to the fundamental importance of class actions in the enforcement of consumer protection laws. For example, *Fiser v. Dell Computer Corp.*, explicitly cites the cost-sharing feature of class actions as providing an opportunity for relief that would otherwise not be economically feasible for an individual plaintiff to obtain.¹²⁴ In *Fiser*, the plaintiff alleged that the defendant computer manufacturer systematically misrepresented

Comcast Corp., 912 A.2d 874 (Pa. Super. Ct. 2006); *Lytle v. Citifinancial Services, Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *W. Va. ex rel Dunlap v. Berger*, 567 S.E.2d 265, 278–79 (W. Va. 2002), *cert. denied*, 527 U.S. 1087 (2002); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 745 (Wis. Ct. App. 2007); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155 (Wis. 2006).

¹²² 655 S.E.2d at 373. *See also Kinkel*, 828 N.E.2d at 820 (holding class arbitration ban unconscionable where cost of filing and pursuing individual claims would offset significant portion of potential recovery, which was capped at \$150).

¹²³ *See, e.g., Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732 (Wis. Ct. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006).

¹²⁴ *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1219 (N.M. 2008).

the memory size of its computers, calculated to be a loss of ten to twenty dollars to each consumer.¹²⁵ The arbitration clause between the plaintiff and defendant prohibited class action arbitration. The defendant argued that the plaintiff had not met his burden of proving that the small amount of coverable damages made it economically infeasible to bring an individual claim, but the court disagreed:

On these facts, enforcing the class action ban would be tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws. It is not hyperbole or exaggeration to say that it is a fundamental principle of justice in New Mexico that corporations may not tailor the laws that our legislature has enacted in order to shield themselves from the potential claims of consumers. Because it violates public policy by depriving small claims consumers of a meaningful remedy and exculpating Defendant from potential wrongdoing, the class action ban meets the test for substantive unconscionability.¹²⁶

In contrast to those post-*Bazzle* state court decisions which have found no-class-action-arbitration clauses unconscionable, other state courts have found such clauses enforceable.¹²⁷ They typically reason that such clauses are not per se void without additional circumstances. For example, the court held in *Lomax v. Woodmen of World Life Ins. Society*,¹²⁸ that an arbitration clause in an agreement between members of a fraternal benefit society and the society itself was not substantively unconscionable and therefore the agreement was enforceable. The society's members argued that the ban on class-wide arbitration rendered the clause unconscionable, but the court disagreed, concluding that, without more, the prohibition of class-wide arbitration did not render the arbitration clause unconscionable. Other courts have upheld such clauses for the sake of efficiency:

¹²⁵ *Id.* at 1217.

¹²⁶ *Id.* at 1221.

¹²⁷ See, e.g., *Cunningham v. Citigroup, Inc.*, No. 05-3476(SRC), 2005 WL 3454312 (D. N.J. Dec. 16, 2005) (upholding clause prohibiting class actions because it was clear and unambiguous); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574 (W.D. N.C. 2000) (upholding clause because cardholder continued using card after receiving proper notice of changed terms); *Mackey v. MBNA Am. Bank, N.A.*, 343 F. Supp. 2d 966, 969 (W.D. Wash. 2004) (citing *Edelist* regarding the enforceability of an amended arbitration clause); *Gras v. Assocs. First Capital Corp.*, 346 N.J. Super. 42, 786 A.2d 886 (App. Div. 2001) (upholding clause because it was sufficiently clear and specific as to its terms). See also *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566 (E.D. La. 2002) (upholding clause because such clauses are routinely included in consumer contracts).

¹²⁸ *Lomax v. Woodmen of World Life Ins. Society*, 228 F. Supp. 2d 1360 (N.D. Ga. 2002).

Arbitration is meant to resolve private disputes in an expeditious and efficient manner, not to remedy a public wrong. The fact that the procedural device of class treatment is not available in arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition characteristics that generally make arbitration an attractive vehicle for resolution of low-value claims.¹²⁹

Some commentators have also argued against finding no-class-action clauses "unconscionable" by noting the relative speed, informality, and privacy of individual arbitration in contrast to standard court proceedings.¹³⁰ Other commentators have pointed out that class arbitration increases the drafting party's cost of doing business, which reduces savings which would otherwise be passed on to consumers and employees in the form of lower product prices and higher employee salaries.¹³¹

While some courts may rely on a general statement in favor of enforcing arbitration agreements,¹³² courts upholding no-class-action clauses have also commonly taken into consideration the circumstances surrounding the agreement. These courts find it particularly relevant whether the plaintiff received proper notice of the clause. In *Edelist v. MBNA Am. Bank*, the court held that the no-class-action clause was not unconscionable because the plaintiff credit cardholder had received notice of the arbitration amendment and did not opt out of the amendment.¹³³ In this and several other credit card cases, courts have held in favor of credit card issuers who have carefully followed the statutory guidelines for providing proper notice to cardholders about changed terms, as well as the opportunity to opt-out of the new terms.¹³⁴ Courts have also taken into account the specific terms of the arbitration agreement, including whether an arbitration agreement entitled a plaintiff to

¹²⁹ *Wing v. Cingular Wireless, LLC*, No. A105906, 2005 WL 1168363, at *7 (Cal. Ct. App. May 18, 2005) (internal quotations and citations omitted).

¹³⁰ Jack Wilson, *No-Class-Action Arbitration Clauses, State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 *QUINNIPIAC L. REV.* 737, 759 (2004).

¹³¹ Joshua S. Lipshutz, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 *STAN. L. REV.* 1677, 1710 (2005).

¹³² *See, e.g., Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 896 (Ill. App. Ct. 2003) (upholding clause stating that the "strong policy that favors enforcement of arbitration provisions" could not be ignored) (internal citations omitted).

¹³³ 790 A.2d 1249, 1258 (Del. Super. Ct. 2001).

¹³⁴ *See, e.g., Jenkins v. First Am. Cash Advance of Ga., L.L.C.*, 400 F.3d 868, 878 (11th Cir. 2005).

recover attorney's fees, thus rendering the representation of small claims plaintiffs in arbitration proceedings more attractive to lawyers.¹³⁵

Even courts in California, the jurisdiction most hostile to no-class-action arbitration clauses, have found that such clauses are not per se void as against public policy, but instead their validity depends on the specific facts of each case. In *Szetela v. Discover Bank*, the court held that although adhesive arbitration clauses are not per se unconscionable, the advantages such provisions may give to one party over another may render the clause unfair in practice.¹³⁶ In the case before it, the court noted that, because the defendant was also the drafting party, it had effectively written itself a "get out of jail free card" while seriously compromising consumers' rights.¹³⁷ The court held that this practice went against California Legislature's policy of discouraging unfair and unlawful business practices, and undermined the very mechanism by which members of the general public could seek relief for their claims.¹³⁸

In *Discover Bank v. Superior Court*, the court held that a clause waiving the right to class arbitration in a consumer contract of adhesion could, under certain circumstances, be unconscionable and should not be enforced.¹³⁹ In that case, the plaintiff alleged that the defendant bank misrepresented to cardholders that late payment fees received by a certain date would not lead to late charges, whereas the bank actually assessed fees for any payment received after 1:00 p.m. on the specified date. The plaintiff's individual damages were small, but aggregating the damages across a class of consumers would be significantly larger. The credit card agreement prohibited class-wide arbitration, making it unlikely that any individual credit cardholder would bring a claim for a small amount of damages. The Supreme Court of California took exception to this, noting that the practices of the defendant bank

¹³⁵ See, e.g., *Billups v. Bankfirst*, 294 F. Supp. 2d 1265 (M.D. Ala. 2003) (upholding clause because defendant card issuer would pay administrative fees and clause did not limit recovery of attorney fees); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333 (M.D. Ala. 2003) (upholding clause because Fair Credit Billing Act, as applied to state law, made creditor liable to a successful claimant for attorney fees and costs). See also Kathleen M. Scanlon, *Class Arbitration Waivers: The "Severability" Doctrine and Its Consequence*, 62 DISP. RESOL. J. 40 (Feb.-Apr. 2007) (noting that the court in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), found that barring class arbitration "would not necessarily choke off the supply of lawyers willing to pursue" certain claims under the federal lending laws).

¹³⁶ *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d at 868 (Cal. Ct. App. 2002).

¹³⁷ *Id.* (internal citations omitted).

¹³⁸ *Id.*

¹³⁹ *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

had rendered the no-class-action clause unconscionable. It further noted, however, that:

[w]e do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.” (Civ.Code, § 1668). Under these circumstances, such waivers are unconscionable under California law and should not be enforced.¹⁴⁰

In the case of *Kristian v. Comcast Corp.*, the First Circuit took the unusual step of severing a no-class-action clause, which it found unconscionable, from the rest of the arbitration clause, thereby forcing the defendant into a class action arbitration.¹⁴¹ The court noted that:

Typically, courts prefer declaring an arbitration agreement unenforceable rather than using severance as a remedy when fundamental elements of the arbitration regime are at issue However, here, the arbitration agreements do anticipate specifically the severance of the class arbitration bar. Therefore, [defendant] Comcast cannot claim that it did not foresee the possibility that, despite its strong preference for individual arbitration, it would have to arbitrate on a class basis because the contractual bar on class arbitration might, in its application to particular claims, run afoul of controlling law.¹⁴²

As a result of the diversity of decisions regarding the enforceability of arbitration agreements with no-class-action clauses, one should be careful to draft no-class-action arbitration clauses so that such clauses are not severable if one prefers litigating a class action in court, rather than in an arbitration, in the event that such a clause is voided.¹⁴³ A well-drafted and explicit provision to this effect should allow a defendant to successfully avoid participating in an undesired class arbitration.¹⁴⁴

¹⁴⁰ *Id.* at 1110.

¹⁴¹ *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

¹⁴² *Id.* at 62–63 (citations omitted).

¹⁴³ Scanlon, *supra* note 135, at 44.

¹⁴⁴ *Id.*

VIII. CONCLUSION

When drafting arbitration clauses which may lead to arbitrations in New York or in the United States, counsel should be aware of the developing law in the area of class arbitration outlined in this article.

