Arbitration or Class Actions: Can the Courts Provide Access to Justice?

*By Edward C. Anderson**

The use of arbitration to resolve civil disputes is sweeping American commerce. Where once arbitration was restricted to highly technical disputes within narrow groups of professionals, today, a growing range of disputes are resolved by the arbitration process, rather than the long slog through the morass of a lawsuit. Federal and state courts have offered broad support to this availability of a route to resolve claims. In hundreds of cases since 1984, they have rejected every attack on arbitration.

This growth in arbitration is primarily a result of pre-dispute arbitration agreements – contracts to arbitrate, rather than litigate, future disputes. The proliferation of these arbitration clauses has been described by attorneys on both sides of these issues as the most important development in dispute resolution in the last decade.[1] Reflection on dispute resolution leads to the conclusion that it could not be otherwise. Once a dispute occurs, the parties are unlikely to agree on a dispute resolution system, other than that to which they are already committed. It is inevitable that one party or the other and, likely, both lawyers[2] will fear some disadvantage in an alternative system. In fact, research confirms this common sense evaluation; there are almost no "post-dispute" agreements for arbitration among litigants who have not agreed beforehand to arbitrate their dispute.[3]

These changes have resulted in both the growing refinement of the arbitration process and increasing judicial approval of arbitration.[4] But, in actual fact, the expansion of arbitration is the outgrowth of the increasing unavailability of the lawsuit process to most Americans. The cost, complexity and risk associated with the lawsuit process have put our most common form of dispute resolution beyond the reach of all but the richest Americans. According to Judge Higganbotham of the Fifth Circuit Court of Appeals, "Our civil process before and during trial…is a masterpiece of complexity that dazzles in its details – in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the fact finder and the choreography of the trial. But few litigants or courts can afford it…"[5]

The lack of access to justice in United States is striking. The American Bar Association ("ABA"), the largest association of legal professionals, has estimated that the lawsuit process is beyond the means of at least 100 million Americans.[6] *The ABA Journal*, the monthly magazine of the ABA, has concluded that members cannot undertake representation in a litigation matter worth less than $20,000.[7] This is an amount to which few disputes rise and is, in fact, likely a low estimate, when one considers the expense and complexity of modern American litigation and the increasing inability of any professional or observer to predict the outcome in the process. In fact, commentators have calculated, based on surveys of practitioners, that the minimum value of a plaintiff's employment case must be $60,000, before an attorney can justify representation.[8] This results in 19 out of 20 aggrieved employees being locked out of the court system, because they cannot obtain counsel.[9]

The "real world" lawsuit system serves as an effective bar to justice for all but the richest Americans.

The 1960s Response - Federal Rules of Civil Procedure - Rule 23

Although this lack of justice for most Americans has become more pronounced as litigation has become more complex, time consuming, expensive and risky, these hurdles have existed for many years. In 1966, the drafters of the "new" Federal Rules of Civil Procedure made one attempt to relieve courts of these burdens and, thereby, enable more Americans to use the courts. The creation of the "opt out" class action in FRCP 23 was intended to provide access to justice for Americans with relatively minor claims and to relieve the courts from having to serially address thousands of similar claims.[10] State courts acted rapidly to adopt similar rules.[11]

Before the 1966 amendments, Rule 23 did not directly address the issue of whether all potential class members were excluded unless they affirmatively "opted in" or whether all potential class members were included unless they affirmatively "opted out."[12]

Despite this silence, courts quite logically concluded that individuals could not be forced into a lawsuit to which they had not consented. Until the changes in 1966, it was well established that the default standard was exclusion. One court observed, "Prior to the 1966 amendment to the Rule, an individual could wait to see the outcome of the litigation before deciding whether or not to become a party."[13]

This changed when the new Rule 23 permitted "opt-out" classes, which bound every potential claimant to the judgment, unless they affirmatively "opted" out. The Supreme Court noted that, because the change would bind all class members save those who opt out, "[Rule 23 § (b)(3)] was the most adventuresome innovation of the 1966 Amendments."[14]

Rule 23 was reflective of a 1960's faith that the courts could resolve all issues, but there were also plausible practical justifications for the change. The principal problem with the earlier "opt-in" requirement was that large numbers of people might not even realize they had a claim. It is difficult to communicate effectively with large num-

bers of potential class members. An affirmative "opt-in" requirement was an impediment to class formation and could leave claimants without a remedy.

There were also potential problems for defendants in the "opt in" system. "Opt-in" classes could lead to serial litigation as claimants manipulated the system, waiting to see what would happen in a given case before they committed. An "opt-out" regime was expected to alleviate these concerns. It also allowed classes to be created more quickly and was expected to facilitate the prompt adjudication of claims.[15]

Notwithstanding the fact that the opt-out mechanism would consolidate the claims of largely silent class members, the drafters expected that the actual claimants would remain the real parties in interest. As the Ninth Circuit Court of Appeals described the anticipated result,

> "there is nothing in the Advisory Committee's Note that suggests that the amendments had as their purpose the authorization of massive class actions conducted by attorneys engaged by near-nominal plaintiffs."[16]

There were, however, two logical flaws in the "opt-out" scheme that were not recognized in 1966:

> Claimants must still "opt-in" at some point, if they ever are ever to be compensated. If the class claim is successful, the matter will be resolved by a settlement or verdict that creates a fund for class members. To take advantage of that fund, individual class members must identify themselves and demonstrate affirmatively that they are entitled to a share.

> Moreover, claimants who merely remain passive are bound by the actions of their supposed "representative," despite the fact that experience and common sense teach us that almost no one reads or can decipher the notices that precede the decision to stay in or opt out. Thousands of claimants with valid causes of action are bound by the settlement decisions of their "representative," with whom they have never had the slightest real contact.

Since individual class members are still required to "opt-in," Rule 23 only postpones, but does not eliminate notice to class members, who are still likely to remain uninformed and indifferent. The actual opt-in rates for class action settlements are educational. In *Strong v. BellSouth Telecommunications, Inc.*,[17] the negotiated settlement provided class members with a service plan or a credit. Although the settlement was asserted to provide $64 million in compensation, the credit requests submitted by class members amounted to less than $2 million.

The practical result is that lawyers, rather than the claimants, are the real parties in interest in a Rule 23 action. As Bill Lerach, one of America's most successful and famous class action lawyers observed, "I have the best practice in the world; I have no clients."[18]

When claimants were required to "opt-in" before class certification, class action attorneys had *bona fide* clients to whom they had to be attentive and responsive. Because the absent class members are not identified until the remedy phase, modern Rule 23 attorneys effectively act on their own. If the response rate is minimal at the remedy phase, the lawyers remain the real parties in interest throughout the case.

Rule 23, therefore, permits lawyers to speak for immense classes of individual claimants who have not selected them - - who may in fact, be entirely unaware that they are parties to a lawsuit or might even be opposed to making the claim. In theory, individual notice to class members is required if it can be done with reasonable effort, so that absent claimants will have the opportunity to opt-out.[19] In practice, this requirement is not strictly applied and, even if it were, experience shows that most people do not pay attention and have little incentive to opt-out. The Rule 23 lawyer speaks on behalf of an army of possible claimants and automatically acquires substantial bargaining power.

Judge Posner, of the Seventh Circuit Court of Appeals, described the resultant settlements by quoting Judge Henry Friendly:

> Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment, in a class action, "blackmail settlements".[20]

In the final analysis, Rule 23 does not afford access to justice. For both sides, class actions actually reflect the lack of access to justice described by Judge Higganbotham, writ large.[21] No actual claimant, without massive resources, can bring a class action. The individual class members become, of necessity, mere procedural necessities for the Rule 23 attorneys who can afford to fund the litigation. The defendants, likewise, are deprived of their day in court by the costs of litigation and magnitude of the exposure, regardless of the merits of the defense.

Rule 23 lawyers, who have borne the burden of the litigation and, as a result, have achieved the power bestowed by representing the class, must redeem their investment. It is irrational to expect that, having spent their own resources on the litigation, they will always be able to sublimate their own interests in favor the interests of "clients" they have never met. There are always conflicts issues in multiparty litigation; the "opt-out" class institutionalizes the conflict between Rule 23 lawyers and class members.[22]

Because, under Rule 23, the "opt-in" is delayed until the fund is achieved and because, in the real world, response rates are very low, class action litigation is effectively converted from the purpose of compensation of victims to the goal of punishing alleged wrongdoers. In class action practice, victims receive a very small proportion of their claims.[23]

There is nothing perverse about the goal of punishment, in theory. Punishment is a powerful weapon that serves important public purposes – retribution and deterring future misconduct. The problem is that this terrible weapon has been placed in the hands of lawyers who act, in effect, as private bounty hunters. They may be primarily concerned with public interest; they likely are not. As noted above, they (not the "clients") have borne the heavy burden of the litigation. They answer to no public authority in bringing or settling these "private" actions. Once the class is certified, they get paid whether they net a guilty or innocent party, because the defendant must acquiesce.[24]

As a result, these class actions may deter the wrong conduct or the wrong parties or not deter at all. In actions against business entities, class action expenses and settlements merely add to the costs to be paid by future customers. This can result in a transfer of wealth from one group of consumers to another; more often, in current practice, it is the transfer of wealth from future customers to present lawyers.

The overwhelming majority of class actions are settled before trial.[25] When response rates and actual payouts are low, however, there is the potential for a substantial pool of unclaimed funds. This surplus can, in effect, be split between plaintiffs' lawyers, who are essentially free agents, and the defendants. Recurring features of Rule 23 settlements indicate compromises that subordinate the interests of the absent claimants.

> Two common examples are:
> (1) so-called "coupon" settlements, where class members receive discounts on future purchases from the defendants, rather than cash; and,
> (2) settlements where class counsel and other non-parties get an inordinately large share of the recovery.

Even a cursory review of current class action practice suggests that non-cash compensation to class members is only representative of a larger problem. Defendants can easily agree on coupons which generate additional sales or are unlikely to be redeemed. The net cost is minimal or negative. Such a settlement minimizes the deterrent effect. Of course, no real plaintiff with a real claim would accept a coupon, for even the same value, as an alternative to cash. In reality, the value of these coupons or discounts represent a tiny fraction of the value of claims made in the litigation, if the claims are meritorious.[26]

Nonetheless, Rule 23 attorneys, who have made massive expenditures to support the litigation and must commit even more to continue the case, are naturally tempted to make such a settlement, provided that the coupons, discounts or changes in procedures appear valuable enough to justify substantial attorneys' fees, which are infrequently paid in the same script.

Two, of many, reported examples illustrate the negative impact of such settlements on the absent class members. In the *Kamilewicz v. Bank of Boston*, the bank was accused of over-collecting escrow money from mortgage borrowers and profiting from the excess float. The settlement paid up to $8.76 to each absent class member, and $8.5 million in fees to attorneys. The absent members were bound by the settlement judgment. The settlement provided that the fees were to be paid by deductions from class members' accounts, resulting in net losses for class members.[27]

In another national settlement, the defendant was accused of extracting excessive late-payment fees from customers. Under the settlement, the Rule 23 lawyers got $5.5 million in fees. Customers got a new late-payment policy and a choice of various free services, but they also got larger monthly bills. One class member analyzed the result: "Please don't sue anyone else on my behalf. I can't afford any more of these brilliant legal victories."[28]

Where the true parties in interest are the Rule 23 lawyers and the defendant, these settlements reflect the optimal result of the litigation for those parties. The defendant minimizes the outlay to resolve the matter. The Rule 23 attorneys reduce the investment risk by settling and can induce the defendant to put a greater portion of their reduced loss toward attorneys' fees. The court removes a docket burden that limits the judge's ability to serve other litigants.

But, as *USA Today* editorialized: "Token settlements and high fees benefit everyone involved in class action suits except damaged parties."[29]

The Alternative: Arbitration

For most litigants, even those with a small claim, arbitration presents an attractive alternative to a potential lawsuit. It is simpler, less expensive, more easily scheduled, and more likely to generate a rational result.[30] Courts, too, have been receptive to the growth of arbitration as an alternative to the lawsuit. Courts have overwhelmingly supported pre-dispute agreements to arbitrate future claims.[31] Moreover, many courts now mandate arbitration of claims that have been brought as lawsuits, in an attempt to avoid the most burdensome aspects of the civil justice process.[32]

Growing research demonstrates that all parties save significant time and money in the arbitration process.[33] Equally importantly, individuals do as well or better in arbitration as they do in equivalent lawsuits.[34] These pragmatic results have led to growing public acceptance of arbitration as the preferred method for resolving disputes.[35]

Opposition to Arbitration

While the courts, the public and transaction lawyers have become increasingly enthusiastic about arbitration, litigation practitioners have been understandably reluctant to embrace a system that reduces litigation expenditures.[36] This has led to legal attacks on arbitration on grounds of the enforceability of the Federal Arbitration Act ("FAA"),[37] cost of arbitration,[38] mutuality of arbitration contracts,[39] pre-emption of the FAA by other federal statutes,[40] and other alleged infirmities of the arbitration process.[41]

The federal and state courts have rejected each of these attacks,[42] while, at the same time, providing substantial guidelines for the basic fairness of an acceptable arbitration process.[43]

Arbitration and Class Actions

Current attacks are based on the relationship of the FAA and FRCP 23 and its state progeny.[44] These attacks on arbitration clauses take two forms:

> The assertion that, under the authority of the court, Rule 23 must be overlaid onto arbitration procedure to provide for "class" arbitration;[45] or, alternatively,
>
> The claim that, if the arbitration clause prohibits class actions or the arbitration rules do not provide for the procedural equivalent of "class" treatment, the arbitration clause is "unconscionable" under state contract law.[46]

"Class" Arbitration

Plaintiffs have frequently sought "class" certification in arbitration. Federal courts which have addressed the issue squarely have held that where the arbitration rules did not specifically provide for arbitration on a class basis, under Section 4 of the FAA, "class" arbitration is not permitted.[47] Most state courts have taken the same position. For instance, the Supreme Court of Alabama rejected the "class" assertions of parties who had agreed to arbitration.[48]

> "Arbitration agreements cannot be forced into the mold of class action treatment without defeating the parties' contractual rights; a rule of civil procedure providing for class actions cannot overcome binding arbitration agreements." [49]

Similarly, an Illinois appellate court concluded that individual arbitrations under fair set of arbitration rules further the exact purposes for which Rule 23 was adopted.[50]

The overwhelming majority of judicial decisions have held that such a limitation in an arbitration rule structure is enforceable.[51] Every federal court that has addressed the issue has concluded that the waiver of the class action process (a court rule of procedure) is inherent in an agreement to arbitrate.[52]

However, some California courts and, recently, the Supreme Court of South Carolina, have held that, where the arbitration agreement or rules are silent on the subject, a class arbitration can be ordered by the court.[53] At least one California court ordered a "class" arbitration, relying on the silence of the rules of the American Arbitration Association on the subject.[54]

The United States Supreme Court was recently offered the opportunity to clearly resolve this first line of attack.[55] In *Bazzle,* the Court addressed two related cases in which the arbitration clause was arguably silent on the issue of "class" treatment in arbitration. In one, the trial court had ordered "class" arbitration; in the other, the arbitrator had followed suit and ordered "class" arbitration. The defendant asserted that FAA §4 required enforcement of the contract as written and that the contract language did not allow "class" arbitration.[56] The plaintiff asserted (and the South Carolina Supreme Court agreed)[57] that the contract language was ambiguous on the subject and, absent an agreement of the parties to prohibit "class" arbitration, the courts of South Carolina could create a "class" arbitration, as a matter of local law.[58]

The Supreme Court, in a plurality opinion, punted. The Court agreed that the contract language was ambiguous, but held that the interpretation of the ambiguous language was for the arbitrator.[59] The decision reversed the judgment of the South Carolina Supreme Court and returned the matter to the *arbitrator* for contract interpretation, to determine whether the contract language prohibited "class" arbitration.[60]

Notably, the four justice plurality seemed to accept that, if the arbitrator ultimately concluded that the contract prohibited "class" arbitration, that prohibition would be enforced under FAA §4.[61] Additionally, a three justice minority concluded that the language was not, in fact, ambiguous, did prohibit "class" arbitration, and should have been enforced under Section 4.[62] At oral argument, Justice Stevens made the point that, given the very nature of the litigation, there would not likely be another arbitration clause ambiguous on this subject matter.[63] The opinions in *Bazzle* suggest that, when faced with an unambiguous prohibition on "class" arbitration, the United States Supreme Court will not allow the creation of a "class" in arbitration.

Arbitration Prevents Class Actions

The other attack on arbitration agreements through Rule 23 is more direct, although no more widely accepted. Alabama and California state courts and the Ninth Circuit Court of Appeals (interpreting and applying California state law) have concluded that a prohibition of a "class" in arbitration, if enforced "as written", is "unconscionable" as a matter of state law.[64] These decisions have been based either, somewhat incongruously, on the supposed cost of bringing an individual claim in arbitration[65] or an apparent conclusion that some litigants have a substantive right to bring class actions, of which they are deprived by an arbitration process that adjudicates claims individually.[66]

Although it is clear that courts can refuse enforcement arbitration clauses because of the costs associated with arbitration,[67] that action requires a specific determination that the costs are prohibitive.[68] Only the *Leonard* court, in a 4-3 decision, has leapt from the class action prohibition present in an arbitration clause to a conclusion that only through a Rule 23 action could the plaintiff's claim be economically pursued.[69]

The best available research shows that arbitration is less costly than litigation.[70] If the cost of arbitration led directly to the creation of a Rule 23 action, so, too, should the cost of an individual lawsuit. Of course, under Rule 23, the actual procedural prerequisites to "class" certification (as opposed to the underlying justification for the Rule) have little to do with the alternative cost of the individual lawsuit.[71]

Moreover, most national arbitration rules provide for shifting of costs from individual claimants to the business that propound the arbitration agreement.[72] This is an effective judicial requirement for arbitration, as a growing number of courts have held that businesses must defray the cost of arbitration for individuals, so that actual cost to the individual cannot exceed the cost of the court process.[73]

In this direct attack on arbitration procedures that do not provide for a "class" in arbitration, lower California courts have held that a prohibition on "class" treatment, contained in an arbitration clause, was "unconscionable, as a matter of state law."[74] However, other California courts have reached the opposite conclusion.[75]

The Ninth Circuit Court of Appeals adopted the *Szetela* position on California law and concluded that an arbitration agreement that clearly prohibited "class" treatment of claims was "substantively unconscionable" and would not be enforced.[76] The *Ting* clause did contain some additional infirmities that made it more offensive to that court.[77] While it is theoretically possible that the California law on "unconscionability" could be different than other states, in the context of the FAA, these decisions appear to violate Section 4 of the FAA and are inconsistent with those of the Third, Fourth, Seventh, Eigth, and Eleventh Circuits.[78] The resolution of this conflict remains for the Supreme Court.

The Result

The Supreme Court has effectively applied the FAA to all arbitrations.[79] The Court has directly held that the FAA preempts federal statutes that appear to favor class actions or create a right to class actions.[80] The Supreme Court and other federal appeals courts have held that any such procedural rights are waived by a party who agrees to arbitration.[81] In a different context, a separate panel of the Ninth Circuit Court of Appeals has agreed with the other Circuits on this issue.[82]

Additionally, a decision that a contract is "unconscionable" with regard to the named plaintiff would apparently be pyhrric. Courts have consistently held that even if the named plaintiff was not bound by an arbitration agreement, where absent "class" members had agreed to arbitrate, individual arbitrations for those claimants would be ordered.[83]

Courts, including the U.S. Supreme Court, have also held that "class type" remedies provided for in statutes for protection for specific classes of plaintiffs do not prevent the referral of claims under such a statute to arbitration.[84] The California appellate courts sent a California §17200 (injunctive relief on behalf of the state) claim to arbitration.[85]

The current status of the law is that the FAA covers all but the most unusual arbitration agreements.[86] Section 4 of the FAA provides that arbitration agreements shall be enforced as written.[87] Under the FAA, the authority to consolidate claims is limited by the agreement of the parties and the incorporated rules of arbitration.[88]

Beyond the conflict with of the majority of federal appellate courts, the *Ting* decision seems to ignore the contractual rights, not only of the defendant, but of the absent class members. Justice Thomas, dissenting in *EEOC v. Waffle House*, made the point that the failure to enforce the arbitration agreement exposed the defendant to "two bites at the apple" by a plaintiff who was not restricted to his arbitration remedies.[89] The appellant in *Bazzle* noted that, despite the "class" resolution of the claims, all of the absent class members retained their right to seek arbitration remedies against the defendant.[90] The only way to avoid these anamolous results would be to deprive both defendant and all of the absent class members of the benefit of their arbitration agreements, solely to create leverage for the Rule 23 lawyers in the case before the court.

In the cases where these few courts have held an arbitration contract "unconscionable" with regard to a named plaintiff (a very individual analysis), absent "class" members have never asserted that their similar contract is

unfair or unenforceable with regard to them. These courts, while holding that the named plaintiffs had not effectively waived their right to bring a class action, have thus far not held that the absent "class" members, who have agreed to arbitration, are prohibited from proceeding to arbitration. In fact, other courts have specifically held that those who sign a mandatory arbitration agreement are excluded from a class action brought by similarly situated plaintiffs (whowere not bound by an arbitration agreement).[91] A plaintiff who is excused from his contract by reason of "unconscionability" is the only party unbound; if a court is going to extend that determination to every contracting party, it would seem to require an individual analysis for every potential "class" member.[92]

Additionally, regardless of an arbitration agreement, the punishment objectives and power to change behavior that are the real purposes of the modern class actions are still exercised by the proper authorities.[93] For this reason, it seems likely that the Supreme Court will retain its current balance between the "right" to bring a Rule 23 action and the "as written" provisions of the FAA, as outlined in *Gilmer*:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions… But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred. (Internal citations omitted). Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief. [94]

*Edward C. Anderson is the Managing Director of the National Arbitration Forum and a member of the Litigation Practice Group of the Federalist Society.

Footnotes

[1] *F. Paul Bland, Jr.: Pursuing a Passion for Law and Life*, Consumer Financial Services Law Report, Oct. 9, 2002, at 3; *Alan S. Kaplinksy: Providing Guidance for Clients and Colleagues*, Consumer Financial Services Law Report, Sept. 25, 2002, at 3.
[2] David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail To Fix The Problems Associated With Employment Discrimination Law Adjudication,* 24 Berkeley J. Emp. & L. 1, 31-32 (2003).
[3] *Id.*; Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-DisputeEmployment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 314 (2003).
[4] *See e.g.* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Armendariz v. Foundation Health Psychare Services, Inc., 6 P.3d 669 (Cal. 2000).
[5] Judge Patrick E. Higginbotham, Ainsworth Lecture at Loyola University School of Law, (April 6, 2001) (quoting Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. Rev. 1935, 1935 (1997)).
[6] *Public Loses As Lawyers Block Access to Cheaper Legal Help*, USA Today, Feb. 29, 1999, at 14A.
[7] Jill Schachner Chanen, *Pumping Up Small Claims: Reformers Seek $20K Court Limits – With No Lawyers*, 84 A.B.A. J. 18, 18 (Dec. 1998).
[8] Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 57 (1998).
[9] *Id.* at 58.
[10] Fed. R. Civ. Pro. 23 advisory committee's note.
[11] *E.g.* Minn. R. Civ. P. 23.
[12] *See* text of the pre- and post-amendment versions of Rule 23. *See also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356 (1967).
[13] Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461, 463 (N.D. Ind. 1976).
[14] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 592 (1997).
[15] Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 226 (2003).
[16] La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 465 (9th Cir. 1973).
[17] 173 F.R.D. 167, 172 (W.D. La. 1997).
[18] William P. Barrett, *I Have No Clients*, Forbes, Oct. 11, 1993.
[19] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).
[20] In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (1995) (Posner, J.) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).
[21] Higginbotham, *supra* note v.
[22] *See generally* Lawrence B. Solum, *Legal Theory Blog Political Science Association*, *at* http://lsolum.blogspot.com/2003_10_01_lsolum_archive.html (Dec. 8, 2003).
[23] Cornerstone Research, *Post-Reform Act Securities Case Settlements: Cases Reported Through Dec. 2002*, at 5, *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2002/Through2002.pdf (Dec. 8, 2003).
[24] *In the Matter of Rhone-Poulenc Rorer, Inc.*, *supra* note xx.
[25] *See e.g.*, Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 Ind. L.J. 497, 501 (1987) (concluding that "most class actions, like most litigation, settle prior to trial" based on a 78% settlement rate - - 36 out of 46 - - in a sample of certified class actions).
[26] Cornerstone Research, *Post-Reform Act Securities Case Settlements: Cases Reported Through Dec. 2002*, at 15, *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2002/Through2002.pdf (Dec. 8, 2003).
[27] Joe Stephens, *Coupons Create Cash for Lawyers: Class Action 'Paper' Settlements Mean Little to Individual Plaintiffs*, Wash. Post, Nov. 14, 1999, at A1.
[28] Bryan Bruggerman, *Hall of Shame Announced for Class-Action Lawsuits in County*, Bellevill News-Democrat, Sept. 6, 2002, at A40.
[29] Editorial, *Class-Action Plaintiffs Deserve More than Coupons*, USA Today, Oct. 9, 2002.
[30] *Allied-Bruce*, 513 U.S. at 280.
[31] *See* Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402 (2003); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); *Allied-Bruce*, 513 U.S. 265; Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989).
[32] Cal. Civ. Pro. Code § 1141.11 (2002).

[33] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 30, 55 (1998); Steven J. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A.J. 78, 79-80 (1985); *Allied-Bruce*, 513 U.S. at 280 (quoting HR Rep. No. 97-542, p.13 (1982)).
[34] *See* Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, 6 Disp. Resol. Mag., Fall 1999, at 23.
[35] Roper ASW, *Legal Dispute Study* (April 2003), *available at* http://adrinstitute.com/adri-lds2.pdf (Dec. 5, 2003).
[36] Erika Birg, *Waging War Against Binding Arbitration: Will Trial Lawyers Win the Battle?*, Engage, May 2003, at 112.
[37] *See Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce*, 513 U.S. 265 (1995).
[38] *See Randolph*, 531 U.S. 79 (2000).
[39] *See Armendariz*, 6 P.3d 669 (2000).
[40] *See Circuit City*, 532 U.S. 105 (2001); *Mastrobuono*, 514 U.S. 52 (1995); *Gilmer*, 500 U.S. 20 (1991).
[41] *See* Ting v. AT&T, 319 F.3d 1126 (2002); Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003).
[42] *See* cases cited *supra* notes xxxiv-xxxviii.
[43] *See Gilmer*, 500 U.S. 20 (1991); *Volt,* 489 U.S. 468 (1989); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).
[44] *See Bazzle*, 123 S. Ct. 2402 (2003), *Ting,* 319 F.3d 1126 (2002).
[45] Bazzle v. Green Tree Financial. Corp., 569 S.E.2d 349, 360-61 (S.C. 2002)
[46] *Ting*, 319 F.3d at 1150.
[47] Dominium Austin Ptnrs., 248 F.3d 720, 723 (8th Cir. 2001); Champ v. Siegel Trading Co., 55 F.3d 269, 270 (7th Cir. 1995); *Arriaga*, 163 F. Supp. 2d 1189, 1195 (S.D.Cal. 2001); McCarthy v. Providential Corp., 1994 WL 387852, at *8 (N.D. Cal. 1994); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993), *app. dism'd.*, 15 F.3d 93 (8th Cir. 1994) . *Gammaro* and *Arriaga* involved agreements that incorporated the *Code of Procedure* of the National Arbitration Forum. As in *Randolph*, *supra*, and *Johnson*, *supra*, although the claims were both "common" and "typical", Forum Rule 19 was held to allow consolidation, but not as a "class", in the style of Rule 23.
[48] Ex parte Green Tree Financial Corp., 723 So. 2d 6, 11 (Ala. 1998).
[49] *Id.* at 10 n.3.
[50] Hutcherson v. Sears Roebuck & Co., 793 N.E. 2d 886, 896 (Ill. App. 2003).
[51] *E.g.* Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002); Lloyd v. MBNA Am. Bank, 2001 WL 194300 *3 (D.Del.), *aff'd* (3d Cir. Jan. 7, 2002) (No. 01-1752); Goetsch v. Shell Oil Co., 197, 578 F.R.D. 574 (W.D.N.C. 2000); Doctor's Assocs. v. Hollingsworth, 949 F.Supp. 77, 85 (D.Conn. 1996); Coleman v. Nat'l Movie-Dine, Inc., 449 F. Supp. 945, 948 (E.D. Pa 1978).
[52] *E.g. Gilmer*, 500 U.S. at 31; Bowen v. First Family Fin. Svcs., 233 F.3d 1331, 1338 (11th Cir. 2000); *Johnson*, 225 F.3d at 377-378; *Champ*, 55 F.3d at 276.
[53] *Bazzle*, 569 S.E.2d at 360; Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982).
[54] Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998).
[55] *See Bazzle*, 123 S. Ct. 2402 (2003).
[56] Reply Brief at *5,. *Bazzle*, 123 S. Ct. 2402 (2003) (No. 02-634).
[57] *Bazzle*, 569 S.E.2d at 360.
[58] *Id.*
[59] *Bazzle*, 123 S. Ct. at 2407.
[60] *Id.*
[61] *Id.* at 2408.
[62] *Bazzle*, 123 S. Ct. at 2409-2410.
[63] Oral Argument at *55, *Bazzle*, 123 S. Ct. 2402 (2003) WL 1989562.
[64] *Ting*, 319 F.3d 1126, 1150 (2002); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002); Leonard v. Terminix, 854 So. 2d 529, 538 (Ala. 2002).
[65] *Leonard*, 854 So. 2d at 535.
[66] *Ting*, 319 F.3d at 1150.
[67] *Randolph*, 531 U.S. at 90.
[68] *Id.* at 92.
[69] *Leonard*, 854 So. 2d at 538-539.
[70] *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998); *Allied-Bruce*, 513 U.S. at 280 (quoting HR Rep. No. 97-542, p.13 (1982).
[71] *See* Fed. R. Civ. P. 23.
[72] National Arbitration Forum, *Code of Procedure*, Rule 44(I), *available at* http://www.arb-forum.com/code/part7.asp; American Arbitration Association, *Supplementary Procedures for Consumer-related Disputes*, C-8, *available at* http://www.adr.org/index2.1.jsp?JSPssid= 15747&JSPsrc=upload\LIVESITE\Rules_Procedures\ National_International\..\..\focusArea\consumer\ AAA236 current.htm.
[73] *E.g. Armendariz*, 6 P.3d 669, 687 (Cal. 2000).
[74] *E.g. Szetela*, 118 Cal. Rptr. 2d at 867.
[75] *E.g.* Discover Bank v. Superior Court, 129 Cal. Rptr. 2d 393, 396 (Ct. App. 2003).
[76] *Ting*, 319 F.3d at 1150.
[77] *Id.* at 1151-52.
[78] *See Snowden*, 290 F.3d 631 (4th Cir. 2002); *Dominium*, 248 F.3d 720 (8th Cir. 2001); Baron v. Best Buy, 260 F.3d 625 (11th Cir. 2001); Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000) *cert. denied*, 121 S. Ct. 1081 (2001); *Champ*, 55 F.3d 269 (7th Cir. 1995).
[79] *See* Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037, 2040 (2003) ("We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.")
[80] *Mastrobuono*, 514 U.S. at 62; *Gilmer*, 500 U.S. at 32; *et al.*
[81] *E.g. Gilmer*, 500 U.S. at 31; *Bowen v. First Family Fin. Svcs.*, 233 F.3d 1331, 1338 (11th Cir. 2000); *Johnson*, 225 F.3d at 377-378; *Champ*, 55 F.3d at 276.
[82] *See* E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 747-50 (9th Cir. 2003).
[83] *Snowden*, 290 F.3d 631, 639 (4th Cir. 2002); *Lloyd*, 2001 WL 194300 *5 (D.Del.); *Goetsch*, 197 F.R.D. 574, 578 (W.D.N.C. 2000); *Hollingsworth*, 949 F.Supp. 77, 85-86 (D.Conn. 1996); *Coleman*, 449 F. Supp. 945, 948 (E.D. Pa 1978).
[84] *Circuit City*, 532 U.S. at 123; *Gilmer*, 500 U.S. at 32.
[85] *Arriaga*, 163 F. Supp. 2d at 1201.
[86] *See* Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003).
[87] 9 U.S.C. § 4 (2000).
[88] Weyerhaeuser v. W. Seas Shipping, 743 F.2d 635, 637 (9th Cir. 1984).
[89] *E.E.O.C. v. Waffle House*, 534 U.S. 279, 310 (2002).
[90] Reply Brief at *15-16, *Bazzle*, 123 S. Ct. 2402 (2003) (No. 02-634).
[91] Collins v. Int'l Dairy Queen, Inc., 169 F.R.D. 690, 692 (M.D. Ga. 1997).
[92] McManus v. CIBC World Markets Corp., 134 Cal. Rptr. 2d 446, 455-456 (Cal. App. 2d 2003).
[93] *See Waffle House*, 534 U.S. at 288 (2002); *Gilmer*, 500 U.S. at 28 (1991).
[94] *Gilmer*, 500 U.S. at 32.