NOTES & COMMENTS

SO YOU ARE SAYING THAT THERE'S A CHANCE: STRATEGIES FOR CHALLENGING COMPELLED ARBITRATION

by
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Significant scholarship has been dedicated to recent jurisprudence on arbitration clauses and class action waivers in modern contracts. Given the difficult landscape of legislation and court decisions favoring arbitration, the availability of the class action model as a vehicle for relief has dwindled. Although the prospects for litigants who wish to bring class claims in courts may be daunting, this Note has discovered some strategies that still may prove useful for future litigation.

I reviewed putative class action cases in which a party moved to compel arbitration between January 1, 2017 and April 1, 2019 to identify recent, effective tactics that attorneys used to keep class claims in court. From this research, I identified a number of instances where creative lawyers have used close analyses of the agreements to develop successful methods of combating arbitration agreements. The strategies used in these cases exhibit imaginative approaches to the fundamentals of contract law and suggest that savvy attorneys can still deliver positive outcomes in the face of difficult challenges. Although many of the strategies used in these examples are fact-specific and thus have limited application, the review of these cases may inspire new approaches for attorneys who wish to help clients keep claims in court.

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INTRODUCTION

Arbitration agreements have become a pervasive feature of modern contracts. These provisions appear in contracts that range from consumer contracts, to employment contracts, to financial contracts, and beyond.[1] Often, the parties drafting arbitration agreements have greater bargaining power than the individuals with whom they contract and offer the agreements on a take-it-or-leave-it basis. Thus, avoiding these clauses is unlikely (if not impossible) for many individuals unless the individual refuses to contract with these drafting entities altogether. These provisions, especially those that preclude class arbitrations, can make relief difficult for individuals and create safe harbors for parties who wish to avoid facing suit in class actions.

Recent legislation and court decisions have limited the availability of class relief and favored the enforcement of arbitration agreements. As will be discussed in more detail below, in the past decade, four major Supreme Court decisions favoring arbitrations have greatly impacted plaintiffs' ability to bring claims under the class action or aggregate structure. First, in *AT&T Mobility LLC v. Concepcion*, the Supreme

[1] *See, e.g.*, Castellanos v. Mariner Finance, LLC, No. MJG-17-3168, 2018 WL 488725, at *1 (D. Md. Jan. 18, 2018) (finding arbitration agreement in a financial contract between a loan provider and borrower enforceable); Keena v. Groupon, Inc., 192 F. Supp. 3d 630, 640 (W.D. N.C. 2016) (finding arbitration clause in consumer agreement with coupon sales company valid and enforceable); Cutler Assocs., Inc. v. Palace Constr., LLC, 132 F. Supp. 3d 191, 200 (D. Mass. 2015) (finding arbitration agreement in commercial contract between general contractor and subcontractor valid and enforceable); Paradise v. Eagle Creek Software Servs., Inc., 989 F. Supp. 2d 132, 143 (D. Mass. 2013) (enforcing arbitration agreement found in employment contract).

Court held that the Federal Arbitration Act ("FAA") preempted state law, holding that class waivers in arbitration agreements were unconscionable.[2] A few years later, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court ruled that arbitration clauses with class waivers were valid even if it would be economically impracticable to maintain the claims as individuals.[3] Then, in *Epic Systems Corp. v. Lewis*, the Supreme Court determined that class action waivers for arbitration agreements were enforceable in employment contracts.[4] Most recently, in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the Supreme Court ruled that courts cannot decide the threshold question of whether a claim is arbitrable when the relevant agreement delegated that issue to the arbitrator, even if the argument that the dispute is arbitrable is deemed to be "wholly groundless."[5] With the difficult landscape of judicial opinions supporting arbitration, the opportunities to avoid arbitration and assert claims as a class or collective action seem to be disappearing.

Class action scholars have expressed a somewhat pessimistic view on the future of class actions in response to the Supreme Court's seminal rulings in *Concepcion*, *American Express*, and *Epic Systems*. Following the decision in *Concepcion*, one scholar predicted that "businesses will eventually be able to eliminate virtually all class actions brought against them."[6] Another described the holdings in *Concepcion* and *American Express* as the "most dramatic development undermining the availability of the class action (and citizen access to the courts generally) in recent years, especially in the context of a wide range of consumer transactions, employment disputes, and small business matters."[7] And after the Supreme Court's decision in *Epic Systems*, one scholar predicted that "greater numbers of employers overall [will] adopt[] mandatory arbitration in order to take advantage of the opportunity of using class action waivers that would be unavailable outside of the arbitral context."[8] Though the landscape of opportunities may seem dismal, some recent cases have shown that savvy attorneys are still discovering ways to challenge these provisions and keep claims in the courts.

I have reviewed putative class action cases in which a party moved to compel arbitration between January 1, 2017 and April 1, 2019 to identify recent, effective tactics that attorneys used to keep class claims in court. From this research, I have identified a number of strategies that may prove useful in future litigation. These

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[2] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011).

[3] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 237–38 (2013).

[4] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[5] Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019).

[6] Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015).

[7] Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1, 28 (2018).

[8] Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 17 (2019).

examples show that creative lawyers have used close analyses of the agreements to identify arguments for attacking the formation of the contract, challenging terms of the contract, or contractual defenses.

This Note features a sample of cases that show successful methods of combating arbitration agreements and keeping claims in the court system. The strategies used in these cases exhibit imaginative approaches to the fundamentals of contract law. Section I of this Note summarizes relevant legislation and case law to provide background for the current legal landscape for arbitration. Section II analyzes cases where parties avoided compelled arbitration by challenging the formation of the contract. Section III examines cases where attorneys opposed arbitration agreements using close analyses of the terms of the contract. Section IV discusses how an argument using the statutory interpretation of the FAA has been used to defeat compelled arbitration. Finally, Section V surveys cases in which the party seeking to enforce the agreement has prevented enforcement through its own actions. Each of these sections include cases illustrating contrary holdings to help delineate some of the limitations to these strategies. Though some of these strategies may have limited application, these cases show that skillful lawyering can overcome barriers to class actions even in seemingly impossible cases.

I. SETTING THE STAGE: A BRIEF HISTORY OF ARBITRATION LEGISLATION AND NOTABLE COURT DECISIONS

Congress enacted the Federal Arbitration Act in 1925 to address judicial hostility to arbitration agreements.[9] The negative treatment of arbitration was inherited from English common law when arbitration was viewed as a threat to the power and jurisdiction of the courts.[10] Congress sought to eliminate the hostility towards arbitration by placing arbitration agreements "upon the same footing as other contracts."[11] The FAA was made to provide "an opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the document by the parties to it" and to ask "parties to come in, and carry through, in good faith, what they have agreed to do."[12] Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal,

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[9] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[10] 65 CONG. REC. 1931 (1924).

[11] H.R. REP. NO. 96, 68th Cong., 1st Sess., at 1 (1924).

[12] 65 CONG. REC. 1931.

> shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[13]

Since the enactment of the statute, the Court has expanded the application of the FAA. In 1983, the Court extended the FAA's application in state courts by ruling that Section 2 preempts state laws that hold arbitration unenforceable.[14] In 1995, the expansion continued when the Court held that the phrase "involving commerce" should be interpreted broadly as "affecting commerce" so that the statute "signals an intent to exercise Congress' commerce power to the full."[15] After this ruling, the statute applied to contracts that affect interstate commerce whether or not the parties contemplated an impact on interstate commerce.[16]

Recent cases have significantly impacted the application of the FAA in the context of complex litigation. In the landmark case *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA preempted California's prior ruling that, in the context of consumer contracts, class waivers in mandatory arbitration clauses were unconscionable.[17] In that case, customers brought a class action suit alleging that AT&T's offer of a free telephone was false advertising and fraudulent because customers were charged sales tax for the phone. The district court refused to compel arbitration because the clause prohibited bringing the claim as a class. The court relied on the California Supreme Court's decision in *Discover Bank v. Superior Court* that held that mandatory arbitration provisions with class waivers in consumer contracts of adhesion were unconscionable.[18] The Ninth Circuit affirmed,[19] but the

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[13] 9 U.S.C. § 2 (2012).

[14] *See* Southland Corp. v. Keating, 465 U.S. 1, 7–8 (1984); *see also* Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1526 (1995).

[15] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995). Notably, the majority stated that Section 2 provides states with a "method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision" and that states "may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Id.* at 281 (quoting 9 U.S.C. § 2).

[16] *Id.*

[17] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).

[18] Discover Bank v. Superior Court of Los Angeles, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 ("We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud or willful injury to the person or property of another.'"(citations omitted)).

[19] Laster v. AT&T Mobility LLC, 584 F.3d 849, 852 (9th Cir. 2009), *overruled by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Supreme Court overturned the ruling in a 5–4 decision, focusing on the principal purposes of the FAA—efficiency and enforcing contractual agreements according to the terms of the agreement.[20] The Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[21] Notably, Justice Thomas's concurrence and the fifth vote for the majority held that an arbitration agreement can be avoided if "a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress."[22]

Two years after *Concepcion*, the Supreme Court made another monumental ruling in *American Express Co. v. Italian Colors Restaurant* and decided that arbitration clauses with class waivers were valid even if it would be economically impracticable to maintain the claims as individuals.[23] The plaintiffs in that case filed an antitrust claim against American Express alleging that the company used its monopoly power to overcharge plaintiffs. The plaintiffs sought to avoid arbitration because the cost of bringing the claim would, as a practical matter, make relief impossible. The expert analysis necessary for the antitrust claim was estimated to cost several hundred thousand dollars, but the maximum recovery for each plaintiff would be less than $40,000.[24] Thus, the cost of bringing the claim would far outweigh any possibility for relief if the arbitration provision were enforced. Once again, the Court upheld the arbitration provision and stated that "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[25] The dissent, written by Justice Kagan, argued that this decision allowed the defendant to "use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[26]

Then, in three consolidated cases—*Epic Systems Corp. v. Lewis*, *Ernst & Young, LLP v. Morris*, and *NLRB v. Murphy Oil USA, Inc.*—the Supreme Court considered whether the National Labor Relations Act ("NLRA") banned the use of class action waivers for arbitration agreements in employment contracts.[27] The NLRA guarantees workers the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[28] Plaintiffs offered two arguments: (1) the NLRA's guarantee makes the class waiver agreements illegal and unenforceable under the Arbitration Act's savings clause, and (2) the guarantee in the NLRA displaced the Arbitration Act. The Court disagreed with both lines of

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[20] *Concepcion*, 563 U.S. at 344.

[21] *Id.*

[22] *Id.* at 353.

[23] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[24] *Id.* at 231.

[25] *Id.* at 233.

[26] *Id.* at 240 (Kagan, J., dissenting).

[27] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018).

[28] 29 U.S.C. § 157 (2012).

reasoning. First, the Court held that "the savings clause recognizes only defenses that apply to 'any' contract."[29] Since the NLRA's restriction on class waivers targeted arbitrations, then, like in *Concepcion*, the agreement could not be deemed unenforceable on that basis. Second, the Court determined that there was no "clear intention to displace the Arbitration Act" in the NLRA.[30] *Epic Systems* made clear that a federal statute would need a "clearly expressed congressional intention" to displace the FAA for any limitation on its broad protection to be upheld.[31]

Most recently, in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the Supreme Court held that courts cannot decide threshold questions of whether an arbitration agreement applies to a dispute, even if the argument is considered frivolous, when the contract delegates arbitrability questions to the arbitrator.[32] Before this ruling, some lower courts decided the question of arbitrability, despite any terms delegating the issue to arbitration, if the argument that the arbitration agreement covered a dispute was deemed "wholly groundless."[33] In *Henry Schein*, the parties' compelled arbitration contract excluded actions seeking injunctive relief. After a controversy arose between the parties, the plaintiff filed an antitrust suit seeking both money damages and injunctive relief. The defendant sought to invoke the compelled arbitration provision, but the district court and Fifth Circuit both determined that the argument for arbitration was wholly groundless. Accordingly, the Fifth Circuit denied the defendant's motion to compel arbitration. The Supreme Court vacated the ruling, finding that the "wholly groundless" exception was inconsistent with the FAA. Justice Kavanaugh, writing for a unanimous court, stated in the opinion that "[w]e must interpret the [FAA] as written, and the [FAA] in turn requires that we interpret the contract as written."[34] The Court did note, however, that courts retain the authority to determine whether a valid arbitration agreement exists before referring a dispute to an arbitrator. But if a valid agreement to arbitrate exists, the court must not decide arbitrability issues that the contract delegates to an arbitrator.

Additionally, recent legislative efforts seeking to limit the application of class waivers in mandatory arbitration provisions have been thwarted. For example, in 2017 the Consumer Financial Protection Bureau ("CFPB") attempted to regulate the use of mandatory arbitration provisions in consumer contracts in finance. The CFPB announced a new rule—the Arbitration Agreements Rule—that would have

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[29] *Epic Sys.*, 138 S. Ct. at 1622.

[30] *Id.* at 1632.

[31] *Id.* at 1624 (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)).

[32] Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019).

[33] *Id.* at 528–29.

[34] *Id.* at 529.

banned financial companies from using mandatory arbitration clauses to deny consumers the ability to bring group actions.[35] Before the rule went into effect, President Donald Trump signed a joint resolution passed by Congress and removed the rule under the Congressional Review Act.[36] The resolution was passed in the Senate with a 51–50 vote with Vice President Mike Pence casting the tie-breaking vote.[37] The White House released a statement that "the CFPB's rule would neither protect consumers nor serve the public interest" and the new rule would leave consumers with "fewer options for quickly and efficiently resolving financial disputes."[38] However, the rule did not prevent consumers from pursuing arbitration solutions. It merely prevented financial companies from requiring the use of this method. The head of the CFPB stated that these clauses "allow companies to avoid accountability by blocking group lawsuits and forcing people to go it alone or give up."[39] He opined that the removal of the rule was "a giant setback for every consumer in this country."[40]

These cases and legislation demonstrate the federal government's strong support of upholding contracts, including arbitration agreements, according to their terms. The Supreme Court's recent decisions (and lower court decisions applying them) have also shown lower courts that decisions that are found to "target" arbitration agreements will be struck down. These decisions create a difficult backdrop for parties that wish to avoid arbitration and keep a claim in court. Still, improbable is not impossible.

The following cases show how attorneys have found success for their clients even in the midst of this difficult landscape. The following Sections address four distinct challenges to the enforceability of arbitration agreements made in recent class actions: attacking the formation of the contract, the interpretation of the terms of the agreement, the statutory interpretation of the FAA, and the application of contract law defenses.

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[35] *Final Rule Arbitration Agreements*, CONSUMER FIN. PROTECTION BUREAU https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/arbitration-agreements/ (last visited Oct. 21, 2019).

[36] Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html.

[37] *Id.*

[38] Donna Borak & Ted Barrett, *Senate Kills Rule That Made It Easier to Sue Banks*, CNN (Oct. 25, 2017), https://www.cnn.com/2017/10/24/politics/senate-cfpb-arbitration-repeal/index.html.

[39] Gillian B. White, *Congress's Late-Night Vote to Protect Banks from Lawsuits*, ATLANTIC (Oct. 25, 2017), https://www.theatlantic.com/business/archive/2017/10/cfpb-mandatory-arbitration/543918/.

[40] Borak & Barrett, *supra* note 38.

II. CONTRACT FORMATION

Recent case law suggests that there may be more nuances in the opposition of arbitration provisions than expected by critics of the Supreme Court's recent arbitration cases. The following Sections summarize arguments that were used to successfully avoid compelled arbitration. First, this Section focuses on a method that has proven to be effective: attacking the formation of the contract. Challenging the formation of a contract offers a strategic advantage over attacking the arbitration clause itself, as recent Supreme Court decisions have emphasized the Court's "liberal federal policy favoring arbitration."[41] The FAA and any corresponding presumption in favor of arbitration, however, only apply after the parties have established the existence of a contract. Thus, the parties argue from a level playing field until the court has recognized the formation of a valid agreement. The following cases demonstrate a few strategies that attorneys may use to contest the formation of a contract.

A. Offer, Acceptance, and the "Meeting of the Minds"

As any first-year law student knows, the foundation of every contract is the requisite offer, acceptance, and mutual intent to be bound by the agreement or "meeting of the minds."[42] These simple concepts are easily overlooked when considering strategies to avoid arbitration. These fundamental aspects of contracts, however, can provide persuasive arguments for discerning attorneys. As technology changes the manner that contracts are made, novel arguments have been formed to contest the formation of agreements. The following cases show the thoughtful arguments that focus on these components of contract formation.

Some recent cases indicate that courts will refuse to enforce arbitration agreements when a party was not reasonably made aware of the existence of the arbitration clause because the agreement lacks a "meeting of the minds." This argument has proven especially fruitful in the context of "click-wrap" or "shrink-wrap" agreements.[43] In *Jones v. Samsung Electronics America, Inc.*, a consumer class action in-

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[41] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[42] RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1979) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."); *id.* § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."); *id.* § 30(2) ("Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.").

[43] Shrink-wrap agreements, sometimes referred to as "in-the-box contracts," are "terms included in a document inside the box that contains the purchased product. The failure to return the product after removing the plastic shrink-wrap from the box and unpacking the product may

volving allegedly defective cell phones, the court determined that the plaintiff-consumers were not bound by an arbitration clause that was buried within a shrink-wrap agreement.[44] In *Jones*, the plaintiffs filed a class suit against Samsung alleging that the Samsung S3 cell phone was defective and had a tendency to overheat and catch fire. Within the packaging for the cell phone, purchasers received a 64-page booklet titled "Important Information for the Samsung SPH-L710."[45] The relevant arbitration agreement appeared approximately twenty pages into the booklet under a section titled "Manufacturer's Warranty."[46]

Plaintiffs argued that the agreement was unenforceable because a buyer would not reasonably be aware of the agreement to arbitrate. According to the plaintiffs, without any awareness of the arbitration agreement, there could be no mutual intent to be bound by its terms. When analyzing the inconspicuous nature of the arbitration clause, the court highlighted that none of the section headings in the booklet mentioned mandatory arbitration, contract provisions, or waivers. Furthermore, the clause was "tucked away" under the title of "Manufacturer's Warranty."[47] The court found this title misleading because it implied that the section would address only the defendant's obligations to consumers (and not the consumers' obligations) since consumers typically do not provide warranties. The court denied the motion to compel arbitration, stating that "[i]t is one thing to hold consumers to agreements they have not read; it is another to hold them to agreements that, perhaps by design, they will probably never know about."[48]

Similarly, in *Norcia v. Samsung Telecommunications America, LLC*, a consumer class action alleging Samsung misrepresented a cell phone's capabilities, the Ninth Circuit held that the arbitration clause was unenforceable because the plaintiffs received inadequate notice of the arbitration agreement.[49] The arbitration provision was placed in a 101-page brochure titled "Safety & Warranty Information" within the phone's packaging and provided 30 days for phone purchasers to opt out of the

constitute assent to the terms." Noble v. Samsung Elecs. Am., Inc., 682 F. App'x 113, 116 n.4 (3d Cir. 2017) (citing Schnabel v. Trilegiant Corp., 697 F.3d 110, 121–22 (2d Cir. 2012)); Clickwrap agreements are "terms that appear on a consumer's computer screen [or cellular device] and to which a [party] can manifest assent by clicking an icon indicating agreement." *Noble*, 682 F. App'x at 116 n.5 (citing Hoffman v. Supplements Togo Mgmt., LLC, 18 A.3d 210, 219 (N.J. Super. Ct. App. Div. 2011)).

[44] Jones v. Samsung Elecs. Am., Inc., No. 2:17-cv-00571-MAP, 2018 WL 2298670, at *5 (W.D. Pa. May 21, 2018).

[45] *Id.* at *1.

[46] *Id.* at *2.

[47] *Id.* at *4.

[48] *Id.* at *5.

[49] Norcia v. Samsung Telecomms. Am., LLC, 845 F.3d 1279, 1290 (9th Cir. 2017).

agreement.[50] The court determined that the purchasers had no duty to opt out because there was no notice of the arbitration agreement and the purchasers did not retain any additional benefit by choosing not to opt out.[51] The Ninth Circuit further held that an offeree's silence does not constitute acceptance "when the offeree *reasonably did not know* that an offer had been made."[52]

Although these cases offer some hope for parties seeking to avoid compelled arbitration, this argument may have limited application. In *Jones*, the court addressed an apparent circuit court split on the treatment of arbitration clauses in shrink-wrap agreements. The *Jones* court described the Seventh Circuit's holding in *Hill v. Gateway 200, Inc.*[53] as one polar end of the shrink-wrap controversy with the Ninth Circuit's holding in *Norcia* taking an opposite approach.[54] In *Hill*, the Seventh Circuit held that plaintiffs were bound by an arbitration agreement that was included as part of a "Statement of Terms" inside a shipping box for a computer.[55] The plaintiffs in that case admitted that they were aware of the terms generally but denied that they had read the terms closely enough to notice the arbitration agreement. The Seventh Circuit held that a "contract need not be read to be effective," and the proper manner to reject the agreement was by the terms of the contract—namely, returning the computer.[56] The *Jones* court described the Seventh Circuit's holding as "perhaps outdated," stating that "[m]ore recent cases [such as *Norcia*] focus not on whether consumers have *read* waiver language, but on whether they received reasonable *notice* of the existence of the language."[57] The *Norcia* court analyzed the applicability of the Seventh Circuit's holding in *Hill*, but rejected the relevance of the decision from that case because "even if a customer may be bound by an in-the-box contract under certain circumstances, such a contract is ineffective where the customer does not receive adequate notice of its existence."[58] Still, *Hill* remains good law and a party seeking to avoid arbitration may have a difficult time if the relevant party was "generally aware" of the existence of the agreement. The analyses from *Jones* and *Norcia* suggest, however, that a party seeking to avoid arbitration may be more likely to find success if the court perceives that the agreement was hidden or that the party lacked adequate notice of its existence.

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[50] *Id.* at 1282.

[51] *Id.* at 1286.

[52] *Id.* at 1285 (emphasis added).

[53] Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

[54] Jones v. Samsung Elecs. Am., Inc., No. 2:17-cv-00571-MAP, 2018 WL 2298670, at *3 (W.D. Pa. May 21, 2018).

[55] *Hill*, 105 F.3d at 1148.

[56] *Id.*

[57] *Jones*, 2018 WL 2298670, at *3.

[58] Norcia v. Samsung Telecomms. Am., LLC, 845 F.3d 1279, 1289 (9th Cir. 2017).

Similar issues have appeared in the context of click-wrap agreements.[59] In *Applebaum v. Lyft*, a putative class action alleging a ride-sharing app misled users about ride rates, the Southern District of New York analyzed the acceptance of a click-wrap contract within an app.[60] In order to sign up, the app required users to provide personal and payment information on several consecutive screens. On a screen that asked for the user's phone number, the user was required to click a box next to the phrase "I agree to Lyft's Terms of Service," then click a large hot pink button that stated "Next" at the bottom of the screen.[61] The text for "Terms of Service" was light blue (on a white background) and much smaller and less noticeable than the button for "Next."[62] The contract was a click-wrap agreement, where users could only view the terms of the contract, including the arbitration agreement, by clicking on a hyperlink embedded in the blue lettering.[63]

The plaintiff in *Applebaum* argued that he never read nor knowingly agreed to the arbitration agreement in the Terms of Service. The court found that even though the "Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract,"[64] and "[m]utual manifestation of assent . . . is the touchstone of contract."[65] The court focused the analysis on whether the terms of the agreement were "reasonably conspicuous" because "[c]larity and conspicuousness of arbitration terms are important in securing informed assent."[66] The court concluded that a reasonably prudent consumer would not be on reasonable notice of the terms or the "gravity of the 'clicks,' namely, that clicking the Box and then

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[59] *See* Cullinane v. Uber Techs., Inc., 893 F.3d 53, 64 (1st Cir. 2018) (finding arbitration unenforceable because plaintiffs were not reasonably notified of the terms of the agreement in a click-through hyperlink); Meyer v. Kalanick, 200 F. Supp. 3d 408, 421–22 (S.D.N.Y. 2016), *vacated sub nom.*, Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017) (holding arbitration provision unenforceable because plaintiffs had inadequate notice of the provision that was "accessible only via a small and distant hyperlink").

[60] Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454, 458 (S.D.N.Y. 2017). The court ultimately granted the motion to compel arbitration based on a superseding contract made by the parties. Although the plaintiff argued that the dispute was outside the scope of the second agreement, that determination was designated to the arbitrator. *See id.* at 469–70. For the purposes of this Note, this analysis focuses on the first agreement and features that would prevent a court from determining that there was a valid acceptance of the terms of the agreement within an app.

[61] *Id.* at 466.

[62] *Id.*

[63] *Id.* at 465. The court compared a click-wrap agreement to that of a "scrollwrap agreement," which requires a user to physically scroll through an internet agreement in order to accept the contract. The court stated that scrollwrap agreements are "consistently found . . . enforceable because they present the consumer with a 'realistic opportunity' to review the terms of the contract *and* they require a physical manifestation of assent." *Id.*

[64] *Id.* at 464 (quoting Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004)).

[65] *Id.* (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 (2d Cir. 2002)).

[66] *Id.* at 466 (quoting *Specht*, 306 F.3d at 30).

the pink 'Next' bar at the bottom of the screen constituted acceptance of a contract."[67] The court reached this determination because the text was difficult to read and coloring alone was insufficient to indicate the hyperlink to a contract.[68] The court also held that the placement on the phone number verification page was misleading because a reasonable customer may assume that the terms related to being contacted by Lyft. The court decided that a "reasonable consumer may have understood that [they] agreed to something, but not to the lengthy [contract]."[69]

Applebaum offers one example of a sufficiently inconspicuous arbitration provision in a click-wrap agreement where the court was willing to find that the plaintiffs were not bound to the agreement. This case should not be taken as an indication, however, that courts frequently find click-wrap arbitration agreements unenforceable. A number of cases have reached contrary results.[70] For instance, in *Kutluca v. PQ New York, Inc.*, a putative class action alleging wage and hour law violations, the Southern District of New York enforced a mandatory arbitration provision found in a click-wrap agreement.[71] In *Kutluca*, the defendant employer directed newly hired employees to complete electronic documentation regarding the terms of their employment within three days of being hired. The first screen of the electronic documents displayed the employer's "Terms and Conditions Agreement" ("TCA"), which included the arbitration agreement.[72] Before proceeding to another screen, the employee had to click on a button marked "I Accept."[73] The TCA agreement began, "PLEASE READ THIS TCA CAREFULLY. IT CONTAINS IMPORTANT INFORMATION REGARDING . . . THE HANDLING OF ANY DISPUTES ARISING OUT OF YOUR RELATIONSHIP WITH [THE EMPLOYER]."[74] The provision was "set forth in full" in the TCA, as opposed to being viewable only by clicking on a hyperlink.[75] And the first screen visible to the

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[67] *Id.*

[68] *Id.* at 467 ("Where the terms are not displayed but must be brought up by using a hyperlink, courts . . . have looked for a clear prompt directing the user to read them." (quoting Sgouros v. TransUnion Corp., 817 F.3d 1029, 1035 (7th Cir. 2016))).

[69] *Id.* at 469 ("Reasonably conspicuous notice of the existence of the contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." (quoting *Specht*, 306 F.3d at 35)).

[70] *See* Zelkhind v. Flywheel Networks, Inc., No. 15-cv-03375-WHO, 2015 WL 9994623, at *1 (N.D. Cal. Oct. 16, 2015); Langford v. Hansen Techs., LLC, No. 14cv1870-CAB (BGS), 2014 U.S. Dist. LEXIS 184878, at *11 (S.D. Cal. Nov. 19, 2014).

[71] Kutluca v. PQ N.Y., Inc., 266 F. Supp. 3d 691, 705 (S.D.N.Y. 2017).

[72] *Id.* at 695.

[73] *Id.* at 702.

[74] *Id.* at 695.

[75] *Id.* at 702. The court also referenced the general principle in contract law that "a party who accepts an agreement is conclusively presumed to know its content and assent to them." *Id.*

plaintiffs referenced the dispute resolution agreement. The court held that the plaintiffs had adequate notice that the TCA included an arbitration provision and found the provision "reasonably conspicuous."[76] As this case demonstrates, the enforceability of an arbitration agreement found in a click-wrap contract will be largely fact-specific and focus on how conspicuously the agreement or link to the agreement appears on the screen. In instances where an individual is provided reasonable notice that a click-through action manifests assent to an arbitration agreement, the court will likely find the agreement enforceable.

Another example of a case where a plaintiff has successfully used a "meeting of the minds" argument is in *Dasher v. RBC Bank (USA)*, a case involved in a multi-district litigation ("MDL") against RBC Bank for allegedly rearranging the order of transactions to increase overdraft charges.[77] In *Dasher*, the Eleventh Circuit declined to compel arbitration because the defendant failed to establish that the plaintiff agreed to an arbitration agreement in an amended contract. In that case, RBC Bank sent the plaintiff-account holder an amended contract after the district court refused to compel arbitration based on a prior agreement. The amended agreement added an arbitration clause that applied retroactively and would effectively evict the ongoing case from court. The new agreement included an opt-out provision that stated that account holders who continued to use their bank accounts would be deemed to accept the contract. The plaintiff failed to opt out and continued to use his account. Then, the defendant moved to compel arbitration.

The court held that the defendant failed to establish the requisite meeting of the minds for two reasons. First, the potentially litigation-ending amendment was communicated directly to an adverse litigant without counsel. Second, the plaintiff was actively resisting arbitration in ongoing litigation when he failed to opt out of the amended contract. Although the court recognized the national policy favoring arbitration, the court stated that when "addressing the underlying question of whether parties have a valid arbitration agreement, no presumption in favor of arbitration applies."[78] The court further emphasized that the "policy favoring arbitration [only] comes into play later, when addressing whether a particular claim is covered by an otherwise valid and enforceable agreement."[79] The burden of proof is on

(citing Fleming v. J. Crew, No. 1:16-cv-2663-GHW, 2016 WL 6208570, at *3 (S.D.N.Y. Oct. 21, 2016)).

[76] *Id.*

[77] Dasher v. RBC Bank (USA), 882 F.3d 1017, 1019 (11th Cir. 2018).

[78] *Id.* at 1022 ("[W]hile doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." (quoting Dasher v. RBC Bank, 745 F.3d 1111, 1116 (8th Cir. 2014)) (alteration omitted)).

[79] *Id.* (citing Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 (2010)).

the party asserting the existence of a contract.[80] Since the plaintiff "clearly and simultaneously" expressed resistance to the arbitration agreement, the defendant failed to establish that the plaintiff agreed to the amended contract.[81]

As these cases show, courts are unwilling to apply any presumption in favor of arbitrations to overcome flaws in the formation of a contract. Furthermore, as noted in *Dasher*, the party seeking to establish the formation of an agreement bears the burden of proof. Thus, by framing arguments as contesting the formation of the agreement, plaintiffs may simultaneously avoid any favoritism towards arbitration and place the burden of proof on the adverse party.

B. Parties to the Contract

In some cases, the party seeking to compel arbitration was not actually a party to the original contract. Courts have strictly enforced the requirement that only parties to the contract can enforce arbitration agreements. The following cases offer examples of courts that grappled with whether a party was entitled to compel arbitration.

In *Goplin v. WeConnect, Inc.*, a Fair Labor Standards Act ("FLSA") action, the Seventh Circuit refused to enforce an arbitration agreement because the defense failed to establish that it was a party to the contract.[82] In that case, an employee worked for the company WeConnect, but signed an arbitration agreement with Alternative Entertainment, Inc. ("AEI") when he started. Throughout the agreement, the contract referred only to AEI and did not mention WeConnect. When the plaintiff filed a class and collective action against WeConnect, he argued that the defendant was not a party to the agreement and, as such, could not compel arbitration. The defendant responded that AEI and WeConnect were the same entity and merely experienced a name change. The court held that the defendant "bore the burden of establishing its right to enforce the arbitration agreement."[83] The only proof that the defendant offered, however, was an affidavit from the Human Resource Director. The court held that WeConnect "miscalculated and relied on a conclusory sentence in a[n] . . . affidavit to establish the corporate relationship between WeConnect and AEI."[84] And because the appellate court found no exception to permit additional proof, the court could only review the evidence in the record from the district court.

In *Janvey v. Alguire*, a case where a receiver was appointed to recover over $200 million in assets that had been fraudulently conveyed in a Ponzi scheme, the court

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[80] *See* Bazemore v. Jefferson Capital Sys., LLC, 827 F.3d 1325, 1330 (11th Cir. 2016).

[81] *Dasher*, 882 F.3d at 1023.

[82] Goplin v. WeConnect, Inc., 893 F.3d 488, 489 (7th Cir. 2018).

[83] *Id.* at 491.

[84] *Id.*

declined to compel arbitration because the receiver was suing on behalf of entities that were not parties to the agreement.[85] In that case, the employees of the company implicated in the Ponzi scheme sought to compel the receiver to arbitrate based on provisions found in promissory notes and employment agreements with the employer. Although the receiver was appointed to represent the employer and other entities, the receiver could bring the claim on behalf of any of the parties he chose (with a claim against the defendants). The receiver brought the claims on behalf of third-party creditors that were not signatories to the arbitration agreements. The court ruled that third parties are only bound when the "intent to make someone a third-party beneficiary is 'clearly written or evidenced in the contract.'"[86] Therefore, affiliations with the signatories were insufficient to compel arbitration.

The previous cases show that courts will deny a motion to compel arbitration when the moving party does not establish that it was a signatory to the agreement. There are limited circumstances, however, where a nonsignatory may invoke the use of an arbitration clause against a signatory. In some cases, courts may permit a nonsignatory to enforce an arbitration agreement under a theory of equitable estoppel or as a third-party-beneficiary to the contract. The Supreme Court has held that state contract law governs the ability of nonsignatories to enforce arbitration provisions.[87]

For example, in *Berryman v. Newalta Environmental Services*, a putative class action alleging violations of FLSA, the court permitted a third-party-beneficiary to a contract to compel arbitration.[88] In *Berryman*, the plaintiffs claimed that Newalta improperly classified them as contractors in order to avoid paying overtime wages. Newalta denied that they had employed plaintiffs, contending that plaintiffs were employed by a staffing entity, Smith Management and Consulting ("Smith"). Newalta further asserted that it employed Smith in its capacity as a staffing agency. The plaintiffs' employment contracts with Smith included an arbitration provision that covered claims arising out of work performed "for or on behalf of any client of the company."[89] The court held that, although there is a presumption against conferring third party status on non-contracting parties, "it is the contracting parties' intent that controls."[90] The court determined that the express language of the contract "made clear" that the parties intended to resolve all disputes with Smith's clients, including Newalta, in arbitration.

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[85] Janvey v. Alguire, 847 F.3d 231, 243 (5th Cir. 2017).

[86] *Id.* (quoting Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 362 (5th Cir. 2003)).

[87] *See* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632 (2009).

[88] Berryman v. Newalta Envtl. Servs., No. 18-793, 2018 WL 5723290, at *10 (W.D. Pa. Nov. 1, 2018).

[89] *Id.* at *6.

[90] *Id.* at *5 (quoting S. Tex. Water Auth. v. Lomas, 223 S.W.3d 304, 306 (Tex. 2007)).

In *Stinson v. Best Buy Co.*, the court ruled that Best Buy could enforce an arbitration agreement against plaintiffs despite the fact that Best Buy was not a party to the contract under a theory of equitable estoppel.[91] In *Stinson*, plaintiffs filed a class action claiming that Best Buy misled customers about the terms of a Citibank credit card that Best Buy marketed to customers for in-store purchases. Plaintiffs asserted that Best Buy described the Citibank credit card as having "no interest" or 0% interest for 18 months when, in fact, consumers who failed to pay off the entire balance within 18 months would be charged retroactive interest on the entire purchase price. The relevant arbitration agreement was included in the terms for the Citibank credit card. The court recognized that under South Dakota state law, equitable estoppel applies when a "signatory asserts 'claims arising out of agreements against nonsignatories . . . without allowing those defendants also to invoke the arbitration clause contained in the agreements.'"[92] The court explained that it would be "unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of the same agreement."[93] The court held that plaintiffs' claims were "inextricably intertwined" with the Citibank agreement that included the arbitration agreement.[94] The court then concluded that Best Buy had standing to enforce the arbitration agreement.

These examples demonstrate that even when a party is a nonsignatory to the arbitration agreement, courts may still enforce the provision against a signatory. Still, as with other aspects of contract formation, the burden of proof lies on the party seeking to enforce arbitration. If there are questions regarding a party's right to enforce an arbitration agreement, disputing this fact may work in the favor of plaintiffs. And, as shown in *Goplin*, a favorable ruling for a plaintiff may prove difficult to overturn if the defendant fails to offer sufficient proof at the trial level.

C. Lack of Consideration

Courts have refused to compel arbitration if the contract is not adequately supported by consideration. Consideration has been deemed insufficient when one party retains a unilateral ability to terminate or alter the agreement, an agreement lacks mutuality, or terms are added to an existing agreement without additional consideration.

In *Freeman v. Progress Residential Property Manager, LLC*, a case where plaintiffs filed a FLSA claim alleging that employees were denied overtime wages, the court

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[91] Stinson v. Best Buy Co., No. 0:18-cv-00295-JNE-KMM, 2018 WL 3850739, at *9 (D. Minn. June 26, 2018), *adopted by* 2018 WL 3848443.

[92] *Id.* at *7 (quoting Rossi Fine Jewelers, Inc. v. Gunderson, 648 N.W.2d 812, 815 (S.D. 2002)).

[93] *Id.* (quoting Alltell Comm'ns, LLC v. Oglala Sioux Tribe, No. CIV.10-5011-JLV, 2010 WL 1999315, at *9 (S.D. May 18, 2010)).

[94] *Id.* at *10.

refused to compel arbitration because the agreement was not sufficiently supported by consideration.[95] In that agreement, the company retained the power to unilaterally terminate the agreement to arbitrate. The court held that the contract was invalid because "the agreement is illusory where one party has the unrestrained unilateral power to terminate its obligation to arbitrate."[96] Similarly, in *De Angelis v. Nolan Enterprises, Inc.*, another FLSA case, the court denied defendant's motion to compel arbitration because the defendant retained the right to modify or cancel any terms of an employment agreement at any time without notice.[97] The court held that the defendant's contractual promises were illusory and lacked mutuality so the entire contract, including the arbitration agreement, was void.[98]

Likewise, in *State ex rel. Alst v. Harrell*, an employment discrimination action, the court refused to compel arbitration because the agreement was not adequately supported by consideration.[99] The employees agreed to arbitrate by signing an "Acknowledgement" from the company within the employee manual.[100] The court held that the "plain language of the Acknowledgement contains promises made only by [the employees]" and did not include any promises by the employer.[101] The court determined that the use of singular pronouns throughout the contract ("I agree…") suggested that only the employees must agree.[102] The court agreed with the plaintiff's argument that "There is no 'I' in mutual."[103] Based on the lack of mutuality, the agreement was found unenforceable.

In another example, *Plummer v. Nicor Energy Services Co.*, the Southern District of Indiana refused to enforce an arbitration agreement when a customer consented to an insurance service over the phone but did not receive the additional

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[95] Freeman v. Progress Residential Prop. Manager, LLC, No. 3:16-CV-356, 2017 WL 2954409 (S.D. Tex. July 10, 2017).

[96] *Id.* at *2 (quoting Mendivil v. Zanios Foods, Inc., 357 S.W.3d 827, 832 (Tex. App. 2012)).

[97] De Angelis v. Nolan Enters., Inc., No. 2:17-cv-926, 2018 WL 4566280 (S.D. Ohio Sept. 24, 2018).

[98] *Id.*

[99] State of Missouri *ex rel.* Alst v. Harrell, 528 S.W.3d 442 (Mo. Ct. App. 2017).

[100] *Id.* at 444.

[101] *Id.* at 447. Under Missouri law, continued at-will employment cannot constitute adequate consideration for an agreement to arbitrate. *See* Baker v. Bristol Care, Inc., 450 S.W.3d 770, 775 (Mo. 2014) (en banc). Other jurisdictions, however, consider at-will employment sufficient consideration for an arbitration agreement. *See, e.g.*, Lockette v. Morgan Stanley, 18-cv-876 (JGK), 2018 WL 4778920, at *5 (S.D.N.Y. Oct. 3, 2018) ("[C]ontinued employment generally serves as legal consideration sufficient to support an arbitration agreement."); Wilson v. Bristol-Meyers Squibb Co., No. 3:17-cv-2054-SI, 2018 WL 2187443, at *4 (D. Or. May 11, 2018) (finding that Oregon courts consider continued at-will employment sufficient consideration for an agreement to arbitrate).

[102] *Harrell*, 528 S.W.3d at 447.

[103] *Id.* at 448.

conditions of the contract, which included the arbitration provision, until 12 days later.[104] The defendant argued that the customer accepted the additional terms because she failed to cancel the services within a 30-day window. The court disagreed and determined that the contract was formed when the customer consented over the phone. The customer did not consent to the arbitration agreement at that time, so the arbitration agreement was deemed to be an additional term to the agreement for which no consideration was provided.

As these cases have shown, some courts are unwilling to enforce arbitration agreements when one party retains a unilateral ability to modify the terms of the agreement. A number of contrary holdings, however, demonstrate that the bar for what may constitute consideration is often quite low. Furthermore, because the sufficiency of consideration is analyzed under the laws of different states and state laws may differ in the requirements for adequate consideration, attorneys must be mindful of the policies concerning consideration under the relevant state contract laws when crafting this type of argument.[105] For instance, in *Sharp v. Terminix International, Inc.*, a wage and hour case, the court, pursuant to Tennessee state law, held that a mutual promise to arbitrate "in itself [constitutes] sufficient consideration."[106] For employment disputes, some jurisdictions consider continued at-will employment adequate consideration for an agreement to arbitrate.[107] Moreover, in *Cypress v. Cintas Corporation*, a wage and hour class action, the court held that under New York state law, an offer of employment constituted valid consideration in exchange for agreeing to arbitrate employment-related disputes.[108] And in *Family Security Credit Union v. Etheredge*, a claim alleging negligence in car-financing, plaintiffs argued that an arbitration agreement lacked consideration and mutuality of remedy because the defendant was under no duty to arbitrate and retained the ability to bring claims in a court of law.[109] The Alabama Supreme Court disagreed, stating

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[104] Plummer v. Nicor Energy Servs. Co., No. 1:17-cv-2177-WTL-MPB, 2018 WL 1156281, at *7 (S.D. Ind. Mar. 5, 2018).

[105] *See* Berryman v. Newalta Envtl. Servs., No. 18-793, 2018 WL 5723290, at *4 (W.D. Pa. Nov. 1, 2018).

[106] Sharp v. Terminix Int'l, Inc., No. 2:18-cv-02072-SHM-dkv, 2018 WL 3520140, at *5 (W.D. Tenn. July 20, 2018) (quoting Rodgers v. S. Newspapers, Inc., 379 S.W.2d 797, 800 (Tenn. 1964)); *see also* Farrow Road Dental Grp., P.A. v. AT&T Corp., No. 3:17-cv-01615-CMC, 2017 WL 4216158, at *3 (D.S.C. Sept. 22, 2017) (holding mutual promise to arbitrate disputes was adequate consideration under South Carolina state law).

[107] *E.g.*, *Berryman*, 2018 WL 5723290.

[108] Cypress v. Cintas Corp., 16-cv-2478 (ADS)(ARL), 2017 WL 564492, at *3 (E.D.N.Y. Feb. 11, 2017).

[109] Family Sec. Credit Union v. Etheredge, 238 So.3d 35, 40 (Ala. 2017). This case is not a class or collective action but is a consolidation of eight cases. It is included as an instructive example of what courts deem as adequate consideration.

that "[t]he doctrine of mutuality of remedy is limited to the availability of the ultimate redress for a wrong suffered by plaintiff, not the means by which that ultimate redress is sought."[110] The court found that the parties' financing agreement for the vehicle purchase satisfied consideration.

As these cases demonstrate, determining whether a contract has adequate consideration requires a close analysis of the agreement, the context in which the agreement was formed, and the standards for consideration under relevant state laws. Challenging an agreement for a lack of consideration may only be effective in extreme factual scenarios where one party retains the unilateral ability to modify obligations or adds the arbitration agreement as an additional term after the formation of the agreement. Even then, courts may still enforce an agreement if the applicable laws accept another source of consideration such as at-will employment.

III. TERMS OF THE AGREEMENT

As noted in the previous Section, the courts have recognized a policy favoring arbitration when determining whether a claim falls within the scope of a valid agreement.[111] For this reason, arguing that a claim does not fall within the terms of the agreement can be challenging. Still, the following cases suggest that courts continue to closely evaluate the terms of the agreement and make favorable rulings for plaintiffs when making this type of determination.

A. Scope

Arbitration agreements are commonly drafted with sweeping terms that aim to encompass any and all claims that may arise. After all, how effective is an arbitration provision if it does not cover all disputes? Proving that a claim arises outside of the scope of the agreement can prove to be a formidable task. The following cases, however, illustrate that even the most expansive terms are not all-encompassing.

For example, in *Gamble v. New England Auto Finance, Inc.*, a Telephone Consumer Protection Act ("TCPA") class action, the court refused to grant the defendant's motion to compel arbitration because the claim arose outside the scope of the contract.[112] In that case, the plaintiff entered a loan agreement with defendant but refused to consent to receiving text messages in the "Text Consent Provision."[113] After the loan was repaid, the plaintiff began to receive unwanted text messages that advertised new loans from the defendant. Although the loan contract required arbitration for "any claim, dispute, or controversy" between the parties "that *in any way*

[110] *Id.* (citing Green Tree Fin. Corp. of Alabama v. Vintson, 753 So.2d 497, 504 (Ala. 1999)).

[111] *See supra* Section II.

[112] Gamble v. New Eng. Auto Fin., Inc., 281 F. Supp. 3d 1354, 1360 (N.D. Ga. 2017).

[113] *Id.* at 1357.

arises from or relates to this agreement," the court refused to compel arbitration because the claim did not "arise from any right implicated by the Loan Agreement."[114] The court held that the unsigned "Text Consent Provision" did not create any rights or obligations so the provision could not serve as a basis to enforce arbitration. Furthermore, the court held that the harm to plaintiff would have occurred regardless of whether the parties entered into the contract.[115]

Likewise, in *Wuest v. Comcast Corp.*, a putative class action alleging Comcast violated California state laws prohibiting the recording of telephone conversations without consent, the court denied a motion to compel arbitration because the dispute was unrelated to the contract.[116] The plaintiff in that case was a former customer of Comcast who had previously entered into a valid arbitration agreement that covered "any dispute, claim, or controversy . . . regarding any aspect of your relationship with Comcast."[117] Nine months after the cancellation of his service, the plaintiff called Comcast after receiving an advertisement that was addressed to the plaintiff or "new resident" but "limited to new residential customers."[118] The plaintiff alleged that Comcast recorded his phone call without his consent or notification of the recording. The defendant sought to enforce an arbitration agreement found in the plaintiff's former subscription agreement, arguing that the dispute touched upon the prior relationship.[119] Even though the advertisement mailing was addressed to the plaintiff, the court was persuaded that the dispute resulted from a "generic advertisement soliciting new customers for new services unrelated to [plaintiff's] past relationship as a former customer."[120] The court held that the claim did not arise from or in any way relate to the prior relationship with Comcast and extending the scope of the prior agreement would "yield absurd results."[121]

These cases, to be sure, are atypical, as courts are more likely to find that a dispute falls within the terms of an arbitration agreement. Arguing that a dispute falls outside of an arbitration provision is especially challenging due to the federal substantive policy that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[122] A number of cases may be cited that reflect the strong presumption in favor of finding that a claim is

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[114] *Id.* (emphasis added); *id.* at 1360.

[115] *Id.* at 1359.

[116] Wuest v. Comcast Corp., No. C 17-04063 JSW, 2017 WL 6520754, at *3 (N.D. Cal. Oct. 5, 2017).

[117] *Id.* at *2.

[118] *Id.* at *1.

[119] *Id.*

[120] *Id.* at *3.

[121] *Id.*

[122] Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24–25 (1983).

arbitrable.[123] As one example, in *Sam Houston Electric Cooperative v. Berry*, a putative class action claiming that the board of an electric cooperative mismanaged finances, the court cited the "strong presumption favoring arbitration" in ruling that the dispute fell within the arbitration agreement.[124] Plaintiffs argued that the arbitration provision could not be enforced because claims that arose before the arbitration agreement was created could not fall within the scope of the agreement. The court found that, while some claims arguably occurred before the creation of the arbitration agreement, the vast majority of the claims fell within the agreement. The court stated that to come within the scope of the agreement, a party's claims "need only be factually intertwined with arbitrable claims" or "touch upon the subject matter of the agreement."[125] The court then determined that all of the claims "touched" the agreement. Accordingly, because most of the allegations occurred within the scope of the agreement, the court held that all claims were arbitrable.

When comparing the holdings from *Gamble* and *Wuest* to the court's decision in *Sam Houston*, the viability of an argument contesting the scope of an agreement appears to turn on whether a plaintiff may argue that the dispute occurred wholly outside the arbitration agreement. Because doubts concerning the scope of a provision will as a matter of federal policy favor arbitrations, identifying a marked separation between the agreement and the dispute may be necessary to successfully argue that a dispute does not fall within the reaches of the arbitration agreement.

B. Interpreting the Terms of the Agreement

In some cases, the terms of the contract can be used to prevent the enforcement of an arbitration agreement. Identifying these opportunities requires a shrewd eye and a close examination of the text of the contract. The following cases suggest that

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[123] *See, e.g.*, Augustine v. TLC Resorts Vacation Club, LLC, No. 3:18-cv-01120-H-JMA, 2018 WL 3913923, at *8 (S.D. Cal. Aug. 16, 2018) (finding that the plaintiff's claim fell within the arbitration agreement given the "plain, broad language of the arbitration provision, as well as the strong presumption in favor of arbitration"); Kutluca v. PQ N.Y., Inc., 266 F. Supp. 3d 691, 703 (S.D.N.Y. 2017) (holding that the dispute fell within the scope of the arbitration agreement); Evans v. Midland Funding, LLC, No. 3:16-CV-00421-GNS-DW, 2017 WL 1347694, at *4 (W.D. Ky. Apr. 10, 2017) (finding that the plaintiff's claims fell within the scope of the credit card agreement); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 197 (Tex. Ct. App. 2003) (holding that the plaintiff's claim fell within the scope of the arbitration agreement because it "touch[ed] matters" in the agreement).

[124] Sam Houston Elec. Coop. v. Berry, No. 09-16-00346-CV, 2017 WL 4319849, at *5 (Tex. App. Sept. 28, 2017).

[125] *Id.*

the presumption in favor of arbitration may influence the manner that a court considers an ambiguity but will not overcome a term that directly conflicts with the enforcement of the agreement.[126]

For instance, in *Lloyd v. J.P. Morgan Chase & Co.*, a case where plaintiffs brought a collective action alleging FLSA violations, the court declined to compel arbitration after a close examination of the terms in the employment contract.[127] Collective actions are a type of aggregate litigation distinct from class action claims arising under the Federal Rules of Civil Procedure. Section 216(b) of the FLSA provides a private cause of action for employees to bring claims against an employer for themselves and on behalf of "similarly situated" individuals as a collective action.[128] In *Lloyd*, the plaintiffs entered into employment contracts that obligated employees to resolve any claim or controversy "*required to be arbitrated by the FINRA* [Financial Industry Regulatory Authority] *Rules* . . . by individual (not class or collective) arbitration[s] . . . ."[129] When the parties entered into the agreement, the FINRA did not expressly prohibit the arbitration of collective claims. By the time the plaintiffs filed their claim, however, the FINRA rules had since been amended to prohibit arbitrating collective claims.[130] For this reason, the plaintiffs argued that the collective claim could not be "required to be arbitrated" under the employment agreement because the FINRA rules prohibited the arbitration of collective claims.

The defendant argued that because of the court's policy favoring arbitration, the earlier version of the relevant FINRA rule should apply and the agreement should be interpreted to permit the arbitration of collective claims. This argument was decisive for the FLSA claim. If the court deemed that the rules required the collective claim to be resolved in arbitration, then the terms of the employment agreement would also require that the dispute be arbitrated individually rather than in a collective action. The defendants contended that the court should find that the dispute was covered by the compelled arbitration agreement if the agreement was "susceptible" to such an interpretation.[131] The court disagreed and emphasized that the presumption in favor of arbitration is a "soft one" and stated that "if an arbitration clause is best construed to express the parties' intent *not* to arbitrate certain

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[126] *See* Equal Emp't Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 294 (2002) ("While ambiguities in the language of the agreement should be resolved in favor of arbitration . . . we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.").

[127] Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 273 (2d Cir. 2015).

[128] *See* 29 U.S.C. § 216(b) (2018).

[129] *Lloyd*, 791 F.3d at 268 (emphasis added).

[130] *Id.*

[131] *Id.* at 270.

disputes, that intent controls and cannot be overridden by the presumption of arbitrability."[132] The court refused to apply the earlier version of the rules, which did not prohibit collective claims, because "[a] party that agrees to arbitrate in a particular forum according to the rules of that forum assumes the risk that the forum's rules might change."[133] The court thus held that the arbitration provision was unenforceable and permitted the claim to proceed in court.

In another example, *Rogers v. SWEPI LP*, a plaintiff filed a putative class action claim alleging that landowners were not paid signing bonuses that they were owed for oil and gas leases.[134] The lease agreement stated that the plaintiff "promises to proceed with this Lease and be bound [to the arbitration agreement] thereby upon [the defendant's] paying the full amount of the bonus payment."[135] Although the agreement contained a broad arbitration clause, the court held that the enforceability of the arbitration provision depended on whether the defendant had paid the signing bonus. After a close analysis of the terms in the agreement, the court determined that "the specific language of the bonus payment clause made clear" that the signing bonus was a condition precedent to the arbitration clause becoming effective.[136] Because plaintiffs had not yet received the bonus payment, the court did not enforce the arbitration clause.

For comparison, consider *Taylor v. Shutterfly, Inc.*, a class action involving allegedly false advertising.[137] In *Taylor*, the court considered the threshold issue of whether an agreement delegated arbitrability issues to the arbitrator. Although the agreement stated that all "issues . . . relating to the scope and enforceability" of the arbitration agreement were for the arbitrator to decide, the plaintiffs argued that the agreement failed to "clearly and unmistakably" delegate the issues of arbitrability to the arbitrator.[138] The plaintiffs asserted that the delegation clause was ambiguous because the provision conflicted with the severability clause in the agreement. The severability provision stated that "[i]f any provision of these Terms[ ] . . . will be held by a *court of competent jurisdiction* to be invalid, void, or otherwise unenforceable, such provision will be enforced to the maximum extent possible, or . . . deleted from these Terms."[139] Plaintiffs contended that the court had the authority to determine whether the arbitration provision was enforceable because the severability

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[132] *Id.*

[133] *Id.* at 273.

[134] Rogers v. SWEPI LP, No. 2:16-cv-999, 2018 WL 797331, at *1 (S.D. Ohio Feb. 9, 2018).

[135] *Id.* at *2 (noting that the word "upon" means "on the condition of").

[136] *Id.* at *4.

[137] Taylor v. Shutterfly, Inc., No. 18-cv-00266-BLF, 2018 WL 4334770, at *1 (N.D. Cal. Sept. 11, 2018).

[138] *Id.* at *3–4.

[139] *Id.* at *4 (emphasis added) (internal quotes omitted).

provision used the phrase "court of competent jurisdiction" rather than "arbitrator."[140] The court described the purported conflict as "artificial" because no matter how broad the arbitration clause, the parties may need to invoke the jurisdiction of a court for claims outside the agreement or for other remedies.[141] Absent a clear conflict in the terms of the agreement, the court was unwilling to find the express delegation clause unenforceable.

As these cases demonstrate, courts are unlikely to find that an arbitration provision is unenforceable unless the terms of the agreement expressly prevent the enforcement of the agreement. Even when, as in *Shutterfly*, there are terms that may appear to conflict, courts will, whenever possible, construe the terms in a manner that upholds the enforceability of the agreement to arbitrate.

IV. STATUTORY INTERPRETATION

As previously discussed, in *Henry Schein*, the Supreme Court held that courts must allow an arbitrator to decide questions of arbitrability if the contract delegates that issue to the arbitrator.[142] Another recent Supreme Court decision, however, shows that this rule is not without qualifications. The following case demonstrates how plaintiffs may craft arguments using the statutory construction of the FAA in order to avoid arbitration.

In *New Prime v. Oliveira*, the Supreme Court considered whether a court must leave disputes over the arbitration exception in Section 1 of the FAA to an arbitrator when the contract delegates arbitrability questions to an arbitrator.[143] Section 1 of the FAA provides a carve-out exception that states that the FAA will not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[144] In *New Prime*, a driver for an interstate trucking company filed a class action suit claiming that the trucking company misclassified drivers as independent contractors and denied drivers lawful wages. The defendant sought to remove the claim from court and moved to compel arbitration. The defendant argued that, because the parties' contract delegated arbitrability questions to an arbitrator, disputes related to the application of Section 1 should be determined in arbitration. Alternatively, the defendant asserted that Section 1 did not apply to the contracts with independent contractors because "contracts of employment" refers only to employer-employee contracts.[145]

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[140] *Id.*

[141] *Id.* at *5.

[142] *See supra* Section II.

[143] New Prime Inc. v. Oliveira, 139 S. Ct. 532, 536 (2019).

[144] 9 U.S.C. §§ 1–2 (2012).

[145] *New Prime*, 139 S. Ct. at 535.

First, the Supreme Court reviewed the FAA's terms and sequencing and determined that a court should decide whether the exclusion in Section 1 applies before ordering arbitration. The Court explained that Sections 1 and 2 work in conjunction to define which contracts are covered by the Act. Under Section 2, the FAA applies only to a "written provision in . . . a contract evidencing a contract involving commerce."[146] Section 1 defines which contracts involving interstate commerce are covered by the Act by listing exclusions.[147] And Sections 3 and 4 apply only to contracts within that designation. Thus, "to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2."[148] Accordingly, the Court held that a delegation provision in an arbitration agreement may only be enforced once the parties establish that the clause appears in a "written provision in . . . a contract evidencing a contract involving commerce" as defined by Congress in Sections 1 and 2.[149]

The Court then considered whether the exclusion of "contracts of employment . . . of workers engaged in . . . interstate commerce" encompassed independent contractor relationships. The Court engaged in a textualist analysis of "contracts of employment," citing the fundamental canon of statutory construction that "words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute."[150] After reviewing dictionaries and cases from the time period in which the FAA was enacted, the Court found no evidence that suggested that the original meaning of the phrase "contracts of employment" indicated only an employer-employee relationship. Instead, the Court found that a contract of employment merely meant an agreement to perform work at the time of the FAA's enactment. For this reason, the Court held that "employment contracts" should be interpreted to encompass both employer-employee relationships and agreements with independent contractors.[151] The Court affirmed the lower court's denial of the defendant's motion to compel.

As established in *New Prime*, an arbitration provision may only be enforced if the agreement falls within the confines of Sections 1 and 2 of the FAA. Accordingly, in cases where a party may argue that an agreement somehow falls outside of one of these Sections, that party may be able to avoid compelled arbitration, even when the agreement contains a delegation provision.

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[146] *Id.* at 534 (internal quotations omitted).

[147] *Id.* at 536.

[148] *Id.* at 537.

[149] *Id.* at 538 (internal quotations omitted).

[150] *Id.* at 539 (quoting Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (internal quotations omitted)).

[151] *Id.* at 540.

V. DEFENDANT'S ACTIONS

Defendants sometimes act as a blockade to the enforcement of the arbitration provisions they seek to uphold. In an effort to ensure a favorable outcome, some parties file motions to dismiss or summary judgment motions that require a decision on the merits. Once this occurs, many courts are hesitant to remove a case for arbitration because the moving party would get two bites at the apple. In other cases, courts have refused to compel arbitration because the terms of the arbitration agreement overreach, leaving a party without an adequate avenue for relief.

A. Waiver

In several instances courts have determined that a defendant has invoked the judicial process and thereby waived its right to arbitrate. The courts look to the time spent in court, whether the merits of the action were argued, and whether the nonmoving party suffered any prejudice as a result of the delay. Whether the untimeliness was perceived as strategic or neglectful, courts have been unwilling to grant motions to compel arbitration in these cases. Courts have proven to be especially weary of dismissing or staying cases for arbitration when the decision would, in effect, give a party an opportunity to re-argue the same issues.

For example, in *Scott v. Family Dollar Stores, Inc.*, a class action alleging an employer discriminated against female store managers, the court refused to compel arbitration because the defendant did not move to compel arbitration until after the class had been certified and affirmed by the Fourth Circuit.[152] The defendant solicited putative class members to sign arbitration agreements after oral arguments for class certification but did not inform the plaintiffs' counsel or the court for more than three years. The court noted that it is "well recognized that arbitration can be waived when not sought until after class certification has been fully litigated."[153] The court reasoned that seeking arbitration that far into litigation goes against the purpose of arbitration, which is "to reach a full settlement of disputed matters without litigation."[154]

Similarly, in *Degidio v. Crazy Horse Saloon and Restaurant, Inc.*, the Fourth Circuit refused to enforce an arbitration agreement after finding that the defendant abused the judicial process to the detriment of plaintiffs.[155] The defendants unilaterally contacted potential plaintiffs, without notice to class counsel, and presented

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[152] Scott v. Family Dollar Stores, Inc., No. 3:08-CV-540-MOC-DSC, 2017 WL 4126354, at *1–2 (W.D.N.C. Jan. 4, 2017).

[153] *Id.* at *1.

[154] *Id.* (internal quotations omitted) (quoting Elliott v. K.B. Home N.C., Inc., 752 S.E.2d 694, 697 (N.C. Ct. App. 2013)).

[155] Degidio v. Crazy Horse Saloon & Rest. Inc., 880 F.3d 135, 137 (4th Cir. 2018).

them with a misleading arbitration agreement that was found to prejudice the plaintiffs' opportunity to opt in to the action after the lawsuit commenced. Additionally, the defendants used judicial proceedings to pursue a merits-based litigation strategy—including filing multiple motions for summary judgment, serving discovery, and asking the district court to certify questions of state law—for three years before moving to compel arbitration. The court noted that "[t]his conduct could not be more at odds with the FAA's goal of facilitating expeditious settlement of disputes."[156]

Likewise, in *Prowant v. Federal National Mortgage Association*, the court declined to enforce an arbitration agreement because defendant Fannie Mae waived and breached the arbitration agreement by filing a motion for summary judgment with the court.[157] When additional plaintiffs sought to opt in to the action, the defendant sought to bind opt-in plaintiffs to the arbitration agreement. The court held that the prior ruling applied to the opt-in plaintiffs, and even if the former order did not apply, the plaintiffs would not be required to arbitrate because the defendant participated in litigation proceedings for eight months. Moreover, the defendant did not move to compel arbitration until receiving an unfavorable summary judgment ruling, indicating that the decision to compel arbitration was a "tactical maneuver as opposed to a legitimate motive."[158]

And in *Healy v. Cox Communications, Inc.*, an antitrust case, the Tenth Circuit found that the defendant waived its right to arbitration by failing to inform the court about arbitration agreements until two years into litigation.[159] The court held that a party must make the "earliest feasible determination" of whether to pursue arbitration.[160] The defendant engaged in extensive discovery, class certification, and made several dispositive motions without notifying the court of its intent to arbitrate. The Tenth Circuit applied a six-factor test from *Peterson v. Shearson/American Express, Inc.* to determine whether the defendant waived its right to arbitration. The *Peterson* factors examine:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into the preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not

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156 *Id.* at 141.

157 Prowant v. Fed. Nat'l Mortg. Ass'n, 255 F. Supp. 3d 1291, 1300 (N.D. Ga. 2017).

158 *Id.* at 1296.

159 Healy v. Cox Commc'ns, Inc., 790 F.3d 1112, 1115 (10th Cir. 2015).

160 *Id.* at 1119.

> available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.[161]

Applying this analysis, the court found that the defendant's actions conflicted with the FAA's purpose of facilitating "streamlined proceedings and expeditious results" as stated in *Concepcion*.[162] Specifically, the court noted that one of the arbitration agreements, for which the defendant withheld relevant information, would have significantly impacted the plaintiffs' ability to satisfy one of the requirements for filing as a class action, the numerosity requirement, because it would remove 87% of class members.[163] The court determined that the defendant's intentional withholding of material facts until after an unfavorable ruling on class certification was an attempt to "play heads I win, tails you lose."[164] The court characterized the defendant's actions as "improper gamesmanship" that wasted a "copious amount of judicial resources . . . at great expense to the public."[165]

There are several contrary examples, however, where courts have found that the defendants' actions did not rise to the level of waiver. In *Fozard v. CR England, Inc.*, a FLSA case, the court determined that the defendant did not waive the right to arbitrate because the plaintiffs had failed to establish that the defendant's actions caused the plaintiffs detriment or prejudice.[166] Under Fifth Circuit precedent, a party waives its right to arbitrate if it substantially invoked the judicial process and thereby caused detriment or prejudice to the party. A failure to establish either element will prevent a finding of waiver. The plaintiffs asserted that the defendant substantially invoked the judicial process to the detriment of the plaintiffs by filing an answer, filing a motion to dismiss, participating in discovery conferences with the court, responding to discovery requests, and removing a related case to federal court.[167] The court found the plaintiffs' waiver argument unavailing because they did not argue that any of the defendant's behaviors caused them detriment or provided even "a single example" of how the actions caused detriment.[168]

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[161] *Id.* at 1116 (citing Peterson v. Shearson/Am. Express, Inc., 849 F.2d 464, 467–68 (10th Cir. 1988)).

[162] *Id.* at 1118 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011)).

[163] *Id.* at 1118. Under Rule 23(a)(1) of the Federal Rules of Civil Procedure, which governs class actions, "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members *only if* (1) the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1) (emphasis added).

[164] *Id.* at 1117.

[165] *Id.* at 1118–19.

[166] Fozard v. C.R. Eng., Inc., 243 F. Supp. 3d 789, 796 (N.D. Tex. 2017).

[167] *Id.* at 795.

[168] Although the court ruled that the waiver argument failed to establish any detriment or prejudice, the court went on to state that even if the plaintiffs had provided examples of how they were prejudiced, the defendant's actions did not substantially invoke the judicial process. *Id.* at 796.

Similarly, in *Vandehey v. Asset Recovery Solutions, LLC*, the court rejected the plaintiffs' argument that the defendants prejudiced the plaintiffs by waiting five months after the commencement of litigation before filing the motion to compel arbitration.[169] The court cited Seventh Circuit precedent that held that the relevant factors to consider were the defaulting party's diligence or lack thereof, delay in requesting arbitration, participation in discovery, and prejudice to the party asserting waiver.[170] The plaintiffs argued that the elapsed time of five months exhibited the defendants' lack of diligence. The plaintiffs further asserted that the delay caused prejudice because they had already spent significant time litigating the case, including drafting a Rule 26(f) plan, participating in a Rule 16 conference, participating in discovery, and filing a motion for class certification. The defendants responded that discovery had been minimal in the case and that the motion to compel arbitration was filed as soon as the defendants became aware of the clause. The court found that, although the parties participated in some litigation, no substantive rulings had been made in the case, no trial date had been set, and the parties had engaged in minimal discovery. The court then held that these circumstances did not constitute sufficient prejudice against the plaintiffs to establish waiver.

Another example is *Mason v. Midland Funding, LLC*, a class action alleging violations of the Fair Debt Collections Practices Act, in which the court found that the defendants had not waived the right to arbitrate despite litigating the case for over a year in court and filing a motion to dismiss the case.[171] Although the plaintiffs argued that litigating the case for over a year cost the court and the plaintiffs "thousands of hours and hundreds of thousands of dollars," the court held that the plaintiffs had failed to provide any evidence or specific information regarding the time spent or expenses incurred.[172] The court then ruled that the plaintiffs failed to carry the "heavy burden" of establishing waiver.[173]

These cases reveal that plaintiffs must demonstrate, with particularity and evidence, that the defendants' actions caused detriment or prejudice to meet the heavy burden of establishing that the defendants' actions constitute waiver. Without proof of this element, plaintiffs' waiver arguments will surely fail. As demonstrated by these few examples, courts do not provide hard lines on the length of time a claim may be litigated in court before the litigation is perceived as invoking the judicial process. In cases where substantive rulings have been made by the court, however,

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[169] Vandehey v. Asset Recovery Sols., LLC, No. 18-C-144, 2018 WL 6804806, at *7 (E.D. Wis. Dec. 27, 2018).

[170] *Id.* (citing Kawasaki Heavy Indus., Ltd. v. Bombadier Recreational Prods., Inc., 660 F.3d 988, 994 (7th Cir. 2011)).

[171] Mason v. Midland Funding LLC, No. 1:16-cv-02867-LMM-RGV, 2018 WL 3702462, at *20–22 (N.D. Ga. May 25, 2018).

[172] *Id.* at *23.

[173] *Id.* at *37.

plaintiffs are more likely to establish that a defendant has invoked the judicial process. To be sure, evidence of gamesmanship or attempting to re-litigate issues will weigh heavily in favor of finding a defendant waived arbitration rights.

B. Fraud, Duress, Unconscionability

The Supreme Court has held that an agreement to arbitrate, like any other contract, may be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability. In *Concepcion*, the Supreme Court concluded that even generally applicable state-law rules are preempted if in practice they have a "disproportionate impact" on arbitration or interfere with fundamental attributes of arbitration and thus create "a scheme inconsistent with the FAA."[174] Since this decision, some courts have interpreted this holding to mean that the FAA displaces any state law defense, such as unconscionability, that has a disproportionate effect on arbitration.[175] Still, relevant state contract principles are used to determine whether a contract defense is applicable in a case, as long as the state laws are not displaced by the FAA.[176] The following cases demonstrate examples where attorneys achieved favorable rulings with these common contract defenses.

For instance, in *Billingsley v. Citi Trends, Inc.*, a collective FLSA action, the court refused to compel arbitration because the agreements were unconscionable.[177] After the plaintiffs had filed their FLSA claim and the court had held a scheduling conference, the defendant set up two-on-one meetings with putative class members in "back-room" settings and asked them to sign arbitration agreements. The employees understood that they would be fired if they did not sign the documents, and the employer refused to provide copies of the contract to the employees after the documents were signed. The court found the practice "highly coercive" and "specifically targeted at curtailing th[e] litigation."[178] The court also refused to compel arbitration for opt-in plaintiffs because of the "record of abuse" of the proceedings on the part of the defendant.[179]

And in *Ziglar v. Express Messenger Systems Inc.*, another FLSA action and wage dispute, the District Court for the District of Arizona held that an arbitration agreement was unconscionable because it prevented the recovery of certain statutory damages, prohibited the award of attorney fees, and included a cost-splitting requirement that, in effect, would make the plaintiffs unable to afford arbitrating their

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[174] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

[175] *See* Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1159 (9th Cir. 2013); Wolf v. Nissan Motor Acceptance Corp., No. 10-cv-3338 (NLH)(KMW), 2011 WL 2490939, at *6 (D.N.J. June 22, 2011).

[176] *See* Quilloin v. Tenet HealthSystem Phila., Inc., 673 F.3d 221, 230 (3d Cir. 2012).

[177] Billingsley v. Citi Trends, Inc., 560 F. App'x 914, 919 (11th Cir. 2014).

[178] *Id.*

[179] *Id.*

claims.[180] The agreement also barred the recovery of punitive or equitable relief. The plaintiffs alleged that the agreement was unconscionable because, *inter alia*, the clause would prevent the plaintiffs from receiving the full range of damages, specifically treble damages, for unpaid wages under state labor law.[181] The plaintiffs argued that the agreement would block access to treble damages because, under Arizona wage law, treble damages are considered punitive in nature. The court agreed and held the clause was unenforceable because it "fail[ed] to provide for all the types of relief that would otherwise be available in court."[182] The court also found that the prohibition on attorneys' fees prevented the plaintiffs from recovering an award available under the FLSA. Finally, the court ruled that the cost-splitting provision denied the plaintiffs' opportunity to vindicate their rights because the plaintiffs established that they lacked the financial resources for the arbitrations. The cost of arbitration was estimated to be approximately $28,000 for each plaintiff. Notably, the agreement did not include a fail-safe provision for a reduction of costs or cost shifting for parties with financial hardship.[183]

Even in cases where the court finds a provision of an arbitration agreement unconscionable, however, severability provisions often enable the court to enforce the remaining portions of the arbitration agreement. For instance, in *Larsen v. Citibank*, a class action challenging a bank's overdraft policy, the Eleventh Circuit found a confidentiality provision in the arbitration substantively unconscionable and unenforceable.[184] The court held that "unconscionable terms are severed from the applicable agreement wherever possible."[185] Rather than hold that the agreement in its entirety was unenforceable, the court severed the confidentiality provision and upheld the agreement to arbitrate. Similarly in *Beltran v. AuPairCare, Inc.*, the Tenth Circuit overruled the district court's denial of a motion to compel arbitration because the unconscionable provision did not "permeate" the contract.[186] The provision at issue granted the defendants the unilateral power to select the arbitration provider. The court recognized that the "strong preference [under California law] is to sever" unlawful provisions.[187] Although the court found that this clause had a

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[180] Ziglar v. Express Messenger Sys. Inc., No. CV-16-02726-PHX-SRB, 2017 WL 6539020, at *3–4 (D. Ariz. Aug. 31, 2017).

[181] *See* ARIZ. REV. STAT. ANN. § 23-355 (2019) ("[I]f an employer, in violation of this chapter, fails to pay wages due to any employee, the employee may recover in a civil action against an employer or former employer an amount that is treble the amount of the unpaid wages.").

[182] *Ziglar,* 2017 WL 6539020, at *3 (internal quotations omitted) (quoting Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895 (9th Cir. 2002)).

[183] *Id.*

[184] Larsen v. Citibank FSB, 871 F.3d 1295, 1319 (11th Cir. 2017).

[185] *Id.* at 1314 (citing Woodward v. Emeritus Corp., 368 P.3d 487, 496 (Wash. 2016)).

[186] Beltran v. AuPairCare, Inc., 907 F.3d 1240, 1263 (10th Cir. 2018).

[187] *Id.* (quoting Magno v. College Network, Inc., 204 Cal. Rptr. 3d 829, 841 (Cal Ct. App. 2016)).

"high degree of substantive unconscionability," it determined that severing the provision was proper.[188]

Once again, the scales weigh towards the enforcement of arbitration agreements. Thus, convincing a court that an arbitration agreement is unenforceable for unconscionability may require plaintiffs to prove that the unconscionable portions of the agreement are not severable.

CONCLUSION

Even though the deck may be stacked against a party seeking to avoid arbitration, these cases show that creative lawyers have still found pathways to success. Savvy attorneys may frame their case in a more favorable light and avoid a presumption in favor of arbitration by attacking the formation of a valid contract. Additionally, closely analyzing the terms and the context of the agreement may reveal avenues to secure favorable outcomes. Parties may also find helpful strategies by analyzing the statutory construction of the FAA. Adverse parties may provide grounds for contesting arbitration through waiver or other contractual defenses. Ultimately, this study shows that even in difficult situations, diligent attorneys can still deliver winning strategies to escape arbitration in some circumstances.

[188] *Id.* at 1258.