CAN ARBITRATION DO MORE FOR CONSUMERS? THE TILA CLASS ACTION RECONSIDERED

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In this Note, Robert Alexander Schwartz assesses the state of the debate in the latest chapter of the ever-unfolding law of arbitration. What works for high-value agreements between sophisticated parties in arms-length negotiation may not work for contracts of adhesion between businesses and consumers. Focusing on disputes arising under the Truth in Lending Act (TILA), Schwartz analyzes recent case law upholding arbitration agreements contained in consumer-lending contracts of adhesion, as well as recent scholarship criticizing the courts' actions. He concludes that both the courts and the scholars have it wrong: Neither arbitration as presently constituted nor class action lawsuits can provide individual justice to TILA plaintiffs. Schwartz suggests an alternative legal framework for attacking unfair arbitration clauses while offering a set of modernizing improvements that might make arbitration a viable tool for the resolution of TILA claims and other consumer agreement disputes.

INTRODUCTION

Businesses have become enamored of arbitration clauses.[1] These boilerplate contractual provisions—which typically provide that any conflicts under a commercial contract will be resolved by a private dispute-resolution agency rather than a court of law—have become a part of everyday commercial life. This trend is most commonly attributed to arbitration's many advantages over traditional court proceedings. In particular, businesses perceive arbitration to be a faster, cheaper, and more predictable method of resolving a dispute than the typical lawsuit in the public courts.[2] These advantages are particularly attractive to large companies that engage in repeated, uniform contracts with many consumers. Businesses, though, could not have

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[1] Linda J. Silberman & Allan R. Stein, Civil Procedure: Theory and Practice 1052 (2001). An "arbitration clause" is a contractual provision providing that "any disputes that arise between [the signatories] will be resolved not in a court of law, but under the auspices of a privately run dispute-resolution organization." Id. at 1050.

[2] Id. at 1052.

taken advantage of these benefits so easily had it not been for a series of developments in the law of arbitration during the twentieth century.

That century began with a "longstanding judicial hostility" to arbitration agreements.[3] Courts of that era would sometimes refuse to enforce those agreements on public policy grounds.[4] In 1925, things began changing dramatically when Congress enacted the Federal Arbitration Act (FAA).[5] The FAA's plain language calls for a resounding reversal of the previous antipathy toward arbitration clauses. The Act provided—without apparent ambiguity—that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6]

Despite the seeming clarity of this language, for a time some courts remained reluctant to enforce arbitration agreements as they pertained to certain statutorily created rights.[7] For these courts, when Congress creates a private right of action and then relies on private lawsuits for enforcement of public policy goals, the individual litigant is serving as a private attorney general. Such a litigant should not necessarily be able to choose a forum other than that which Congress had intended.[8]

By the century's end, however, several decisions by the Supreme Court had made clear that, in light of a "liberal federal policy favoring arbitration agreements,"[9] absent extraordinary circumstances,[10] courts must strictly enforce agreements to arbitrate. Supreme Court decisions have enforced the arbitration of disputes that arose under a

[3] Id. at 1051 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991)).

[4] See id. The historic judicial hostility towards private arbitration in England, one court suggested, may have been linked to the judiciary's interest in collecting case fees from litigants at a time when judges' salaries came largely from these fees. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942).

[5] Silberman & Stein, supra note 1, at 1051. The Federal Arbitration Act (FAA) enacted by Pub. L. 61-282, ch. 392, 61 Stat. 669 (codified at 9 U.S.C. §§ 1-14 (2000)).

[6] § 2.

[7] See, e.g., Wilko v. Swan, 346 U.S. 427, 438 (1953) (holding invalid agreement to arbitrate issues arising under Securities Act of 1933), overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 828 (2d Cir. 1968) (concluding that antitrust claims are inappropriate for arbitration), overruled by Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632-37 (1985).

[8] See, e.g., *Am. Safety Equip. Corp.*, 391 F.2d at 826-27.

[9] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[10] See infra notes 33-35 and accompanying text for a discussion of exceptional circumstances that can justify nonenforcement of arbitration agreements.

range of statutes, including the Sherman Act,[11] the RICO Act,[12] the Securities Act of 1933,[13] the Securities Exchange Act of 1934,[14] and the Age Discrimination in Employment Act (ADEA).[15] Typically, the Court has concluded that such statutory claims can be effectively vindicated in an arbitral forum and that the public policy goals served by these private rights of action are unharmed by submitting them to arbitration.[16] Although this development has not been universally lauded,[17] some commentators have persuasively argued that arbitrating these claims has produced positive results.[18]

Special problems arise, however, when consumers are bound to arbitrate their statutory consumer protection claims. The Truth in Lending Act[19] (TILA), in particular, has been the focus of significant litigation and commentary on the issue of arbitrability.[20] The TILA,

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11 See *Mitsubishi Motors*, 473 U.S. at 616, 640.

12 See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 222, 238-42 (1987).

13 See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485-86 (1989).

14 See *McMahon*, 482 U.S. at 238.

15 See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-35 (1991).

16 See, e.g., *Mitsubishi Motors*, 473 U.S. at 636-37.

17 See generally Christine Godsil Cooper, Where Are We Going with *Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims, 11 St. Louis U. Pub. L. Rev. 203 (1992) (criticizing *Gilmer*); Robert R. Gregory, Arbitration: It's Mandatory but It Ain't Fair, 19 Sec. Reg. L.J. 181 (1991) (listing several reasons why arbitration of claims by customers against securities brokerage firms is unfair); Christine L. Davitz, Note, U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen's License to the Sky Reefer's Edict, 30 Vand. J. Transnat'l L. 59 (1997) (arguing that arbitration arising under regulatory statutes often ignores Congress's broader policy goals in regulating parties and over time may eviscerate regulatory schemes in United States).

18 See Samuel Estreicher, Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001) ("In a world without employment arbitration as an available option, we would essentially have a '[C]adillac' system for the few and a 'rickshaw' system for the many."); Deborah Masucci, Securities Arbitration: A Success Story, 31 Wake Forest L. Rev. 183, 183-84 (1996) (characterizing arbitration in securities industry as "largely successful," as well as "fair, expedient, and inexpensive"); Eric A. Posner, Arbitration and the Harmonization of International Commercial Law: A Defense of *Mitsubishi*, 39 Va. J. Int'l L. 647, 668 (noting that *Mitsubishi* decision may have produced "an international arbitration system that both respects mandatory rules and avoids the need for routine judicial review with its attendant costs and biases"); Eric James Fuglsang, Comment, The Arbitrability of Domestic Antitrust Disputes: Where Does the Law Stand?, 46 DePaul L. Rev. 779, 781 (1997) (describing how public policy behind antitrust laws may be vindicated in arbitration).

19 Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified at 15 U.S.C. §§ 1601-1693 (2000)). The Truth in Lending Act (TILA) is a disclosure statute whose purpose is to facilitate comparison shopping for credit. The Act's major disclosure requirements pertain to finance charges and annual percentage rates. 17 Am. Jur. 2d Consumer and Borrower Protection § 16 (1990).

20 See, e.g., Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (finding that claims under TILA are arbitrable despite rendering class action unavailable), cert.

among other things, obliges lenders to make plain-language disclosures to consumers concerning finance charges.[21] Although a number of consumer-protection statutes could be debated in similar terms, the TILA has given rise to particularly difficult cases–poster children for critics of arbitration agreements. This is because TILA claims typically involve a large number of identical contracts in which consumers must agree to arbitrate disputes and where the amounts of money at issue in a single case are small.

Although the great weight of authority now supports the enforcement of predispute arbitration agreements in the case of TILA claims,[22] commentators and some courts have expressed serious concerns about the suitability of TILA claims for arbitration.[23] Summarily stated, they argue that a TILA claim is usually too small to permit cost-effective, individual enforcement. Therefore, these claims can be successfully brought only if aggregated into class actions. Because, however, class actions are generally unavailable in arbitration,[24] critics

denied, 531 U.S. 1145 (2001); see also Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 819 (11th Cir. 2001) (same); Fluehmann v. Assocs. Fin. Servs., No. 01-40076-NMG, 2002 U.S. Dist. LEXIS 5755, at *10-11 (D. Mass. Mar. 29, 2002) (same); Arellano v. Household Fin. Corp., No. 01-C2433, 2002 U.S. Dist. LEXIS 2184, at *15-16 (N.D. Ill. Feb. 12, 2002) (same); Hale v. First USA Bank, No. 00 Civ. 5406, 2001 U.S. Dist. LEXIS 8045, at *22-23 (S.D.N.Y. June 12, 2001) (same); Gray v. Conseco, Inc., No. SA CV 00-322 DOC, 2000 U.S. Dist. LEXIS 14821, at *21-22 (C.D. Cal. Sept. 29, 2000) (same). These decisions have not been well received by commentators. See generally Richard M. Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform, 38 Hous. L. Rev. 1237 (2001); Richard B. Cappalli, Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?, 10 B.U. Pub. Int. L.J. 366 (2001) (criticizing Third Circuit's reasoning in *Johnson v. West Suburban Bank* and arguing for nonarbitrability of TILA class action claims); Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 Wm. & Mary L. Rev. 1 (2000) (arguing for limitations on arbitrability of consumer claims).

21 17 Am. Jur. 2d, supra note 19, § 16.

22 For decisions that have found arbitration clauses effective for TILA claims, see, for example, *West Suburban Bank*, 225 F.3d at 369, and cases cited supra note 20.

23 See, e.g., Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264, 266 (D. Del. 1999) ("[W]ithout a guarantee that Johnson may effectively . . . vindicate his statutory cause of action in the arbitral forum, it is questionable that the statute will continue to serve both its remedial and deterrent function." (internal quotations omitted)), rev'd sub nom. *Johnson v. W. Suburban Bank*, 225 F.3d at 369; Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) ("[T]he remedial purposes of TILA are substantially defeated or impaired by arbitration clauses.").

24 Because the FAA requires the enforcement of agreements to arbitrate "in accordance with the terms of the agreement," 9 U.S.C. § 4 (2000), courts have reasoned that class treatment is inappropriate absent explicit provision in the arbitration contract. See Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) (holding that § 4 of FAA "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter"); Herrington v. Union Planters Bank, 113 F. Supp. 2d 1026, 1034 (S.D. Miss. 2000) (interpreting agreement silent on consolidation and class actions to preclude class arbitration). But see Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal.

argue that enforcement of predispute arbitration agreements effectively defeats Congress's purposes in enacting the TILA.[25]

This Note challenges the simplistic conclusion that class actions are necessarily desirable and that arbitration is inherently unworkable in this context. While arbitration agreements, as presently constituted, do not offer an effective way of redressing individual grievances under the TILA's disclosure requirements, class actions hardly represent an effective means of redress for individual plaintiffs. In fact, class action lawsuits under the TILA present a real danger of enriching plaintiffs' attorneys while extinguishing the rights of class plaintiffs without significant remuneration. Not only do TILA complainants face well-known incentive problems in the lawyer-class relationship, but, in addition, Congress has imposed an intentionally low statutory cap on damages in TILA class actions. This Note takes issue with suggestions that either the courts or Congress should act to preclude the arbitration of TILA-based and other similar consumer disputes. Such "solutions" are based on pollyannaish misconceptions about class actions and overly rigid notions about arbitration. As presently constituted, *both* of these tools—the class action and the individual arbitration—are deeply flawed methods for providing redress to aggrieved consumers.

This Note offers a way out of the dilemma: reform of the arbitral forum as a means of facilitating recovery by individuals. Part I.A details the leading case on the question of TILA arbitrability, *Johnson v. West Suburban Bank*,[26] and Part I.B examines two of the more persuasive criticisms of the use of arbitration to resolve TILA claims and other consumer disputes. Part II attempts to dispel the notion that a class action lawsuit is an effective means of redress for individual TILA plaintiffs and thus a desirable alternative to arbitration. In re-

1982) (permitting class actions in arbitration), rev'd on other grounds, Southland Corp. v. Keating, 465 U.S. 1, 9 (1984); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (determining, where contract allowed arbitration of "any controversy" relating to various subjects, that agreement encompassed class actions and provided purchasers of securities with right to obtain class certification from state trial court prior to initiating arbitration proceedings); Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 361 (S.C. 2002) (deciding that arbitrator did not act in manifest disregard of law in permitting class arbitration to proceed).

[25] See, e.g., *Tele-Cash*, 82 F. Supp. 2d at 266 (finding inherent conflict between FAA and TILA renders TILA disputes nonarbitrable pursuant to predispute arbitration agreement), rev'd sub nom. *Johnson v. W. Suburban Bank*, 225 F.3d at 379; Cappalli, supra note 20, at 373-74.

[26] 225 F.3d 366. Most commentators who have discussed this case have referred to it with the shorthand "*Johnson.*" This Note uses "*West Suburban Bank*" simply to distinguish this case from the myriad others bearing the name "*Johnson.*" A LEXIS search revealed 752 Third Circuit cases including "Johnson" among the party names.

sponse to critics who have called for a federal law prohibiting predispute arbitration agreements in consumer contracts, Part III.A proposes a doctrinal framework that would permit courts to strike down unfair arbitration agreements while encouraging the development of more efficient and accessible dispute-resolution methods. Finally, Part III.B suggests several changes companies might make in their standard arbitration mechanisms that would allow those mechanisms to survive the sort of judicial scrutiny suggested in Part III.A and would make arbitration a more viable forum for the resolution of consumer disputes.

I
THE PROBLEM: TERRY JOHNSON AND HIS EIGHTY-EIGHT DOLLARS

In *Johnson v. West Suburban Bank*, the Third Circuit held that claims arising under the TILA may be subject to predispute arbitration agreements, even though such arbitration may render class action litigation impossible.[27] This decision has sparked spirited criticism from commentators who believe that the only plausible way to adjudicate TILA disputes is in court through a class action. What follows is a brief account of the facts of *West Suburban Bank*, a description of the Third Circuit's analysis of the arbitrability of TILA claims, and a synopsis of the more compelling arguments that the Third Circuit reached the wrong result and that the status quo should be changed.[28]

A. *The Case:* Johnson v. West Suburban Bank

Terry Johnson's odyssey in complex litigation began with an application for a short-term loan for $250 from County Bank of Rehoboth Beach, Delaware.[29] His loan agreement provided that the principal on this loan, and interest charges of eighty-eight dollars, were due two weeks from the date of the loan, meaning that Johnson was paying an annualized interest rate of 917%. The agreement also contained a predispute arbitration clause.[30]

For reasons known only to himself and his legal counsel, Johnson's satisfaction with his short-term loan waned, and he brought suit against the bank and the bank's agent for the loan transaction. The action was filed on behalf of Mr. Johnson as representative of a

27 *W. Suburban Bank*, 225 F.3d at 369.

28 The story of poor Terry Johnson has been told and retold. In avoidance of a duplicative effort, only the essential facts are recounted here. For a comprehensive retelling of Mr. Johnson's misadventures in consumer lending, see Cappalli, supra note 20, at 370-74.

29 *W. Suburban Bank*, 225 F.3d at 369.

30 Id. at 369-70.

putative class, alleging, inter alia, that the defendants had violated the TILA by failing to make proper disclosure of the high rate of interest.[31] The claim's argument was that the arbitration clause contained in the loan agreement was unconscionable.[32]

There are at least two distinct means by which a signatory to an arbitration contract, like Johnson, can persuade a court that arbitration should not be ordered to settle a dispute within the confines of the agreement. The FAA provides that all arbitration agreements concerning interstate commerce are valid, irrevocable, and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[33] Therefore, an arbitration agreement may be voidable upon a finding of fraud, duress, unconscionability, etc. This is a question of state law and an exercise in contract interpretation. Note that the "any contract" language in the FAA implies that the state law utilized to invalidate the agreement must not be specifically targeted at arbitration: It must be applicable with equal force to any given contract dispute.[34]

Additionally, the Supreme Court has held that it may be possible for a party to avoid arbitration of a federal statutory cause of action if the party can prove that Congress intended to preclude arbitration of disputes arising under the statute in question—effectively overriding the FAA for a discrete class of claims.[35] This is a question of federal law and an exercise in statutory interpretation.

The district court found for Johnson under the latter theory. It was obvious that parties who had signed the arbitration clause would not ordinarily be able to pursue a class action. Most courts that have addressed the issue have concluded that, because the FAA requires arbitration clauses to be enforced "in accordance with the terms of the agreement," neither courts nor arbitrators may read unprovided-for procedural devices into the contractual dispute-resolution arrangement.[36] In Terry Johnson's case, the district court held that the plaintiff had met his burden of proving congressional intent to preclude

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[31] Id. at 370.

[32] Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264, 266 (D. Del. 1999), rev'd sub nom. *Johnson v. W. Suburban Bank*, 225 F.3d at 379.

[33] 9 U.S.C. § 2 (2000).

[34] See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002) ("[Although] 'courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions,' general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements." (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996))).

[35] See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (imposing burden on party seeking to avoid arbitration of Age Discrimination in Employment Act (ADEA) claim to show congressional intent to preclude such arbitrations).

[36] See supra note 24.

arbitration of TILA disputes: Because a class action would be unavailable to those who had signed the arbitration clause, compelling arbitration in this case would create an "inherent conflict" with the purposes of the TILA. The court therefore denied the defendants' motion to compel arbitration.[37]

Johnson's success in avoiding arbitration was short-lived. Nine months after the district court's decision, a panel of the Third Circuit reversed, holding that while the TILA clearly "contemplates" class actions, nothing in that law creates a substantive right to bring one or creates an exemption from binding arbitration clauses.[38] The panel held that neither TILA's text nor its legislative history clearly evinced an intent to preclude arbitration or create a substantive right to proceed as a class.[39] The court noted that Johnson had the proper incentives to bring his claim before an arbitrator,[40] that he could retain counsel based on the prospect of recovering under the TILA's fee-shifting provisions,[41] and that administrative agencies would pick up any slack left by private attorneys general in deterring TILA violations. Based on these conclusions, the panel found no "inherent conflict" in the enforcement of arbitration agreements concerning TILA claims.[42]

The court's search for an "inherent conflict"[43] between the TILA and arbitration was instructive because it prompted the court to flesh

[37] *Tele-Cash*, 82 F. Supp. 2d at 266. The Court reasoned,

> [B]y enforcing the boiler plate arbitration clause . . . in this (and every other) one-page loan agreement unilaterally drafted by the defendants, the court would be allowing them to effectively insulate themselves against the . . . penalties which Congress deemed necessary to "provide creditors with a meaningful incentive to comply with the law."

Id. at 271 (quoting S. Rep. No. 93-278, at 14).

[38] *W. Suburban Bank*, 225 F.3d at 371.

[39] Id. at 371-73.

[40] See id. at 374 (noting incentive to assert rights remains because sums available to individual plaintiff in arbitration are "not automatically increased" by use of class action).

[41] Id.

[42] See id. at 378 (disagreeing with lower court "about whether the TILA precludes compelling arbitration"). A party seeking to avoid an arbitration agreement on the grounds that a given statutory cause of action is nonarbitrable has the burden of establishing congressional intent to preclude arbitration of that cause of action. "If such an intention exists, it will be discoverable in the text of [the given statute], its legislative history, or an 'inherent conflict' between arbitration and [the statute's] underlying purposes." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 29 (1991); see also Duffield v. Robertson Stevens & Co., 144 F.3d 1182, 1190 (9th Cir. 1998) (applying *Gilmer* test to Civil Rights Act of 1991); Oldroyd v. Elmira Sav. Bank, 134 F.3d 72, 77-78 (2d Cir. 1998) (applying *Gilmer* test to Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

[43] The *West Suburban Bank* court bizarrely hiccups in using the phrase "inherent conflict" in the third paragraph of Part II, id. at 371, and switching to a test for "irreconcilable conflict" by Part II.C, id. at 373. This Note is wary of making too much of this semantic difference. The "inherent conflict" language is found in *Gilmer*, 500 U.S. at 26, while the

out the two distinct functions of the TILA: the statute's public policy purpose of deterring deceptive lending practices[44] and its function of vindicating individual claims of right.[45] The two purposes suggest possibly different conclusions about arbitration agreements. If Congress bestows a statutory right on an individual, one might think that the individual is free to bargain away that right in exchange for other benefits, such as agreeing on an alternative forum for resolving claims. But to the extent that the individual litigant is acting as a private attorney general—deterring certain behavior and thereby safeguarding the rights of others—Congress might not have wanted to give that party such authority over the dispute-resolution forum. This two-tiered analytical approach, in which both public and private purposes of a statute are scrutinized, can be found in the Supreme Court's approach to assessing the arbitrability of various statutory claims. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[46] the Court considered both the public policy and individual rights purposes inherent in the Sherman Act.[47] It held that, in the antitrust context, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[48] Similarly, the Court concluded in *Gilmer v. Interstate/Johnson Lane Corp.* that there is no inconsistency between redressing individual grievances arising under the ADEA through arbitration and effecting social policies through deterrence created by the threat of private action.[49]

On the subject of social policy inherent in the law, the Third Circuit in *West Suburban Bank* made the uncited assumption that while arbitrating would-be class claims on an individual basis might reduce the number of plaintiffs seeking to enforce the TILA, arbitration would not eliminate private enforcement incentives altogether. Neither, in the court's view, would arbitration choke off the supply of attorneys willing to represent individual TILA plaintiffs since the statute provides for the recovery of attorney's fees.[50]

"irreconcilable conflict" language apparently comes from Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987) (finding civil RICO claims arbitrable).

44 See *W. Suburban Bank*, 225 F.3d at 373-76.

45 See id.

46 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

47 Sherman Act, 15 U.S.C. § 1 et seq. (2000).

48 *Mitsubishi Motors*, 473 U.S. at 637.

49 *Gilmer*, 500 U.S. at 27 (quoting goal of Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621(b), to "promote employment of older persons based on their ability rather than age" and "help employers and workers find ways of meeting problems arising from the impact of age on employment").

50 *W. Suburban Bank*, 225 F.3d at 374.

Next, the court discussed the relationship between the TILA's individual remedial functions and its broad social purposes. As discussed above, the Supreme Court has held, with respect to the Sherman Act and the ADEA, that where litigants have a forum accessible to them, the statutes can still serve their deterrent functions.[51] The *West Suburban Bank* court considered *Gilmer*, the ADEA case, and took from that case the broader principle that the Supreme Court had rejected "[t]he notion that there is a meaningful distinction between vindicating a statute's social purposes and adjudicating private grievances for purposes of determining whether a statute precludes . . . arbitration."[52] In other words, to the Third Circuit in *West Suburban Bank*, an accessible forum always equals fulfillment of a statute's social purposes. Once the court had set forth that principle, its analysis was straightforward. Satisfied that the arbitral forum was accessible to plaintiffs, the court held that deterrence could remain intact.[53]

Beyond that generalization, the court stated that Congress's social purposes could be bolstered by the statute's administrative enforcement provisions. Again, without citing a source, the Third Circuit panel asserted, in conclusory terms, that administrative enforcement offers "meaningful deterrents" to violators of the TILA, should private enforcement actions fail in that role.[54]

Terry Johnson, now stripped of his putative class, saw his case remanded to arbitration. There appears to be no further public information available on the fate of his claim, but his prospects for relief must have been bleak at this stage of the controversy. Part I.B explains the predicament in which Johnson most likely found himself following the Third Circuit's decision, summarizing commentators' criticism of settling TILA disputes via arbitration and explains the predicament in which Johnson most likely found himself following the Third Circuit's decision.

B. *The Criticism: Calls for Congressional and Judicial Action*

Commentators have made two important proposals concerning the result in *West Suburban Bank*. Professor Cappalli argues that

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[51] See *Gilmer*, 500 U.S. at 27-28; *Mitsubishi Motors*, 473 U.S. at 637.

[52] *W. Suburban Bank*, 225 F.3d at 374. This reading of *Gilmer* is seriously questionable because *Gilmer* was discussing the ADEA and made no apparent attempt to create a rule to be applied to any and all statutes. See *Gilmer*, 500 U.S. at 27 ("[T]he ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims." (citation omitted)).

[53] *W. Suburban Bank*, 225 F.3d at 374-75.

[54] Id. at 375.

"methodological deficiencies" in the court's reasoning in this case have led to a "horrendous result"[55] and that proper application of the relevant law would lead courts to find predispute arbitration agreements unenforceable with respect to TILA claims as a matter of federal law.[56] By contrast, Professor Alderman maintains that, whatever the merits of the Third Circuit's reasoning in *West Suburban Bank*, Congress should amend the FAA to include an express prohibition of the use of binding arbitration in all consumer transactions.[57]

Cappalli proceeds by reviewing the sources of positive law consulted by the *West Suburban Bank* court and by highlighting some others that he suggests were overlooked or ignored. Cappalli first claims that the Third Circuit improperly relied on a Supreme Court dictum from *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*: that federal statutes should be construed in light of a "liberal federal policy favoring arbitration,"[58] leading to *West Suburban Bank*'s "powerful" presumption that saddled the plaintiff with the "heavy burden" of showing nonarbitrability.[59] Cappalli takes the Third Circuit to task for treating *Moses H. Cone*'s language favoring arbitration as binding precedent when, in fact, that case did not decide the arbitrability of the plaintiff's claim but rather decided a federal court abstention issue, rendering the "liberal federal policy" language mere dicta.[60]

In light of subsequent Supreme Court cases, Cappalli's critique of the Third Circuit is certainly a peculiar one. Even assuming that the *Moses H. Cone* language is not binding on lower courts, in several cases decided after *Moses H. Cone* but before *West Suburban Bank*, the Supreme Court reiterated—in its *holdings*—the principle that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[61]

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55 Cappalli, supra note 20, at 367.

56 See id. at 414 (endorsing conclusion that "the arbitration clause imposed upon Terry Johnson would not have been invocable against his TILA class action").

57 Alderman, supra note 20, at 1265.

58 Cappalli, supra note 20, at 375 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

59 Id. at 377 (citing Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000)).

60 Id. at 375-76 (citing *Moses H. Cone*, 460 U.S. at 23-24).

61 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-27 (1991) (upholding decision that claims arising under Age Discrimination in Employment Act (ADEA)are arbitrable); see Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481-83 (1989) (ruling that claims arising under Securities Act of 1933 are arbitrable); Perry v. Thomas, 482 U.S. 483, 490-91 (1987) (noting, in finding California statute requiring judicial forum for wage disputes preempted by FAA, Congress's "intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"); Shearson/ Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (holding RICO claims arbitrable);

First, in *Mitsubishi Motors*, the Court relied on this federal policy to hold that claims arising under the Sherman Act are arbitrable.[62] Next, in *Shearson/Am. Express, Inc. v. McMahon,* the Court cited the "federal policy favoring arbitration" in support of its conclusion that RICO claims are arbitrable.[63] Later, in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, the Court invoked the same policy to determine that claims arising under the Securities Act of 1933 are arbitrable.[64] And in *Gilmer*, the Court again relied on the federal policy favoring arbitration, holding that ADEA claims are arbitrable.[65]

Supreme Court cases subsequent to *West Suburban Bank* have likewise confirmed the "liberal policy favoring arbitration agreements."[66] Thus, notwithstanding Cappalli's analysis of *Moses H. Cone*, and regardless of whether or not the Supreme Court's subsequent decisions have overrelied on that case, the Third Circuit was clearly obliged to account for the federal policy favoring arbitration by the time *West Suburban Bank* came up for review. A federal policy favoring arbitration agreements has been repeatedly articulated by the Supreme Court and must bind lower courts in their arbitrability assessments. And commentators who seek solutions to the *West Suburban Bank* problem cannot avoid this stubborn fact. Cappalli also attacks the Third Circuit's hasty dismissal of TILA's extensive legislative history,[67] which indicates that "Congress very much wanted the class action penalty" to deter would-be violators.[68] Cappalli's research reveals far more support for the conclusion that Congress in-

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (allowing antitrust claims to proceed in international arbitration forum).

[62] *Mitsubishi Motors*, 473 U.S. at 625-26 (deciding that parties' intentions will control interpretation of sales agreement but that those intentions would be construed in light of "federal policy favoring arbitration" (quoting *Moses H. Cone*, 460 U.S. at 24)).

[63] *McMahon*, 428 U.S. at 226 (drawing on "federal policy favoring arbitration" to explain why burden of proof is on party opposing arbitration).

[64] *Rodriguez de Quijas*, 490 U.S. at 479-81 (observing that judicial hostility to arbitration has eroded and that precedent relied upon by court below "has fallen far out of step with our current strong endorsement of the federal statutes favoring [arbitration]").

[65] *Gilmer*, 500 U.S. at 26 (requiring plaintiff to show that Congress intended to preclude waiver of judicial forum for ADEA claims, in light of fact that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" (quoting *Moses H. Cone*, 460 U.S. at 24)); id. at 35 (distinguishing line of cases that "were not decided under the FAA, which . . . reflects a 'liberal federal policy favoring arbitration agreements" (quoting *Mitsubishi Motors*, 473 U.S. at 625)).

[66] See EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (stating that liberal policy favoring arbitration does not require binding nonparties to arbitration agreement); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000) (declining to invalidate arbitration agreement based on speculative evidence of its high costs, which "would undermine the 'liberal federal policy favoring arbitration'" (quoting *Moses H. Cone*, 460 U.S. at 24)).

[67] Cappalli, supra note 20, at 390-401.

[68] Id. at 400.

tended TILA disputes to be resolved principally by class action than the Third Circuit ever acknowledged in its opinion.[69] This part of Cappalli's analysis is particularly persuasive. Repeated references to the class action device by members of Congress on all sides of the issue strongly reinforce the contention that the TILA is a statute constructed around the idea of the class action lawsuit.

Finally, Cappalli attacks the Third Circuit's finding that there is no "irreconcilable conflict" between arbitration and the TILA. As he frames it, the question is, in the absence of class action enforcement, "would lenders disclose correctly? Would bankers, fearing no civil liability, follow the law?"[70] Any court's attempt to answer such questions, says Cappalli, is "a highly speculative intellectual venture."[71] Still, he says, courts cannot overlook the fact that the small size of individual TILA awards would certainly reduce the number of private enforcement actions dramatically. Cappalli argues, for example, that it would be unreasonable to expect any lawyer to represent a single TILA plaintiff in Terry Johnson's position because an individual award for inadequate disclosure might be as low as $100.[72] Referring to contingency arrangements, Cappalli asks, "[W]hat lawyer cannot multiply 30% times $100 to determine an unacceptably low fee of $30?"[73] It is assumed that, lacking a class, Johnson's lawyer never would have pursued the matter. Furthermore, Cappalli argues, "[a]ll arbitrators would insist on an initial deposit of an amount to cover their fees, an amount likely to be substantial in a case as complex as truth-in-lending."[74] It is assumed that Johnson could not afford to make such a deposit, even if the bank were ultimately assessed fees, and that it would be "financially frivolous" for any lawyer to advance the money.[75] Cappalli concludes that, by throwing these barriers in Johnson's path, the *West Suburban Bank* decision manifestly "stripped away a critical component of truth-in-lending enforcement."[76]

In contrast to Cappalli, Alderman suggests a legislative, rather than a judicial, solution to the perceived shortcomings of arbitration as an enforcement mechanism for the TILA and similar consumer-

69 Id. at 390-401.

70 Id. at 401.

71 Id.

72 Id. at 404-05.

73 Id. at 405.

74 Id. This is a clear example of the commentators' tunnel vision when it comes to arbitration proceedings. Cappalli assumes that arbitration is static and gives no consideration to the possibility of adapting it to consumer-protection situations. See infra Part III.B, arguing that arbitrators need not place such an obstacle in a TILA plaintiff's path.

75 Id.

76 Id. at 404.

protection statutes. Specifically, Alderman recommends that Congress amend the FAA to prohibit predispute mandatory arbitration provisions in all consumer transactions.[77] Alderman acknowledges that the legal system is sometimes too slow and inefficient to deal with "the myriad of problems it [is] asked to resolve."[78] Furthermore, he takes no issue with the philosophical underpinnings of alternative dispute resolution (ADR) generally.[79] For disputes arising out of consumer contracts, however, Alderman argues that arbitration is an implausible solution. First, Alderman notes, consumers have no real choice in the matter because arbitration is often imposed by a contract of adhesion.[80] While some form of consent is necessary to validate any contract, Alderman suggests that, "[g]iven the current trend favoring enforcement of arbitration provisions, only those agreements that are truly induced by fraud, duress, or incapacity are likely to be found unenforceable."[81]

Alderman's second argument is that arbitration is not always as prompt and inexpensive as a lawsuit.[82] He points out that small claims court ordinarily would be available to a consumer at a cost of less than $100. In arbitration, by comparison, "[c]osts in excess of $1,000 a day are not unusual."[83] The relatively high costs of arbitration, Alderman says, "will often preclude effective resolution of disputes" arising from consumer contracts.[84]

Third, Alderman maintains that the informal rules governing arbitration proceedings, and the typical finality of arbitrators' decisions, tend to favor businesses. He credits this bias to the repeat-player status of large companies, in contrast with the average consumer's status as a one-off disputant.[85] The provision of arbitration services is itself "a competitive business involving large profits,"[86] says Alderman. He notes that in 2000 the American Arbitration Association (AAA) handled 198,491 cases and generated $80,357,000 in revenue.[87] Although Alderman cannot conclusively link AAA's income-generation to any particular bias, he makes the claim that arbitrators tend to favor the

[77] Alderman, supra note 20, at 1264-65.
[78] Id. at 1238.
[79] See id.
[80] Id. at 1240.
[81] Id. at 1246.
[82] Id. at 1240-41.
[83] Id. at 1250.
[84] Id. at 1253.
[85] See id. at 1241-42 ("[I]nformal rules, lack of guidelines, and finality in the decision often favor the business organization, due in large part to its significant role as a 'repeat player.'").
[86] Id. at 1256.
[87] Id.

repeat-player, i.e., the business interest, "whose continued business is essential for [the arbitrators'] financial success."[88] Alderman's point is that arbitration is a highly competitive industry in the United States[89] and that, whether intentionally or not, arbitrators may side with the large repeat customers who write the mandatory arbitration clauses, so as to assure they win the continued business of these customers in the future.

Alderman's notion that "big business" and "big arbitration" might be acting in concert to prevent the fair resolution of consumer disputes seems unlikely, or at least exaggerated. This Note assumes that arbitrators are generally an unbiased and professional group.[90] Even if arbitral bodies do respond subconsciously to economic pressures, there are still countervailing incentives to prevent the system that Alderman fears—one in which the costs of arbitration prohibit any effective redress. Even if complainants are not repeat players, their attorneys likely will be. It would seem, then, that arbitrators' economic self-interest would lead them to craft an arbitration process that is efficient and accessible, so that complainants—and plaintiffs' attorneys specializing in these kinds of disputes—would actually use it.

Finally, Alderman points out, mandatory arbitration generally precludes consumers from proceeding as a class—the *West Suburban Bank* problem.[91] Here, Alderman's arguments are similar to those made by Cappalli. Class actions, he notes, may be the most efficient way to settle disputes when the individual plaintiff's claim is small but the defendant's wrongful conduct is significant,[92] as is the case with many disputes that arise under the TILA. Plus, the threat of class actions may serve as a deterrent against wrongful conduct.[93] In the case of Terry Johnson, says Alderman, "[e]ffective redress could be obtained only through a class action, maintained on behalf of all the individuals who had been adversely affected by this predatory lending practice."[94] Alderman concludes that the class action should be restored to consumers like Terry Johnson through a legislative prohibition of predispute mandatory arbitration provisions in consumer contracts.[95]

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[88] Id. at 1258.

[89] Id. at 1256 n.81.

[90] Reasonable people might disagree with this assumption. However, a full discussion of whether arbitrators as a general matter are good or evil is beyond the scope of this Note.

[91] Alderman, supra note 20, at 1242.

[92] Id. at 1258-59.

[93] Id. at 1259.

[94] Id. at 1261.

[95] Id. at 1265.

II
WHY TILA CLASS ACTIONS DO NOT SOLVE JOHNSON'S PROBLEM

Alderman and Cappalli agree that the TILA class action is a necessary component of TILA enforcement, serving each of the TILA's distinct goals: compensating individual plaintiffs and deterring disclosure violations generally. Cappalli declares that the legislative history behind the TILA delivers a message "long, deep and loud that Congress very much wanted the class action penalty as a deterrent to disclosure illegalities,"[96] and that the Third Circuit decision to send Terry Johnson into arbitration "cut into the scheme of the Truth-in-Lending Act because class actions, not permitted in arbitration absent agreement, could no longer put economic pressure on lenders to comply with their obligations under federal law."[97] Similarly, Alderman argues that the result in *West Suburban Bank* precludes "the beneficial and deterrent effects of the class action."[98]

In addition to their view that the TILA's deterrence function is being frustrated without the availability of class actions, both Alderman and Cappalli also conclude that the other important goal of TILA—vindicating individual claims—was given short shrift in the *West Suburban Bank* case. In seeking a remedy against the bank's alleged unsavory lending practices, Terry Johnson became, in the words of Cappalli, a "two-time victim,"[99] suffering poor disclosure at the hands of the bank and then having his only effective means of redress denied at the hands of the Third Circuit. Cappalli sharply criticizes the "'head in the sand' conclusion that Johnson could get effective relief in arbitration."[100] Alderman, too, notes that effective redress for Terry Johnson "could be obtained only through a class action, maintained on behalf of all the individuals who had been adversely affected by this predatory lending practice."[101]

Although both commentators assert that Terry Johnson could not realistically get individual redress unless he had been permitted to proceed with a TILA class action, neither of these authors examines whether he could get individual redress even then. For instance, although Alderman endorses statutory reform largely to give litigants such as Johnson the benefit of the class action,[102] he never analyzes

96 Cappalli, supra note 20, at 400.
97 Id. at 401-02 (citation omitted).
98 See Alderman, supra note 20, at 1261.
99 Cappalli, supra note 20, at 366.
100 Id. at 374.
101 Alderman, supra note 20, at 1261.
102 See id. at 1267.

whether that benefit would ever be enough to actually get Johnson reasonable compensation. A "complete discussion of the pros and cons of the class action device," says Alderman, "is beyond the scope" of his article.[103]

This is a glaring omission. In fact, a critical examination of the TILA class action mechanism reveals that Terry Johnson and other TILA plaintiffs in his position could *not* reliably obtain redress for substandard financial disclosure, even if they were free to join TILA class actions to their hearts' content. Common criticisms of the class action device focus precisely on the potential for class members' interests to go unprotected.[104] And in the TILA context, the problems may be particularly acute.

One problem arises due to the private incentives of plaintiffs' attorneys to maximize the fees they can recover. In a typical class action, the class counsel's fee is taken out of the sum of money recovered for the class.[105] A lawyer successful in obtaining recovery will call upon the equitable powers of the court to obtain a portion of the common fund in payment for his services to the class.[106] Where recovery comes by way of settlement, class counsel generally negotiate their fee directly with the defendant.[107] The court must approve the fee in the case of settlement as well and, when the case proceeds to judgment, the fee, for practical purposes, is taken out of the sum that would have otherwise been awarded to the plaintiff.[108] The allure of a large fee may induce the class counsel to put their own interests over those of the class itself.[109]

In a well-known article, Professor Coffee points out certain peculiarities in the "principal-agent" relationship between a class action plaintiff and the class's attorneys. In contrast to lawsuits where the client's interests define the lawyer's objectives, the "attorney's interests typically control class . . . actions."[110] In many cases, says Coffee, "it is well understood that the actual client generally has only a nomi-

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103 Id. at 1259.

104 For a discussion of arguments maligning the class action device, see Sternlight, supra note 20, at 34-37.

105 Silberman & Stein, supra note 1, at 925.

106 Id.

107 Id.

108 Although class counsel's payment is an explicit part of settlement package, in practical terms it comes out of funds available to the class, since the defendant generally will be willing to pay a particular total amount without regard to how it is allocated between the class and its counsel. See id.

109 Id. at 926.

110 John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 676 (1986).

nal stake in the outcome of the litigation."[111] In fact, at times the attorney has even been permitted to settle a class action over the objections of the class representative.[112] Coffee argues that under the traditional, contingency-fee model for plaintiffs' attorneys in class actions, the entrepreneurial attorney can generally maximize profit by settling at some time before the profit-maximizing moment of settlement (or trial) for the class itself.[113] "Plaintiff's attorneys," Coffee explains, "have an incentive to settle prematurely and cheaply when they are compensated on the traditional percentage of the recovery basis."[114] The private-attorney-general system cannot function when a "private watchdog can be bought off by tossing him the juicy bone of a higher-than-ordinary fee award in return for his acceptance of an inadequate settlement."[115] These principal-agent problems between class plaintiffs and class lawyers are, by this time, fairly well-known and well-accepted.

In the TILA context, however, the risks to a plaintiff's interests are exacerbated by a statutory cap on damages for class actions. In theory, TILA does not limit the recovery of *actual* damages by class action plaintiffs.[116] In practice, however, actual damages are usually unprovable in these cases.[117] Plaintiffs might have to show, for instance, that they would have borrowed elsewhere at a lower rate but for the imperfect disclosure.[118] Apparently reflecting an awareness of this difficulty, the statute provides for additional damages. In the case of an individual lawsuit, a victorious plaintiff is entitled to a statutory minimum of one hundred or two hundred dollars, depending on the

111 Id. at 677-78.

112 Id. at 678.

113 Id. at 688.

114 Id. at 690.

115 John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 226 (1983).

116 15 U.S.C. § 1640(a)(1) (2000).

117 Cappalli, supra note 20, at 371; see also In re Wood, 643 F.2d 188, 192 (5th Cir. 1980) ("[A] misrepresentation of the cost of credit may [prevent] the debtor from obtaining cheaper credit after comparison shopping. The debtor's actual damages are difficult to ascertain.").

118 Cappalli, supra note 20, at 371. Some courts require a plaintiff to show "strict detrimental reliance" in order to prove actual damages. Anne-Marie Motto, Note & Comment, Skirting the Law: How Predatory Mortgage Lenders Are Destroying the American Dream, 18 Ga. St. U. L. Rev. 859, 872 (2002) (citing Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir. 2001), and Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433 (5th Cir. 2000)). *Perrone* held that in order to show actual damages the plaintiff has the burden of proving that, but for the lender's failure to make proper disclosure, he would have engaged in a different, less expensive transaction. 232 F.3d at 436. In *Adiel v. Chase Federal Savings & Loan Ass'n*, the Eleventh Circuit held that the district court had discretion to award statutory damages in lieu of actual damages, because actual damages are difficult to prove. 810 F.2d 1051, 1054-55 (11th Cir. 1987).

nature of the loan.[119] By contrast, in the case of a class action, the court has discretion to award recovery in addition to actual damages, but there is no statutory minimum, and the award must be limited to "the lesser of $500,000 or 1 per centum of the net worth of the creditor."[120] Thus, where a TILA class is very large, individual class members may recover very little.

On the facts of *West Suburban Bank*, for example, Terry Johnson was charged $88 in interest on a $250, two-week-long loan: an effective annual interest rate of about 917%.[121] We are given no reason to believe that this fee was higher or lower than that paid by a typical class member, but let us assume that $88 was the class average. We also do not know the size of the putative class in *West Suburban Bank*, but let us assume the class could have easily comprised 130,000 loan recipients, the estimated size of the class in *Ratner v. Chemical Bank New York Trust Co.*,[122] another significant TILA case. If 130,000 plaintiffs had each been charged $88 in interest in a group of transactions arising out of a single TILA violation, the class would have spent a total of $11.44 million on finance charges. But because the TILA limits the class to a recovery of $500,000, before subtracting attorney's fees, in this case each class member would be entitled not to a return of his $88, nor to the $100 statutory minimum to which he would be entitled as an individual litigant, but to a meager $3.85 at most.[123]

Indeed, the attenuation of a typical plaintiff's recovery does not end there. As noted above, attorney's fees in a typical class action can be quite substantial. Courts commonly award plaintiffs' attorneys fees ranging from twenty to thirty percent of the total recovery.[124] If one assumes a twenty-percent legal fee, then each individual class member's recovery dwindles further, from $3.85 to about $3.08. If Terry Johnson recovered $3.08 of the total of $88 in interest paid, he would have paid a net annual interest rate of about 885%, while his attorneys went home $100,000 richer (that is, twenty percent of the $500,000 cap).

The above hypothetical assumes that the class action does not settle for less than $500,000. But given that $500,000 is the maximum they can win in court, assuming unprovable actual damages, the class's

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119 § 1640(a)(2)(A).

120 § 1640(a)(2)(B). The ceiling on damages applies to "any class action or series of class actions arising out of the same failure to comply by the same creditor." Id.

121 Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000).

122 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

123 Can we expect to create much deterrence by fining a lender $500,000 on a transaction that had generated $11.44 million in gross revenue?

124 Coffee, supra note 110, at 685.

attorneys may have every incentive to settle the case for less, as discussed above. The moment the attorneys feel that any additional effort would likely yield additional fees lower than what the lawyers could be earning on an alternative matter, a settlement becomes likely. So, a $3.08 recovery may in fact be a best-case scenario for Mr. Johnson.

Of course, Mr. Johnson is not a prisoner of this hypothetical class action. He could opt out of any class action that is brought. But opting out is not an effective solution either: Individual litigation in the courts would present Johnson with many of the same difficulties he would face in individual arbitration: the prohibitive expense of obtaining counsel, the time-consuming nature of the TILA litigation, and even court costs—which might appear nominal in other contexts but significant in the pursuit of such a small judgment. Moreover, the ability of a plaintiff in Terry Johnson's position to opt out does not support the proposition that a class action is an effective means of redress. Rather, it gives him a way out of a potentially ineffective means.

One possible solution, of course, would be to remove the $500,000 cap on class action damages. Unfortunately, given TILA's history, this may be politically difficult. Unlimited damages in TILA actions have long ago been rejected, both in the courts and in Congress.[125] After the TILA was enacted, courts were split as to whether TILA actions were appropriate for class treatment.[126] Congress responded with two amendments explicitly permitting class claims, ultimately capping class damages at the lesser of $500,000 or one percent of the creditor's net worth.[127] These figures were the product of compromise, amendment, and re-amendment.[128] While, decades later, some adjustment in the ceilings may be plausible, a dramatic uncork-

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[125] For a discussion of the early history of TILA class action damages, see Cappalli, supra note 20, at 390-401.

[126] See Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974) (characterizing class action under TILA as preferable to individual actions); *Ratner*, 54 F.R.D. at 414 (refusing to certify class of TILA plaintiffs in part because "the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement"), followed by Goldman v. First Nat'l Bank, 56 F.R.D. 587, 593 (N.D. Ill. 1972). See generally 7B Charles Alan Wright et al., Federal Practice and Procedure § 1804 (2d ed. 1986) (reviewing courts' treatment of TILA class actions).

[127] The opinion in Johnson v. West Suburban Bank, 225 F.3d 366, 371-73 (3d Cir. 2000), notes that courts' early reluctance to certify TILA class actions prompted Congress to enact explicit class action damages limits applying to TILA claims. Originally the cap on damages was going to be the lesser of $100,000 or one percent of net worth of creditor; it was later changed to the lesser of $500,000 or one percent of creditor's net worth.

[128] See Cappalli, supra note 20, at 390-99 (discussing history of class action as civil penalty in relation to TILA, from Federal Reserve Board's 1972 recommendation of class

ing of limitless class action damages under the TILA seems very unlikely.[129]

If we are truly serious about obtaining effective justice for plaintiffs like Terry Johnson, we must recognize that the individual relief afforded in a TILA class action is chimerical, and look for individual justice through other means. The best candidate is neither an individual suit in the courts, nor the sorts of arbitration that are currently in place. It is, in fact, an arbitration process, but not one plagued by the inefficiencies one commonly finds in arbitral forums today. Instead, the greatest hope for those like Terry Johnson lies in a radically redesigned arbitration process—one that is swift, inexpensive, and accessible to consumer litigants seeking individual relief.

Fortunately, courts already have a tool they can use to force the creation of a serviceable arbitration forum: the common law doctrine of unconscionability. Courts might well find arbitration clauses to be permissible under the TILA, but insist that those arbitration clauses pass the same equitable scrutiny as any other contractual provision—including the avoidance of unconscionable terms. In doing so, they would be acting in a way consistent with the *West Suburban Bank* decisions, and would simultaneously be creating the first real opportunity for TILA plaintiffs to have their injuries truly redressed.

From the perspective of TILA plaintiffs, this would be a much better result than an outright reversal of *West Suburban Bank*. After all, if TILA disputes were found to be nonarbitrable per se, there would be no question of creating a reformed arbitration process because arbitration itself would be foreclosed in all TILA cases. If, however, courts were to find individual arbitration contracts to be "unconscionable" as a matter of state law, this would leave open the possibility that more "conscionable" arbitration systems might pass muster, and that possibility would give companies the incentive to draft more plaintiff-friendly arbitration agreements.

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action damages cap, meant to facilitate class certification, to final version's passage in 1976).

129 The absence of any congressional motivation to reinvigorate the TILA's remedial provisions is demonstrated by Senator Russell Feingold's experience with the Consumer Credit Fair Dispute Resolution Act, S. 192, 107th Cong. (2001), which he has attempted to pass multiple times. See Johanna Harrington, Comment, To Litigate or Arbitrate? No Matter—The Credit Card Industry Is Deciding for You, 2001 J. Disp. Resol. 101, 116 (describing version of Consumer Credit Fair Dispute Resolution Act introduced in Senate in February, 2000, as well as similar bill introduced in House of Representatives). The legislation would forbid consumer credit companies from using predispute arbitration agreements, essentially making it a narrower version of the blanket proposal by Professor Alderman, supra note 20, which would eliminate binding arbitration clauses for all consumer transactions.

III
THE REMEDY: REFORM OF ARBITRATION AGREEMENTS AND THE ARBITRAL FORUM

This Note has argued that the most practical way to compensate victims of faulty disclosure in lending is *not* for courts to hold that the TILA precludes arbitration agreements, and not even for Congress to write TILA-related arbitration clauses out of the Federal Arbitration Act. Rather, it is for courts to use state law to strike down unconscionable adhesion contracts, including those that govern the arbitration of TILA disputes. Part III.A details an interesting example of the application of this common law doctrine to render an arbitration clause voidable. Part III.B suggests that if courts set clear precedent rejecting many common arbitration agreements as unconscionable, drafters of adhesion contracts will begin to craft fairer and more efficient systems of consumer dispute to avoiding costly class actions that result when an arbitration clause is rejected and the case is bounced back into the traditional tort system.

A. *Unconscionability: Darcy Ting's Approach*

On occasion, courts have held, pursuant to state law, that individual arbitration contracts were unenforceable against a signatory.[130] Darcy Ting's battle with AT&T, though outside the TILA context, provides an excellent example of aggressive application of California's unconscionability doctrine by a district court to strike down a predispute arbitration clause.[131] It may provide a useful model in the TILA context as well for overcoming adhesive arbitration agreements that would presently lead their clients into the currently available, forbidding arbitral forum. Ting's dispute unfolded as follows.

During the spring and summer of 2001, California customers of AT&T received either an attachment to their monthly bill or a separate mailing, easily confused with junk mail containing the terms of a new Consumer Services Agreement (CSA).[132] The CSA included a set of "Legal Remedies Provisions" (LRPs) which called for arbitra-

[130] See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (holding dispute resolution agreement in employment contract unconscionable for nonmutuality, failure to allow adequate remedies, and failure to protect employee from unreasonable costs); Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002) (declaring that elimination of class action, failure to guard against unreasonable expenses for consumer, curtailment of damages, and requirement of confidentiality rendered unconscionable legal-remedies section of contract for long-distance telephone service).

[131] See *Ting*, 182 F. Supp. 2d at 921 (applying unconscionability doctrine to arbitration clause in question).

[132] Id. at 912-13.

tion of disputes arising out of the contract, expressly prohibited class actions,[133] contained a strict confidentiality provision preventing complaining customers from revealing the results of their arbitrations,[134] and provided for some scant defrayment of the costs of arbitration by AT&T itself.[135]

Darcy Ting and her employer, a consumer-advocacy nonprofit called Consumer Action, brought suit in federal court on behalf of AT&T's California customers. The complaint in *Ting v. AT&T* asked the court to enjoin the imposition of the new telephone-service contract on that state's customers. They argued, among other things, that the section containing the predispute mandatory binding arbitration agreement was unconscionable.[136] Under California law, unconscionability has both a procedural element and a substantive one.[137] Generally, a court must find both to reject a contractual provision as unconscionable, but there is something of a sliding scale: A more egregious finding of one element can lower the seriousness threshold required for the other.

The question of procedural unconscionability was answered easily by the *Ting* court. Although, in the court's opinion, case law favored the plaintiffs' argument that a contract of adhesion is always procedurally unconscionable, there were also some factors peculiar to *this* adhesion contract that certainly made it procedurally unconscionable in the court's view.[138] For instance, there was the fact that most other long-distance carriers in the market had also included arbitration provisions in their consumer contracts, thus depriving the consumer of any meaningful choice.[139] Moreover, the mailings containing the new contract were likely, or even calculated, to escape the con-

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[133] Id. at 930.

[134] Id. at 931.

[135] See id. at 933-34; infra notes 143-149 and accompanying text for discussion of the legal remedies provision.

[136] Id. at 921.

[137] This two-prong formulation is typical. See Restatement (Second) of Contracts § 208 cmt. d (1981) ("[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative . . . ."). The procedural element "focuses on 'oppression,' which 'arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice,' or 'surprise,' which 'involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them.'" *Ting*, 182 F. Supp. 2d at 927 (quoting with alteration Flores v. Transam. Homefirst, Inc., 113 Cal. Rptr. 2d 376, 381 (Ct. App. 2001)). Substantive unconscionability has traditionally involved contract terms that impose "harsh or oppressive" terms or are so one-sided as to "shock the conscience." Id. at 928 (internal citations omitted).

[138] *Ting*, 182 F. Supp. 2d at 929-30.

[139] Id. at 929.

sumer's attention.[140] "[A]ll this," the court said, "is enough to satisfy the procedural element of unconscionability . . . ."[141]

The court's discussion of substantive unconscionability was lengthier, but no more favorable to the plaintiff. It included an in-depth analysis of the arbitration process itself, made possible in part by a discovery order against the AAA,[142] to demonstrate the true meaning of the arbitration clause contained in their contracts. A wealth of information was obtained under the discovery order, some of it ultimately decisive. The court was particularly interested in the high costs of arbitration and the express preclusion of class actions.

Armed with evidence obtained directly from the AAA, the court examined the agreement's fee arrangements. It noted that the contract contained several cost-shifting provisions, ostensibly ameliorating the problem of up-front costs for the complainant.[143] Also, under the agreement the prevailing party could seek to recover from the other side the AAA's fees and the cost of the arbitrator's compensation.[144] Some arbitrators were to be made available to complainants on a pro bono basis, but the AAA was unable to give a precise number.[145] Finally, in extreme circumstances of financial hardship, the AAA might defer or reduce its administrative fees, although a financial hardship claim would require a complainant to submit detailed financial information including two years of federal tax returns. In any case, the court found that a complete waiver of administrative fees was rare. Most often, the AAA would defer a portion to a later date in the proceeding, such as the date of the hearing.[146]

The court found that even under comparatively favorable circumstances this fee structure would deter consumers from initiating arbitration proceedings.[147] In a hypothetical explored by the court, a customer seeking $25,000 in damages would face a potential cost (including a deposit against the arbitrator's fees) of $2650 before the ar-

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140 Id. at 930.

141 Id.

142 Id. at 934.

143 Id. at 916, 933-34. The contract provided that AT&T would subsidize a customer's cost of initiating arbitration according to a sliding scale. For claims under $1000, AT&T would subsidize all but $20 of the American Arbitration Association's (AAA's) usual $125 filing fee. For claims above $1000 and below $10,000, the customer would be responsible for the full $125, but AT&T would pay all other arbitration costs. For claims in excess of $10,000, the customer would initially be responsible for filing fees, service fees, and half of the average daily arbitrator compensation—probably about $1900. Id.

144 Id. at 916.

145 Id. at 917.

146 Id.

147 See id. at 934 ("Having to advance such substantial sums will deter many litigants from proceeding.").

bitration even began.[148] Because such a substantial sum would deter many litigants from going forward, the court found that AT&T had failed to limit the plaintiffs' costs in a "meaningful fashion."[149] The costs of arbitration strongly supported a finding of substantive unconscionability.[150]

The *Ting* court was also troubled by the prohibition on class actions.[151] In a discussion reminiscent of Cappalli's call for the per se nonarbitrability of TILA claims, the court detailed the public policy factors favoring the use of the class action device. Calling it a "vital instrumentality of consumer protection,"[152] the court held that, particularly in light of the costs associated with arbitration, the prohibition on class actions would prevent potential class members from effectively vindicating their rights, "especially those involving practices applicable to all members of the class but as to which any consumer has so little at stake that she cannot be expected to pursue her claim."[153] The ban on class actions itself was found to be substantively unconscionable.[154]

Having found the LRPs to be unconscionable, the court struck them from the CSA and enjoined their implementation against the class of California customers.[155] The court concluded its opinion by explaining that its holding against AT&T's unconscionable arbitration agreement should not be taken as a commentary on the state or federal policies concerning arbitration generally:

> This lawsuit is not about arbitration. If all AT&T had done was to move customer disputes that survive its informal resolution process from the courts to arbitration, its actions would likely have been sanctioned by the state and federal policies favoring arbitration. While that is what it suggested it was doing to its customers, it was

148 Id.

149 See id. at 934-35 (noting that, unlike other companies that had advanced plaintiffs' up-front arbitration costs or capped costs in terms of their arbitration agreements, "AT&T has chosen not to limit the plaintiffs' costs of arbitration in a meaningful fashion").

150 See id. at 933-35 (recognizing financial obstacles tending to prevent customer from arbitrating claims).

151 Note, however, that when the court bemoans the preclusion of class action lawsuits under this agreement, it does so in the context of the unrefined arbitration regime that has given the commentators fits thus far. Part III.B, infra, suggests some improvements to the institution of alternative dispute resolution (ADR) that may make ADR preferable to class actions.

152 *Ting*, 182 F. Supp. 2d at 930.

153 Id. at 931.

154 Id. But see supra notes 104-24 and accompanying text, discussing the unsuitability of TILA class actions for vindicating individual grievances.

155 Id. at 936, 939.

actually doing much more; it was actually rewriting substantially the legal landscape on which its consumers must contend.[156]

B. Reform of the Arbitral Forum

If a critical mass of courts follow the *Ting* approach, drafters of adhesion contracts who wish to avoid class action lawsuits, and must therefore avoid findings of unconscionability that would throw cases back into the courts, can be expected to amend their arbitration procedures so as to reduce the chances of an unconscionability finding. As the *Ting* court's analysis suggests, to survive scrutiny, an arbitration agreement must provide a forum that is cheap or free for the consumer, must not impose procedural obstacles that will prevent an aggrieved consumer from proceeding, and must hold out the prospect of a fair, impartial decision.

In an effort to revitalize the arbitral forum as a viable one for low-value consumer disputes, such as those arising under the TILA, this Note suggests four types of reform. The first two are designed to improve the "conscionability" of arbitration agreements, so as to enable them to pass judicial scrutiny. The last two are measures that the drafter can take in her own self-interest, to make the process more efficient.

1. Shifting the Costs of Arbitration Entirely to the Drafter of the Adhesion Contract

Shifting the costs of arbitration completely away from the consumer and onto the company that insisted on the arbitration agreement would be the most effective way for businesses to avoid findings of unconscionability.[157] Conversely, by consistently rejecting as unconscionable all contracts that make consumers pay to secure a forum for dispute resolution, courts could help foster cheaper and more accessible arbitral processes without entering into the business of rewriting parties' contracts. Saddled with the full expense of dispute resolution in an arbitral forum, drafters of adhesion contracts would have a far stronger incentive to reform the practice of arbitration in consumer disputes. And companies, not consumers, are the proper ones to bear the burden of improving the process, for reasons of both fairness and practicality. After all, companies are the ones that interact repeatedly with the arbitration system. They are the ones who will save significant amounts of money from any sensible reform, and they

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[156] Id. at 938.

[157] Cf. id. at 933-35 (holding as unconscionable arbitration agreement imposing significant costs on consumer).

are the ones that can disperse the costs of arbitration by internalizing them in the price of their service. Individual consumers have little reason to attempt to reform the system, and the collective action costs would be stifling even if they wanted to try. The authors of the adhesion contracts should bear the costs of arbitration because they are best positioned to do something about them.

Indeed, consumers would have trouble fine-tuning the language of arbitration clauses even if they were economically motivated to do so. Consumer assent to terms contained in the fine print of adhesion contracts is a fiction.[158] Although we speak of mutual assent in contract formation, in fact only one party to a typical mass-produced consumer contract—the seller, or "lender" in the TILA context—has any ability to amend its terms. Therefore, barring an act of Congress, that party is the only one that can effect specific changes in the arbitration terms of such a contract. In fact, it is better to allow individual drafters of these contracts to experiment with various ways of reducing the costs of arbitrating consumer disputes than it would be to endorse direct congressional action. Various companies may need some time to tinker with different approaches before they hit upon a low-cost, fair, and speedy form of arbitration. At the moment, Congress has no experience whatsoever with this sort of project, so there is reason to believe that any one-shot congressional solution would be badly suboptimal.

That explains why companies, not consumers, are the *efficient* bearers of all arbitration costs. The reason why *fairness* also supports this cost allocation is simple. In typical TILA cases, the consumer has not meaningfully consented to participate in arbitration in the first place,[159] and basic notions of fair play would suggest that when consumers unknowingly waive their rights to a judicial forum, they should be given a fair, accessible, and inexpensive forum in return. It should be obvious that, regardless of the legal argument one uses to attack the arbitration of TILA disputes, the current system, in which the typical consumer unwittingly agrees to settle all controversies arising out of a certain transaction given in a forum where costs will undoubtedly exceed the amount in controversy, and for which the consumer will bear all of the initial expense, is fundamentally unfair. If the drafters of adhesion contracts are to receive the benefits of shifting their consumer disputes from the courtroom to the arbitration table, they

[158] See Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1200-01 (1983) (characterizing Karl Llewellyn's idea that most signers of adhesion contracts "agree, within broad limits, to be bound by unknown terms" as fiction constructed to justify preferred result).

[159] See id. (calling consumer assent to adhesion contract a fiction).

should also bear the burden of making sure this arbitration process does not "shock the conscience."

One might argue that imposing these costs, in their entirety, on the firms that lend to consumers is not fair either. After all, if arbitration is currently prohibitively costly for consumers, then perhaps if the fee structure were reversed we would get the opposite problem. In cases where, despite procedural reforms, the costs of arbitration still exceed the amount in controversy, lenders might always settle rather than pay for arbitration, providing a windfall to consumers with tenuous claims and encouraging opportunistic consumers to file frivolous claims. Indeed, consumers with no legitimate complaints whatsoever could inflict economic injury upon their least favorite lenders simply by filing frivolous or trumped-up cases.

Such criticisms are, however, answerable. First, unlike the consumer, the lender selects arbitration as a matter of actual, rather than fictional, assent.[160] To the extent that the forum the lender has selected is not cost-effective, the lender's predicament is one of his own making. Second, although individual arbitrations might be costly, the lender is still getting the benefit of avoiding class action lawsuits. Because the lender, as drafter of the arbitration provision, always has the option of reverting to adhesion contracts that permit class action litigation, it can weigh the costs and benefits of public versus private dispute resolution and choose the "least-bad" format. Third, because the amounts at stake may be small, it seems unlikely that a consumer would go through the time and effort of an arbitration proceeding for a frivolous claim. Surely an individual who undertakes a pure "scam" against a consumer lender would insist on a larger prize than is usually at stake in a TILA suit. And to the extent that a bogus TILA claim is unusually large, the defendant is less likely to settle easily. In case such considerations fail to dissuade some consumers from filing frivolous actions, arbitrators could have the power, in the TILA context, to assess costs against a losing party that has filed a truly frivolous or spiteful claim.[161]

Imposing the full costs of arbitration on the drafter of an adhesion contract is no small burden. That burden, however, should be viewed in light of the benefits the drafting party enjoys by virtue of the fact that it can largely dictate the consumer's entire process for seeking remedies for breach. Evidently, avoidance of class action lawsuits has been a powerful motivator for the consumer-lending indus-

160 See id.

161 See Cappalli, supra note 20, at 405 (noting that plaintiff's attorneys have reason not to be too financially risky since arbitrator could charge plaintiff with costs).

try. Footing the bill for perfecting the arbitration system the industry itself has chosen hardly seems like an unbearable or unfair price to pay.

2. *Switching to an Inquisitory Model of Dispute Resolution*

As commentators have suggested, Terry Johnson and others like him may never be able to hire legal representation for a contingent percentage of an eighty-eight-dollar claim.[162] Although the TILA permits the assessment of a "reasonable attorney's fee" against the losing party, when the expected recovery is under one hundred dollars, the uncertain prospect of a "reasonable" fee may still not be enough to persuade an economically motivated lawyer to participate. Even if the drafter of the contract had to bear one hundred percent of the legal costs in all cases, the magnitude of those costs might be too small to obtain legal services. This Note suggests that, if the arbitration process is reformed to move away from an adversarial model, patterned after an Anglo-American court, to an inquisitorial model, featuring an expert "neutral," such a change could obviate the need for lawyers altogether. It would also answer criticisms and arguments for unconscionability based on a claimant's inability to secure counsel.[163] Thus, it might well be in the interest of the company drafting a contract of adhesion to include such an "inquisitory" model of arbitration, if that company hopes for its arbitration scheme to survive unconscionability analysis by a court. Courts are the linchpin of the process: They must wield the unconscionability doctrine aggressively in an effort to induce proactive improvements by drafters of arbitration clauses.

In an adversary system, "openly biased advocates urge their clients' cases before a passive decisionmaker."[164] Each party is responsible for presenting his own evidence, preparing his witnesses, cross-examining the opposing party's witnesses, and formulating a winning argument to persuade the neutral.[165] In an inquisitory, or "nonadver-

[162] See id. at 404-05 (estimating range of Terry Johnson's claim amount at $100 to $1000, and asking, rhetorically, "What lawyer cannot multiply 30% times $100 to determine an unacceptably low fee of $30 . . . ?").

[163] See Ting v. AT&T, 182 F. Supp. 2d 902, 935 (N.D. Cal. 2002) ("Because AT&T has severely limited the damages a successful plaintiff may obtain and has prohibited the joinder of claims and the use of class actions, it has eliminated other incentives to . . . potential counsel.").

[164] John Thibaut et al., Comment, Adversary Presentation and Bias in Legal Decisionmaking, 86 Harv. L. Rev. 386, 388 (1972).

[165] See Mirjan Damaška, Presentation of Evidence and Factfinding Precision, 123 U. Pa. L. Rev. 1083, 1090 (1975) (describing adversarial process, in which each party calls own witnesses, often having prepared them in advance, and cross-examines witnesses of other

sary," system, by contrast, "an expert decisionmaker actively investigates the claims of unrepresented litigants."[166] Under this model, common in Continental Europe and Latin America,[167] evidence and witnesses do not belong to and are not associated with either party, but are conceived of as the judge's sources of information.[168] The judge, rather than the parties, is responsible for developing the evidentiary record. Little, if any, information is supplied directly by the parties.[169]

The inquisitorial system would be well-suited to resolving consumer claims like Terry Johnson's, in which the disputants are likely to be unequally matched in terms of financial resources, manpower, and legal guile. Claims like Johnson's, unless aggregated with many others like them—as occurs in a class action—are not individually substantial enough to justify legal representation. It can be said that the social cost of resolving an eighty-eight-dollar TILA dispute through our traditional adversarial process outweighs any added benefits of the adversarial process itself.[170]

There remains the risk that even inquisitorial dispute resolution will be inefficient unless the parties select the proper arbitrators. If every TILA arbitrator, saddled with the inquisitorial burden of asking the witnesses the right questions and understanding the documents herself, were forced to take a crash course in consumer lending for every eighty-eight-dollar dispute, the result would be another bloated, slow, and unnecessarily expensive process.

Decisionmaker expertise is an oft-cited advantage of arbitration over litigation.[171] Because an arbitrator is selected by the parties to the dispute, rather than being imposed by the luck of the draw in a court-docket assignment, an arbitrator may be selected who is an expert in the type of dispute likely to arise from a given relationship.[172] Consumer loan contracts might specify the selection of an arbitrator

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party to call in question their reliability and to elicit information to support questioner's own thesis).

166 Thibaut, supra note 164, at 388.

167 Jon C. Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 Colum. L. Rev. 1289, 1300 (1997).

168 Damaska, supra note 165, at 1088-89.

169 Id. at 1089.

170 See supra notes 99-124 and accompanying text for discussion of the sacrifice of individual justice in class actions.

171 See, e.g., Stephen B. Goldberg et al., Dispute Resolution: Negotiation, Mediation, and Other Processes 234 (3d ed. 1999) (contending that one of many theoretical advantages of arbitration is fact that parties can choose decisionmaker who is expert in subject matter, but acknowledging that theoretical advantages are "not always fully realized").

172 Id.

familiar with the TILA, or at least with consumer financial transactions. Alternatively, the need for TILA-literate arbitrators could be met if the major arbitration associations were to direct consumer-lending cases to an assigned category of arbitrators, over time developing a pool of neutrals whose expertise could facilitate a speedy and efficient inquisitory process.[173] Like the drafters of arbitration contracts, the arbitration associations would have a strong financial interest in making sure their arbitrator selection did not attract a court finding of unconscionability.

3. *Adopting Online Dispute Resolution Mechanisms*

Lenders and other drafters of adhesion contracts could be motivated into expediting the arbitration process and reducing its costs: We simply need to assess the expenses of the ADR mechanisms to the party that chooses to impose it. Online dispute resolution (ODR) mechanisms would be a good way of further reducing the cost of arbitration while creating a medium that is convenient for all parties.[174] A move from the traditional, face-to-face arbitral forum envisioned by critics of arbitration in consumer disputes, to a quicker, less-burdensome forum in cyberspace may improve consumer dispute resolution. Although a full discussion of ODR processes is beyond the scope of this Note, some noteworthy features are worth mentioning.

ODR is, simply, a web-based process utilizing specifically tailored applications that provide ADR over the Internet.[175] ODR resembles traditional ADR, with a neutral presiding over negotiation, mediation,

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173 A TILA expert might be able to judge the compliance of a loan agreement simply by making a quick review of the relevant document—perhaps a document submitted over the Internet as part of an online dispute resolution process.

174 For further information on online arbitration, see generally Frank A. Cona, Application of Online Systems in Alternative Dispute Resolution, 45 Buff. L. Rev. 975, 986-99 (1997) (detailing early development of online dispute resolution systems); Lucille M. Ponte, Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions, 12 Alb. L.J. Sci. & Tech. 441 (2002) (recommending improved standards for online dispute resolution); Mary Shannon Martin, Note, Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce, 20 B.U. Int'l L.J. 125 (2002) (proposing that where consumers conduct transactions on line they can be considered to have submitted to "online jurisdiction"). Online mediation is another important component of online dispute resolution (ODR). See generally Joel B. Eisen, Are We Ready for Mediation in Cyberspace?, 1998 BYU L. Rev. 1305 (1998) (arguing that online mediation is unwise until technology and dispute-resolution profession advance to accommodate it); Cheri M. Ganeles, Comment, Cybermediation: A New Twist on an Old Concept, 12 Alb. L.J. Sci. & Tech. 715 (2002) (giving international overview of online and offline mediation processes).

175 Atul Grover, Online Dispute Resolution: Present Status, and Direction for Future Development (2002), at http://www.atulgrover.us/downloads/Executive_Summary.htm.

or arbitration. ODR, however, is typically characterized by an absence of face-to-face interaction.[176] This causes increased reliance on written materials, and may include the use of tools such as e-mail, videoconferencing, and Internet chat.[177] A well-developed Internet application facilitates the secure transmission and storage of information concerning the case.[178] ODR is particularly well-suited to disputes that arise in online transactions. One commentator argues, however, that some offline disputes may be suitable for ODR as well.[179] TILA disputes may arise in online transactions with increasing frequency in the coming years. One estimate predicts that by 2005, as many as twenty-six percent of consumer loans in the United States will be effected on line.[180]

Disputes arising on line can be resolved through ODR in a particularly cost-effective manner. Commentator Atul Grover posits that cost effectiveness can be considerably improved as technology deployed by web merchants and ODR providers becomes more "interoperable," allowing for seamless communication among participants.[181] Grover outlines a scenario in which a customer and merchant interact in an online transaction, a complaint arises, relief is demanded by the customer, and a response is generated by the merchant—all on line. In this scenario, even as the process unfolds informally, an electronic record is being generated by the disputants. If all parties are using highly interoperable technologies, a complete record of the facts can be quickly and easily transferred to the neutral for a speedy resolution of the controversy.[182] A formal complaint and lengthy fact-finding process would have greatly reduced roles because all or most of the relevant information would already be before the arbitrator.

Even in offline transactions leading to arbitrable disputes, online arbitration mechanisms promise the increased efficiency[183] that is cru-

176 Id.

177 See id. (noting that parties may "never meet in person and solely interact using the ODR collaborative tools such as email, videoconferencing, or Internet chat").

178 Id.

179 Id.

180 Jeremy Quittner, Online Lending Struggles to Fulfill Its Promise, The Am. Banker, Aug. 20, 2002, at 9A. One online dispute resolution provider, the "Virtual Magistrate," lists fraud and deceptive trade practices among its limited areas of "subject matter jurisdiction." Cona, supra note 174, at 988.

181 See Grover, supra note 175.

182 See id.

183 See Cona, supra note 174, at 986 ("[S]everal new organizations and pilot projects have also emerged whose functionality is itself intertwined with the technology of the Internet. These organizations are attempting to develop new ways of resolving both conventional 'real-world' disputes, and disputes arising in Cyberspace.").

cial to the resolution of low-value claims. Grover hypothesizes that as the ODR industry, currently in its infancy, matures, better business models will be developed. Web services, publishing, and subscription-based models will create new sources of revenue for ODR providers,[184] ones that are not feasible for traditional arbitration providers.

Finally, because an aggrieved consumer could receive some just process without leaving home, he or she would be much more likely to pursue small claims than if left to struggle with a face-to-face, formal arbitration proceeding. How many days should Terry Johnson take off of work to secure the return of his eighty-eight dollars? A speedy and accessible online process would relieve Johnson and other consumer plaintiffs of the burden of making that calculation. It must be acknowledged that not all consumers will have the technological resources or savvy to take advantage of ODR where it is offered.[185] That should not dissuade us, however, from using it where possible.

4. *Using Matrices to Effect Speedy Resolution of Repetitive Claims*

A problem inherent in making arbitration cost-effective and efficient is that assessing the TILA compliance of a loan agreement is likely to take some amount of a neutral's time, and a neutral's time is always going to cost money. Where claims arising from a widespread form contract are numerous and identical, the time and money required must be multiplied by the number of claimants. As discussed above, for example, the *Ratner* case featured a putative class of 130,000, all holders of the same, allegedly noncompliant, loan contract.[186] Predictably far fewer than that number of complainants would volitionally step forward for individual arbitration. But in the case of a widespread violation, individually adjudicating even a fraction of that number of claims—where each requires a brand new assessment of an identical contract's compliance—would clearly be wasteful, increasing the per-matter cost above what it might otherwise be. One solution might be borrowed from the field of mass tort litigation: the "settlement matrix."

A settlement matrix is a grid, in which a finite number of variables point an aggrieved individual to a certain settlement amount

[184] See generally Grover, supra note 175.

[185] See Ponte, supra note 174, at 470-71 ("[T]hey may lack the technological tools that might be readily available to larger firms, such as access to a scanner to send documents or the use of expensive videoconferencing software and equipment to appear before an online . . . arbitration panel."). Ponte suggests using, initially at least, a mix of traditional communication methods and "more basic technology, such as e-mail, to handle disputes." Id. at 471.

[186] See Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972), discussed supra at note 126.

that the defendant has previously agreed to pay. Settlement matrices are commonly used in class action settlements characterized by varying degrees of injury among the class members.[187] The use of this technique in mass-tort litigation has been credited for streamlining the litigation process, and establishing a predictability of results, for both the claimant and the defendant.[188] Matrices have also been used to help juries calculate complex individual damage awards in mass lawsuits.[189] Claimants have been able to submit their individual matrix parameters on line.[190]

Settlement matrices might easily be adapted, probably in a greatly simplified form, to TILA litigation.[191] As individuals file their complaints on the web site, the ODR neutral would investigate the claims and, upon a finding of liability on the part of the lender, could devise a settlement scheme for that kind of contract violation—that is, a lender might agree to pay a fair percentage of the loan amount for each verified complaint involving particular facts. The arbitral decision would not even have to be binding on future disputes; it could simply be used as a previously agreed-upon settlement offer for all future complainants who log onto the system. A complaining consumer could go on line, provide a few identifying features of his loan agreement, and have an offer immediately available (subject to verifi-

187 See generally Maureen Grady, Conflicts in Massive Proportion, Disp. Resol. J., May-July 2002, at 14 (describing settlement matrices, and noting that they are becoming "part of the ADR settlement landscape."). For cases discussing the use of settlement matrices in the resolution of class actions, see Larson v. Burlington N. & Santa Fe Ry. Co., 210 F.R.D. 663 (D. Minn. 2002); In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig. (Fen-Phen Litigation), No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at *193 (E.D. Pa. Aug. 28, 2000) (calling class action settlement using matrices as fair and reasonable); Raymark Indus., Inc. v. Butera, Beausang, Cohen & Brennan, No. 97-0034, 1997 U.S. Dist. LEXIS 19070 (E.D. Pa. Dec. 1, 1997) (discussing use of settlement matrix by company, which tried all cases in which claimants would not accept the amount in the matrix).

188 See Grady, supra note 187.

189 See Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659, 669-71 (1989) (describing process in asbestos litigation by which plaintiffs submitted answers to 109 questions requesting 512 pieces of information for matrix addressed to issues of causation and damages); Neil Vidmar, The Performance of the American Civil Jury: An Empirical Perspective, 40 Ariz. L. Rev. 849, 881 (1998) (describing use of matrices to simplify jury's task of determining noneconomic damages, like pain and suffering); Jack B. Weinstein, Compensating Large Numbers of People for Inflicted Harms, 11 Duke J. Comp. & Int'l L. 165, 172 (2001) (noting that matrices might be used in tobacco litigation).

190 See Grady, supra note 187, at 14 (discussing online system for filing claims in Fen-Phen litigation).

191 Complicated matrices can lead to complicated problems. For a discussion of problems inherent in one settlement matrix used in a mass tort case, see Paul D. Rheingold, The *Hymowitz* Decision—Practical Aspects of New York DES Litigation, 55 Brook. L. Rev. 883, 894-95 (1989).

cation of the claim). Even if the person could reject the offer, economic and psychological reality suggests that most small-value complainants would take a quick and easy settlement over pressing an individual claim.

In such a system, it is likely that complainants would systematically settle for less than their claims are worth. But if a claim is only worth eighty-eight dollars, it may be much better to take forty dollars for an hour's worth of effort than spend a day vindicating the entire eighty-eight. While ODR services will still have pressure from big business to keep settlement figures low, those services would also have incentives to attract complainants (if, for example, the ODR service took a small transaction fee from each successfully processed settlement). ODR services would have incentives not to make settlements too low, but, perhaps more importantly, they would have the incentive and means to organize and facilitate claims across diverse groups of consumers.

The settlement matrices organized on line could be considered, essentially, class action chatrooms. The ODR provider could centralize and streamline several aspects of the typical class action process: It could advertise alleged violations and pending claims; help consolidate similar claims or organize victims into "classes"; provide a cheap and accessible forum for complainants to coordinate and communicate; and act as arbitrator-investigator-mediator in reaching a judgment or settlement scheme. Potentially, ODR services could handle TILA situations efficiently and effectively, as long as their interests were tied to the number of satisfied customers (on both sides of the dispute), rather than the size of the judgment or time-consuming nature of the dispute.

This Note does not mean to imply that this specific system is or should be the wave of the future. It recognizes the potential for inequities and complexities, as well as the potential due process hazards inherent in any approach that emphasizes depersonalized, expedient negotiations over individual consideration and formal legal determinations. Thus, the intention is merely to raise the possibility of integrating settlement matrix-like solutions into a streamlined, nonadversarial arbitration process for small-value claims, such as in TILA disputes. ODR and settlement matrices may not be the kind of private attorney general system that Congress intended, but they may be better at regulating industry conduct and at compensating injured consumers than either arbitration or class action.

Conclusion

Under the status quo, individuals may have a private right of action under the TILA, but they have no acceptable way of enforcing their rights. Through the use of adhesion contracts, lenders are able to force consumers out of court and into an individual arbitration process that is prohibitively costly, time consuming, and unable to provide sufficient legal protection. The situation, as it presently exists, permits lenders to thwart both of Congress's primary goals in enacting the TILA—the deterrence of misleading lending practices and the provision of a remedy to individually aggrieved consumers.

Commentators have correctly judged that a change is called for. The problem has been correctly identified, and the reasoning of courts like the one that decided *West Suburban Bank* has been justly criticized. The existing scholarship misses the mark, however, in concluding that a return to the class action lawsuit cures the ills presently afflicting the consumer-lending industry. The class action regime always threatens to enrich plaintiffs' attorneys at the expense of class members. That threat is heightened in the TILA context because of the limits on damages available to a class. Just as Terry Johnson and others like him cannot get individual redress in arbitration as it is presently constituted, these plaintiffs would very likely be no better served by having to rely on class actions.

In an effort to avoid the two-time victimization of potential TILA plaintiffs, courts and commentators should resist the temptation to return to the pre-*West Suburban Bank* system. Although more careful reasoning is called for than that exhibited by the Third Circuit in *West Suburban Bank*, courts should continue to observe the "strong federal policy favoring arbitration," and should resist calls to foreclose the possibility of arbitrating TILA claims altogether. Instead, state unconscionability doctrine should be used to pressure lenders into developing fairer arbitration mechanisms.

Consumers like Terry Johnson deserve the full benefit of the protections granted by Congress under the TILA. But they also deserve a more careful examination of the available mechanisms for delivering those protections than the courts or the commentators have yet afforded them. Participants in this debate have worn blinders in their view of the arbitral forum. Alternative dispute resolution is far more flexible than the literature has acknowledged. Critics should not labor under the misimpression that plain-vanilla arbitration is the only flavor. This Note raises only a few of the possibilities for change. Only the limits of legal inventiveness need constrain the development of a more attractive forum.