COMMENT

The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements

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INTRODUCTION

Under the Federal Arbitration Act ("FAA"), agreements to arbitrate involving interstate commerce are valid and enforceable.[1] Sometimes, however, a party may render such an agreement invalid by asserting a generally applicable contract defense.[2] The state law concept of unconscionability is one possible contract defense, and parties often use unconscionability to nullify arbitration agreements without violating federal law.[3] Common terms found in many arbitration agreements have been the focus of unconscionability arguments nationwide.[4] Such terms include the choice of law and forum, limitations on types of relief and damages, shortened statutes of limitations, and class action waivers.[5]

Federal circuit courts have split on whether an arbitration provision's class action waiver, in various contexts, renders the provision unconscionable and unenforceable.[6] Most circuits have held that class

[1] 9 U.S.C. § 2 (2006); *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (noting FAA's saving clause indicates that Congress's intended purpose of FAA was to require courts to treat arbitration agreements equally with other contracts); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981 n.4 (9th Cir. 2007).

[2] 9 U.S.C. § 2; *Shroyer*, 498 F.3d at 981 (stating that presence of unconscionability renders any contract unenforceable); *see also* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1280 (9th Cir. 2006) (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996)) (noting unconscionability defense is generally applicable to all contracts).

[3] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *Shroyer*, 498 F.3d at 978; *Nagrampa*, 469 F.3d at 1286-87.

[4] *See* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218-19 (9th Cir. 2008) (asserting unconscionability of class action waiver); Gay v. CreditInform, 511 F.3d 369, 390-91 (3d Cir. 2007) (asserting unconscionability of choice-of-law provision); *Nagrampa*, 469 F.3d at 1286-87 (asserting unconscionability of choice of forum provision); Overstreet v. Contigroup Cos., 462 F.3d 409, 412 (5th Cir. 2006) (asserting unconscionability of remedy limitations).

[5] *See* cases cited *supra* note 4.

[6] *Compare Shroyer*, 498 F.3d at 984 (holding that inclusion of class action waiver rendered arbitration agreement unenforceable as unconscionable), *Nagrampa*, 469 F.3d at 1286-87 (finding unconscionability in franchisee-franchisor context due to extreme disparity in bargaining power), Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003) (finding unconscionability where considerably stronger party drafted contract and imposed contract as nonnegotiable condition of employment), *and* Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (finding unconscionability where stronger parties avoid arbitration for their own claims while imposing arbitration on weaker parties' claims through adhesive contracts), *with* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868 (11th Cir. 2005)

action waivers do not render arbitration agreements substantively unconscionable.[7] The Ninth Circuit Court of Appeals, however, has interpreted relevant state unconscionability law and determined that class action waivers in arbitration agreements are substantively unconscionable.[8] Recently, the Supreme Court has denied certiorari to a case which would have resolved this circuit split.[9]

Many types of contracts contain arbitration clauses, including contracts involving general consumer transactions, employment, and telecommunications.[10] For example, imagine that a cellular phone customer receives a mailed notice stating that his service provider, GenTel, has merged with another telecommunications company, NewTech.[11] This merger does not impact the terms of the customer's service contract under his original agreement with GenTel, and, thus, the service contract remains unchanged.[12] The original GenTel service contract terms do not contain an arbitration provision waiving class actions and are, to the customer, preferable to the terms offered by NewTech under the merged entity.[13] Following the merger, the customer's cellular phone service with GenTel deteriorates.[14] During a call to NewTech/GenTel's customer service hotline, NewTech notifies

(holding that inclusion of class action waiver did not render arbitration agreement unconscionable and, thus, was enforceable), Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004) (holding class action waiver enforceable), *and* Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 554 (7th Cir. 2003) (finding arbitration agreement fully enforceable and, thus, holding that class action waiver contained within was also fully enforceable).

[7] *See Jenkins*, 400 F.3d at 871; *Carter*, 362 F.3d at 298; *Livingston*, 339 F.3d at 554.

[8] *Shroyer*, 498 F.3d at 978; *see also* Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078, 1084-85 (9th Cir. 2008) (noting Citibank's class action waiver would be substantively unconscionable under facts alleged, but remanding for more fact finding); *Lowden*, 512 F.3d at 1218-19; *Nagrampa*, 469 F.3d at 1286-87; *Ingle*, 328 F.3d at 1175; *Ting*, 319 F.3d at 1150; Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001).

[9] *Lowden*, 512 F.3d at 1214-15, *cert. denied*, 129 S. Ct. 45 (2008) (presenting question of whether FAA allows courts to refuse arbitration agreement enforcement in context of individual arbitration of small consumer claims because of state unconscionability law).

[10] *See Lowden*, 512 F.3d at 1214-15 (involving telecommunications transaction); *Shroyer*, 498 F.3d at 978 (same); *Jenkins*, 400 F.3d at 870 (involving consumer transaction); *Ingle*, 328 F.3d at 1175 (involving employee transaction); *Ting*, 319 F.3d at 1150 (involving telecommunications transaction).

[11] This scenario stems from the facts in *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 979 (9th Cir. 2007).

[12] *See id.*

[13] *See id.*

[14] *See id.*

the customer that his service will improve if he extends his wireless plan through NewTech.[15] The customer agrees to extend his plan, and he executes an electronic signature over the phone, assenting to NewTech's Agreement and Terms of Service.[16] The customer is unaware that he has just agreed to a form contract that includes an arbitration provision containing a class action waiver.[17]

Later, when the customer's service has not improved, he initiates a class action lawsuit to recover his monthly bill with NewTech.[18] However, the customer soon learns that the arbitration provision and class action waiver subsumed within NewTech's agreement governs his dispute.[19] This provision shifts the customer's dispute into the arbitral forum and precludes him from using a class action to vindicate his rights.[20] But given his small possible damage award, proceeding as a sole plaintiff is economically unfavorable to the customer, leaving him without recourse.[21]

Companies anticipating the possibility of expensive class action litigation frequently turn to the arbitral forum because of the forum's ability to customize dispute resolution.[22] Arbitration agreements can proscribe class actions, limit remedies and forums, and shorten statutes of limitations.[23] Sophisticated companies often use their bargaining power to impose these arbitration provisions on consumers as contracts of adhesion that prohibit the consumers from negotiating terms.[24] Consumers are often unaware that their contracts contain

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[15] *See id.*

[16] *See id.*

[17] *See id.* at 980.

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.* at 984.

[22] Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 75-76 (2004) (noting companies' increasing use of arbitration agreements containing class action waivers to immunize themselves from consumer claims); *see also* Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141-42 (1997) (urging franchisers to use arbitration to prevent class actions by franchisees).

[23] *Shroyer*, 498 F.3d at 978 (precluding class action); Davis v. O'Melveny & Myers, 485 F.3d 1066, 1080 (9th Cir. 2007) (limiting remedies); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1285-88 (9th Cir. 2006) (imposing forum selection clause); Nyulassy v. Lockheed Martin Corp., 16 Cal. Rptr. 3d 296, 307-08 (Ct. App. 2004) (shortening statute of limitations).

[24] *See* cases cited *supra* note 23. An adhesion contract is typically drafted unilaterally by one party, and is offered to a second party with no opportunity for the

these limiting provisions and, therefore, do not truly assent to the contracts' terms.[25]

This Comment argues that the Ninth Circuit's minority approach, which finds class action waivers in arbitration agreements to be unconscionable and unenforceable, should be binding authority nationwide.[26] Part I reviews the legal background of the FAA, including its scope and the accepted defenses against arbitration agreements.[27] Part II illustrates the circuit split by examining two cases representing the minority and majority views.[28] Part III argues that the Supreme Court should resolve the split in favor of the minority approach.[29] First, the contract requirement of mutuality favors the minority approach.[30] Second, the minority approach furthers the FAA's purposes, such as ensuring judicial enforcement of arbitration agreements and encouraging efficient and speedy dispute resolution.[31] Finally, the minority approach ameliorates widespread unfairness to individuals by preserving their rights to pursue a class action remedy for their small-sum claims.[32]

I. BACKGROUND

The Supreme Court has expressed a strong policy in favor of enforcing arbitration agreements.[33] Under the FAA, courts must

second party to negotiate terms. *See infra* note 25 and accompanying text.

[25] Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 515-16 (2008) (noting that form contract drafters often hide onerous terms resulting in adhering parties learning of actual contract terms only when disputes arise); *see also Shroyer*, 498 F.3d at 979 (noting that adhering party agreed to form contract via telephone); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 2 (2007); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 2 (2007).

[26] *See infra* Part III (analyzing mutuality, purposes of FAA, and effect of class action waivers on individuals' legal rights).

[27] *See infra* Part I (presenting background information).

[28] *See infra* Part II (presenting current law).

[29] *See infra* Part III (analyzing mutuality, purposes of FAA, and effect of class action waivers on individuals' legal rights).

[30] *See infra* Part III.A (arguing that Ninth Circuit's minority approach, resulting in repeated findings that class action waivers in arbitration agreements are unconscionable, is consistent with contractual requirement of mutuality).

[31] *See infra* Part III.B (arguing that minority approach furthers purposes of FAA as evidenced by legislative intent).

[32] *See infra* Part III.C (arguing that minority approach ameliorates widespread unfairness to individuals by preserving class action remedy for their small-sum claims).

[33] *See* Perry v. Thomas, 482 U.S. 483, 490 (1987); AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986) (noting that courts should

rigorously enforce arbitration agreements between private parties.[34] If doubts exist concerning an arbitration agreement's scope, the expansive federal policy supporting arbitration advises courts to settle these doubts in favor of arbitration.[35] When a contract contains an arbitration clause, a presumption of arbitrability exists.[36] Most circuit courts reinforce this arbitrability preference through their unwillingness to hold arbitration agreements unconscionable, even where those agreements contain class action waivers.[37] However, judicial support of arbitration is relatively new, as early American jurisprudence evidenced strong opposition to arbitration agreements.[38] Through the FAA, Congress has overcome this judicial opposition to arbitration agreements, granting arbitration a secure position in American life.

A. The FAA: History, Scope, and Legislative Intent

As mentioned above, early American courts were hostile to arbitration agreements, preferring to retain and resolve disputes within the court system itself.[39] As a response to this judicial hostility, Congress enacted the FAA in 1925 and codified the act in the U.S. Code in 1947.[40] Despite the enactment of the FAA, courts continued

order arbitration of dispute unless party shows that clause does not cover alleged dispute); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

[34] *Perry*, 482 U.S. at 490 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)); *see* Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 679-80 (8th Cir. 2001); Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000).

[35] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (holding that federal policy favoring arbitration must influence arbitrability questions); *see* Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 643 (7th Cir. 1981); Hart v. Orion Ins. Co., 453 F.2d 1358, 1360 (10th Cir. 1971).

[36] *AT&T Techs.*, 475 U.S. at 650 (noting that courts should order arbitration of dispute unless party shows that clause does not cover alleged dispute); *see United Steelworkers*, 363 U.S. at 583; Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979).

[37] *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 871 (11th Cir. 2005); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 297 (5th Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 554 (7th Cir. 2003).

[38] *See* cases cited *infra* notes 40-41 and accompanying text.

[39] *See* cases cited *infra* notes 40-41 and accompanying text.

[40] 9 U.S.C. § 2 (2006); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (noting that Congress enacted FAA in 1925 and then reenacted and codified FAA as Title 9 of U.S. Code in 1947); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406-07 (2d Cir. 1959) (noting that Congress had resolved to find solution to judicial anathema towards arbitration agreements long before enactment of FAA in 1925).

to find multiple ways to invalidate arbitration agreements to ensure judicial forums for disputes.[41] In response, Congress used both its commerce and maritime powers to strengthen the FAA and demonstrate a strong preference for the enforcement of arbitration agreements.[42]

Congress expressed two main purposes for enacting the FAA.[43] First, Congress sought to ensure judicial enforcement of arbitration agreements between private parties by treating arbitration agreements like other contracts.[44] Second, Congress intended to encourage efficient and speedy dispute resolution.[45]

To achieve these goals, Congress intended the FAA to have a broad scope, encompassing all arbitration agreements involving commerce.[46] Accordingly, the FAA prohibits states from enacting arbitration-specific regulations.[47] The only limits to the FAA's broad scope are generally applicable contract defenses.[48] Thus, individual parties may use arguments of fraud, duress, or unconscionability to invalidate arbitration agreements without violating the FAA.[49] Throughout its

[41] *Devonshire*, 271 F.2d at 406 (noting large variety of ways courts invalidated arbitration agreements prior to passage of FAA and dismissing any attempt to catalog these methods); *see* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 120-21 (1924) (referencing courts' use of multiple methods to invalidate arbitration agreements); *see also* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) (mentioning courts' method of invalidating arbitration agreements by ouster of jurisdiction).

[42] *Devonshire*, 271 F.2d at 407; *see* Citizens v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (interpreting FAA's scope based on Congress's commerce clause power to be far-reaching, thus including all transactions relating to items in flow of interstate commerce); *see also Kulukundis*, 126 F.2d at 985.

[43] EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002); *Gilmer*, 500 U.S. at 24; Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-21 (1985).

[44] *Gilmer*, 500 U.S. at 24; *Dean Witter*, 470 U.S. at 220; *see also* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983-84 (9th Cir. 2007); H.R. REP. NO. 68-96, at 1 (1924) (stating that purpose of FAA is to ensure that courts treat arbitration agreements equally with other contracts); S. REP. NO. 68-536, at 2 (1924).

[45] *Dean Witter*, 470 U.S. at 220-21; *see also* H.R. REP. NO. 68-96, at 1; S. REP. NO. 68-536, at 2.

[46] *Citizens*, 539 U.S. at 56; Perry v. Thomas, 482 U.S. 483, 490 (1987); *see also* Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 274-75 (1995).

[47] *Perry*, 482 U.S. at 489-90 (noting that Congress intended FAA to prevent state legislative attempts to invalidate arbitration agreements on grounds inapplicable to contracts in general); *see Allied-Bruce*, 513 U.S. at 275; Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974).

[48] *Perry*, 482 U.S. at 489-90; *see* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996); *Allied-Bruce*, 513 U.S. at 281.

[49] *Doctor's Assocs.*, 517 U.S. at 686-87; *see* Kristian v. Comcast Corp., 446 F.3d 25, 63 (1st Cir. 2006); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003).

jurisprudence, the Supreme Court has recognized and reinforced Congress's purposes under the FAA: the equal treatment of contracts and arbitration agreements, and the efficient resolution of disputes.[50]

B. Common Law Evolution of the FAA

Since the enactment of the FAA in 1925, the Supreme Court has interpreted the FAA in accordance with Congressional intent.[51] In *Perry v. Thomas*, the Supreme Court invalidated a California law that allowed employees to maintain wage collection lawsuits regardless of any arbitration agreement.[52] The Court reinforced the broad scope of the FAA, holding that courts must rigorously enforce arbitration agreements between private parties.[53] The Court noted that under the Supremacy Clause, the FAA preempts any state regulation not generally applicable to all contracts.[54] Because the California labor law only applied to arbitration agreements, the Court held that the law was invalid.[55]

The Supreme Court further reinforced the broad scope of the FAA as applied to franchise agreements in *Doctor's Associates, Inc. v. Casarotto*.[56] As in *Perry*, the *Doctor's Associates* Court held that the FAA preempted a Montana statute directly aimed at limiting the enforcement of arbitration agreements.[57] The Montana law rendered arbitration provisions unenforceable unless the contract provided notice of the arbitration provisions via underlined capital letters on the contract's first page.[58] Because the Montana law solely targeted arbitration agreements, the Court held that the law was invalid under the FAA.[59] The Court reasoned that the Montana law's arbitration notice requirement expressly violated the FAA's purpose of treating

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[50] *See Perry*, 482 U.S. at 489-90; *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89-90 (2000); *Doctor's Assocs.*, 517 U.S. at 686-87; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23-24 (1991).

[51] *See Perry*, 482 U.S. at 489-91; *see also Green Tree*, 531 U.S. at 89-90; *Doctor's Assocs.*, 517 U.S. at 683, 686-87; *Gilmer*, 500 U.S. at 23-24, 26.

[52] *Perry*, 482 U.S. at 489.

[53] *Id.* at 490.

[54] *Id.* at 491.

[55] *Id.*

[56] *Doctor's Assocs.*, 517 U.S. at 686-87.

[57] *Id.* at 683.

[58] *Id.*

[59] *Id.* (noting that FAA prevents courts from invalidating arbitration agreements through arbitration-specific laws that do not govern contracts in general).

arbitration agreements in the same manner as other contracts.[60] The Court emphasized that states and individuals may only use generally applicable contract defenses to invalidate arbitration agreements, including unconscionability, fraud, and duress.[61]

Litigants have also attempted to invalidate arbitration agreements in the context of federal statutory rights.[62] In *Gilmer v. Interstate/Johnson Lane Corp.*, a terminated employee sued his former employer under the Age Discrimination in Employment Act of 1967 ("ADEA").[63] However, the terminated employee had signed a registration application which required arbitration of disputes, and, thus, the employer moved to compel arbitration.[64] In holding for the employer, the Supreme Court stated that the law in this area was settled and, therefore, arbitration agreements could encompass statutory claims.[65] Moreover, the Supreme Court held that parties seeking to avoid arbitration must prove that Congress intended to preclude a waiver of a judicial forum for the statutory claims at issue.[66]

The Supreme Court further strengthened its arbitration doctrine regarding statutory claims in *Green Tree Financial Corp.-Alabama v. Randolph*.[67] In *Green Tree*, a mobile home buyer sued her home finance lender under the Truth in Lending Act, claiming the lender violated statutory disclosure requirements.[68] The Court concluded that claims arising under statutes designed to further important social policies are arbitrable if litigants may vindicate their rights.[69] Examples of such statutes include the ADEA, California's Fair Employment and Housing Act, and the Truth in Lending Act.[70] As in *Gilmer*, litigants

[60] *Id.* at 687; *see* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974); H.R. REP. NO. 68-96, at 1 (1924); *see also* S. REP. NO. 68-536, at 2 (1924); James T. Brittain, Jr., *Foreign Forum Selection Clauses in the Federal Courts: All in the Name of International Comity*, 23 HOUS. J. INT'L L. 305, 325 (2001).

[61] *Doctor's Assocs.*, 517 U.S. at 687.

[62] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23-24 (1991); *see* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 482-83 (1989); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

[63] *Gilmer*, 500 U.S. at 23-24.

[64] *Id.* at 23.

[65] *Id.* at 26.

[66] *Id.*

[67] Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

[68] *Id.* at 82-84.

[69] *Id.* at 90.

[70] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109-10 (2001) (holding that claims arising under California's Fair Employment and Housing Act are arbitrable); *Gilmer*, 500 U.S. at 23 (holding that claims arising under ADEA are arbitrable);

seeking to avoid arbitration must prove one of two situations.[71] First, litigants may prove that Congress intended for a judicial forum to hear the statutory claims at issue.[72] Alternatively, litigants may prove that factors associated with arbitration would prevent them from vindicating their rights.[73] Circuit courts have likened this lack of vindication to a showing of unconscionability.[74]

C. Unconscionability: Mutuality in Agreement

Under general contract law, an unconscionability analysis examines both procedural and substantive unconscionability.[75] The analysis of procedural unconscionability focuses on bargaining power inequality.[76] The analysis of substantive unconscionability, on the other hand, focuses on the lack of mutuality in agreement.[77] Both types of unconscionability must be present to some degree.[78] However, courts do not require equal proof of procedural and substantive unconscionability.[79] Instead, courts analyze these two factors using a

Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (holding that claims arising under Truth in Lending Act are arbitrable).

[71] *Green Tree*, 531 U.S. at 90.

[72] *Id.*; Sarah D. Slater, *Class Actions as Essential to the Vindication of Rights Under the Truth in Lending Act: A Call for Congressional Action*, 1 J. AM. ARB. 59, 63 (2001) (noting that litigant seeking judicial review of dispute covered by arbitration agreement must establish Congress's intent to statutorily preclude waiver of judicial remedies).

[73] *Green Tree*, 531 U.S. at 90.

[74] Faber v. Menard, Inc., 367 F.3d 1048, 1053 (8th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496, 502-03 (4th Cir. 2002); Dobbins v. Hawk's Enters., 198 F.3d 715, 717 (8th Cir. 1999).

[75] Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689-90 (Cal. 2000); *see* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 982 (9th Cir. 2007).

[76] Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001); *see* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002).

[77] *Soltani*, 258 F.3d at 1042-43; *see* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1286 (9th Cir. 2006); *Adams*, 279 F.3d at 893-94.

[78] *Ahmed*, 283 F.3d at 1199-1200 (finding that no procedural unconscionability was present and, thus, no unconscionability of agreement); *Soltani*, 258 F.3d at 1044 (finding no substantive unconscionability and, thus, no unconscionability of agreement); *see* Nyulassy v. Lockheed Martin Corp., 16 Cal. Rptr. 3d 296, 306-07 (Ct. App. 2004) (discussing need for both substantive and procedural unconscionability); *see also* Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., No. 2:08-CV-00767, 2008 WL 3876341, at *6 (E.D. Cal. Aug. 20, 2008) (stating rule that without some procedural unconscionability, no finding of unconscionability is possible); Swarbrick v. Umpqua Bank, No. 2:08-CV-00532, 2008 WL 3166016, at *2 (E.D. Cal. Aug. 5, 2008) (same).

[79] *Armendariz*, 6 P.3d at 689-90; *see* Hoffman v. Citibank (S.D.), N.A., 546 F.3d

sliding scale.[80] Therefore, substantial evidence of procedural unconscionability allows a court to render an agreement unenforceable when less evidence of substantive unconscionability exists.[81] Similarly, substantial evidence of substantive unconscionability allows a court to render an agreement unenforceable when less evidence of procedural unconscionability exists.[82]

Courts find substantive unconscionability where the terms of an agreement are overly harsh or one sided in words or in effect.[83] One sided terms frequently include a limited choice of law and forum, types of relief and damages, shortened statutes of limitations, and class action waivers.[84] For example, in consumer or employment situations, the seller or employer will not likely initiate class action proceedings against the buyer or employee.[85] Thus, a class action waiver, which facially appears to preclude class actions by both contracting parties, effectively precludes class actions by only one party.[86]

In determining the unconscionability of an agreement, circuit courts look to the relevant state's contract law precedents for guidance.[87] Thus, the Ninth Circuit's unconscionability analyses frequently interpret California contract law.[88] The California Supreme Court recently enumerated a three-part test to determine the unconscionability of class action waivers in consumer contracts.[89]

1078, 1084 (9th Cir. 2008); *Nagrampa*, 469 F.3d at 1280.

[80] *See* cases cited *supra* note 79.

[81] *Armendariz*, 6 P.3d at 689-90; *see Shroyer*, 498 F.3d at 981-82 (citing *Nagrampa*, 469 F.3d at 1280); Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003).

[82] *Armendariz*, 6 P.3d at 689-90; *see Hoffman*, 546 F.3d at 1084; *Shroyer*, 498 F.3d at 981-82 (citing *Nagrampa*, 469 F.3d at 1280).

[83] *Soltani*, 258 F.3d at 1042; *see* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003); *Armendariz*, 6 P.3d at 689-90.

[84] *See* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218-19 (9th Cir. 2008) (asserting unconscionability of class action waiver); Gay v. CreditInform, 511 F.3d 369, 390-91 (3d Cir. 2007) (asserting unconscionability of choice of law provision); *Nagrampa*, 469 F.3d at 1286-87 (asserting unconscionability of choice of forum provision); Overstreet v. Contigroup Cos., 462 F.3d 409, 412 (5th Cir. 2006) (asserting unconscionability of remedy limitations).

[85] *Ingle*, 328 F.3d at 1176; *Ting*, 319 F.3d at 1150; *see also Lowden*, 512 F.3d at 1218-19.

[86] *Ingle*, 328 F.3d at 1176; *Ting*, 319 F.3d at 1150; *see* Sternlight & Jensen, *supra* note 22, at 89-90; *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974).

[87] *Ingle*, 328 F.3d at 1170 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)); *see also* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002) (same); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 936-37 (9th Cir. 2001) (quoting Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).

[88] *See* cases cited *supra* note 87.

[89] Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

Each of the three factors must be present in order for a court to deem the class action waiver unconscionable.[90] The first factor is a finding of contractual adhesion, whereby one contracting party has no opportunity to negotiate the agreement's terms.[91] The second factor requires that the parties' dispute involves predictably small damage amounts.[92] The third factor requires the consumer to allege that the business has executed a fraudulent scheme to cheat numerous consumers out of small sums.[93] When class action waivers are at issue, courts applying California law utilize this three-factor test in addition to traditional unconscionability analysis.[94] Currently, the federal circuit courts interpret this lack of mutuality differently, because no congressional or nationally binding common law precedent exists.[95]

II. CURRENT LAW

The Supreme Court has not yet provided guidance to the lower courts regarding the class action waiver's impact on the enforceability of arbitration agreements.[96] This lack of governing law has allowed courts to take divergent approaches in resolving this enforceability issue.[97] Some courts have held that class action waivers in arbitration agreements are one sided and, thus, are substantively unconscionable and unenforceable.[98] Conversely, other courts have held that class

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 982-83 (9th Cir. 2007) (citing *Discover Bank*, 113 P.3d at 1110); Jaimee Conley, *Suing for Small Potatoes: Consumer Class Action Waivers in Arbitration Agreements Distinguished by the Ninth Circuit*, 2008 J. DISP. RESOL. 309, 316-17; *see also* Cohen v. DirecTV, Inc., 48 Cal. Rptr. 3d 813, 819-21 (Ct. App. 2006); Klussman v. Cross Country Bank, 36 Cal. Rptr. 3d 728, 739 (Ct. App. 2005).

[95] *See* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1214-15 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 45 (2008); *Shroyer*, 498 F.3d at 978; Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 870 (11th Cir. 2005); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 554 (7th Cir. 2003); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003).

[96] *See Lowden*, 512 F.3d at 1214-15; *infra* Part II.A-B (presenting current law).

[97] *See Lowden*, 512 F.3d at 1214-15; *Jenkins*, 400 F.3d at 870; *Carter*, 362 F.3d at 294; *Livingston*, 339 F.3d at 554; *Ingle*, 328 F.3d at 1175; *Ting*, 319 F.3d at 1150.

[98] *Shroyer*, 498 F.3d at 978; s*ee* Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078, 1084-85 (9th Cir. 2008) (noting Citibank's class action waiver would be substantively unconscionable under facts alleged, but remanding for more fact finding); *Lowden*, 512 F.3d at 1218-19; *Ingle*, 328 F.3d at 1175; *Ting*, 319 F.3d at 1150.

action waivers in arbitration agreements are not unconscionable and are therefore enforceable.[99]

A. The Minority: Class Action Waivers in Arbitration Agreements Are Unconscionable and Unenforceable

The Ninth Circuit's opinion in *Shroyer v. New Cingular Wireless Services, Inc.* represents the minority view on this split.[100] In *Shroyer*, the Ninth Circuit held that the presence of a class action waiver in an arbitration agreement was unconscionable and unenforceable.[101] Kennith Shroyer had been an AT&T cellular phone service customer prior to a merger between AT&T and Cingular.[102] After the merger, in which AT&T customers became Cingular customers, Shroyer experienced reductions in service quality and contacted Cingular's customer service.[103] Over the telephone, Shroyer agreed to a form contract with Cingular to obtain promised improvements in service quality.[104] Cingular's form agreement contained a provision prohibiting class actions and requiring the arbitration of all disputes and claims.[105] When Shroyer's service did not improve, he filed a class action suit in California Superior Court alleging multiple causes of action.[106] Cingular removed the action to federal court in California and then moved to compel arbitration of the dispute under the FAA.[107] The district court granted Cingular's motion and compelled arbitration between the parties.[108]

In reversing the district court's ruling, the Ninth Circuit concluded that the class action waiver was unenforceable and lacked mutuality under California's three-part unconscionability test.[109] Under the first

[99] *Jenkins*, 400 F.3d at 870-71; *see Carter*, 362 F.3d at 298; *Livingston*, 339 F.3d at 554; Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002).

[100] *See Shroyer*, 498 F.3d at 978; Sternlight & Jensen, *supra* note 22, at 76.

[101] *Shroyer*, 498 F.3d at 978.

[102] *Id.* at 979.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 979-80.

[106] *Id.* at 979 (alleging multiple causes of action including unfair competition, untrue and misleading advertising, violations of Consumers Legal Remedies Act, and breach of contract).

[107] *Id.* at 980.

[108] *Id.* at 978.

[109] *Id.* at 982 (citing Discover Bank v. Superior Court, 110 P.3d 1100, 1110 (Cal. 2005)); *see also* Cohen v. DirecTV, Inc., 48 Cal. Rptr. 3d 813, 819-21 (Ct. App. 2006); Klussman v. Cross Country Bank, 36 Cal. Rptr. 3d 728, 739 (Ct. App. 2005).

factor, the court found that the contract was adhesive and that the drafter, Cingular, was a large corporation with superior bargaining power.[110] Cingular did not allow Shroyer to negotiate the terms of the agreement or to sign an agreement that did not contain a class action waiver.[111] Cingular forced Shroyer to agree to Cingular's terms or end his relationship with Cingular and accept termination fees and replacement service costs.[112]

Under the second factor, the court found that Cingular's agreement with Shroyer occurred in a low-damage setting, which effectively precluded individual litigation against Cingular.[113] Shroyer suffered damages from reduced service quality, termination costs, and replacement service costs.[114] These damages totaled less than a thousand dollars, far below typical attorney's fees for similar cases, making an individual action by Shroyer a losing proposition.[115] Even if Shroyer won his individual action, he would recover much less than the cost of the suit.[116]

Under the third and final factor, the court found that Shroyer properly alleged that Cingular asserted a fraudulent scheme.[117] Cingular's scheme allegedly aimed to cheat numerous consumers out of small individual sums through the imposition of a class action waiver.[118] Cingular misrepresented to AT&T consumers that contract extensions with their company were the only way to ensure their cellular service would improve.[119] These Cingular contract extensions contained arbitration provisions including the class action waiver.[120] As such, each consumer who extended his or her service through these contracts gave up this right to a class action.[121]

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[110] *Shroyer*, 498 F.3d at 983-84.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 984; *see* Discover Bank v. Superior Court, 113 P.3d 1100, 1108-09 (Cal. 2005); *Cohen*, 48 Cal. Rptr. at 820.

[114] *Shroyer*, 498 F.3d at 984.

[115] *Id.*; *see, e.g.*, Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218-19 (9th Cir. 2008) (noting that under policy favoring aggregation of small-sum claims, class action waivers effectively preclude consumer recovery of small-sum claims and are thus unconscionable).

[116] *Shroyer*, 498 F.3d at 984.

[117] *Id.*; *see Discover Bank*, 113 P.3d at 1110; *Cohen*, 48 Cal. Rptr. 3d at 820.

[118] *Shroyer*, 498 F.3d at 984.

[119] *Id.*

[120] *Id.*

[121] *Id.*

The court ultimately held that all elements of unconscionability were present.[122] Accordingly, the arbitration provision and class action waiver were unconscionable and unenforceable.[123] Thus, the Ninth Circuit's minority approach interpreted the unconscionability doctrine under California law and concluded that Cingular's class action waiver invalidated the arbitration agreement.[124]

B. The Majority: Class Action Waivers in Arbitration Agreements Are Not Unconscionable

The Eleventh Circuit Court of Appeals opinion in *Jenkins v. First American Cash Advance of Georgia, LLC*, represents the majority view on this split.[125] In *Jenkins*, the Eleventh Circuit held that the presence of a class action waiver did not render an arbitration agreement unconscionable or unenforceable.[126] Charlene Jenkins, a payday loan borrower, entered into several lending transactions with First American Cash Advance of Georgia in 2002.[127] Each form lending agreement contained the same arbitration provision that required the arbitration of most disputes and proscribed class actions.[128] Jenkins filed a class action lawsuit against First American in the Superior Court of Richmond County, Georgia, alleging violation of Georgia's usury statutes.[129] First American removed the case to federal court in Georgia, and then moved to compel arbitration of the dispute under the FAA.[130] The district court denied this motion, holding that the

[122] *Id.*

[123] *Id.*

[124] *Id.*; *see also* Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078, 1084-85 (9th Cir. 2008) (noting that Citibank's class action waiver would be substantively unconscionable under facts alleged, but remanding for more fact finding); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218-19 (9th Cir. 2008); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1286-87 (9th Cir. 2006); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002)

[125] *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 870 (11th Cir. 2005); Sternlight & Jensen, *supra* note 22, at 76.

[126] *Jenkins*, 400 F.3d at 870.

[127] *Id.* at 871.

[128] *Id.* at 871-72 (requiring arbitration of all disputes except those suitable to small claims court, which may be adjudicated in that forum, but must be appealed via arbitration).

[129] *Id.* at 872-73.

[130] *Id.* at 873.

arbitration agreements were unenforceable because they were unconscionable adhesion contracts that precluded class actions.[131]

On appeal, the Eleventh Circuit reversed the district court's finding of unconscionability and held that class action waivers in arbitration agreements were valid and enforceable.[132] The court dismissed the district court's findings that class action waivers precluded relief in low-damage cases and hindered Jenkins's ability to obtain a lawyer.[133] Further, the court rejected the district court's statement that the class action waiver would practically immunize First American from liability.[134]

The *Jenkins* court based its position on prior Eleventh Circuit precedent as well as similar holdings from the Third, Fourth, and Seventh Circuits.[135] The court noted that consumers are able to recover attorney's fees and expenses if, as in this case, the fees are allowed by statute.[136] Therefore, the *Jenkins* court dismissed the lower court's finding that Jenkins would be unable to find a lawyer for her claim, as attorney's fees for her dispute were statutorily allowed.[137] In theory, Jenkins's ability to recover attorney's fees preserved her financial ability to maintain an individual, non–class action claim against First American.[138] Thus, the court held that the arbitration agreements' class action waivers did not immunize First American from liability and were neither unconscionable nor unenforceable.[139] The majority position, therefore, maintains that where class action waivers do not result in an egregious imbalance between parties, the waivers are fully enforceable.[140]

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[131] *Id.* at 876.

[132] *Id.* at 877-78.

[133] *Id.* at 878.

[134] *Id.*

[135] *Id.*; *see* Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (stating that presence of only small-sum claims does not meet requirements of unconscionability); Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2002); Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 819 (11th Cir. 2001).

[136] *Jenkins*, 400 F.3d at 878.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See id.*; Conley, *supra* note 94, at 309 (noting that courts enforcing class action waivers base their decisions on finding that contractual inequality is not egregious enough to fall within unconscionability doctrine); *see also* Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 297 (5th Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 554 (7th Cir. 2003).

III. ANALYSIS

The minority approach to analyzing class action waivers in arbitration agreements, as evidenced by the Ninth Circuit in *Shroyer*, is correct for three reasons.[141] First, the minority approach is consistent with the general contractual requirement of mutuality.[142] Second, the minority approach furthers the purposes of the FAA, as evidenced by the FAA's legislative intent.[143] Finally, the minority approach recognizes and ameliorates the widespread unfairness shown to individuals by the frequent enforcement of unilateral contracts.[144] Therefore, courts should follow the minority interpretation and hold that class action waivers in arbitration agreements are unconscionable and unenforceable.[145]

A. The Contractual Requirement of Mutuality Supports the Minority Approach

Fundamentally, the minority approach is proper because this approach correctly applies the standard contractual requirement of mutuality.[146] Mutuality in agreement requires that the terms of the contract treat parties equally and are not one sided.[147] The most egregious example of nonmutuality usually arises where sellers retain the right to litigate all claims but relegate consumers' claims to arbitration.[148] Similarly, where class action waivers act to preclude

[141] *See infra* Part III.A-C (analyzing contractual mutuality, purpose and scope of FAA, and enforcement impact on consumers and employees).

[142] *See infra* Part III.A (arguing that general contract requirement of mutuality insists on unenforceability of unilateral contracts).

[143] *See infra* Part III.B (arguing that minority approach furthers FAA's purposes).

[144] *See infra* Part III.C (arguing that enforcement of unilateral contracts imposes widespread unfairness on consumers and employees).

[145] *See infra* Part III.A-C (arguing that contractual mutuality, FAA's purposes, and widespread unfairness require adoption of minority approach).

[146] Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981-84 (9th Cir. 2007); *see also* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000); THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION xx-xxi (2d ed. 2007) (noting tendency of minority of courts, particularly California courts, to frequently void arbitration agreements as unconscionable and lacking mutuality when contracts are adhesive in nature).

[147] *See* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1286 (9th Cir. 2006); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893-94 (9th Cir. 2002); Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001).

[148] *See* Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002) (noting that one-sided agreement required borrowers to arbitrate all claims under contract unless parties agreed otherwise); *Armendariz*, 6 P.3d at 692 (noting

consumer recovery, the sellers' disproportionately high protection from liability also lacks mutuality.[149] Lack of contractual mutuality runs rampant in situations of unequal bargaining power, such as consumer contracts and employee agreements.[150] Unequal bargaining power between contracting parties exacerbates the absence of mutuality because stronger parties can force weaker parties to adhere to the stronger parties' terms.[151]

The minority approach recognizes this inherent contractual deficiency in consumer and employment contracts and correctly applies unconscionability principles to protect parties' legal rights.[152] Notably, the minority approach focuses on the adhesive nature of consumer and employment contracts, as well as the superior bargaining power of the drafter.[153] Substantive unconscionability relies on the absence of contractual mutuality, which requires an agreement to treat parties equally on its face and in effect.[154] Adhesive contracts in situations involving bargaining power disparities lack contractual

that unconscionability doctrine limits ability of stronger party to avoid arbitration of its claims while requiring arbitration of weaker party's claims); *see also* Aaron C. Gundzik & Rebecca Gilbert Gundzik, *Will California Become the Forum of Choice for Attacking Class Action Waivers?*, 25 FRANCHISE L.J. 56, 60 (2005) (noting that substantive unconscionability is found where only weaker parties' claims under contract fall under arbitration).

[149] *See* Slater, *supra* note 72, at 72 (arguing that prohibitive arbitration fees combined with low damage amounts effectively limit claimants' ability to vindicate their rights); *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (recognizing that damages of $70 requires party to vindicate rights through class action or choose not to proceed with suit); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218 (9th Cir. 2008); *Shroyer*, 498 F.3d. at 984.

[150] *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003); Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003); *Armendariz*, 6 P.3d at 692.

[151] *See Ingle*, 328 F.3d at 1171-72 (finding unconscionability where considerably stronger party drafted contract and imposed contract as nonnegotiable condition of employment); *Ting*, 319 F.3d at 1149 (citing *Armendariz*, 6 P.3d at 692) (stating that unconscionability doctrine precludes stronger parties from avoiding arbitration for their own claims while imposing arbitration on weaker parties' claims through adhesive contracts); *see also Nagrampa*, 469 F.3d at 1282-83 (finding unconscionability in franchisee-franchisor context due to extreme disparity in bargaining power).

[152] *See Ingle*, 328 F.3d at 1171-79; *Ting*, 319 F.3d at 1148-52; *see also Lowden*, 512 F.3d at 1218-19; *Shroyer*, 498 F.3d at 981-87.

[153] *Shroyer*, 498 F.3d at 983-84; *see Ingle*, 328 F.3d at 1171-72; *Ting*, 319 F.3d at 1149 (citing *Armendariz*, 6 P.3d at 692).

[154] *See Nagrampa*, 469 F.3d at 1285; *Ingle*, 328 F.3d at 1172; Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1043 (9th Cir. 2001).

mutuality, and the minority approach properly recognizes these contracts as unconscionable.[155]

Courts that enforce these class action waivers reason that the standard rules of offer and assent apply to all contracts, including arbitration agreements.[156] As such, where a party contractually consented to clear and unambiguous terms, those terms are binding regardless of their ultimate effects.[157] Proponents of this view rely on the Supreme Court's proarbitration jurisprudence.[158] For example, in *Shroyer*, Cingular asserted that no claim of oppression or procedural unconscionability could exist where the consumer has meaningful choices.[159] Under this "marketplace alternatives" argument, the presence of alternative sources for cellular phone services preserved Shroyer's freedom to choose and, thus, no unconscionability was present.[160] In theory, Shroyer could have freely assented to an offer from one of many cellular phone service companies.[161] Accordingly,

[155] *Shroyer*, 498 F.3d at 983-84; *see also Nagrampa*, 469 F.3d at 1282-83; *Ingle*, 328 F.3d at 1171-72; *Ting*, 319 F.3d at 1149 (citing *Armendariz*, 6 P.3d at 692).

[156] *See* Peter Wilder, *Resisting Equal Footing: Did the Wisconsin Supreme Court Disguise an Assault on Arbitration?*, 2007 J. DISP. RESOL. 297, 311 (stating that parties' freedom to contract should prevail over court's interest in preventing unfair agreements and protecting consumers); *see, e.g.*, Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 818 (11th Cir. 2001) (noting that Congress did not intend FAA to prevent contracting parties from agreeing to remove class actions from available options for relief); Billups v. Bankfirst, 294 F. Supp. 2d 1265, 1269-70 (M.D. Ala. 2003) (noting that plaintiff's assent to arbitration agreement was valid and therefore agreement was enforceable); Craig R. Trachtenberg, *Case Note:* Smith v. School of Rock, 28 FRANCHISE L.J. 91, 95 (2008) (noting that parties' thorough negotiations evidenced their freedom to contract and lauding court's enforcement of arbitration provision).

[157] *See* Wilder, *supra* note 156, at 311; *see also* Cunningham v. Citigroup, Inc., No. 05-3476(SRC), 2005 WL 3454312, at *7 (D.N.J. Dec. 16, 2005) (enforcing arbitration agreement with class action waiver where arbitration clause was found to be unambiguous and clear); Edelist v. MBNA Am. Bank, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001) (enforcing arbitration agreement with class action waiver where forfeiture of class action right was clear).

[158] Adkins v. Labor Ready, Inc., 303 F.3d 496, 506-07 (4th Cir. 2002) (affirming district court's order compelling arbitration as supporting expansive policy in favor of arbitration agreements); *Green Tree*, 244 F.3d at 818 (noting Supreme Court's liberal policy in favor of arbitration agreements); Am. Italian Pasta Co. v. Austin Co., 914 F.2d 1103, 1104 (8th Cir. 1990) (construing ambiguous arbitration term in contract to require arbitration under expansive policy in favor of arbitration agreements).

[159] *Shroyer*, 498 F.3d at 985.

[160] *Id. But see Nagrampa*, 469 F.3d at 1283 (holding that possible availability of alternative franchise opportunities is not dispositive against finding of procedural unconscionability); *Ingle*, 328 F.3d at 1172 (holding that availability of alternative choices has no impact on finding of procedural unconscionability).

[161] *See Shroyer*, 498 F.3d at 985; *see also* Wayne v. Staples, Inc., 37 Cal. Rptr. 3d

Cingular argued that Shroyer's assent to the contract was valid and enforceable.[162] Therefore, proenforcement courts often view marketplace alternatives as eliminating any unconscionability problems resulting from adhesion contracts, including bargaining power discrepancies between the parties.[163]

The unequal distribution of bargaining power in situations such as consumer-seller or employee-employer renders assent illusory, thus showing that the marketplace alternatives argument is incorrect.[164] The minority approach recognizes that assent in adhesive contract situations is illusory where bargaining power discrepancies and bars to the negotiation of terms exist.[165] Assent is illusory because the weaker, nondrafting parties may not be aware of contractual changes and may not comprehend the difference between arbitration and litigation.[166] Therefore, consumers' lack of both awareness and negotiating power negates their ability to choose between alternatives within the marketplace.[167] The minority approach recognizes the inherent lack of contractual mutuality present in the above situations and correctly finds the resulting agreements unconscionable.[168] This recognition is

544, 556 (Ct. App. 2006); Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc., 107 Cal. Rptr. 2d 645, 656 (Ct. App. 2001) (noting that evidence of meaningful choice weighs against unconscionability).

[162] *See Shroyer*, 498 F.3d at 985; *see also Wayne*, 37 Cal. Rptr. 3d at 556. *But see* Villa Milano Homeowners Ass'n v. Il Davorge, 102 Cal. Rptr. 2d 1, 5 (Ct. App. 2000) (noting that contract may be unconscionable even if weaker party could reject contract and choose another provider).

[163] Riensche v. Cingular Wireless, LLC, No. C06-1325Z, 2006 WL 3827477, at *6 (W.D. Wash. Dec. 27, 2006) (finding that presence of meaningful alternative consumer agreements without arbitration provisions weighs against finding of unconscionability); *see also Wayne*, 37 Cal. Rptr. 3d at 556; *Marin Storage*, 107 Cal. Rptr. 2d at 656.

[164] *See Shroyer*, 498 F.3d at 985; *Nagrampa*, 469 F.3d at 1283; Slater, *supra* note 72, at 62 (noting that true assent is fallacy when uneducated buyers adhere to form contracts in consumer relationships).

[165] *See Shroyer*, 498 F.3d at 985; Slater, *supra* note 72, at 62; *see also* Bellsouth Mobility, LLC v. Christopher, 819 So. 2d 171, 173 (Fla. Dist. Ct. App. 2002) (remanding for evidentiary hearing to determine whether Christopher understood terms of agreement and had opportunity to negotiate).

[166] *See* Slater, *supra* note 72, at 62; *see also Shroyer*, 498 F.3d at 985; *Bellsouth*, 819 So. 2d at 173 (noting that procedural unconscionability is found through bargaining power discrepancy and inability of weaker party to understand terms).

[167] *See Shroyer*, 498 F.3d at 985; *Bellsouth*, 819 So. 2d at 173; Slater, *supra* note 72, at 62.

[168] *Shroyer*, 498 F.3d at 985; *see also Nagrampa*, 469 F.3d at 1285 (finding unconscionability where lack of mutuality in agreement was present); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003) (same); Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001) (finding no substantive unconscionability where terms of agreement were not one sided).

necessary to maintain the integrity of general contractual requirements and to preserve the basic tenets of offer and assent.[169] Without this recognition, stronger parties may diminish these general contractual requirements by using adhesive and illusory agreements to impose unilateral terms on weaker parties.[170] Thus, the minority approach to determining the unconscionability of class action waivers in arbitration agreements is essential and proper because it follows contractual mutuality principles.[171]

B. The Minority Approach Properly Furthers the Purposes of the FAA

The minority approach properly furthers the purposes of the FAA, as evidenced by the FAA's legislative intent.[172] Congress noted two primary purposes behind the FAA's enactment.[173] First, Congress wanted to secure equivalent judicial enforcement of contracts and arbitration agreements between private parties by treating both types of agreements identically.[174] Second, Congress wanted to encourage efficient and speedy dispute resolution.[175]

The minority approach properly recognizes that the preclusion of a party from relief, due to the presence of a class action waiver, destroys contractual mutuality.[176] As discussed above, if contractual mutuality

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[169] *See* Slater, *supra* note 72, at 62; *see also Shroyer*, 498 F.3d at 985; *Nagrampa*, 469 F.3d at 1285.

[170] *See* Slater, *supra* note 72, at 62; *see also Shroyer*, 498 F.3d at 985; *Ingle*, 328 F.3d at 1172.

[171] *See Shroyer*, 498 F.3d at 985; *see also Nagrampa*, 469 F.3d at 1285 (finding unconscionability where lack of mutuality in agreement was present); *Ingle*, 328 F.3d at 1172 (same); *Soltani*, 258 F.3d at 1042 (finding no substantive unconscionability where terms of agreement were not one sided).

[172] *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-21 (1985); *see also* H.R. REP. NO. 68-96, at 1 (1924); S. REP. NO. 68-536, at 2 (1924).

[173] *Waffle House*, 534 U.S. at 289; *Gilmer*, 500 U.S. at 24; *Dean Witter*, 470 U.S. at 219-21.

[174] *Gilmer*, 500 U.S. at 24; *Dean Witter*, 470 U.S. at 219; *see also* H.R. REP. NO. 68-96, at 1 (noting that FAA's purpose is to ensure equal treatment of contracts and arbitration agreements); S. REP. NO. 68-536, at 2; Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Act*, 12 VA. L. REV. 265, 283-84 (1926) (noting that FAA reverses tradition of judicial hostility toward arbitration agreement by giving courts freedom to enforce arbitration over adjudication).

[175] *Dean Witter*, 470 U.S. at 220-21; *see also* H.R. REP. NO. 68-96, at 1; S. REP. NO. 68-536, at 2.

[176] *See Shroyer*, 498 F.3d at 983-84; *see also Nagrampa*, 469 F.3d at 1285 (finding unconscionability where lack of mutuality in agreement was present); *Ingle*, 328 F.3d at 1172-73 (same); *Soltani*, 258 F.3d at 1042 (finding no substantive

no longer exists, then the agreement no longer meets general contract law requirements and is unconscionable and unenforceable.[177] The FAA expressly allows courts to reject arbitration agreements if grounds for revoking a contract exist.[178] One such proper ground for refusing enforcement of a contract is unconscionability.[179] Enforcement of an unconscionable arbitration agreement would frustrate the FAA's purpose of treating arbitration agreements like other contracts.[180] Congress, through the plain text of the FAA, expressly requires courts to treat arbitration provisions in the same way as other contracts.[181] As such, Congress does not impose or allow special treatment for arbitration agreements, such as immunizing arbitration agreements from judicial scrutiny.[182] The minority approach furthers the FAA's purpose of equal judicial enforcement of arbitration agreements by properly applying general contractual mutuality requirements to arbitration agreements.[183] In contrast, the majority approach overlooks contractual unilateralism by enforcing

unconscionability where terms of agreement were not one sided).

[177] 9 U.S.C. § 2 (2006) (stating that arbitration agreements are enforceable and irrevocable except in presence of generally applicable contract defenses); *see Shroyer*, 498 F.3d at 981 (stating that unconscionability is generally applicable contract defense whose presence renders any contract unenforceable); *see also Nagrampa*, 469 F.3d at 1280 (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996)) (noting that unconscionability is generally applicable contract defense).

[178] 9 U.S.C. § 2; *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (noting Congress's intended purpose of FAA equal treatment of contracts and arbitration agreements); *Shroyer*, 498 F.3d at 989; *Nagrampa*, 469 F.3d at 1280.

[179] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483-84 (1989) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)); Southland Corp. v. Keating, 465 U.S. 1, 16 n.11 (1984).

[180] *Shroyer*, 498 F.3d at 990; *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); *Dean Witter*, 470 U.S. at 219; H.R. REP. NO. 68-96, at 1 (stating that purpose of FAA is to ensure courts treat arbitration agreements equally with other contracts); S. REP. NO. 68-536, at 2.

[181] *See* 9 U.S.C. § 2; Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); *Prima Paint*, 388 U.S. at 404 n.12; *Shroyer*, 498 F.3d at 990.

[182] *See Volt Info.*, 489 U.S. at 478; *Prima Paint*, 388 U.S. at 404 n.12; *Shroyer*, 498 F.3d at 990.

[183] *See Shroyer*, 498 F.3d at 990; s*ee also* Discover Bank v. Superior Court, 113 P.3d 1100, 1112 (Cal. 2005) (noting that California state principle holding that class action waivers are sometimes unconscionable applies to all contracts generally, not just arbitration agreements); Scott v. Cingular Wireless, 161 P.3d 1000, 1008 (Wash. 2007) (noting that Congress, through FAA, requires courts to treat arbitration agreements equally with other contracts and does not confer special treatment).

class action waivers in nonmutual arbitration agreements and, thus, gives arbitration agreements unsupported special treatment.[184]

In addition, the minority approach furthers the second purpose of the FAA — the encouragement of efficient and speedy dispute resolution.[185] When disputes arise in a setting involving small-sum damages, a class action is more efficient than the prosecution of many individual claims.[186] Accordingly, the minority approach properly finds that class action waivers in arbitration agreements often result in inefficient dispute resolution and, thus, frustrate the FAA.[187] Therefore, the minority approach furthers the FAA's goals by implementing the generally applicable contract defense of unconscionability and encouraging efficient dispute resolution through class actions.[188]

However, proponents of the majority view assert that minority-approach decisions requiring companies to consent to class actions will frustrate the purposes of the FAA.[189] Instead of fostering the FAA's purpose of efficient dispute resolution, a requirement to consent to class actions or even class arbitrations may force companies to avoid arbitration altogether.[190] Majority proponents argue that arbitral class

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[184] Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 880 (11th Cir. 2005) (holding that arbitration agreement did not lack mutuality but overlooking effect of class action waiver on consumer's ability to seek relief); *see e.g.*, Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (holding class action waiver enforceable because statute allowed consumer's recovery of attorney's fees and thus consumer's concern regarding her ability to retain counsel was immaterial); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. App. 2003) (rejecting consumer's statements that class action waiver precludes consumers from relief due to small possible damage amounts).

[185] *Shroyer*, 498 F.3d at 990-91; *see Dean Witter*, 470 U.S. at 220-21; *see also* H.R. REP. NO. 68-96, at 1; S. REP. NO. 68-536, at 2.

[186] *Shroyer*, 498 F.3d at 990-91; *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (recognizing that minimal damages are insufficient to sustain individual litigation, and, thus, class action vehicle is necessary to assert small-sum claim); Sternlight & Jensen, *supra* note 22, at 85-86.

[187] *Shroyer*, 498 F.3d at 990-91; *see* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218-19 (9th Cir. 2008); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003).

[188] *See* 9 U.S.C. § 2 (2006); *Shroyer*, 498 F.3d at 983-84, 989-91; *Jenkins*, 400 F.3d at 880; *see also Scott*, 161 P.3d at 1008.

[189] *See Snowden*, 290 F.3d at 638-39; Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (holding that claims arising under Truth in Lending Act are arbitrable even with presence of class action waiver); *see also Jenkins*, 400 F.3d at 877-78.

[190] *See Shroyer*, 498 F.3d at 989; Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 754; Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (But Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer*

actions are as complex and expensive as judicial class actions, which would obstruct Congress's aim of efficiency.[191] Additionally, arbitral class actions, unlike judicial class actions, do not provide parties an opportunity to appeal unfavorable decisions due to judicial deference to arbitration awards.[192] The complexity of arbitral class actions and the lack of reviewability, therefore, remove the companies' speed, simplicity, and cost-control incentives for engaging in arbitration.[193] Thus, more companies will choose to avoid arbitration altogether, which will shift dispute resolution back to the court system.[194] Courts following the majority view note that Congress intended for the FAA to ease court congestion, and companies' choosing to avoid arbitration greatly frustrates that goal.[195] Accordingly, commentators supporting the majority view argue that finding class action waivers in arbitration agreements unconscionable frustrates Congress's intent in enacting the FAA.[196]

This argument supporting the majority view fails for two reasons.[197] First, class arbitration fosters Congress's goals of innovation and

Arbitration Agreements, 58 BUS. LAW. 1289, 1298 (2003).

[191] *See* sources cited *supra* note 190.

[192] *Shroyer*, 498 F.3d at 989; *see also* 9 U.S.C. § 10 (2006) (listing sole grounds for federal court vacation of arbitration awards); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407-08 (1967) (Black, J., dissenting); Klumpe v. IBP, Inc., 309 F.3d 279, 285 (5th Cir. 2002).

[193] *Shroyer*, 498 F.3d at 989; *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); Schoenduve Corp. v. Lucent Techs., Inc., 442 F.3d 727, 731 (9th Cir. 2006); Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003) (en banc); 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, 1712-13 (2005) (arguing that class arbitration is hybrid of arbitration and litigation and, thus, class arbitration loses efficiency benefits of individual arbitration).

[194] *See* sources cited *supra* note 190.

[195] *See* Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967) (viewing FAA's policy as honoring freedom to contract as well as easing court congestion); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), *cert. denied*, 364 U.S. 801 (endorsing frequent common law view of FAA as supporting intentions of contracting parties and easing court congestion); *see also* Mellon Bank, N. A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244, 1249 (8th Cir. 1981) (citing *Galt*, 376 F.2d at 714).

[196] *Shroyer*, 498 F.3d at 989; *cf.* Drahozal, *supra* note 190, at 754 (noting that class actions are problematic and may not reach efficiency benefits because of frequent conflicts between plaintiffs and attorneys); Kaplinsky & Levin, *supra* note 190, at 1298 (noting that arbitral class actions have burdens of litigation that negate benefits of arbitration).

[197] *See Shroyer*, 498 F.3d at 991-93; *see also* W. Mark C. Weidermaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 96 (2007); Jordan Robertson, *AT&T*

efficiency through the arbitral benefit of the freedom to choose informal and flexible procedures and remedies.[198] This creative freedom in dispute resolution fosters Congress's goal of efficiency by allowing parties to customize class action procedures while preserving consumers' rights.[199] Second, the FAA's policy of judicial deference promotes Congress's goal of efficient dispute resolution, as this policy eliminates the possibility of lengthy appeals.[200] Companies are realizing Congress's efficiency goal through the class arbitration context, as almost 200 class arbitrations were ongoing at the time of the *Shroyer* decision.[201] Thus, the majority's fear of mass corporate arbitral abandonment based on judicial deference to arbitral awards in a class context is unfounded.[202] Additionally, the judicial deferential standard of review for arbitral awards does not change regardless of whether the arbitration concerned a class or an individual plaintiff.[203] Even with the imposition of a deferential standard, many large corporations still routinely choose arbitration for individual claims

Cell Phone Service Suit to Proceed, USA TODAY, Aug. 17, 2007, http://www.usatoday.com/money/economy/2007-08-17-3830219027_x.htm (citing AT&T's statement claiming changes to its arbitration provisions make them more consumer friendly).

[198] *Shroyer*, 498 F.3d at 991; Weidermaier, *supra* note 197, at 96. *But see* Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 2 (1999) (arguing that arbitration is too informal to properly resolve complicated class action claims).

[199] *Shroyer*, 498 F.3d. at 991 n.9; *see also* Weidermaier, *supra* note 197, at 96. *But see* Lipshutz, *supra* note 193, at 1712-13.

[200] *See* 9 U.S.C. § 10 (2006) (listing sole grounds for federal court vacation of arbitration awards, including award procurement by fraud and arbitrator corruption, misconduct, or misbehavior); Klumpe v. IBP, Inc., 309 F.3d 279, 285 (5th Cir. 2002); Team Scandia, Inc. v. Greco, 6 F. Supp. 2d 795, 798 (S.D. Ind. 1998).

[201] *Shroyer*, 498 F.3d at 993 (citing American Arbitration Association, Searchable Class Arbitration Docket, http://www.adr.org/sp.asp?id=25562 (last visited Sept. 16, 2009)); *see also* S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 27-28 (2008); American Arbitration Association, Searchable Class Arbitration Docket, http://www.adr.org/sp.asp?id=25562 (last visited Sept. 16, 2009).

[202] *See Shroyer*, 498 F.3d at 993; *see also* 9 U.S.C. § 10; Hall Street Assocs., LLC v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008); Henry R. Chalmers et al., *High Court Rejects Arbitration Agreements That Expand Judicial Review*, 34 LITIG. NEWS 1, 6-7 (2008). *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407-08 (1967) (Black, J., dissenting) (noting that choice of arbitration does not come with right to appeal); *Klumpe*, 309 F.3d at 285 (noting that submission of claims to arbitration presumes parties relinquished right to appeal merits of claim).

[203] *Shroyer*, 498 F.3d at 993 n.11. *See generally Prima Paint*, 388 U.S. 395 at 407-08 (Black, J., dissenting) (noting lack of right to appeal arbitral awards); *Klumpe*, 309 F.3d at 285 (noting that courts presume parties relinquished their right to appeal merits of dispute where parties submitted their claims to arbitration).

when huge sums are at stake.[204] Therefore, companies' fears regarding consolidation of many small consumer claims into one large claim are simply illogical given their willingness to arbitrate large individual claims.[205] Overall, the minority's approach furthers Congress's intent in enacting the FAA by fostering judicial enforcement of arbitration agreements and promoting efficient and speedy dispute resolution.[206]

C. The Minority Approach Ameliorates Widespread Unfairness to Individuals

The minority approach recognizes that the frequent enforcement of unilateral arbitration agreements causes widespread unfairness to individuals.[207] The minority approach ameliorates this unfairness by finding class action waivers in arbitration agreements unconscionable.[208] In contrast, the majority approach would result in the effective abolition of a class action remedy for many small-sum plaintiffs, leaving these plaintiffs without remedy.[209] Additionally, the poor economic state of the country may increasingly limit an individual's choice in employment and consumer decisions, allowing for corporate exploitation of individuals.[210] Finally, legislative and

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[204] *Shroyer*, 498 F.3d at 993 n.11; *see also* Sandra Partridge, *Negotiating Commercial Leases: How Owners and Corporate Occupants Can Avoid Costly Errors*, *in* REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK 373, 382 (PLI Order No. 14145, 2008); Online search for "million 'arbitration award,' " www.google.com (Sept. 1, 2009) (resulting in numerous listings of arbitration awards from one million dollars to hundreds of millions of dollars).

[205] *See Shroyer*, 498 F.3d at 993 n.11; *see also* Partridge, *supra* note 204, at 382; Online Search, *supra* note 204.

[206] *See Shroyer*, 498 F.3d at 990-93; *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974); H.R. REP. NO. 68-96, at 1 (1924); S. REP. NO. 68-536, at 2 (1924); Sternlight & Jensen, *supra* note 22, at 85-86.

[207] *See Shroyer*, 498 F.3d at 983-84 (noting consumers' lack of bargaining power, small-sum claims, and Cingular's fraudulent scheme); *see also* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218-19 (9th Cir. 2008); Kristian v. Comcast Corp., 446 F.3d 25, 59 (1st Cir. 2006); Sternlight & Jensen, *supra* note 22, at 85-86.

[208] *See supra* note 207.

[209] *See Shroyer*, 498 F.3d at 986 (noting that potential for small individual gain in consumer recovery will effectively eliminate claims against large companies); *see also* Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (holding that courts should not enforce class action waivers in arbitration agreements if waivers act to absolve corporations from liability for small-sum claims); Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L.J. 103, 104 (2008) (noting class action waivers leave consumers with small-sum claims without remedy).

[210] *See, e.g.*, *Fed Pushes Aggressive Credit Card Protections*, SEATTLE TIMES, May 3,

common law trends support the minority approach in protecting consumers and employees from a preventable loss of rights.[211]

The nationwide adoption of the minority view would constitute a reasonable step toward the protection of individual rights.[212] The majority of circuit courts have enforced arbitration provisions containing class action waivers, leaving many plaintiffs without legal remedy for their injuries.[213] Consumers with small claims may be unable to obtain legal representation due to the low possible recovery for both counsel and client.[214] Similarly, the small possible recovery may preclude consumers from seeking relief altogether as these consumers will likely lose money due to costs and attorney's fees.[215] In contrast, the minority approach recognizes the inherent unfairness in applying class action waivers in consumer agreements and appropriately applies the unconscionability doctrine to alleviate this problem.[216] The unconscionability doctrine acknowledges that class

2008, at A1 (noting that abuses against consumers have increased due to poor economy); Jennifer C. Kerr & Natasha T. Metzler, *Experts Fear Economy May Spur Purchase of Unsafe Toys*, USA TODAY, Nov. 12, 2008, http://www.usatoday.com/news/washington/2008-11-12-2413533195_x.htm (noting that consumers seeking bargain toys for holiday gifts may limit purchases to second-hand resellers who may be unaware of toys' safety concerns); Christopher S. Rugaber, *Jobless Claims Jump Unexpectedly to 16-Year High*, S.F. CHRON., Nov. 20, 2008, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/11/20/financial/f053256S02.DTL (reporting 16-year-high jobless claim figure and predicting trend to worsen in coming months); Robert J. Samuelson, *A Darker Future for Us*, NEWSWEEK, Nov. 10, 2008, at 26, 27-28 (noting recent events including takeovers of Freddie Mac and Fannie Mae and surge in unemployment have rattled consumers, causing car and retail sales to decrease).

[211] *See Dale*, 498 F.3d at 1218-19; *Kristian*, 446 F.3d at 59; Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. §§ 1-5 (2007); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. §§ 1-5 (2007).

[212] *See* Conley, *supra* note 94, at 317 (arguing that Ninth Circuit's minority approach in *Shroyer*, which follows *Discover Bank*'s three-factor test, allows consumers to vindicate their rights); Sternlight & Jensen, *supra* note 22, at 89-90 (noting that class action notification requirements protect consumers by alerting them of their rights); *see also Shroyer*, 498 F.3d at 986; Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003).

[213] *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 871 (11th Cir. 2005); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004) (holding class action waiver enforceable); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 554-55 (7th Cir. 2003) (finding arbitration agreement fully enforceable and, thus, holding class action waiver contained within must also be enforced).

[214] *See* Conley, *supra* note 94, at 317; *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974); *Kristian*, 446 F.3d at 59.

[215] *See* Conley, *supra* note 94, at 317; Sternlight & Jensen, *supra* note 22, at 89-90; *see also Eisen*, 417 U.S. at 161; *Kristian*, 446 F.3d at 59.

[216] *See* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218 (9th Cir. 2008) (citing Scott v. Cingular Wireless, 161 P.3d 1000, 1005 (Wash. 2007)) (noting class action

action waivers in the consumer context are effectively unilateral and pro-company, and correctly voids these terms or agreements.[217] Class actions must remain a viable remedy in consumer and employment disputes to prevent companies and employers from escaping liability.[218] Without a class action remedy, companies may avoid liability by effectively dissuading consumers from litigating, arbitrating, or even initiating their small-sum claims.[219]

The current economic downturn has further limited consumer and employment choices for Americans, increasing the bargaining power disparity between individuals and corporations.[220] This limitation, in turn, may allow large corporations to exploit individuals by providing these individuals with little or no available recourse for their injuries.[221] Congress intended the FAA to apply to disputes between commercial entities of generally similar sophistication and bargaining power.[222] Individual consumers will rarely, if ever, possess the same level of sophistication or bargaining power as a commercial entity.[223] This situation places the individual consumer at a distinct

remedy is necessary for vindication of society's rights if numerous small-sum consumer claims exist); *Shroyer*, 498 F.3d at 983-84; *Ting*, 319 F.3d at 1150.

[217] *See* cases cited *supra* note 216.

[218] *See* Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007); Slater, *supra* note 72, at 59-60 (noting large companies use arbitration agreements with class action waivers to immunize themselves from liability and negative publicity arising from large class action lawsuits); *cf.* Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775, 775 (2005) (noting frequency of arbitral class action waiver use in consumer agreements).

[219] *See* Conley, *supra* note 94, at 317; Sternlight & Jensen, *supra* note 22, at 89-90; *see also Kristian*, 446 F.3d at 59; *cf. Eisen*, 417 U.S. at 161 (noting that economic realities of small-sum claims require class action vehicle for effective dispute resolution).

[220] *See e.g.*, Rugaber, *supra* note 210 (noting worsening unemployment trend); Samuelson, *supra* note 210, at 27-28 (citing high unemployment as factor causing increasing consumer fear and reduced consumer purchases); *Fed Pushes Aggressive Credit Card Protections*, *supra* note 210 (citing poor economy as factor in increasing consumer abuse by credit card companies).

[221] *See Dale*, 498 F.3d at 1224; *Kristian*, 446 F.3d at 61; Slater, *supra* note 72, at 59-60.

[222] Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 2 (2007); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 2 (2007); *cf.* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008) (noting that early arbitrations were between equally sophisticated parties); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 340-41 (noting that agreements to arbitrate by parties of equal sophistication should be enforced).

[223] *See* H.R. 3010 § 2; S. 1782 § 2; *see also* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983-84 (9th Cir. 2007); Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir. 2003).

disadvantage when contracting for goods or services.[224] These consumers have little or no choice regarding the acceptance of arbitration provisions due to their lack of alternatives and absence of bargaining power.[225] These arbitration provisions are widespread, and many consumers are frequently unaware of the provisions' impact on their rights.[226] The minority approach's recognition of the inherent unfairness present in situations of bargaining power inequality is necessary to protect consumers from commercial exploitation.[227] The minority approach prevents commercial exploitation by invalidating unconscionable arbitration agreements.[228] Thus, the prevention of commercial exploitation requires the extension of the minority approach nationwide, through both congressional and common law change.[229] Further, legislative trends support the minority approach in protecting consumers and employees from a preventable loss of rights.[230] Legislative amendments to the FAA are currently pending.[231] These amendments would remove consumer and employment contracts from the FAA's jurisdiction.[232] While the outcome of these

[224] *See* H.R. 3010 § 2; S. 1782 § 2; *see also Shroyer*, 498 F.3d at 984; Slater, *supra* note 72, at 62 (discussing how Uniform Commercial Code recognizes different standards for merchants and nonmerchants and arguing that federal arbitration law should incorporate this principle).

[225] H.R. 3010 § 2; S. 1782 § 2; *see Shroyer*, 498 F.3d at 983-84; *Ting*, 319 F.3d at 1149.

[226] H.R. 3010 § 2; S. 1782 § 2; *see Shroyer*, 498 F.3d at 976-80; *Ting*, 319 F.3d at 1149; *see also* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36; Warkentine, *supra* note 25, at 515-16.

[227] *See Shroyer*, 498 F.3d at 983-84 (noting consumers' lack of bargaining power); *see also* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218-19 (9th Cir. 2008); Sternlight & Jensen, *supra* note 22, at 85-86.

[228] *See Shroyer*, 498 F.3d at 983-84 (invalidating arbitration agreement as unconscionable and noting Cingular's substantial bargaining power as compared to adhering consumer); *see also Lowden*, 512 F.3d at 1218-19; Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003).

[229] *See* H.R. 3010 §§ 1-5; S. 1782 §§ 1-5; *see also* Bruhl, *supra* note 222, at 1487-88 (discussing new prominence of congressional proposals to amend FAA through Arbitration Fairness Act of 2007, which would effectively remove consumer and employment agreements from FAA); Pamela A. MacLean, *Class Action Waivers Hit a Wall: Courts Find Waivers "Unconscionable," Refuse to Compel Arbitration*, NAT'L L.J., Aug. 27, 2007, at 5 (noting definite trend in courts striking down class action waivers).

[230] *See* H.R. 3010 (noting unfairness of provisions added by sophisticated companies to adhesive consumer and employment arbitration agreements); S. 1782 (same); Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1, 3 (2007).

[231] *See* H.R. 3010 §§ 1-5; S. 1782 §§ 1-5; Sternlight, *supra* note 230, at 3.

[232] *See* H.R. 3010 § 2 (noting minority of courts protect individuals while majority of courts uphold unfair arbitration agreements in deference to supposed Federal

amendments is uncertain, the proposed change would accomplish the goal of the minority approach — preserving individual rights.[233]

Though courts nationwide still favor the majority approach, an increasing number of courts have begun to adopt the minority approach.[234] Courts applying the minority approach find class action waivers unconscionable where individual claims are too small to support an individual action.[235] Further, like the minority approach, these courts recognize that class actions are necessary to preserve individual rights.[236] The nationwide adoption of the minority approach, through either legislation or common law change, is critical to the vindication of these rights.[237]

CONCLUSION

The presence of class action waivers in arbitration agreements renders these agreements unconscionable and unenforceable.[238] The minority approach's finding that class action waivers in arbitration agreements are unconscionable is consistent with the contractual requirement of mutuality.[239] Additionally, the minority approach to class action waivers in arbitration agreements furthers the purposes of

policy favoring arbitration over constitutional rights); S. 1782 § 2 (same); *see also* Bruhl, *supra* note 222, at 1487; Sternlight, *supra* note 230, at 3.

[233] *See Lowden*, 512 F.3d at 1218 (citing Scott v. Cingular Wireless, 161 P.3d 1000, 1005 (Wash. 2007)) (noting frequency of small-sum consumer claims requires availability of class action remedy to preserve society's rights); *see also* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 982-83 (9th Cir. 2007); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1176 (9th Cir. 2003).

[234] *See* Dale v. Comcast Corp., 498 F.3d 1216, 1218-19 (11th Cir. 2007); Kristian v. Comcast Corp., 446 F.3d 25, 59 (1st Cir. 2006); *see also* Conley, *supra* note 94, at 313; MacLean, *supra* note 229, at 5 (noting that 12 states and First Circuit in *Kristian* have found mandatory arbitration agreements, in consumer contexts, that preclude class actions to be unconscionable and unenforceable).

[235] *See Dale*, 498 F.3d at 1224; *Kristian*, 446 F.3d at 59; Leonard v. Terminix Int'l Co., L.P., 854 So. 2d 529, 538-39 (Ala. 2002).

[236] *See* cases cited *supra* note 235.

[237] *See* H.R. 3010 §§ 1-5; S. 1782 §§ 1-5; Conley, *supra* note 94, at 317, 319; *see also* Schwartz, *supra* note 226, at 132 (advocating reverse of majority trend of enforcing adhesive and procedurally unconscionable arbitration agreements).

[238] *Shroyer*, 498 F.3d at 978; *see also* Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078, 1084-85 (9th Cir. 2008); *Lowden*, 512 F.3d at 1218-19; Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1286-87 (9th Cir. 2006); *Ingle*, 328 F.3d at 1175; Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002); Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001).

[239] *See supra* Part III.A (arguing that general contract requirement of mutuality insists on unenforceability of unilateral contracts).

the FAA, as evidenced by the FAA's legislative intent.[240] Finally, the minority approach recognizes and ameliorates the widespread unfairness shown to individuals by the frequent enforcement of unilateral contracts.[241] Unless Congress amends the FAA to exclude consumer and employment agreements or the Supreme Court adopts the minority approach, individuals' rights will remain at risk.[242]

[240] *See supra* Part III.B (arguing that minority approach's interpretation of unconscionability law furthers FAA's purposes).

[241] *See supra* Part III.C (arguing that minority approach ensures that plaintiffs retain important legal remedy).

[242] *See supra* Part III.C.