"Class" Arbitration? What About the Rights of Absent "Class" Members?

*By Edward C. Anderson & Kirk D. Knutson**

During the past two decades, in response to the cost, risk and inefficiency of the litigation system, an increasing number of attorneys have been turning to arbitration as a preferred means of resolving disputes.[1] As one result, arbitration clauses are now regularly included in form contracts governing millions of relationships that drive the United States economy. This trend has caused courts to examine the relationship between arbitration and class actions under Rule 23 of the Federal Rules of Civil Procedure.[2]

Three years ago, in *Green Tree Financial Corp. v. Bazzle*,[3] the Supreme Court considered whether a particular arbitration clause prohibited "class" arbitration. This article begins by discussing that decision and identifying the several questions remaining in its wake. One of those questions—whether there are any limitations on class action "waivers"[4] in arbitration—has engendered a substantial body of case law. The second part of this article examines some of those decisions.

The third part of this article discusses the distinctions between arbitration and class actions as procedural mechanisms. Finally, the article concludes by considering the impact of the nature of arbitration and the contractual rights of the parties, among other things, on any "class arbitration" rules. To accommodate the rights of absent "class" members, "class" arbitration must follow the traditional affirmative "opt-in" procedure rather than the "opt-out" procedure applicable under Rule 23.[5]

The Supreme Court Visits the Issue of Class Arbitration and Leaves Most Questions Unanswered

In *Bazzle*, the Supreme Court divided on the issue of whether the arbitration clause at issue prohibited class arbitration, leaving the more universal questions without direct answers. *Bazzle* combined two related cases from the South Carolina state courts. In each case, the plaintiff brought a putative class action against Green Tree Financial Corporation ("Green Tree"), a commercial lender, alleging that Green Tree failed to provide the borrowers with a legally required document in connection with their purchase of a mobile home.[6]

Green Tree maintained that the arbitration clause in its contracts with the plaintiffs precluded the lawsuits and required individual arbitration. In one case, the trial court compelled arbitration but certified an arbitration class.[7] In the other, the arbitrator followed the lead of the trial court and certified an arbitration class.[8] The same arbitrator heard both cases and awarded $10,935,000 in damages to one class and $9,200,000 to the other.[9]

In appealing the trial court's subsequent confirmation of those awards, Green Tree argued that by imposing class arbitration, the trial court and arbitrator failed to enforce the arbitration agreement in accordance with its terms as required by the Federal Arbitration Act ("FAA").[10] The South Carolina Supreme Court disagreed, holding that Green Tree's contracts were silent on the issue and that South Carolina law permitted class arbitration.[11]

The United States Supreme Court granted *certiorari*. In a plurality opinion authored by Justice Breyer and joined by Justices Scalia, Souter and Ginsburg, the Court held that, in deciding that the agreement did not bar class arbitration, the lower courts had usurped the arbitrator's authority since an arbitration contract necessarily delegates such questions of interpretation to the arbitrator.[12] The Court remanded the case to allow the arbitrator to decide the question of whether the agreement prohibited class arbitration because the trial court decided the question in one case and the arbitrator had followed the court's lead in the other case.[13]

Beyond that narrow holding, the Court was splintered. Justice Stevens concurred in the result solely to effectuate a controlling judgment. Chief Justice Rehnquist authored a dissenting opinion, joined by Justices O'Connor and Kennedy, which concluded that the contracts at issue actually did bar class arbitration and, accordingly, South Carolina's imposition of class arbitration ran afoul of the FAA.[14] Justice Thomas dissented in adherence to his continuing belief that the FAA does not apply to state court proceedings.

In the wake of *Bazzle* there remain several unanswered questions. For example, what language is sufficient to forbid class arbitration, triggering the FAA requirement that an arbitration agreement be enforced in accordance with its terms? A related question is the degree to which courts will review an arbitrator's determination that an arbitration clause does or does not prohibit class arbitration.

These questions, along with *Bazzle* itself, will eventually become moot, as attorneys drafting arbitration clauses fulfill Justice Steven's prediction that all future clauses will explicitly prohibit class arbitration.[15] However, these questions are of continuing significance for the many preexisting arbitration clauses that are silent or ambiguous on the issue of class arbitration.

The Court's divergent interpretations of the Green Tree language imply that when an arbitration clause is silent or inartful on the issue of class arbitration, it is necessarily ambiguous on that issue.[16] Ambiguity effectively forecloses meaningful review of the arbitrator's determination because the meaning of an ambiguous contract is generally considered a question of fact,[17] and an arbitrator's findings of fact are virtually unassailable.[18] Given the far-reaching import of an arbitrator's decision to certify a class, the absence of any meaningful review of a "class" certification is one dramatic result of *Bazzle*.

**Edward C. Anderson is the CEO and Managing Director of the National Arbitration Forum, where Kirk D. Knutson is Staff Counsel.*

Even Where the Clause Prohibits "Class" Arbitration, Some Courts Refuse to Honor the Prohibition

As predicted by Justice Stevens,[19] attorneys have responded to *Bazzle* by drafting arbitration clauses that explicitly bar class arbitration, usually by including a class action "waiver."[20] *Bazzle* implies class action "waivers" in arbitration agreements are permissible because, on remand, the arbitrator was free to determine that the arbitration clause prohibited class arbitration. Moreover, three of the dissenting Justices found that the clause in question actually prohibited class arbitration and therefore, that the FAA required enforcement of the arbitration clause as written, thus further establishing the effectiveness of class action "waivers" in arbitration agreements.[21]

Because of the impact of these class action waivers on the class action industry,[22] their validity remains the subject of vigorous litigation, generally under the rubric of "unconscionability." The vast majority of jurisdictions enforce class action "waivers" in arbitration agreements, holding that such "waivers" must be given effect under the FAA.[23] The majority rule recognizes that the exclusion of "certain litigation devices is part and parcel of arbitration's ability to offer simplicity, informality, and expedition, characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims."[24]

In those rare cases where a "waiver" has been found unconscionable, the matter is still referred to arbitration, where the arbitrator conducts all subsequent proceedings.[25] In *Discover Bank v. Superior Court*,[26] the California Supreme Court held that a class action "waiver" in an arbitration clause was unconscionable under California law where the plaintiff alleged that the "waiver" was part of "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[27]

The New Jersey Supreme Court adopted a similar analysis in *Muhammad v. County Bank of Rehoboth Beach*,[28] holding that a particular class action "waiver" in an arbitration clause was unconscionable under New Jersey law. In reaching this holding, the Court reasoned that enforcement of that "waiver" would "functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action."[29] However, on the same day it decided *Muhammad*, the court held that, under New Jersey law, such "waivers" were not generally unconscionable.[30]

A third, and particularly interesting, exception to the majority rule is *Kristian v. Comcast Corp.*,[31] in which the First Circuit Court of Appeals held that a class action "waiver" was unenforceable because without a class action, plaintiffs would be unable to vindicate their statutory rights.[32] As in *Muhammad*, the court found that the "waiver" would insulate the defendant from privately enforced antitrust liability because the prospect of a substantial recovery was a necessary incentive to justify the difficulty and expense of proving an antitrust violation.[33]

However, instead of ruling that the class action "waiver" was unconscionable under state law, the First Circuit concluded that enforcement would result in prohibitive costs and thus prevent the plaintiffs from vindicating their statutory rights in the arbitral forum.[34] Barring settlement, *Kristian* may be a good candidate for Supreme Court review, since it is arguably inconsistent with the Supreme Court's ruling in *Gilmer*[35] and presents the important question whether the FAA allows any limitations on class action "waivers".

One district court has already carried *Kristian* beyond the orbit of its reasoning. In *Wong v. T-Mobile USA, Inc.*,[36] the United States District Court for the Eastern District of Michigan relied on *Kristian* in holding that a class action "waiver" was unenforceable because it prevented the plaintiff from vindicating his statutory rights under the Michigan Consumer Protection Act.[37] Despite relying on *Kristian* and acknowledging that it represented a minority position, the court completely neglected the *sine qua non* of that decision —namely, the difficulty and expense of proving an antitrust violation.

These few courts have not been alone in their refusal to honor class arbitration "waivers." In November 2004, arbitration administrator JAMS announced that it would not honor class waivers, asserting that "the inclusion of such clauses is an unfair restriction on the rights of the consumer."[38] This disregard for party agreements was met by a barrage of criticism, and JAMS subsequently abandoned the policy.[39] JAMS now requires arbitrators to decide on a case-by-case basis whether an arbitration clause "permits the arbitration to proceed on behalf of or against a class."[40]

Enforceability Often Turns on Choice of Law

Although these outposts of minority law are limited by geography and narrow circumstances, they are not insignificant. Accordingly, "choice-of-law" will often dictate the enforceability of the "waiver." In *Discover Bank*, the class action prohibition was reinstated on remand because the cardmember agreement provided for the application of Delaware law and, under Delaware law, class action "waivers" in arbitration agreements are enforceable.[41] In *Muhammad*, the agreement also provided for the application of Delaware law, but the court did not address application of state law because the defendants had not properly raised the issue.[42] It is unclear which law will apply on remand or at arbitration. These cases underscore the importance of choice-of-law provisions and the importance, for all parties, of addressing the issue at each stage of arbitration or litigation.

Arbitration and Rule 23 Class Actions are Distinct Procedural Mechanisms That Cannot Practically Be Merged.

In federal court, class actions are authorized and governed by Rule 23 of the Federal Rules of Civil Procedure.[43] The drafters of Rule 23 envisioned class actions as a way to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[44]

The class action device was intended partly to facilitate the prosecution of minor claims that, standing alone, are not economically feasible, given the costs of litigation and the American Rule, which ordinarily prevents a prevailing party from recovering its attorney fees.[45] It was also intended to free courts from the burden of having to try multiple suits on the same subject matter.[46]

Arbitration has the same purpose and achieves the same goals. It directly reduces the burden on the court system by removing cases to a different forum. Moreover, the streamlined procedures of arbitration are naturally conducive to the prosecution of minor claims.[47] As the Fifth Circuit Court of Appeals observed in upholding a class arbitration "waiver," the exclusion of "certain litigation devices," such as the class action, "is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims."[48] Arbitration is suitable for "low-value" or "consumer" claims because the corporate party typically bears the cost of arbitration and an arbitrators have the authority to award attorneys' fees.[49]

Some class action advocates have argued in support of class actions by portraying class counsel as "private attorneys general" who punish and deter wrongdoing where the public authority has failed to act.[50] However, the history and substance of Rule 23 do not support this theory of class actions.[51] Many states have enacted private attorney general statutes authorizing a private party to sue on behalf of large groups or the general public,[52] which indicates that Congress, legislatures and courts are perfectly capable of conferring such authority when they intend to do so.

Since arbitration and class actions are distinct means of achieving similar purposes, it should come as no surprise that there is inherent friction between the two procedures. Generally speaking, this friction derives from the "attempt to combine the streamlined procedures of an informal dispute resolution mechanism with the complexity of resolving the individual claims of large numbers of individuals, in some cases tens of thousands or more."[53] One commentator offers this evocative description of class arbitration: "half fish and half fowl, and about as pretty as that image suggests."[54]

By infusing arbitration with the complexity and numerosity of class actions, thereby eviscerating its "simplicity, informality, and expedition,"[55] merger with class action procedure would deprive arbitration of the attributes that make it friendly and feasible to the individual consumer.[56] As the Supreme Court has observed, "arbitration's advantages often would seem helpful to individuals . . . who need a less expensive alternative to litigation."[57]

The merger of arbitration and class actions is also troubling because it would extinguish the contractual rights of the absent "class members" to elect and enforce dispute resolution procedures. In other words, procedural rules would eclipse substantive rights.[58] The *Bazzle* plurality avoided these issues by simply referring the entire issue to the arbitrator, but the three dissenting Justices explained how the "class" mechanism would deprive the parties of their contractual rights.[59] Specifically, these Justices observed that applying the "class" mechanism in arbitration destroys at least two distinct rights: (1) the right to participate in selecting the arbitrator; and (2) the right to have individual claims decided by different arbitrators.[60]

Further, "class" arbitration carries much greater risk than a Rule 23 action. Rule 48 of the Federal Rules of Civil Procedure requires a unanimous verdict by a jury of no fewer than six members.[61] Accordingly, in a Rule 23 class action, the risk of an unfavorable outcome is diffused by delegating independent fact finding authority to at least six separate individuals. Moreover, the judge operates as another constraint, first by deciding whether to certify a class action and later by guarding against a settlement or verdict unsupported by the evidence.

In "class" arbitration, by contrast, all of that power is likely to be concentrated in the hands of a single arbitrator.[62] Moreover, under some arbitration regimes, the arbitrator is not constrained by any objective standard.[63]

Because an arbitrator's decisions, unlike a verdict, is subject to very limited review,[64] the concern inherent in giving one person such far-reaching authority is even greater than it would be in traditional litigation. In an attempt to mitigate this concern, some arbitration administrators have adopted rules that allow parties to seek judicial review of an arbitrator's decision to certify an arbitration class.[65] However, given the limited grounds for review, it would be exceedingly difficult to challenge an arbitrator's decision on class certification, especially since class certification is a fact-intensive inquiry.[66] These factors combine to make class arbitration fraught with the potential for irreparable error. This increases the probability of widely criticized "blackmail" settlements.[67]

"Class" Arbitration—What Rules?

Of those courts that have declined to uphold class action waivers, the New Jersey Supreme Court was the to directly acknowledge that Rule 23 does not apply in arbitration and to note that arbitration administrators or the contracting parties must create the "class" rules on their own. That court also suggested that in drafting "class" arbitration rules, arbitration administrators could cure some of the abuses inherent in current Rule 23 practice.[68]

Many procedural rules are somewhat arbitrary. However, the rules pertaining to absent "class" members are not. The rights of absent class members are demonstrably at risk in a Rule 23 action and far more so, in a "class" arbitration. In theory, absent class members are represented by the named plaintiffs and their attorneys,[69] but a large number of reported cases cast doubt on that assumption, because class counsel is so frequently the largest beneficiary.[70] "Class" arbitration greatly increases those risks while reducing judicial review. Additionally, absent "class" members in arbitration have more rights than Rule 23 class members and need more protection.

Prior to 1966, class actions used a voluntary "opt-in" procedure whereby members affirmatively joined the class.[71] Absent class members were not presumed to be part of the class by reason of ignorance or inaction. The 1966

amendments to Rule 23 reversed this longstanding procedure and created the "opt-out" procedure whereby absent members are bound by any judgment, unless they affirmatively request exclusion. Rule 23 does not even require actual service of process.[72] The constitutionality of the "opt-out" procedure rests on the legal fiction that class counsel and the named plaintiffs represent the interests of absent class members, so that actual notice is not essential.[73]

That fiction underlay the Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*[74] that a forum state could exercise jurisdiction over the claims of absent class members despite the absence of the minimum contacts otherwise necessary for personal jurisdiction.[75] The Court posited that an absent class member "is not required to do anything" because "[h]e may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[76]

The Supreme Court revisited the rights of absent class members in *Amchem Products, Inc. v. Windsor*.[77] In *Amchem*, the Court held that class certification requirements intended to protect absent class members "demand undiluted, even heightened, attention" when a class is being certified for settlement purposes only.[78] In reality, these safeguards meant to protect absent class members are decidedly flimsy, as illustrated by the famous remark of prominent class action attorney William Lerach: "I have the greatest practice of law in the world . . . I have no clients."[79]

Since *Amchem*, courts have increasingly subjected class certifications to heightened scrutiny. For example, in *Mirfasihi v. Fleet Mortgage Corp.*, [80] the Seventh Circuit Court of Appeals rejected a settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river."[81] Similarly, in *Smith v. Sprint Communications Co., L.P.*,[82] the Seventh Circuit vacated a settlement-only class certification because the nationwide class settlement did not satisfy the Rule 23 requirement that the representative parties "fairly and adequately protect the interests of the class."[83] These cases reflect growing concern over the efficacy and fairness of the "opt-out" procedure in Rule 23 class actions.

In "class" arbitration, the "opt-out" procedure is untenable for at least six additional reasons. First, as the New Jersey Supreme Court observed, Rule 23 does not apply to "class" arbitration.[84] Accordingly, in arbitration there is no authority for the legal fictions that underlie Rule 23.

Second, the jurisdiction of the arbitrator over each arbitration litigant depends upon the arbitration contract. An arbitrator is not a judge in a court of general jurisdiction. The arbitrator has no authority, *sua sponte*, to assert jurisdiction over a contracting party who has never appeared or agreed to an arbitration proceeding or a modification of his or her contract. In fact, the FAA and state arbitration laws lay out specific statutory mechanisms to compel non-parties to arbitrate disputes.[85] These processes do not remotely resemble Rule 23 procedures.

Third, absent class members in a class arbitration have specific contractual rights that have no analogue in a Rule 23 class action. Chief Justice Rehnquist's dissenting opinion in *Bazzle* touched on two of those rights—the right to participate in selecting the arbitrator and the right to a separate decision—in recognizing that each "class" member must consent to the chosen arbitrator.[86] Absent affirmative waiver of those rights, there is no authority for a "representative" to exercise them for the absent class members.

The overarching contractual right at stake is the class member's right to an individual arbitration. For consumer and employee claimants, the right to an individual arbitration offers tangible benefits because the business is required to pay most or all of the expense of arbitration[87] and arbitration rules provide for the recovery of costs and fees.[88] "Class" arbitration contains no such assurance. In fact, the courts that have voided "class" prohibitions have assumed that class members must bear significant costs.

Fourth, arbitration has general contractual and statutory attributes that preclude use of the passive "opt-out" procedure in class arbitration. Foremost, "the less formal procedures in arbitration, which are designed for and work well in individual arbitrations, may raise concerns about whether the rights of absent class members are sufficiently protected."[89]

Fifth, if an "opt-out" procedure is used, confirmation of the award would be virtually impossible, unless the court chose to ignore the statutory requirements of the FAA or Revised Uniform Arbitration Act ("RUAA"),[90] which demand specific notice and delivery of awards, set time limitations for challenge and enforcement, and set forth the procedure for confirmation. Confirmation of a "class" arbitration award is different from entering judgment in a Rule 23 class action, which requires only "the best notice practicable under the circumstances."[91] As previously noted, Rule 23 and its attendant legal fictions do not apply to arbitration.

Finally, the confidentiality of arbitration is at odds with the public nature of the Rule 23 "opt-out" procedure, which, in part, relies on mass media to disseminate notice to absent class members.

Of course, an "opt-out" procedure does not require actual notice or a response, by which a "class" member could conceivably waive any or all of these rights. Given the panoply of rights these absent "class" members must surrender, only an "opt-in" procedure, with an affirmative waiver or consent, can ensure that arbitration parties who become "class" members have agreed to the proceeding, consented to the modification of the original arbitration clause, and effectively waived all of the statutory and contractual rights that flow from an arbitration agreement.

CONCLUSION

In conclusion, the streamlined procedures of arbitration make it a viable forum for the prosecution of minor claims, such that the merger of arbitration and the class action is both unnecessary and unwise, as well as frequently prohibited by a contract enforceable under the FAA. In the vast majority of jurisdictions, this is the law.

If one were to posit the desirability of "class" arbitration, Congress and the various states may choose to change the FAA and state arbitration laws to include "class-like" procedures. Alternatively, parties could contract to

waive the various procedural rights built into current arbitration statues and procedural rules. In the absence of these changes, only an "opt-in" procedure ensures that absent participants consent to the modification of their own arbitration contracts and participation in this hybrid litigation.

Footnotes

[1] *See* Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: Current Trends and Developments*, 53 Bus. Law. 1075, 1075 (1998).

[2] Following 1996 amendments, most states adopted class action rules modeled on Rule 23. *See* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1319 n. 34 (2005). One example is Rule 42 of the Texas Rules of Civil Procedure. Subsequent references to Rule 23 also refer to its state court progeny.

[3] U.S. 444 (2003).

[4] The term "class action waiver" is something of a misnomer because waiver generally denotes the relinquishment of a right, but there is no right to pursue a class action. *See, e.g.,* Blaz v. Belfer, 368 F.3d 501, 504 (5th Cir. 2004) (noting there is no "substantive right to pursue a class action, in either Texas state or federal court"). Granted, Rule 23 of the Federal Rules of Civil Procedure creates a procedural right to seek class certification, *see*, *e.g.*, Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 100 S.Ct. 1166 (1980) (noting "the right of a litigant to employ Rule 23 is a procedural right only"), but a party necessarily relinquishes Rule 23 when he agrees to arbitrate and waives his right to sue in court. Nevertheless, since the "waiver" terminology is widely familiar, this article will use the term to avoid confusion.

[5] The "opt-out" provision of Rule 23 provides: "The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, *and who have not requested exclusion*, and whom the court finds to be members of the class." Fed. R. Civ. P. 23 (c)(3) (emphasis added).

[6] *Bazzle*, 539 U.S. at 540.

[7] *Id.* at 449.

[8] *Id.* at 449, 454.

[9] *Id.* at 449.

[10] Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349, 356 (S.C. 2002).

[11] *Bazzle*, 539 U.S. at 450.

[12] *Id.* at 451-53.

[13] *Id.* at 454.

[14] *Id.* at 455-60.

[15] During oral argument in *Bazzle*, Justice Stevens inquired of counsel for the Respondents: "Does this case have any future significance, because isn't it fairly clear that all the arbitration agreements in the future will prohibit class actions?" Transcript of Oral Argument at 55, Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (No. 02-634), *available at* 2003 WL 1989562 [hereinafter *Bazzle Transcript*].

[16] There was nothing exceptional about the arbitration clause in the Green Tree contracts. The plurality found that the arbitration clause was silent (i.e., ambiguous) on the issue of class arbitration, whereas the three dissenting Justices found that the arbitration clause prohibited class arbitration by virtue of its procedure for selecting an arbitrator.

[17] *See, e.g.*, Dill v. Blakeney, 568 So. 2d 774, 778 (Ala. 1990); Clark v. St. Paul Prop. and Liab. Ins. Cos., 639 P.2d 454, 455 (Idaho 1981); Plambeck v. Union Pacific R. Co., 509 N.W.2d 17, 20 (Neb. 1993); Amusement Bus. Underwriters v. Am. Int'l Group, 489 N.E.2d 729, 732 (N.Y. 1985); Gibson v. Bentley, 605 S.W.2d 337, 339 (Tex. Ct. App. 1980); Pilling v. Nationwide Mut. Fire Ins. Co., 500 S.E.2d 870, 872 (W. Va. 1997).

[18] *See* Cytyc Corp. v. DEKA Prods. Ltd. P'ship, 439 F.3d 27, 34 (1st Cir. 2006) ("With certain exceptions . . . we are duty-bound to give effect to an arbitrator's findings of fact."); Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 214 (2d Cir. 2002) ("The arbitrator's factual findings and contractual interpretation are not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law."); Cunningham v. Pfizer Inc., 294 F.Supp.2d 1329, 1333 (M.D. Fla. 2000) (noting the defendant "has improperly asked the Court to reconsider findings of fact and interpretation").

[19] *Bazzle Transcript*, *supra* note 15, at 55.

[20] *See* 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).

[21] *See* Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update: Green Tree Financial Corp. V. Bazzle—Dazzle for Green Tree, Fizzle for Practitioners*, 59 Bus. Law. 1265, 1272 (2004). As the authors note, one may surmise that seven of the nine Justice deciding *Bazzle* would have ruled that the FAA does not allow a state to single out and invalidate a class action waiver in an arbitration clause. *See id.* at 1270-72.

[22] *In re: Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 68 (E.D. Pa. 1983) (referring to "the widely-held and mostly unfavorable impressions of the plaintiffs' class action bar, sometimes referred to as the class action industry").

[23] *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868 (11th Cir. 2005); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553 (7th Cir. 2003); Lloyd v. MBNA Am. Bank, N.A., 27 Fed. Appx. 82 (3d Cir. 2002); Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Gipson v. Cross Country Bank, 294 F. Supp. 2d 1251 (M.D. Ala. 2003); Edelist v. MBNA Am. Bank, 790 A.2d 1249 (Del. Super. Ct. 2001); Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886 (Ill. App. Ct. 2003); Tsadilas v. Providian Nat. Bank, 786 N.Y.S.2d 478 (App. Div. 2004); Ranieri v. Bell Atlantic Mobile, 759 N.Y.S.2d 448 (App. Div. 2003).

[24] *Iberia Credit Bureau, Inc.*, 379 F.3d at 174 (internal quotations and citations omitted).

[25] *See, e.g.*, Skirchak v. Dynamics Research Corp., Inc., 432 F. Supp. 2d 175, 181 (D. Mass. 2006).

[26] 113 P.3d 1100 (Cal. 2005).

[27] *Id.* at 1110.

[28] 2006 WL 2273448 (N.J. Aug. 9, 2006).

[29] *Id.* at *9.

[30] Delta Funding Corp. v. Harris, 2006 WL 2277984 (N.J. Aug. 9, 2006).

[31] 446 F.3d 25 (1st Cir. 2006).

[32] *Id.* at 60.

[33] *Id.* at 57-61.

[34] *Id.* at 57-64.

[35] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991). *Gilmer* rejected the idea that there was a right to bring a class action while observing that the regulatory agency retained authority to seek class-wide relief. *Id.* at 32.

[36] No. 05-73922, 2006 WL 2042512 (E.D. Mich. July 20, 2006) (unpublished).

[37] *Id.* at *5.

[38] Meredith Nissen, AAA v. JAMS*: Different Approaches to a New Concept*, Disp. Resol. Mag., Summer 2005, at 19, 20.

[39] *Id.*

[40] JAMS Class Action Procedures Rule 2, *at* http://www.jamsadr.com/rules/class_action.asp; *see also* Nissen, *supra* note 39, at 20.

[41] Discover Bank v. Superior Court, 36 Cal. Rptr. 3d 456, 459-62 (Ct. App. 2005).

[42] Muhammad v. County Bank of Rehoboth Beach, 2006 WL 2273448, *6 n. 2 (N.J. Aug. 9, 2006).

[43] Fed. R. Civ. P. 1, 23.

[44] Amendments to Rules of Civil Procedure, Advisory Committee's Notes, 39 F.R.D. 69, 102-03 (1966) (quoted in Buford v. Am. Finance Co., 333 F. Supp. 1243, 1251 (D. Ga. 1971)).

[45] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

[46] Buford v. H & R Block, Inc., 168 F.R.D. 340, 345 (S.D. Ga. 1996).

[47] Kirk D. Jensen, *Can Financial Institutions Be Required to Arbitrate on a Class-Wide Basis Notwithstanding Provisions That Prohibit Class Arbitration*, 122 Banking L.J. 328, 336-37 (2005) (discussing the "manifold benefits" that arbitration provides consumers).

[48] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)).

[49] *See, e.g.*, National Arbitration Forum Code of Procedure Rule 37C, *available at* http://www.arb-forum.com/.

[50] *See, e.g.*, John H. Beisner, *et al.*, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1451 (2005).

[51] *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 74 (2003) (explaining that "the class action was never designed to serve as a free-standing legal device for the purpose of 'doing justice,' nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds").

[52] Cal. Bus. & Prof. Code §§ 17200-17208 (West 2006) is one example.

[53] Jensen, *supra* note 48, at 329-30.

[54] Eric Mogilnicki, *Courts Undermine Arbitration When They Grant Class Status*, Am. Banker., Feb. 14, 2003, at 9 (quoted in Jensen, *supra* note 48, at 330).

[55] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[56] *See* Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 Ga. St. U. L. Rev. 761, 765-68 (2003) (explaining how individuals benefit from arbitration's streamlined procedures). The article also discusses studies indicating that individuals are more likely to prevail in arbitration than in court. *Id.* at 763-65. One of the authors, Mogilnicki, was recently named Chief of Staff for Senator Edward M. Kennedy of Massachusetts. *See Kennedy Names New Chief of Staff*, Boston Globe, Jan. 9, 2006, *available at* http://www.boston.com/news/local/massachusetts/articles/2006/01/09/kennedy_names_new_chief_of_staff/.

[57] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 280 (1995).

[58] *See* Leonard v. Terminix Int'l Co., 854 So.2d 529, 542-43 (2002) (Woodall, J., dissenting).

[59] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 459 (2003).

[60] *Id.*

[61] Fed. R. Civ. P. 48.

[62] National Arbitration Forum Code of Procedure R. 22 (providing for a single arbitrator unless parties agree otherwise); AAA Supplementary Rules for Class Arbitrations R. 2(b) (providing that "the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed"), *available at* http://www.adr.org/sp.asp?id=21936; JAMS Comprehensive Arbitration Rules and Procedures R. 7 (providing for a single arbitrator unless parties agree otherwise), *available at* http://www.jamsadr.com/rules/comprehensive.asp.

[63] Rule 43(a) of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable. . . ." By contrast, Rule 20D of the National Arbitration Forum Code of Procedure requires the arbitrator to "follow the applicable substantive law."

[64] There are only a few statutory bases for challenging an arbitrator's award. *See* 9 U.S.C. §§ 10-11 (2006). None require the arbitrator to follow the law. An arbitration award may be vacated for "manifest disregard of the law," which is generally regarded as a common law, non-statutory basis for vacating an arbitration award. *See, e.g.*, Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 234 (4th Cir. 2006). *But see* Wise v. Wachovia Sec., LLC, 450 F.3d 265 (7th Cir. 2006) (noting "we have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground – 'where the arbitrators exceeded their powers'"). However, as the D.C. Circuit Court of Appeals recently observed, "[t]he 'manifest disregard of the law' standard for overturning an arbitration award is manifestly difficult to satisfy." To ensure that an arbitrator's determinations, such as the decision to certify a class, are legally sound, parties may agree that the arbitrator must follow the law. For example, Rule 20E of the National Arbitration Forum Code of Procedure requires the arbitrator to "follow the applicable substantive law." If an arbitration agreement or the designated rules require the arbitrator to follow the law, an arbitrator who fails to follow the law has exceeded his powers, which is a statutory basis for vacating an arbitration award. *See* 9 U.S.C. 10(a)(4) (2006).

[65] AAA Supplementary Rules for Class Arbitrations R. 5 (requiring the arbitrator to issue a "partial final award" subject to judicial review);

JAMS Class Action Procedures R. 3(c) (giving the arbitrator discretion to enter "a partial final award subject to immediate court review").

[66] *See, e.g.*, Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir.1988).

[67] *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1391-92 (2000) (discussing criticism of "blackmail" settlements"); *see also In re: Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) ("They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.")

[68] Muhammad v. County Bank of Rehoboth Beach, 2006 WL 2273448, at *10 (N.J. Aug. 9, 2006) ("The drafters of arbitration agreements and forum rules, as well as the arbitrators themselves, may allow for the development of innovative class-arbitration procedures that address some of the perceived inadequacies with the current system.").

[69] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-12 (1985).

[70] *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 993 n. 2 (2002).

[71] *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 310 (2001).

[72] *See* Fed. R. Civ. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.").

[73] *See, e.g.*, Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc., 439 F.3d 165, 169 n. 4 (2d Cir. 2006) (noting that "constructive notice" is "sufficient to satisfy due process,").

[74] 472 U.S. 797 (1985).

[75] *Id.* at 809 (noting "[t]he court and named plaintiffs protect [the] interests" of an absent class member).

[76] *Id.* at 810.

[77] 521 U.S. 591 (1997).

[78] *Id.* at 620.

[79] William P. Barrett, *I Have No Clients*, FORBES, Oct. 11, 1993, at 52 (quoted in Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1345 (2005)).

[80] 356 F.3d 781 (7th Cir. 2004).

[81] *Id.* at 785.

[82] 387 F.3d 612 (7th Cir. 2004).

[83] Fed. R. Civ. P. 23(a)(4).

[84] Muhammad v. County Bank of Rehoboth Beach, 2006 WL 2273448, at *10 (N.J. Aug. 9, 2006) (noting that "in the context of class arbitration, contracting parties and the various arbitration forums can fashion procedural rules specific to class arbitration").

[85] *See* 9 U.S.C. § 4 (2006) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."); CAL. CIV. PROC. CODE. § 1281.2 (West 2006).

[86] *Bazzle*, 539 U.S. at 459 (noting that "petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer").

[87] *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) (ruling that "arbitrators' fees should be borne solely by the employer"); Armendariz v. Foundation Health Psychcare Servs., Inc., 24 Cal. 4th 83, 113 (2000) (holding that agreement "impliedly obliges the employer to pay all types of costs that are unique to arbitration").

[88] *See, e.g.*, National Arbitration Forum Code of Procedure R. 37D.

[89] Jensen, *supra* note 48, at 341.

[90] The Federal Arbitration Act requires that notice of an application to confirm an arbitration award be served on an "adverse party." 9 U.S.C. § 9 (2006); *see also* Revised Uniform Arbitration Act §§ 23-24 (giving a party 90 days after "receiv[ing] notice of the award" to challenge the award).

[91] Fed. R. Civ. P. 23(c)(2)(b).