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NOTE

Leaving a Stone Unturned - The Unanswered Question from *Green Tree Financial Corp. v. Bazzle*: Does the Federal Arbitration Act Permit Classwide Arbitration?

I. INTRODUCTION

Corporate America is increasingly relying on adhesive contracts to procure mandatory binding arbitration.¹ Among the principal reasons that Corporate America has chosen to take this route is the perception that the arbitral process facilitates an economical disposition of conflicts which is advanced by the accompanying belief that arbitration awards are usually more rational than jury verdicts.² In addition to the aforementioned reasons for potential corporate defendants to impose mandatory arbitration on consumers, employees, and others, the utility of arbitration as a shield to the dreaded class action effectively eliminates the threat of a class action and thereby acts as a highly effective risk management tool.³ As one commentator has observed, potential corporate defendants are increasingly drafting arbitration clauses that explicitly bar class action proceedings in an effort to secure favorable court rulings.⁴ Consequently, modern arbitration clauses repeatedly

1. See, e.g., *Knepp v. Credit Acceptance Corp.* (*In re Knepp*), 229 B.R. 821, 828 (Bankr. N.D. Ala. 1999) (stating that there has been an "explosive expansion" in the use of arbitration clauses in contracts of adhesion); Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 142 (1997); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator?: Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May-June 1998, at 24; Steven M. Guttell, Note, *An Analysis of a Technique of Dispute Settlement: The Expanding Role of Arbitration*, 7 SUFFOLK U. L. REV. 618, 634-35 (1973).

2. Note, *Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 VA. L. REV. 787 (1981) [hereinafter *Quagmire*].

3. With the Supreme Court's ruling in *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989), propounding that the primary purpose of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-208 (1994), is to enforce arbitration agreements as they are written, potential defendants can presumably guarantee that they will not be subject to class actions if they include such a clause in their arbitration agreements. See also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

4. Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695 (finding that sixteen of thirty-four arbitration clauses examined in a survey of clauses imposed by franchisors on franchisees prohibited class action proceedings in arbitration).

enable corporate defendants to disrupt or disallow attempts by consumers and others to vindicate their rights through class-wide claims.⁵

Despite the fact that the enforceability of arbitration clauses explicitly prohibiting class actions "is currently one of the hottest issues in arbitration,"⁶ the United States Supreme Court failed to seize the opportunity provided in *Green Tree Financial Corp. v. Bazzle*⁷ to address the mounting concern that corporations are using arbitration clauses as a "stealth weapon or Trojan horse" to surreptitiously defeat the class action as a legal remedy.⁸ In *Bazzle*, the Court was able to avoid the pertinent issue of whether the Federal Arbitration Act ("FAA")⁹ permits class arbitration in agreements that are silent on the matter by holding that the question is a matter of state law contract interpretation and is therefore a question for the arbitrator to decide.¹⁰ Respondents Lynn and Burt Bazzle, Daniel Lackey, and George and Florine Buggs separately entered into loan contracts with the petitioner, Green Tree Financial Corporation, a financing company.¹¹ The Supreme Court of South Carolina later consolidated the respondents' claims.¹² Each of the respondent's agreements contained a similar arbitration clause¹³ that was

5. See, e.g., *Doctor's Assocs., Inc. v. Qasim*, No. 99-9434, 2000 WL 1210868 (2d Cir. Aug. 23, 2000) (affirming the grant of an injunction prohibiting participation in a class action in contravention of an arbitration agreement); *Doctor's Assocs., Inc. v. Hollingsworth*, 949 F. Supp. 77 (D. Conn. 1996) (enjoining state court class action in its entirety pending resolution of individual arbitrations).

6. Richard T. Seymour, *Current Developments in Employment Law: Recent Developments in Arbitration* 1355, 1370 (ALI-ABA Course of Study, July 24-26, 2003), available in Westlaw SJ012 ALI-ABA 1355.

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

8. Sternlight, *supra* note 3, at 125.

9. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000).

10. *Bazzle*, 539 U.S. at 453-54.

11. *Id.* at 447-48.

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

13. The text of the Bazzles' actual agreement, in pertinent part, is as follows:

ARBITRATION – All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY U.S. (AS PROVIDED HEREIN) The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

Bazzle, 539 U.S. at 448 (emphasis added by the Court, capitalization in original). The majority opinion stated that Lackey's and the Buggs' arbitration clauses were identical to the Bazzles' "in all relevant respects." *Id.*

silent as to whether class arbitration was permissible. At the time the loan transactions were executed, "Green Tree apparently failed to provide [the respondents] with a legally required form"¹⁴ that would have informed them of their "right to name their own lawyers and insurance agents."¹⁵

All of the respondents filed separate actions in the South Carolina state courts seeking certification of their claims as class actions to which Green Tree responded by attempting to stay the court proceedings and compel arbitration.¹⁶ In January of 1998, the court handling the Bazzles' claim "(1) certified a class action and (2) entered an order compelling arbitration."¹⁷ After the selection of an arbitrator by Green Tree with the consent of the Bazzles, the claim proceeded to arbitration where the arbitrator administered the proceeding as a class arbitration and awarded the class \$10,935,000 in statutory damages and attorney's fees.¹⁸

As the Buggs' and Lackey's had also sought class certification, their case progressed in a similar fashion.¹⁹ Coincidentally the parties chose the same arbitrator that had presided in the Bazzles' claim.²⁰ The arbitrator again certified an arbitral, heard the matter, and in ruling for the class, awarded \$9,200,000 in statutory damages and attorney's fees.²¹ In both matters, Green Tree appealed to the South Carolina Court of Appeals alleging, "among other things, that class arbitration was legally impermissible."²² After consolidation of the claims,²³ the South Carolina Supreme Court held that the arbitration agreements were silent with respect to class arbitration, that they therefore authorized class arbitration, and that the resulting class arbitration proceedings and awards were proper.²⁴

The United States Supreme Court's decision in *Bazze* is less important for what questions it answers than it is for the question that it leaves unanswered: does the FAA permit class arbitration? This note first addresses the history of the FAA, and then proceeds to discuss the substantial change in the law created by *Bazze*, as well as the backdrop of arbitration law upon which that decision relies. Thus, the aforemen-

14. See S.C. CODE ANN. § 37-10-102 (Law. Co-op. 2003).

15. *Bazze*, 539 U.S. at 448.

16. *Id.* at 449.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

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

24. *Id.* at 263-68.

tioned analysis evolves as the *Bazze* decision leaves one stone unturned in terms of the FAA's stance on class arbitration.

II. THE HYBRID OF CLASS-WIDE ARBITRATION

Any discussion or critique of *Green Tree Financial Corp. v. Bazze*²⁵ must begin with the law and policy underlying the decision. In the following paragraphs, as a prelude to the analysis of the Supreme Court's opinion, the law governing both class actions and arbitrations is discussed, as are the purported virtues and pitfalls of the hybrid known as class-wide arbitration.

A. *The Federal Arbitration Act*

Arbitration is a mechanism of alternative dispute resolution²⁶ by which parties contract "to submit a present or future dispute to private individuals" for resolution.²⁷ A primary goal of the FAA is to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."²⁸ Originally passed in 1925, the FAA was reenacted and codified in 1947 as Title IX of the United States code.²⁹ The FAA was enacted to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts," and also to "place arbitration agreements upon the same footing as other contracts."³⁰

In 1984, the Supreme Court gave new life to the FAA by holding that its application extended to state as well as federal courts.³¹ In addition to its dual application, the Supreme Court has repeatedly observed that enforcing arbitration agreements according to their terms is the primary focus of the FAA.³² Since these observations were made by the Supreme Court, the problem of which "gateway issues," such as whether a particular agreement allows for class arbitration, are for the court to

25. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444 (2003).

26. Negotiation, mediation, and litigation fall among other methods of dispute resolution. See generally Note, *Commercial Arbitration: Expanding the Judicial Role*, 52 MINN. L. REV. 1218 (1968).

27. See *Quagmire*, *supra* note 2, at 792-93.

28. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

29. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 644-74 (1996) (tracing the development of the FAA from its inception through 1996).

30. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)).

31. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

32. See *Volt Info. Sciences v. Bd. of Trs.*, 489 U.S. 468, 476 (1989); *Moses H. Cone*, 460 U.S. at 1.

decide, and which issues are for the arbitrator to decide has become increasingly important.³³ After these developments, mandatory arbitration clauses have become commonplace in consumer contracts.³⁴ When those contracts were silent as to the availability of class arbitration, the clear weight of federal authority held that such arbitration was impermissible.³⁵ Thus, under the prevailing interpretation of the FAA, there can be no consolidated or class action arbitration without the express consent of the parties.³⁶ Therefore, the Supreme Court's decision in *Bazze* avoiding that authority, is best understood in light of the law and policies behind both class actions and arbitration.

B. Law and Policy Behind Class Actions

The class action is a procedural device by which a single party or a small number of litigants "represent a larger group of parties that share a common interest in dispute."³⁷ Modern class action jurisprudence is governed by Federal Rule of Civil Procedure Rule 23, which was enacted in 1937.³⁸ The class action device is used when, "because of the [sheer] size of the class, joinder of all of the coparties would be impractical or when, because of venue or service of process limitations, joinder would be impossible."³⁹ Class action judgments are binding on all members of the class as defined by the court, regardless of whether they participated in the litigation.⁴⁰

In order to achieve certification as a class representative, one must demonstrate that the class and its chosen representatives in the litigation

33. See generally IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT* §§ 15.1.4 to 15.3.7, at 15:12 to 15:48 (1994).

34. See Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 834-35 (2002); Drahozal, *supra* note 4.

35. See *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 377-78 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 481-82 (4th Cir. 1999); *Gov't of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107 (6th Cir. 1991), *aff'g*, 761 F. Supp. 472 (N.D. Ohio 1991); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 149 (5th Cir. 1987); *Baesler v. Cont'l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

36. See, e.g., *Champ*, 55 F.3d at 274-77; *Johnson*, 225 F.3d at 377 n.4; *Deiulemar*, 198 F.3d at 481-82; *Boeing*, 998 F.2d at 74.

37. See *Quagmire*, *supra* note 2, at 787.

38. FED. R. CIV. P. 23. See generally FED. R. CIV. P. 23 advisory committee's note (1966 amendments).

39. See *Quagmire*, *supra* note 2, at 787.

40. See *Hansberry v. Lee*, 311 U.S. 32 (1940); RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. e (1982). See generally STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 981-98 (5th ed. 2000).

meet each of the four requirements laid out in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation.⁴¹ Additionally, the class action must fall into one of the three categorical situations described in Rule 23(b): the class action would avoid varying adjudications with respect to individual members of the class,⁴² the action seeks injunctive or declaratory relief where the party opposing the class has acted or refused to act on "grounds generally applicable to the class,"⁴³ or that questions of law or fact common to the class predominate, so that the class action is a superior method for fairly adjudicating the issues involved.⁴⁴

Both policy and history extol the virtues and justifications of the class action device. Efficiency,⁴⁵ improving access to the litigation system, especially for those whose individual claims are too small to warrant the time and expense involved in an individual suit,⁴⁶ and serving the public interest,⁴⁷ are all attributes of the class action that underlie its utility. Without the class action as a mechanism for the enforcement of public rights, school desegregation,⁴⁸ rampant consumer fraud,⁴⁹ and the mistreatment of prisoners⁵⁰ might still be keynote issues in our society.

41. See FED. R. CIV. P. 23(a)(1); YEAZELL, *supra* note 40, at 964.

42. See FED. R. CIV. P. 23(b)(1); YEAZELL, *supra* note 40, at 965; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (observing that Rule 23(b)(1) class actions are appropriate where individual actions would risk "incompatible standards of conduct for the party opposing the class") (quoting FED. R. CIV. P. (b)(1)(A)).

43. See FED. R. CIV. P. 23(b)(2); YEAZELL, *supra* note 40, at 966.

44. See FED. R. CIV. P. 23(b)(3); YEAZELL, *supra* note 40, at 966.

45. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (advocating that a goal of the class action is to permit litigation "of a suit involving common questions when there are too many plaintiffs for proper joinder"); Note, Bruce I. Bertelsen et al., *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1138-41 (1974); see also *Amchem*, 521 U.S. at 617-18 (observing that class actions allow numerous parties with similar claims to avoid lengthy individual proceedings and obtain a speedy adjudication in accordance with Federal Rule of Civil Procedure 1); Note, *Developments in the Law - Class Actions*, 89 HARV. L. REV. 1321, 1321-22 (1976).

46. See *Phillips Petroleum*, 472 U.S. at 809 (suggesting that the virtues of the class action include pooling claims that are uneconomical to litigate individually).

47. See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996) (arguing that the class action is an effective device for enforcing the law and deterring wrongful conduct).

48. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding, in a class action suit, that the Equal Protection Clause prohibits school segregation); *Plyler v. Doe*, 457 U.S. 202 (1982) (affirming award of permanent injunction prohibiting the exclusion of illegal immigrant children from Texas public school district).

49. See *Youngberg v. Bank of Am. Nat'l Trust & Sav. Ass'n*, No. 96-16497, 1997 WL 419113 (9th Cir. 1997) (discussing class action brought against bank for overcharge of fees); James E. Starrs, *The Consumer Class Action - Part II: Considerations of Procedure*, 49 B.U. L. REV. 407 (1969) (arguing that class actions are an effective mechanism for the vindication of consumer's rights).

50. See *Hassine v. Jeffes*, 846 F.2d 169 (3d Cir. 1988) (granting class certification to prisoners alleging unconstitutional conditions at prison); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir.

In sum, although the class action has its critics,⁵¹ its importance as a device by which similar claims are presented and resolved in one adjudication is invaluable as it promotes efficiency, consistency, and liberal access to federal courts.

C. Law and Policy Behind Arbitration

Proponents of arbitration have long espoused the idea that, as a dispute resolution mechanism, arbitration is quicker,⁵² cheaper,⁵³ and easier than litigation.⁵⁴ Further, the additional benefits of allowing parties to contract for their arbitrator, keep proceedings relatively confidential,⁵⁵ as well as relaxed procedural and evidentiary rules⁵⁶ help assure that the manner in which the contracting parties' disputes are resolved will be tailored to their wishes, thereby promoting the preservation of goodwill between the parties.⁵⁷ One of the most avid supporters of arbitration as a favored method of dispute resolution is the United States Supreme Court.⁵⁸

1968) (granting class certification to prisoners seeking injunctive relief as to certain types of discipline).

51. See, e.g., Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 167-70 (1997) (analyzing situations where attorneys are paid large sums of money while members of the class action receive next to nothing).

52. See generally STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (3d ed. 1999); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 850 (1961).

53. Although cost savings through the use of arbitration rather than litigation is a matter still in dispute, many proponents of arbitration cite lower expenses as a substantial reason why arbitration is preferable to litigation. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 148-52 (1992) (noting that cost savings is one reason that the diamond industry prefers private dispute resolution to litigation).

54. See generally Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985 at 3, 6.

55. Arbitration proceedings are designed to be private, and the information revealed within is subject to restrictions on its dissemination. See AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, Introduction (2003) (stating that arbitration is an effective way to resolve disputes privately).

56. Rules of procedure and evidence do not constrain arbitration proceedings. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203-04 n.4 (1956).

57. Arbitration is typically a less adversarial proceeding than litigation and may preserve the parties' business relationship. See Note, *Judicial Control of the Arbitrator's Jurisdiction: A Changing Attitude*, 58 NW. U. L. REV. 521, 542-43 (1963).

58. By stating that the purpose of the FAA was to "reverse the longstanding judicial hostility to arbitration agreements," the Supreme Court radically departed from its initial reluctance to allow the arbitration of all individual claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); see also Julian J. Moore, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1574-75 (2000). The Court reinforced its support of arbitration by unequivocally stating that the Federal Arbitration Act manifests a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). For a thorough discussion

However, arbitration is not without its critics. The ad hoc nature of arbitration, coupled with its disregard for formality in the form of procedural and evidentiary rules, may result in an unpredictable outcome, which in turn could lead to unstable commercial relationships.⁵⁹ The Supreme Court itself has recognized that its liberal policy favoring arbitration⁶⁰ is not without limitations. Examples of such limitations include refusal of the Court to enforce ambiguous arbitration agreements,⁶¹ and reluctance to mandate the arbitration of individual statutory claims.⁶² In addition, the Supreme Court has observed that because arbitration is a creature of contract, it is improper to force parties to arbitrate claims where they have not agreed to do so.⁶³

Although the Supreme Court has placed the aforementioned limits, among others, on its favoritism of arbitration, its support of arbitration as an effective alternative to litigation remains strong. It is this support that has laid the groundwork for the proliferation of binding arbitration agreements limiting parties' abilities to vindicate their rights using the class action mechanism.

D. *Combining the Class Action with Arbitration*

The coupling of the class action device with an arbitral proceeding to form a hybrid "class-wide arbitration" may be seen favorably in terms of combining the virtues present in each individual mechanism. However, courts, scholars, and participants differ immensely with regard to the desirability and feasibility of such a hybrid.⁶⁴ On the other hand, without such a hybrid, there are really only two feasible alternatives that currently exist: allowing the elimination of the class action remedy via binding arbitration agreements or solely permitting class actions to pro-

tracing the attitude of the Supreme Court toward arbitration, see Sternlight, *supra* note 29, at 644-74.

59. See *Quagmire*, *supra* note 2, at 795.

60. See *Moses H. Cone*, 460 U.S. at 24.

61. See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 (1998) (holding an arbitration agreement unenforceable because of a lack of a "clear and unmistakable waiver" of the plaintiff's right to a judicial forum).

62. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); Moore, *supra* note 58, at 1574-83 (discussing the courts' displeasure with the use of arbitration as a means to resolve statutory disputes).

63. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-64 (1995) (recognizing that because arbitration is a matter of choice, it is up to the parties to choose whether punitive damages are available); *First Options, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (holding that parties can choose whether a court or an arbitrator will determine arbitrability); *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989) (observing that arbitration under the FAA is a "matter of consent, not coercion").

64. See *infra* notes 68-89 and accompanying text.

ceed in the judicial forum.⁶⁵

Before entering into the quagmire of the debate surrounding the appropriateness of classwide arbitration, it is prudent to first examine the alleged virtues and shortcomings of such a hybrid dispute resolution mechanism. As a preliminary consideration, arbitration is essentially a contractual matter⁶⁶ whereby parties provide their own device by which their disputes are to be resolved. On the other hand, class action suits, as mentioned above, are formal adjudications involving intense judicial scrutiny.⁶⁷ How and whether the two should dovetail is the subject of much debate.

1. ALLEGED VIRTUES OF CLASS-WIDE ARBITRATION

In *Keating v. Superior Court*,⁶⁸ a California Court of Appeals concluded that there were “no insurmountable obstacle[s]” to conducting classwide arbitration.⁶⁹ The California court is not alone in its deference to classwide arbitration as a dispute resolution device, as several courts and scholars have suggested that such a hybrid is not only workable,⁷⁰ but could effectively preserve the benefits of both the class action and arbitration.⁷¹ This is, of course, subject to the court ruling on major class action issues.⁷²

In permitting classwide arbitration, both the courts in *Keating*⁷³ and *Dickler v. Shearson Lehman Hutton, Inc.*,⁷⁴ insisted that the trial court would take a very active role in the resolution of the class action issues.

65. See Sternlight, *supra* note 3, at 37.

66. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (stating in no uncertain terms that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”).

67. See *supra* notes 37-44 and accompanying text.

68. *Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980) (holding that the trial court erred by failing to first consider class action issues before sending the dispute to arbitration in a franchisor/franchisee relationship), *vacated*, 645 P.2d 1192 (Cal. 1982), and *rev'd on other grounds*, 465 U.S. 1 (1984).

69. *Id.* at 492. The court went on to state that “[i]n an appropriate case, [a classwide arbitration] procedure undoubtedly would be the fairest and most efficient way of resolving the parties’ dispute.” *Id.*

70. See *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982).

71. See *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 320 (Cal. Ct. App. 1986) (praising both class actions and arbitration and stressing that arbitration is “a mutually advantageous process, providing for resolution of disputes in a presumptively less costly, more expeditious, and more private manner by an impartial person or persons typically selected by the parties themselves”) (quoting *Keating*, 645 P.2d at 1198).

72. See Daniel R. Waltcher, Note, *Classwide Arbitration & 10B-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon*, 74 CORNELL L. REV. 380, 403-05 (1989) (advocating classwide arbitration in the securities industry as long as the court made the initial certification of the class).

73. *Keating*, 645 P.2d at 1209.

74. *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

Specifically, the court's responsibilities would extend to certifying the class in compliance with the relevant rules of procedure, ensuring proper notice is provided to all class members, selecting arbitrators, dealing with any potential conflicts of interest between representatives of the class, and reviewing any proposed settlement.⁷⁵ Beyond any of the specific issues, the *Keating* court stated that judicial involvement may be necessary to protect the rights of any absent class members.⁷⁶

Heightened judicial involvement, though it may seem necessary, is not advocated by all of those in favor of classwide arbitration. One commentator advocates that the court should limit its involvement in classwide arbitration to reviewing the arbitration following its conclusion.⁷⁷ The commentator suggests that any determination regarding the certification of a classwide arbitration should be made by an arbitrator and that any abuses of the system can be dealt with by arbitrators as effectively as they could be dealt with by a court.⁷⁸

In essence, viewpoints differ sharply with regard to the handling and the mere allowance of classwide arbitrations. However, as the California Supreme Court stated in *Keating*, "[i]f the alternative in a case of this sort is to force hundreds of individual franchisees each to litigate its cause with Southland in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution."⁷⁹ Combining the traditional class action with arbitration offers an opportunity to take advantage of the benefits of each device in a single proceeding.⁸⁰ Thus, although the hybrid classwide arbitration may be difficult to work, and may in some cases face disagreement as to its management, its benefits may outweigh its shortcomings.

2. ALLEGED SHORTCOMINGS OF CLASSWIDE ARBITRATION

In spite of the aforementioned virtues of classwide arbitration, the hybrid mechanism has not been widely adopted nor for that matter, praised. In fact, the entire securities industry has rejected classwide

75. See *id.* at 866.

76. *Keating*, 645 P.2d at 1209.

77. See *Quagmire*, *supra* note 2, at 806-09.

78. See *id.* at 811.

79. *Keating*, 645 P.2d at 1209.

80. As long as the arbitrator controls the certification of the class, his independence from the judiciary will not be compromised and the traditional advantages sought by those who initially agreed to arbitration, most likely speed and efficiency, will be preserved. This, of course, comports with *Volt's* interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994), wherein its purpose is to enforce arbitration agreements in accordance with their terms. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989).

arbitration as a dispute resolution mechanism.⁸¹ Additionally, commentators and several judges have suggested that the hybrid is inherently defective in that it violates due process.⁸²

A major theme running through contemporary Supreme Court class action jurisprudence is the fact that the class action, as a dispute resolution device, raises several due process concerns.⁸³ The most serious of these due process hurdles is the fact that a judgment or settlement in a class action procedure cannot be binding on absent class members unless they were afforded adequate representation.⁸⁴ In order for these hurdles to be dealt with in a satisfactory manner, some commentators suggest that due process concerns require substantial court oversight of all class-wide arbitration, despite any adverse logistical consequences.⁸⁵ It is these due process concerns and hurdles that in turn, critics argue, make classwide arbitration logistically flawed as well.

However, it is not merely due process concerns that supposedly cause classwide arbitration problems, but rather other less obvious problems. Jean Sternlight suggests that the simple selection of an arbi-

81. Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, 57 Fed. Reg. 52,659 (Nat'l Ass'n of Secs. Dealers Nov. 4, 1992). The order provides that claims filed in arbitration as class actions are not eligible for submission under the Uniform Code of Arbitration and that claims filed by members of a putative or certified class that were filed in another forum are also ineligible for submission if the claim is encompassed by the class action, thereby eliminating any right to classwide arbitration in the securities industry.

82. See *Keating*, 645 P.2d at 1210-18 (Richardson, J., concurring and dissenting); *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70, 77-79 (N.Y. App. Div. 1981) (Bloom, J. dissenting); Dunham, *supra* note 1; Elizabeth P. Allor, Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CAL. L. REV. 1239 (1983).

83. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (finding that "[i]f the forum State wishes to bind an absent [class-action] plaintiff . . . it must provide minimal procedural due process protection"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (finding that the Rule 23(c) notice requirement satisfies the due process requirement of notice, and that the costs of such notice are to be borne by the representative parties, regardless of their amount); *Hansberry v. Lee*, 311 U.S. 32 (1940) (holding that adequate representation is required to bind a non-representative party to a judgment in a class action suit). See generally Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871 (1995) (suggesting alternative due process safeguards for plaintiffs involved in mandatory class actions).

84. See *Phillips Petroleum*, 472 U.S. at 811-12; *Hansberry*, 311 U.S. at 42-45. See generally FED. R. CIV. P. 23.

85. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (suggesting that a determination of class certification can only be made following an in-depth analysis of Rule 23's required components); *Quagmire*, *supra* note 2, at 800-04 (noting that due process concerns in classwide arbitration will likely be addressed by courts on a case-by-case basis, thereby only requiring substantial judicial oversight in cases where procedural safeguards have not already been instituted either privately in the arbitration agreement or by the arbitrator); see also *Keating*, 645 P.2d at 1215 (Richardson, J., concurring and dissenting) (noting that before certifying a class proceeding, "a court must carefully evaluate the nature of the proof that will be presented by the parties, and the parties are likely to devote extensive resources to developing the facts and arguments fully in regard to the usually complex certification issues") (citations omitted).

trator to handle classwide arbitration can prove problematic.⁸⁶ Sternlight contrasts the advantages present in an individual arbitration where all parties have the opportunity to participate in the selection of an arbitrator or a panel of arbitrators with the lack of availability of such participation in classwide arbitration, as the arbitrators would presumably be chosen by the representative parties or by counsel.⁸⁷ Such a system removes the alleged virtue of participation in the selection of the decision-maker to govern your dispute, thereby creating a logistical problem with the classwide arbitration hybrid.

Criticism is also leveled at the classwide arbitration hybrid proceeding in general. Arguments abound for the proposition that the hybrid procedure will become awkward and inefficient in light of the necessity for substantial judicial supervision.⁸⁸ Such considerable supervision might then remove the virtue of efficiency from the arbitration process and impose a substantially similar burden on the arbitrator(s) as that which might have been placed on the court had the class proceeding been filed there.⁸⁹ Regardless of the side taken, one must be sure that any classwide arbitration complies with all due process requirements.

III. THE *BAZZLE* DECISION - LEAVING A STONE UNTURNED

The real impact of *Bazzle* lies in the question it failed to answer, not in the questions that it took up. The failure of the fractured Court to address the impact of the FAA⁹⁰ on classwide arbitration has left a troubling void in contemporary arbitration jurisprudence. Specifically, by avoiding the aforementioned issue, the Court has prolonged a decision on the issue that has attracted the most attention from the business community and consumer advocacy groups: does the FAA enable courts to declare an arbitration clause that specifically prohibits classwide arbitration unconscionable and unenforceable as a matter of state contract law?⁹¹

86. Sternlight, *supra* note 3, at 49.

87. *Id.*

88. See *Keating*, 645 P.2d at 1215-16 (Richardson, J., concurring and dissenting) (noting that continued judicial monitoring of classwide arbitration procedures would make the ensuing arbitration inefficient and lengthy, as well as impose a higher degree of formality than would be customarily required, thereby making the "imposition of class action procedures on the arbitration process . . . self-defeating"); Allor, *supra* note 82, at 1252-53 (arguing that arbitration on a classwide basis would likely lose any efficiency or expense advantage due to the substantial supervision required of a judge in such a proceeding).

89. See *supra* notes 81-87 and accompanying text. But see *supra* note 79 and accompanying text.

90. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000).

91. See, e.g., Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner at *4-5, n.2, *Green Tree Fin. Corp. v. Bazzle*, 538 U.S. 444 (2003) (No. 02-634) (noting a recent decision which held an arbitration clause that forbid proceeding in a

Unfortunately, by avoiding the pertinent question, the Court has failed to take a much needed step toward solidifying how the FAA treats classwide arbitration, and more importantly, the individual's right to pursue classwide relief. In as much as the opinions in *Bazze* send any signals regarding how this question will ultimately be decided, they are troubling at best. With regards to the choice to recognize strict enforcement of arbitration agreements over adherence to state contract law, Chief Justice Rehnquist's dissent suggests that he and at least two other Justices might be willing to grant the FAA a preemptive effect beyond the statute's plain language. When the court is eventually faced with the question it so skillfully avoided in *Bazze*, it should deny corporate America the chance to eliminate the class action as a dispute resolution mechanism and hold that reasonable state law decisions holding clauses prohibiting classwide arbitration unconscionable do not conflict with the FAA.

A. *Contemporary Classwide Arbitration Jurisprudence*

The United States Supreme Court has not ruled on whether arbitrations may take the form of class actions, but in *dicta*, has suggested that such a proceeding may be allowable under the FAA.⁹² In *Gilmer*, the Court addressed whether a claim under the Age Discrimination in Employment Act⁹³ could "be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."⁹⁴ *Gilmer* opposed having his suit sent to arbitration partly on the ground that he would be deprived of the opportunity to proceed by class action.⁹⁵ Without addressing classwide arbitration, the Court denied *Gilmer*'s argument, but in so doing, the Court suggested that a coupling of class actions and arbitration would not necessarily be inappropriate.⁹⁶ The Court went on to explain that arbitrators may possess the necessary authority to allow classwide arbitration under the New York Stock Exchange rules, and that the arbitration agreement at issue would not prohibit the Equal Employment Opportunity Commission from bringing

classwide manner unconscionable and arguing that the *Bazze* case before the Court was an opportunity to dispatch that "shibboleth"), *available at* 2003 WL 721691; Brief of Amicus Curiae Trial Lawyers for Public Justice in Support of Respondents at *18-25, *Bazze*, 538 U.S. at 444 (No. 02-634) (urging the Court not to reach the question of whether the FAA enables courts to declare an arbitration clause that specifically prohibits classwide arbitration unconscionable and unenforceable as a matter of state contract law), *available at* 2003 WL 1701520.

92. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991).

93. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2000).

94. See *Gilmer*, 500 U.S. at 23.

95. *Id.* at 32.

96. See *id.*

an action seeking classwide relief.⁹⁷ In essence, although *Gilmer* does not specifically address the availability of classwide arbitration, it suggests that such availability may hinge upon the language in which the arbitration clause is drafted and the law under which the claim is brought.

After *Gilmer*, but before the Court's decision in *Bazzele*, whether, under the FAA, a class or consolidated arbitration was available appeared to be an issue for a court, not an arbitrator, to decide. Further, the clear weight of federal authority held that absent an express agreement of the parties, there simply could not be classwide arbitration.⁹⁸ The leading case on the issue is the Seventh Circuit's decision in *Champ v. Siegel Trading Co.*,⁹⁹ wherein an investor sued a brokerage firm in federal court, alleging several statutory violations. The defendants in the case moved to compel arbitration under section 4 of the FAA, and the motion was granted by the district court.¹⁰⁰ The plaintiff then sought certification as a class representative in the arbitration, which was denied by the district court.¹⁰¹ The court concluded that because the arbitration agreement did not specifically authorize a class proceeding, it lacked the necessary authority to certify the class arbitration.¹⁰²

On appeal, the central question posed to the Seventh Circuit was whether the district court had the authority to certify a class where the arbitration clause was silent on the issue.¹⁰³ The Seventh Circuit answered the question emphatically in the negative, reasoning that "several other circuits have addressed whether a district court has the authority to apply Fed. R. Civ. P. 42(a) and order consolidated arbitration where the parties' arbitration agreement is silent on the matter."¹⁰⁴ The court went on to note a plethora of federal appellate cases¹⁰⁵ holding that absent an express provision in the parties' agreement, consolidation of arbitral proceedings is prohibited even when such consolidation "would promote the expeditious resolution of related claims."¹⁰⁶ However,

97. See *id.*

98. See *supra* note 36.

99. *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995).

100. *Id.* at 271.

101. *Id.*

102. *Id.*

103. *Id.* at 274.

104. *Id.*

105. See *id.* at 274-75 (citing *Gov't of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *Am. Centennial Ins. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baessler v. Cont'l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984)).

106. See *Champ*, 55 F.3d at 274.

Champ may not be the final word on the subject, even in the Seventh Circuit, as it has recently limited its holding in *Connecticut General Life Ins. Co. v. Sun Life Assurance Co.*,¹⁰⁷ finding that an ambiguous contract silent on the issue of classwide arbitration could reasonably be interpreted to allow consolidated claims.¹⁰⁸

The Seventh Circuit is not alone in coming to the realization that a court may order classwide arbitration if the agreement is silent on the issue. The seminal case in this regard is *Keating v. Superior Court*,¹⁰⁹ where the California Supreme Court promulgated a balancing test for application by trial courts in determining whether to permit classwide arbitration.¹¹⁰ The court's reasoning was based largely on policy arguments commonly used to support class actions,¹¹¹ as well as arbitration,¹¹² and favoring the protection of weaker parties.¹¹³ This acquiescence toward possible classwide arbitration, where the arbitration agreement was silent on the issue, seemingly laid groundwork arguments¹¹⁴ upon which the United States Supreme Court could have relied in allowing for classwide arbitration under the FAA.

B. *Leaving A Stone Unturned*

The Supreme Court granted certiorari to consider whether the South Carolina Supreme Court's holding, that the arbitration agreements in question were silent with respect to class arbitration and therefore

107. *Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co.*, 210 F.3d 771 (7th Cir. 2000).

108. *See id.* at 774-76.

109. *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982).

110. The balancing test is a weighing of the administrative costs and complexities of necessary court involvement in the arbitral process with the likely costs and unfairness that may occur if classwide arbitration were denied. *See id.* at 1209-10. The *Keating* court also stated that the trial court should consider other alternatives, such as the consolidation of individual claims. *Id.* at 1210. For a discussion of the necessary court involvement in classwide arbitration, see *supra* notes 64-89 and accompanying text.

111. In stating "[w]e have observed that the class suit 'both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation,'" the court stressed the role of the class action in the vindication of rights that might not be feasibly asserted otherwise. *Id.* at 1206 (quoting *Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 27 (Cal. 1981)).

112. The court decided that forbidding companies from using contracts of adhesion to eliminate class actions should be avoided in light of the public policies favoring arbitration. *See id.* at 1206-07.

113. The court voiced its concern in allowing companies to impose adhesive contracts on consumers to effectively eliminate any classwide remedy in arbitration. *Id.* at 1207. Specifically, the court said, "[i]f . . . an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party." *Id.*

114. The *Keating* court expressed considerable concern that corporate America, by drafting adhesive arbitration agreements barring class actions, might legally be able to chill "the effective protection of interests common to a group." *Id.*

authorized class arbitration, was consistent with the FAA.¹¹⁵ They never reached that question. The plurality opinion, written by Justice Breyer and joined by Justices Scalia, Souter, and Ginsburg, held that whether the parties' agreement permitted class arbitration was a matter for the arbitrator, not the courts, to decide.¹¹⁶ The opinion begins by observing that if the arbitration clause expressly forbade classwide arbitration, then the South Carolina Supreme Court's holding would have been "flawed on its own terms."¹¹⁷ After noting that the agreement was ambiguous on its face, the court refused to answer whether the specific clause permitted class arbitration.¹¹⁸ It is this particular question, ignored by the Supreme Court, which has left a gaping hole in arbitration law and should have been addressed here.

Though many courts have held that due to the FAA's mandate of enforcing arbitration agreements according to their terms¹¹⁹ they may not compel, or perhaps even allow arbitration on a classwide basis, their analysis of the issue leaves much to be desired as many "have simply assumed that a silent arbitration agreement should be interpreted to foreclose arbitral class actions."¹²⁰ To the extent that courts have attempted to address whether silent agreements allow for class actions, they have done so by analogizing classwide arbitration with consolidation of two or more arbitration proceedings.¹²¹ This proves problematic for several reasons;¹²² however, in light of those reasons, courts need not apply the same analogy and feel compelled to prohibit classwide arbitration.¹²³

Despite ample opportunity to follow the consolidation analogy, Jus-

115. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

116. *Id.* at 451.

117. *Id.* at 450.

118. *Id.* at 450-53.

119. *See, e.g., Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

120. *See Sternlight*, *supra* note 3, at 84.

121. *See, e.g., Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998). *But see Keating v. Superior Court*, 645 P.2d 1192, 1208-10 (Cal. 1982) (using the consolidation analogy to support a classwide arbitration order).

122. *See Sternlight*, *supra* note 3, at 86-87, wherein the author suggests that such an analogy is "inapt" for three principal reasons:

First, the consequences of a court's refusal to order consolidation of two or more arbitral matters are far different than the consequences of a court's refusal to allow an arbitral matter to proceed as a class action. . . .

Second, whereas a consolidation order may well cause conflict in interpreting multiple contracts, an order for class arbitration need not. . . .

Third, where an arbitrator might have the power to order consolidation on his or her own, it is not at all clear that arbitrators could properly handle class actions without assistance from the courts.

Id.

123. *See id.* at 88.

tice Breyer's opinion completely ignored any of the earlier federal appellate decisions holding that the FAA prohibits classwide arbitration when the agreement is silent on the issue.¹²⁴ By failing to acknowledge these federal appellate decisions, Breyer and the rest of the plurality neglected a golden opportunity to resolve a split among the circuits¹²⁵ and several state courts which construe the FAA as allowing for consolidation where the arbitration clause is silent.¹²⁶ Instead, by vacating and remanding upon a finding that there was "at least a strong likelihood . . . that the arbitrator's decision [to conduct classwide arbitration] reflected a court's interpretation of the contracts," the plurality opened the door to a troubling outcome should the main dissent be adopted later.¹²⁷

Justice Stevens' conclusion, that nothing in the FAA prevents a state court from holding "as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue," appears to suggest that he believes the court, rather than the arbitrator, should determine whether a particular agreement allows for classwide arbitration.¹²⁸ However, it does nothing to dispel the troubling implications suggested by the Chief Justice's dissent.¹²⁹ On the other hand, Justice Stevens went on to say that "[a]rguably, the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."¹³⁰ Unfortunately, lacking a majority position, the case resolves nothing.¹³¹

124. See, e.g., *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264 (2d Cir. 1999); *Champ*, 55 F.3d at 275; *Johnson v. W. Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 481-82 (4th Cir. 1999); *Gov't of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107 (6th Cir. 1991), *aff'g*, 761 F. Supp. 472 (N.D. Ohio 1991); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *Baessler v. Cont'l Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984).

125. Compare note 124 and accompanying text, with *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4-5 (1st Cir. 1988), and Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 *IOWA L. REV.* 473, 495-502 (1987) (arguing that even absent explicit contractual authorization, courts should be allowed to order consolidation of various arbitral disputes).

126. See, e.g., *Litton Bionetics, Inc. v. Glen Constr. Co.*, 437 A.2d 208, 219-20 (Md. 1981); *Exber, Inc. v. Sletten Constr. Co.*, 558 P.2d 517, 523-24 (Nev. 1976).

127. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003).

128. *Bazzle*, 539 U.S. at 454 (2003) (Stevens, J., concurring in the judgment and dissenting in part).

129. See *infra* notes 134-41 and accompanying text for a discussion of the Chief Justice's dissenting opinion and its possible implications.

130. *Bazzle*, 539 U.S. at 454 (Stevens, J., concurring in the judgment and dissenting in part).

131. Should Justice Stevens side with the dissent when the court squarely reaches the issue, it appears that Justice Thomas's vote would be decisive. However, Justice Thomas would probably

Undoubtedly, the Court had no intention of making classwide arbitration any murkier;¹³² however, under the guise of deferring the decision to the arbitrator, this is exactly what the Court accomplishes. By avoiding the important question of whether the FAA requires enforcement of an arbitration clause forbidding classwide arbitration, the Court leaves the issue unsettled in the face of divergent lower court decisions.¹³³ Due to such divergence, the Court will unlikely be able to avoid the question for long.

If this is in fact the case, then what does the *Bazze* opinion tell us to expect? The Court's view of the proper outcome was badly splintered, and the Chief Justice's dissent sends a troubling signal by suggesting that he and at least two other Justices are willing to grant the FAA an unprecedented preemptive effect by exalting strict enforcement of arbitration agreements over adherence to state contract law.¹³⁴ He argued that whether the agreement permitted class arbitration was a decision for the court because the issue was what should be submitted to the arbitrator, traditionally a matter left for the judiciary.¹³⁵ Rehnquist based his argument on the preemption doctrine, reasoning that state contract law would be preempted if it conflicted with the congressional pur-

only address the question if it were to arise in a federal court, as his dissent reiterates his long-standing position that the FAA should not apply to proceedings in state courts. *Id.* at 460 (Thomas, J., dissenting).

132. The issue of classwide arbitration, despite its importance, has received relatively little attention from the courts, Congress, and even scholars in the area. As is addressed in this article, the FAA fails to mention classwide arbitration, and the few law review articles that do address the topic are outdated. See Sternlight, *supra* note 3, at 15-16.

133. Decisions in lower courts enforcing arbitration "agreements" barring class treatment: *Arellano v. Household Fin. Corp.*, III, No. 01 C 2433, 2002 WL 221604, at *5 (N.D. Ill. Feb. 13, 2002) (holding that Truth in Lending Act reference to class actions did not convey a right to bring class claims where such claims were not arbitrable under the "agreement"); *Marzek v. Mori Milk & Ice Cream Co.*, No. 01 C 6561, 2002 WL 226761 (N.D. Ill. Feb. 13, 2002) (finding that FLSA provision allowing collective action did not necessarily convey a right to bring a class action). Decisions refusing to enforce arbitration "agreements" barring class treatment: *Ting v. AT & T*, 182 F. Supp. 2d 902, 927 (N.D. Cal. 2002) (finding in a consumer case that a customer service agreement was void under public policy by violating the plaintiffs' rights to bring a class action under California's Consumer Legal Remedies Act; *Bailey v. Ameriquist Mortgage Co.*, No. 01-545(JRTFLN), 2002 WL 100391 (D. Minn. Jan. 23, 2002) (FLSA action).

Applying that case by case principle to the facts of this case, the Court finds that the inability to proceed collectively, particularly when considered in connection with the venue and other provisions discussed above, has the effect of rendering plaintiff's individual claims impractical to pursue. The right to proceed collectively is particularly critical to these plaintiffs, who, as previously mentioned, have relatively small individual claims.

Id. at *7.

134. See *Bazze*, 539 U.S. at 455 (Rehnquist, C.J., dissenting).

135. *Id.* at 456 (Rehnquist, C.J., dissenting).

pose behind the FAA,¹³⁶ thus ensuring that arbitration agreements are enforced according to their terms.¹³⁷ Because the agreement was that all disputes would be decided “by one arbitrator selected by [Green Tree] with the consent of [the claimants],”¹³⁸ any classwide arbitration would be inconsistent with the terms of the agreement, as Green Tree would only be able to select the arbitrator for the class, not for each claim.¹³⁹ Thus, the Chief Justice concluded that the FAA’s mandate of enforcing arbitration agreements as written¹⁴⁰ would preempt the decision of the South Carolina Supreme Court.¹⁴¹

When the time comes for the United States Supreme Court to address the question of whether the FAA permits arbitration clauses to foreclose classwide arbitration even when they are silent on the issue, there are a plethora of reasons the court should hold that the “liberal federal policy favoring arbitration”¹⁴² is consistent with a state contract law determination that such a clause is unenforceable. To begin with, the central provision of the FAA mandates that arbitration agreements are only enforceable to the extent that any contract would be enforceable.¹⁴³ The Court has interpreted this so-called saving clause provision to mean that “generally applicable contract defenses . . . may be applied to invalidate arbitration agreements without contravening” the FAA.¹⁴⁴ Therefore, congressional intent illustrates that arbitration agreements are “as enforceable as other contracts, but not more so.”¹⁴⁵ Thus, if a state court determines an arbitration clause prohibiting classwide arbitration, or remaining silent in that regard, unconscionable or unenforceable for any number of reasons, the FAA should have no preemptive effect on such a judgment. Further, in light of the Supreme Court’s repeated deference to the aforementioned saving clause, the federal policy concerning the FAA’s treatment of silent or prohibitive arbitration clauses on the issue of classwide arbitration should be understood to enforce such agreements according to their terms insofar as they comport with applicable state contract law.¹⁴⁶

136. *Id.* at 458 (“[S]tate law may nonetheless be pre-empted to the extent that it actually conflicts with federal law.”)(quoting *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989)).

137. *Id.* (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479)).

138. *Id.* at 458 (Rehnquist, C.J., dissenting).

139. *Id.* at 459 (Rehnquist, C.J., dissenting).

140. See *supra* note 3 and accompanying text.

141. See *Bazze*, 539 U.S. at 455 (Rehnquist, C.J., dissenting).

142. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

143. See 9 U.S.C. §2 (2000).

144. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

145. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

146. See *Sternlight*, *supra* note 3, at 105.

Traditional contract law provides only one reason why the Supreme Court should abstain from construing silent arbitration agreements as foreclosing classwide arbitration under the FAA. The liberal federal policy favoring arbitration as a dispute resolution mechanism mandates that ambiguous agreements be read to favor arbitration.¹⁴⁷ In permitting arbitrators to award punitive damages when the agreement was ambiguous on the subject, the Supreme Court relied on the "common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it."¹⁴⁸ Thus, drafters (typically companies) of ambiguous agreements as to the issue of classwide arbitration should have the contract construed against their wishes in the event of a dispute, permitting the claimant (typically a consumer) to arbitrate on a classwide basis.

Additionally, as a pure matter of policy, class actions seem to have carved out a favorable niche in federal law. The Federal Rules of Civil Procedure specifically permit them.¹⁴⁹ Further, the importance of class actions in social reform cannot be denied.¹⁵⁰ Lastly, the argument that classwide arbitration detracts from arbitration's "benefits," specifically lower expenses and quicker adjudication, is logically flawed. Classwide arbitration may do just the opposite and be less costly and time consuming due to the adjudication of many similar claims at once.

One should recognize that despite the power of the above arguments, arbitration clauses that are silent on the issue of classwide arbitration are likely to become rare as drafters simply need to create a clause explicitly prohibiting classwide arbitration to avoid the *Bazze* holding.¹⁵¹ The question of how the Court should deal with those agreements that specifically prohibit class proceedings in any forum, judicial or arbitral, is more problematic.¹⁵² As companies begin to draft agreements taking this form¹⁵³ and argue that they must be enforced accord-

147. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

148. See *id.*

149. See FED. R. CIV. P. 23.

150. See *supra* notes 47-50 and accompanying text; see also Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45-55 (1998).

151. See Dunham, *supra* note 1, at 141 (arguing that "[f]ranchisors with an arbitration clause in their franchise agreements have an effective tool for managing these new class action risks").

152. Several courts have taken the approach that when an arbitration clause is interpreted as precluding classwide arbitration, the claimants should be allowed to pursue their claims in class action litigation. See *Nielsen v. Piper, Jaffray & Hopwood, Inc.*, 66 F.3d 145 (7th Cir. 1995); *Olde Disc. Corp. v. Hubbard*, 4 F. Supp. 2d 1268 (D. Kan. 1998), *aff'd*, 172 F.3d 879 (10th Cir. 1999).

153. One such agreement was drafted by Blockbuster, Inc. to govern the use of a BLOCKBUSTER GiftCard® and specifically states:

To fairly resolve any dispute arising between you and Blockbuster regarding your purchase or use of this GiftCard, you and Blockbuster agree that any claims by

ing to their terms, courts are left with little room to maneuver. Limits are necessary, but an all-out ban may be impracticable.¹⁵⁴ The Supreme Court will soon be confronted with issues central to the future of the boilerplate adhesive arbitration clause as drafters begin to explicitly prohibit class arbitrations. Of course, Congress could be lobbied to amend the FAA to require enforcement of arbitration clauses eliminating class proceedings. However, despite the Chief Justice's view to the contrary, the FAA in its current form simply does not have such a preemptive effect.

IV. CONCLUSION

As arbitration meets the class action there is an opportunity to realize the benefits of both mechanisms in a single proceeding. The Supreme Court's avoidance of the question of whether the FAA allows classwide arbitration in *Bazze* clouds the future for claimants seeking to vindicate their rights on a classwide basis. Companies should not be permitted to limit the substantive rights of consumers by imposing adhesive arbitration agreements that eliminate classwide arbitration. This is an essential step in the preservation of consumer rights and if it is not recognized by the courts, Congress should legislate to protect such an important procedural device that has achieved social reform on a large scale. By leaving one stone unturned, the Supreme Court's decision in *Bazze* fails to articulate a constant theory as to when classwide arbitration is permissible under the FAA.

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either you or Blockbuster shall be settled exclusively by binding arbitration governed by the Federal Arbitration Act and administered by the American Arbitration Association under its rules for the resolution of consumer-related disputes, or under other mutually-agreed procedures. Because this method of dispute resolution is personal, individual, and provides the exclusive method for resolving such disputes, *you further agree that you will not participate in a class action or class-wide arbitration* for any claims covered by this agreement. Your use of this BLOCKBUSTER GiftCard constitutes your acceptance of this arbitration agreement.

Blockbuster, Movies, Giftcards, Terms, at <http://www.blockbuster.com/corporate/displayTermsandConditions.action#giftcards> (last updated Apr. 30, 2005) (emphasis added).

154. See Sternlight, *supra* note 3, at 92-100 (illustrating statutory and legislative intent arguments for invalidating arbitration agreements that specifically forbid class proceedings).

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