

TABLE OF CONTENTS

- I. Introduction pg. 2
- II. History of Arbitration pg. 12
- III. History of Specific Performance pg. 22
- IV. The Evolution of Arbitration Case Law pg. 27
- V. Why is Specific Performance and Binding Arbitration a Marriage of Convenience? pg. 37
- VI. Equity Maxims pg. 38
- VII. Lessons Learned from *Gilmer v. Interstate Johnson Lane Corp.* pg. 43
- VIII. *Hill v. Gateway* pg. 45
- IX. Defenses to Binding Pre-Dispute Arbitration Agreements pg. 49
- X. Creative State Law Defenses to Pre-Dispute Arbitration Agreements
pg. 60
- XI. Why is Specific Performance Under the FAA Resisted by Consumer Groups and Promoted by Business Interests? pg. 71
- XII. Can the Marriage of Convenience Survive? Reality v. Theory: pg 76
- XIII. Access to Justice Waivers and Other Issues pg 81
- XIV. CONCLUSION pg. 85

BINDING ARBITRATION AND SPECIFIC PERFORMANCE UNDER THE FAA: WILL THIS MARRIAGE OF CONVENIENCE SURVIVE?

By Kenneth F. Dunham, J.D., LL.M, Associate Professor of Law
ADR Director
Faulkner University's Thomas Goode Jones School of Law

INTRODUCTION:

A homeowner purchased a condominium at an auction and encountered numerous problems. The homeowner's problems with the auction company could not be resolved, and the homeowner sued the auction company for negligence and fraud. The auction company moved the court to stay the lawsuit and compel arbitration under an agreement between the auction company and the condominium homeowner's association.¹ A car buyer brought a lawsuit against a car dealer for suppression and misrepresentation. The sales contract contained an arbitration agreement, and the car dealer moved the court to compel arbitration.² A Delaware general contractor subcontracted a roofing project to a Tennessee roofing contractor for a project in Alabama. When a problem with payment arose, the general contractor sued the owner of the property where the work was performed, and the owner moved the court to compel arbitration.³ A few decades ago arbitration agreements were common in construction contracts, labor

¹ National Auction Group, Inc. v. Hammett, 854 So. 2d 65 (2003).

² Parkway Dodge v. Hawkins, 854 So. 2d 1129 (2003).

³ Huntsville Utilities v. Consolidated Construction Company, 2003 WL 21 205396.

contracts and in some commercial sales contracts,⁴ but it seems they are appearing everywhere these days.

Arbitration is one of a group of conflict resolution processes known as alternative dispute resolution, or ADR. The word “alternative” connotes they are used as alternatives to the public dispute resolution forum known as the court system. Although some would argue there is little need for alternatives to the public justice system, and that some of these alternatives might actually be harmful, their utilization has increased dramatically in the past three decades.⁵ The use of ADR has been blamed on the litigation explosion, although some scholars have questioned the extent and intensity of the “explosion”.⁶ Although there is evidence to suggest lawsuit filings have increased dramatically since the 1960’s, the use of ADR processes may be more reflective of dissatisfaction with the court system than a litigation “explosion.”

The American legal system is a good system, but it is far from perfect. The U.S. court system is neither cost efficient nor time efficient. Each

⁴ *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.* 473 U.S. 614 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, 460 U.S. 1 (1983) *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Company*, 369 U.S. 95 (1962).

⁵ Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) Professor Fiss argues that the dispute resolution process which best meets society’s needs is the public system.

⁶ Arthur Miller, *Maybe the Light at the end of the tunnel is the Litigation Explosion*, IMPLoding DEFENSE COUNSEL JOURNAL (July 1994). Professor Miller points out that the initial predictions about the litigation explosion may have been a bit over-stated. The congested court system, tort reform and new court rules may have slowed down the “explosion,” but the court system still has high costs and lots of delays.

passing year has brought more rules, more fees, more costs and more delays to a system already infamous for such things. The legal system has become like Professor Randy Harris' restaurant analogy.⁷ If a person has always dined at the same restaurant because it had good food at reasonable prices, how long will that person continue to dine at the restaurant if the quality of the food and service go down and the prices go up? How long will that person continue to eat lousy food served by slow waiters at high prices before they consider other alternatives such as fast food restaurants? People who are fed up with the legal system are more receptive to trying ADR to resolve their conflicts.

For nearly two hundred years, "binding arbitration" was an oxymoron in American law; because United States courts refused to enforce binding arbitration agreements. American courts followed the English common law view that binding pre-dispute arbitration was unenforceable. However, in a series of federal court decisions over the past thirty years, the federal judiciary has established a favorable federal policy toward enforcement of arbitration agreements.⁸ The strong federal policy in favor of enforcement of arbitration agreements is a complete about face from the common law

⁷ Randy Harris is a professor at Abilene Christian University and uses the restaurant analogy to explain the nature of changes.

⁸ Southland Corporation v. Keating, 465 U.S. 1 (1984)

view of arbitration as a revocable agency agreement.⁹ A quick review of arbitration's more recent history reveals that this shift in the federal judiciary's view toward arbitration came about as the result of the Federal Arbitration Act.¹⁰

Arbitration at common law was a creature of contract, and due to the revocability doctrine, arbitration contracts were not enforceable.¹¹ Although contract law has governed arbitration agreements for hundreds of years, until the passage of the FAA enforcement of agreements to arbitrate rather than litigate were treated by the American courts as a legal nullity.¹² The Federal Arbitration Act combined the rules governing arbitration under contract law with the equity enforcement powers of specific performance. Agreements to arbitrate may be enforced under the specific performance mandates of the FAA in every court in the land.¹³ Tying arbitration and specific performance together resulted in a previously non-binding process becoming a binding process. Thus, the FAA created a synergy.

Specific performance is an equitable remedy in contracts cases that allows a party to a contract to move the court to compel performance by the other party of the agreed upon terms in the contract, because money

⁹ Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

¹⁰ 9 U.S.C. 1 et. seq.

¹¹ Tobey v. County of Bristol, Fed. Case No, 14065, at 1321 (C.C.D. Mass. 1845). This American case re-dated the English Common law doctrine of revocability.

¹² Insurance Co. v. Morse, 87 U.S. 445 (1874).

¹³ 9 U.S.C. 2

damages would not be an adequate remedy for breach of the agreement.¹⁴ The essence of the Federal Arbitration Act of 1925, codified at 9 U.S.C. 1, et. seq. is specific performance enforcement of the terms of contractual pre-dispute arbitration agreements. A motion to compel arbitration under 9 U.S.C. 4 is, in reality, a motion to compel specific performance, because litigation is not an adequate remedy.¹⁵ Thus, when Congress passed the Federal Arbitration Act in an effort to overcome longstanding judicial hostility and place contracts to arbitrate upon the same footing as other contracts, Congress made agreements to arbitrate subject to the specific performance remedy.¹⁶ Prior to the enactment of the Federal Arbitration Act, specific performance was not available in arbitration contracts.¹⁷

One of the major areas of controversy in arbitration law since the FAA was passed has been whether the FAA was intended to be procedural law applicable only in federal courts or substantive law applicable in all courts. Until more recent times, the FAA was considered to be applicable only in federal courts. Justice Stevens concurring opinion in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and Justice O'Connor's dissent touched upon this misunderstanding. Justice O'Connor's concurring opinion in *Allied*

¹⁴ *Ruder v. Lincoln Rochester Trust Co.*, 235 N.Y.S. 2d 191 (1962).

¹⁵ 9 U.S.C.A. 1 et. seq.

¹⁶ *Circuit City Stores v. Adams*, 149 L. Ed. 2d 234 (2001)

¹⁷ *Kulnkundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978 (2d Cir. 1942)

Bruce Terminex v. Dobson, 513 U.S. 265 (1995), pointed out that congress never intended for the FAA to apply in state courts. Justice Thomas' and Justice Scalia dissented in *Terminex* and stated they did not believe the FAA applied in state courts. Legal scholars are also divided on this issue.¹⁸

There are numerous scholarly articles about binding pre-dispute arbitration agreements. Practically all major legal publications, including law journals and law reviews, have contained at least one article about contractual binding arbitration within the past ten years. Some of the more recent articles focus on the advantages and disadvantages of binding pre-dispute arbitration clauses as they apply to disputes between businesses and consumers and binding arbitration agreements in employment contract disputes.¹⁹ The opposite conclusions reached by the legal scholars who have written articles on this subject reveal there is much room for debate by the academy in this area of contract law.

The society of scholars is also sharply divided between two views of how the FAA should be applied, neither of which could be labeled as the dominant position on contractually binding arbitration. The more traditional

¹⁸ Professor David Schwartz of the University of Wisconsin Law School believes that the FAA should only apply in Federal courts, while Professor Christopher Drahoval of the University of Kansas School of Law contends Congress intended for the FAA to apply in state courts. Both professors have articles regarding federal preemption under the FAA in the Spring 2004 issue of *Dispute Resolution Magazine*.

¹⁹ *Circuit City Stores, Inc. v. Adams* 149 L.Ed. 2d 234 (2001) The U.S. Supreme Court held that contracts of employment are within the reach of the FAA. The court held the FAA pre-empts contrary state law on employment agreements. The ruling refused to consider the state intrusion agreements of 22 attorneys general in their amici briefs filed in this case.

view is that binding contractual arbitration is inseparably yoked to contract law and is subject to examination under contract law principles.²⁰ The other prevalent view of binding pre-dispute arbitration agreements is that although such clauses are subject to legal contract defenses, such clauses should also be examined for the fairness of their resulting effect on the contracting parties.²¹ Both views have merit. Binding arbitration agreements are contracts and should be subjected to contract law principles. However, when specific performance of a binding pre-dispute arbitration agreement is sought, it must be remembered that the origin of specific performance as a remedy is equity and not law.²² Equity principles demand an examination of the fairness of the outcome prior to awarding the remedy.²³ Colleagues in the academy have consistently advocated for either the traditional contract interpretation analysis or the resulting fairness effect analysis. Neither side has been able to win the argument, and the debate continues.

This article will not advocate for the traditional analysis or the resulting fairness effect analysis, but will endeavor to, provide a reflective examination of binding arbitration based upon specific performance principles, examine the origins of the arbitration process and the subsequent

²⁰ Stephen J. Ware, *Paying the price of process*, 2001 J. DISP. RES. 89 (2001)

²¹ Jean R. Sternlight, *Gateway widens doorway to imposing unfair binding arbitration on consumers*, FLA. BAR JOURNAL, NN. 1999

²² "Smith's Remedies Tutorial," WEST, NET (2004).

²³ P.Tucker, *The Early History of the Court of Chancery: A comparative study*, ENGLISH HISTORICAL REVIEW, Sept. 2000.

mutations and transformations that has guided its history. The article will show that the binding arbitration process began as an adjunct to the adjudication process, and it was within the control of the legal system. Binding arbitration was modified over the centuries into a non-binding process governed by agency and contract rules in the common law. Arbitration was then transformed by statutory law in 1925, into a binding process governed by specific performance principles and contract law. The resulting fairness effect analysis adds equity principles to the examination of arbitration agreements, and this view challenges not only the effect of binding arbitration upon the contracting parties contractual rights but also the impact of such clauses upon the parties constitutional rights.²⁴

Numerous articles have been published about the effects of binding consumer arbitration on constitutional rights. Legal scholars are troubled by the access to justice and procedural problems associated with consumer arbitration.²⁵ Some scholars have gone so far as to declare consumers

²⁴ Jean R. Sternlight, *Gateway Widens Door to Imposing Unfair Binding Arbitration on Consumers*, 71 NOV. FL. B.J. 8 (1997).

²⁵ Richard C. Reuben, *First options, Consent to Arbitration, and the Demise of Reparability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. 819, 829-888 (2003)

Some of the major problems associated with binding arbitration are the possibilities of gross substantive and procedural injustices due to the absence of legal standards, capricious awards and uncorrectable awards, and incentives to favor repeat players over one time players. The assent of the parties to arbitration and denial of their access to the judicial system has become a major issue in the arbitration controversy. Professor Reuben discusses the procedures courts use to determine whether the parties agreed to arbitrate, including the so-called separability doctrine, and concludes it has the appearance of a shell game. Arbitrators are allowed to decide fraud issues and other matters normally reserved for the courts. Professor Reuben discusses the tension between *First Options of Chicago v. Kaplan and Prima Paint Corp.* v. *Flood and Conklin Mfg. Co.* The *First Options* case held that courts,

“victims” of the arbitration process.²⁶ Other scholars have suggested revising the arbitration process, and taking steps to make arbitration a fair process for all who are involved in it.²⁷ A variety of unique issues exist with regard to specific performance of arbitration agreements in consumer cases, and the

not arbitrators, are to decide whether the parties have agreed to arbitrate based upon actual, rather than implied assent. *Prima Paint* held that the arbitration clause should be treated as a separate contract from its container contract, and it may be held valid even if the container contract is held invalid. Professor Reuben also contrasts the basic tension between freedom to contract versus the rule of law. The former view favors arbitration, while the later favors the preservation of judicial access. Professor Reuben also discusses the French doctrine of competence-competence regarding the arbitrator’s independent authority to decide issues, and uses substantive arbitrability versus procedural arbitrability to explain the concept. The courts decide substantive arbitrability (was there an agreement to arbitrate?), and the arbitrator decides procedural arbitrability (conditions necessary to trigger a duty to arbitrate). The view of federal courts that arbitrator’s rule on. The issues after the courts rule there is an agreement to arbitrate places non-lawyer arbitrators in the awkward position of endeavoring to analyze legal defenses such as fraud. In some instances, not only are the parties denied their day in court, they are also denied their legal defenses to the contract. Professor Reuben concludes that the courts should move toward actual consent to arbitrate, rather than implied consent to arbitrate under the separability doctrine.

²⁶ Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, BOSTON PUBLIC INTEREST LAW JOURNAL 367-376 Summer 2001

Cappalli cites a dismissal of a class action and order to arbitration as an example of sellers and lenders avoiding legislation protecting consumers by the insertion of binding arbitration agreements into adhesion contracts. He also cites the court’s endeavor to lessen their own workloads by compelling cases to arbitration on almost any ground available. Cappalli describes the “powerful presumption” in federal courts favoring arbitration as a “heavy burden” on consumer protection challenges. He describes “insurmountable barriers” as a game the consumer cannot win. Cappalli points out that the U.S. Supreme Court has fashioned a liberal policy favoring arbitration from the FAA, a statute which actually states to treat arbitration agreements no differently from any other contract. He accuses the courts of using any excuse to shift litigation out of the system due to the heavy docket pressure. In an interesting analogy Cappalli describes the U.S. Supreme Courts “doctrine” concerning arbitration as “the-elbow-on-the-scale boost to arbitration.” Cappalli points out that the consumer plaintiffs cannot get the same relief from an arbitral panel that is available in a court, due to big business being able to eliminate class actions through arbitration.

²⁷ Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1040-1047 (1998)

Federal policy favors arbitral dispute resolution in response to overcrowded dockets, but the extent of favoritism granted to arbitration is a major departure from previous practice and the early interpretations of the FAA. The individual state no longer has the power to regulate arbitration agreements due to the federal policy favoring arbitration. Adhesive contracts of employment containing arbitration clauses are being used to determine employee statutory rights. The logic behind the federal courts interpretation of the FAA rests on two assumptions: Arbitration is different but not inferior to courts, and that parties should be allowed to judge their own best interest. In *Allied Bruce Terminex v. Dobson*, the U.S. Supreme Court rejected the arguments of 20 state attorney’s general against extending the reach of the FAA. In *Doctors Associates v. Casarotto* the U.S. Supreme Court rejected Mortano’s requirement that the notice of a pre-dispute arbitration agreement in a contract be in bold letters. States are not allowed to police the fairness of an arbitration agreement due to preemption by the FAA.

available literature reveals some of these issues are access to justice, access to process, legality of the award and limitations on judicial review.²⁸

Some scholars suggest that specific performance of arbitration agreements under the FAA should not be permitted for statutory claims affecting the parties rights, but it appears that the federal courts have little interest in creating an escape route for such claims.²⁹ The United States Supreme Court and the federal judiciary continue to issue opinions favoring specific performance of arbitration contracts as an alternative forum to litigation. The federal judiciary apparently believes that the positives of binding arbitration outweigh any negatives attached to this process. A brief history of the arbitration process, specific performance and the evolution of arbitration case law provide a necessary foundation for an in-depth examination of the existing controversy. The foundation being laid, this article will then discuss the synergism of contract law and equity which gives the FAA its power, the applicable equity Maxims and defenses to arbitration clauses. Resistive efforts by states and consumer groups to the arbitration process including varied perspectives will be discussed. The

²⁸ See Reuben, *Supra* FN 25.

²⁹ Joseph A. Arnold, *The Circumvention of Compulsory Arbitration: Two Bites at the Apple, or a Restoration of Employees' Statutory Rights*, 33 SETON HALL L. REV. 1207 (2003).

This article argues of a choice by employees to refuse to sign an arbitration agreement without being forced to forego employment. The Supreme Court in *EEOC v. Waffle House* affirmed the EEOC's ability to proceed independent of the employee's agreement to arbitrate, but this case offers little to protection to employees individually. This article argues for the employee's right to enter into a mutual agreement rather than a unilateral waiver of rights in a "take it or leave it" employment agreement.

reality of the process compared to the theory of the process will also be discussed.

HISTORY OF ARBITRATION:

The recorded history of arbitration began with a busy judge spending his days resolving people's problems by hearing cases from early in the morning until late at night. The judge's father-in-law saw the chaotic situation and asked the judge, "Why are you doing this all by yourself?" The judge responded that people have many problems, and when problems arise people come to him for resolution. The father-in-law said, "This is no way to go about it. You will burn out." The father-in-law suggested that the judge select some competent, incorruptible people of integrity to act as private judges of the people's problems. The big cases could still be presented to the judge, but the everyday business problems would be decided by these private judges acting as arbiters. The judge took his father-in-law's advice and appointed a group of competent people to decide the people's everyday problems. The arbiters judged the routine cases, but the hard cases were still heard by the public judge. This was the first recorded implementation of an arbitration process.³⁰

³⁰ EUGENE H. PETERSON, *The Message*, p. 135, 136 NAVE PRESS PUBLISHING GROUP, Colorado Springs, 1995.

The above conversation did not take place in the chambers of a famous jurist. It took place in a wilderness area east of Egypt around 1250 B.C.³¹ The public judge was Moses, the leader of the Jewish exodus from Egypt, and his father-in-law Jethro was an Arab priest. The conversation between them, which gave rise to the first recorded use of the binding arbitration process, is recorded in the *Bible* in the eighteenth chapter of the book of Exodus. The quoted words of Jethro are taken from *The Message*,³² a contemporary language version of the *Bible*. It is not known if Jethro invented the idea of binding arbitration or if it was a familiar process used in the ancient Middle Eastern world. Both Jethro and Moses seemed familiar with the process, and their familiarity could indicate the process was already an acceptable form of dispute resolution in Egypt and Arabia. The book containing the exchange between Moses and Jethro was written over thirty centuries ago, making it by far the oldest known reference to the use of binding arbitration.³³

When courts and dispute resolution professionals refer to arbitration as an alternative forum to litigation, it creates a presumption that jury trials preceded arbitration. Contrary to the assumptions being made about

The book of Exodus in the Bible contains the first known reference to binding arbitration. Moses led the Jews out of Egypt around 1250 B.C. over 3,200 years ago. The nation of Israel numbered in the millions, and problems were abundant within this massive company of people.

³¹ THE MASTER BIBLE, J. Wesley Dickson & Co. Indianapolis, 1957, P. 1730.

³² See PETERSON *Supra*, FN 30.

³³ See MASTER BIBLE, *Supra* FN 31.

arbitration by its opponents, arbitration was not invented as an alternative to the jury trial, because the arbitration process pre-dates the jury trial by at least a thousand years.³⁴ The theory behind arbitration has always been to speed up the dispute resolution process while unburdening the public justice system. In the days of Moses the public justice system was backlogged with cases, and Moses, the only public judge who heard those cases, was overworked.³⁵ The process resulted in justice being dispensed at a painfully slow pace by a burned out judge. The arbitrators suggested by Jethro sped up the process and relieved Moses of the incredible burden of hearing every case arising in a group of people who in number could match the population of a major U.S. city.³⁶ The arbitrators freed Moses to decide the tough cases, which could not be arbitrated and allowed him to conduct other important business. The argument of the modern advocates for arbitration is essentially the same argument used to justify arbitration in Moses day.³⁷

³⁴ William A. Forsyth, *History of Trial By Jury Frederick D. Linnad Company*, JERSEY CITY (1875).

No one seems to know just when the jury trial originated. In England it seems to have been traced to the Anglo-Saxon times, but others argue about it was a product of the ancient courts of Teutonic nations. Although there is some evidence that the Scandinavians may have enjoyed the benefits of the jury trial as early as 750 A.D., the earliest clues pointing to a jury trial originate in ancient Rome. There is a popular legend that the Romans borrowed the jury trial from the ancient Greeks.

³⁵ See PETERSON *Supra*, FN 30.

³⁶ *Id.* The Jews in Moses company numbered in the millions.

³⁷ Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (2001).

Competition forces to pass along the savings obtained from arbitration (reduced costs and reduced exposure) to the consumer. Professor Ware points out that businesses tend to be “profit-maximizing” organizations. Professor Ware points out businesses will usually follow the rate-of-return equalization principle.

American courts are full of crowded dockets and overworked judges and binding arbitration does provide some relief for those conditions.

There is a steady stream of historical references to the binding arbitration process spanning the centuries since Moses lived.³⁸ Romans used arbitration in civil matters on a limited basis, and as Rome conquered Europe they spread its use throughout Europe before the Middle Ages. Moses and the Jewish people became accustomed to the presence of arbitrators in their midst. Throughout the Bible various references are made to judges who served in Israel.³⁹ Those arbitrators were heroes who led the Jewish people during some very rough times of oppression, but all of them were also people who served as arbiters of the peoples' problems.⁴⁰ References in Islamic literature reveal arbitration was used to settle disputes as early as the 7th Century A.D.⁴¹

In its purest form, arbitration is simply a form of private judging. Jewish rabbinical courts have used the arbitration model for the resolution of complaints for hundreds of years.⁴² Modern Rabbinical courts consist of rabbis who are well versed in the Torah (Jewish law). The Torah arbitration

³⁸ Douglas Hurt Yarn, *Commercial Arbitration In Olde England*, DISPUTE RESOLUTION JOURNAL, January 1995

The oldest evidence of arbitration in post-Roman England is the Anglo-Saxon's arbitration of pending judicial cases. During the middle ages the courts and arbitration were somewhat inseparable. As a result, arbitrations in Olde England had similar characteristics to an adjudication process.

³⁹ See MASTER BIBLE, Supra, FN 31, The Book of Judges.

⁴⁰ Id.

⁴¹ Abualy A. Aziz, *Ima'mat in Arabia 600-765 A.D.* History of Ismailism website, 2004.

process involves rabbis who serve as judges, but who are not employed by a public court system.⁴³ During the Middle Ages arbitration was used to resolve problems in the guild system.⁴⁴

Arbitration came to the United States as a result of its use in Europe. United States law is based predominantly upon English law. The English have used arbitration successfully to resolve disputes for centuries as an adjunct process to its judicial system. In the United States two of the more famous individuals who have been involved in the arbitration process are George Washington and Abraham Lincoln. Washington himself was an arbitrator and used arbitration to resolve land disputes in the state of Virginia.⁴⁵ Lincoln served as a judge and arbitrator in Illinois.⁴⁶ Lincoln developed a reputation as a fair arbiter of disputes and served as a referee in horse races and cock fights.⁴⁷

Arbitration in Europe was a binding semi-judicial process until it was changed by the English Common Law. Under the common law, arbitration

⁴² Rabbinical Counsel of California. Rabbinical Administrators handle financial arbitration, conversion, divorce and miscellaneous matters.

⁴³ Christopher R. Drahozal, *A Behavioral Analysis of Private Judgery, paper prepared for a symposium on "The Coming Crisis in Mandatory Arbitration: New perspectives and possibilities,"* DUKE UNIVERSITY SCHOOL OF LAW, October 4-5, 2002. Professor Drahozal discussed the behavioral aspects of arbitrators and how bias may affect their decisions making.

⁴⁴ Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALF. L. REV. 577 (1997)

⁴⁵ T.H Matteson, "George Washington, Boy Hero and Arbitrator", CIRCA 1740, PICTURE HISTORY LLC (2003)

⁴⁶ Abraham Lincoln Research site, Morton 2004. Lincoln served briefly as a judge and arbitrator and his service as a referee in contests made him famous in Illinois.

⁴⁷ Id.

was not considered an ironclad, binding process.⁴⁸ In fact, the common law treated arbitration as a revocable principle-agent process up until the time the arbitration hearing actually took place.⁴⁹ Arbitrators were deemed to be the agents of the parties, and under common law an agency can be revoked at any time.⁵⁰ The 1845 case of *Tobey v. County of Bristol*⁵¹ is an example of how American courts adopted the English common law approach prior to the Federal Arbitration Act providing for statutory arbitration. The English courts began to treat contracts for arbitration as non-binding under what became known as the revocability doctrine that was set forth in *Vynoir's* case.⁵² The essence of the revocability doctrine is that as agents of the parties the agency of the arbitrators can be revoked any time prior to the actual arbitration hearing. In the 1918 case of *Hedley v. Aetna*,⁵³ it was held that agreements to oust or defeat the jurisdiction of courts as to the resolution of differences between the parties were not allowed. This is an example of the

⁴⁸ *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942). Agreements to arbitrate had little validity at common law. Parties were not bound by agreements to arbitrate unless and until they actually arbitrated.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Tobey v. County of Bristol*, Fed. Case. No. 14065, at 1321 (C.C.D. Mass. 1845). This case held that when parties agree that arbitration agreements are irrevocable it serves no purpose, because arbitration agreements are, by their very nature revocable. See also *Insurance Company v. Morse*, 87 U.S. 445, 451 (1874). A party cannot bind himself in advance by an agreement to arbitrate, but may select the courts or arbitration whenever he decides to present the case.

⁵² *Vynoir's Case*, 77 Eng. Rep. 595 (K.B. 1609)

⁵³ *Headley v. Aetna*, 80 So. 466, 202 Ala. 384 (1918). Parties are not allowed to enter an agreement to arbitrate that will be held to bind the parties to arbitration after a dispute arises. Such agreements would effectively oust or defeat the jurisdiction of courts.

so-called judicial hostility that was pervasive in the U.S. Court system until the time of the passage of the Federal Arbitration Act.

In 1925, the United States Congress enacted the United States Arbitration Act, and this Act was codified in 1947, as the Federal Arbitration Act (FAA).⁵⁴ The purpose of the FAA was to eliminate the judicial hostility that had existed at common law against arbitration.⁵⁵ At common law, once the parties had arbitrated a case and received an award, one of them had to bring suit for the enforcement of the award. Under statutory arbitration, such as was envisioned by the FAA, the party would simply file a motion to confirm the award.⁵⁶ If a case was pending at the time, the arbitration award would become the final judgment of the court in that case, and a separate action to enforce the award would not be required.⁵⁷ Pragmatically, the common-law doctrine of revocability died with the FAA. With the passage

⁵⁴ 9 U.S.C. 1 et. seq.

⁵⁵ *Southland Corporation v. Keating*, 465 U.S.1 (1984)

The owner and franchiser of a chain of convenience stores was sued in a class action that included more than 800 of its franchisees. The California Superior court held that arbitration was appropriate, except in the California Franchise Investment Law Claims. The California Court of Appeals held that all the claims were arbitrable, but the California Supreme Court held that the trial court had been correct in excluding arbitration for the California Franchise Investment Law Claims. The California Supreme Court also held that the Franchise Investment Law Claims did not contravene the FAA. The U.S. Supreme Court in its opinion delivered by Justice Berger held that the claims were arbitrable and subject to the FAA. The plaintiff had contended the FAA was a federal procedural act and did not apply in state court, but Justice Berger's opinion held that the Commerce Clause made the FAA applicable in all courts. Of interest in the case is the position of Justice O'Connor that state law claims are not subject to federal perception. Justice Berger did not agree with Justice O'Connor's more narrow view of the commerce clause. Writing for the majority, Justice Berger held that the California law violated the Supremacy Clause and was thus pre-empted. Justice Stevens's concurring opinion stated that the limited objective of the Federal Arbitration Act was to abrogate the common-law rule against specific enforcement of arbitration agreements. Justice O'Connor's dissent characterized the Federal Arbitration Act as a procedural statute applicable only in federal courts.

⁵⁶ Federal Arbitration Act, 9 U.S.C.1, Section 9.

⁵⁷ *Id.*

of the FAA the federal courts began to treat arbitration as a contract for specific performance rather than as a common-law agency arrangement. Under statutory arbitration, an agreement to arbitrate becomes a specific performance issue that can be the subject of a motion to compel performance of the contract in lieu of litigation.⁵⁸ The FAA effectively did away with common law arbitration and allowed parties to contract for specific performance of arbitration, which yielded results that were binding.⁵⁹

New York became the first state to pass a statutory arbitration law in 1920.⁶⁰ The United States Arbitration Act of 1925 was modeled after the New York arbitration statute.⁶¹ After much discussion and not a few hearings on the effect of a national arbitration statute, the United States Arbitration Act was passed as an Article III federal procedural act.⁶² In 1947, the United States Arbitration Act became the FAA in its present form as codified in 9 United States Code Section 1 et. seq. Although the FAA calls for the enforcement of binding arbitration agreements, many jurists assumed it only applied in federal courts. State courts were reluctant to follow the

⁵⁸ Id. Section 4

⁵⁹ Id. Section 2

⁶⁰ JOHN S. MURRAY, ALAN SCOTT PAN, EDWARD F. SHERMAN, ARBITRATION, Foundation Press, New York, p. 54, (1996).

⁶¹ Id. oct 55.

⁶² HR Rep No. 96, 68th Cong, 1st Sess, 1 (1924).

specific performance mandates of the FAA and state laws continued to deny specific performance in arbitration cases.⁶³

Believing the FAA to be an Article III procedural act, the federal courts did not initially interfere with states that refused specific performance of arbitration agreements in their state court cases. Statutory rights cases in federal courts were also considered “off limits” for specific performance of arbitration agreements. *Wilco v. Swan*⁶⁴ is an example of the United States Supreme Court’s attitude toward the FAA in statutory rights cases prior to the high courts more recent policy in favor of binding arbitration. Federal cases prior to *Wilco v. Swan* demonstrate that although the FAA’s specific performance mandates were recognized as substantive federal law, the FAA was not enforced against parties seeking to litigate their statutory rights.⁶⁵ *Shearson/American Express Inc. v. McMahon*⁶⁶ changed the way the federal courts viewed binding pre-dispute arbitration agreements in statutory rights claims cases. *Shearson/American Express v. McMahon* created a significant burden for statutory rights claimants endeavoring to defeat the specific

⁶³ Ala. Code 8-1-41(3) Pre-dispute arbitration agreements are unenforceable.

⁶⁴ *Wilco v. Swan*, 346 U.S. 427 (1953). The court in this case stated that arbitration was desirable, but that certain rights under federal statute are not arbitrable. The court ruled that a judicial forum provided for under Section 14 of the Securities Act of 1933 could not be waived. The arbitration agreement between a securities broker and a customer was held to be invalid.

⁶⁵ *Id.*

⁶⁶ *Shearson/American Express, Inc. v. McMahon* 482 U.S. 220 (1987). The U.S. Supreme Court held the plaintiffs in a security case to the burden of demonstrating that “congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Securities And Exchange Act.” Congress did not address arbitration in the Securities and Exchange Act and, therefore, the McMahon’s burden was impossible to carry.

performance requirements of a pre-dispute arbitration agreement. The plaintiff seeking to avoid arbitration is required to prove that the U.S. Congress intended the statutory right be litigated and excluded from arbitration.⁶⁷ This presents an impossible burden of proof for plaintiffs in most cases, because the congressional record on these acts did not contain references to litigation rights or arbitration.

The utilization of binding arbitration in the United States has increased at a rapid pace in consumer cases due to the holdings of the United States Supreme Court during the past quarter century in cases involving the FAA.⁶⁸ Despite the federal courts receptiveness to arbitration, the state courts were especially slow to enforce specific performance of arbitration against consumers due to its procedural nature and the remaining hostility toward arbitration in the judicial system.⁶⁹

The FAA was supported by the business sector from the initial drafting stage to the passage of the Act in 1925, and business lawyers lobbied hard for the act's passage.⁷⁰ There was and is a reason for the business communities' historical support of binding consumer arbitration over

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ R. Pepper Crutcher, Jr., *Overcoming Mississippi Common Law Hostility to Arbitration*, THE FEDERALIST SOCIETY, 2003.

⁷⁰ Monica J. Washington, I, 74 NYU L. REV. 844, 846 (1999).

litigation.⁷¹ Businesses have used the FAA to reduce litigation expenses, eliminate runaway verdicts and predict outcomes.⁷² Businesses have a long history with the arbitration process, but consumers have little, if any, experience with binding arbitration.⁷³ If knowledge is power, the business community has achieved a higher degree of power than the average consumer with this process.

HISTORY OF SPECIFIC PERFORMANCE:

Specific performance is an equitable remedy.⁷⁴ Although courts of equity and courts of law are no longer separate courts in most states, in early English law these courts were very distinct.⁷⁵ Courts of law provided the remedy of damages, while courts of chancery dealt with equity matters.⁷⁶ The presiding official in a law court was a judge, a lawyer turned jurist who had earned a reputation as a good legal mind.⁷⁷ The presiding official in a

⁷¹ Id.

⁷² Hossam M. Fohmy, *Arbitration: Wiping Out Consumer Rights?* 64 TEX. B.J. 917 (2001)

The definition of “fair and just resolution” may be different for consumers and businesses. The business interests use arbitration to reduce legal costs and protect themselves from high jury verdicts. Fairness in securing the agreement to arbitrate (*Hill v. Gateway*) and fairness in the implementation of the agreement (*Green Tree Financial v. Randolph*) don’t seem to be a part of the “fair and just” concept. The *Gateway* case required consumers to use the International Chamber of Commerce (ICC) arbitration rules to settle disputes. The ICC charges in advance almost double the price of most *Gateway* computers to set up the arbitration. (However, the requirement is to use ICC rules rather than actually using the ICC.) Companies are very selective in the way in which they use arbitration based upon a cost analysis. Mandatory arbitration clauses are designed to be “fair and just” to the businesses that use them and not to their customers.

⁷³ Id.

⁷⁴ SMITH, “SMITH’S REMEDIES TUTORIAL,” West. Net (2004).

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

court of chancery was called a chancellor.⁷⁸ The background of the early chancellors was that of a cleric or an accomplished politician who was appointed by the King or Queen of England.⁷⁹ Chancellors were often members of the clergy who had the political savvy necessary to gain appointment as a chancellor. Parties to a civil action were not sent to a chancery court unless the potential damages in their legal case were inadequate.⁸⁰ A contracts case would not be referred to a chancery court to obtain an equitable remedy such as specific performance unless the legal remedy for breach was totally inappropriate.⁸¹

Jury trials were not permitted in chancery courts, because the chancellor decided the case using equitable principles.⁸² The King of England set up the chancery courts to operate under a different set of rules from those utilized in law courts.⁸³ The guiding principle of chancery courts of equity was to produce decisions based on fairness rather than on the technicalities of the law.⁸⁴ Chancery courts differed from law courts in that they could order a party to do something (specific performance) or refrain from doing

⁷⁸ Id.

⁷⁹ P.Tucker, "*The Early History of the Court of Chancery: A comparative study*", ENGLISH HISTORICAL REVIEW, Sept 2000.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

something (injunction).⁸⁵ Over the centuries the chancery court became corrupt, costly and slow.⁸⁶ In England, the court of Chancery was abolished by the Judicature Act of 1873, and the chancery court became a division of the High Court of Justice.⁸⁷

Most of the chancery or equity courts have also disappeared in the United States. Some states like Delaware and Tennessee still have chancery courts, but the vast majority of states grant equity powers to their superior or circuit courts, thereby allowing these courts to sit as both a court of equity and a court of law.⁸⁸ When deciding equity matters, these courts are required to use the same Maxims of equity utilized by the chancery courts.⁸⁹ These merged courts allow for a more efficient system of implementing justice, because one court can award damages and/or specific performance.⁹⁰ The courts of equity in existence in most states in modern times are the bankruptcy courts.⁹¹ The original chancery courts of equity operated under the jurisdiction and authority of the English monarch to order specific acts.⁹²

⁸⁵ Id.

⁸⁶ Mary Sokol, *Lecture at Sussex University on "In Chancery" BBC Learning series "Beyond the Broadcast,"* April 2004.

⁸⁷ Id.

⁸⁸ *The Lectric Law Library's Lexicon on "Chancery, Court of Equity"* LEC LAW.OM. (2004).

⁸⁹ Id.

⁹⁰ Id.

⁹¹ "Court of Equity" – Definition, LAW.COM (2004)

⁹² See SMITH REMEDIES TUTORIAL. *Supra*, FN 74.

The power of the monarch was replaced by the state constitutions and statutes in the United States, which govern court jurisdiction.⁹³

Chancery courts would not grant specific performance each time a contract was breached.⁹⁴ In order to obtain specific performance, an aggrieved party had to demonstrate a unique set of circumstances from which the chancellor could determine that legal damages would not be suitable.⁹⁵ Chancery courts also used certain Maxims such as laches, estoppel and the clean hands doctrine (he who seeks equity, must do equity) to screen the cases to be heard.⁹⁶ If the aggrieved party had violated one of these Maxims no relief was available in the chancery courts.⁹⁷ The chancery courts also examined any underlying contract to determine if the terms of the contract were unenforceable or unconscionable.⁹⁸ In modern times, a party seeking specific performance is not required to meet these heavy burdens of proof that were necessary to get a case heard in the chancery courts.

In American courts the specific enforcement of contracts is also governed by the principles of the UCC, especially Article 2, which governs sales contracts.⁹⁹ UCC 2-716 provides that specific performance may be

⁹³ See *Lectric Law “Chancery, Court of Equity.”* Supra, FN 88.

⁹⁴ See “SMITH REMEDIES TUTORIAL”. Supra, FN 74.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id.

available when the goods are unique.¹⁰⁰ UCC 2-302 permits courts to declare a contract unfair and decline to enforce it.¹⁰¹ Arbitration agreements are usually constructed in such a way that any legal remedy would be inadequate for their breach, and the only remedy that makes sense is specific performance.

“The maxim, ‘he who seeks equity must do equity’ presupposes that equitable, as distinguished from legal, rights have arisen from the subject-matter in favor of each of the parties; and it requires that such rights shall not be enforced in favor of one who affirmatively seeks their enforcement except upon condition that he consents to accord to the other party the same correlative equitable rights.”¹⁰² “Legal rights are as safe in chancery as they are in a court of law, and however strong an appeal may be to the conscience of a chancellor for equitable relief, he is powerless to grant if the one from whom it must come will be deprived of a legal right.”¹⁰³ These quotes are from cases decided in the first half of the twentieth century, and they purport to require anyone seeking specific performance to grant to their opposing party the same equitable rights they seek and not violate the other party’s legal rights. As will be shown in this article’s review of more modern cases,

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² *Manufacturers’ Finance Co. v. McKay*, 294 U.S. 442 (1935)

¹⁰³ *Colonial Trust Co. v. Central Trust Co.*, 243 Pa. 268, 90 A 189, 191 (1914)

these equitable maxims have all but disappeared from consideration in ruling upon the validity of arbitration contracts.

Specific performance allows a court of equity to compel a party to perform under a contract.¹⁰⁴ Courts of equity have discretion over whether to order performance and may refuse to do so if the terms of the contract are unfair, the consideration inadequate, if the enforcement of the contract will cause unreasonable hardship or loss or if the contract was secured by misrepresentation.¹⁰⁵ Prior to the modern era of FAA enforcement of arbitration agreements through specific performance, it was generally understood that courts would not compel specific performance of arbitration agreements lest they oust their own jurisdiction in such matters.¹⁰⁶ At common law arbitration agreements could not be specifically enforced.¹⁰⁷ Through the years following the passage of the FAA, the aversion to order specific enforcement of arbitration contracts disappeared, along with most of specific performance's equity hurdles.

THE EVOLUTION OF ARBITRATION CASE LAW:

One of the most cited cases regarding the federal policy favoring arbitration is *Moses H. Cone Memorial Hospital v. Mercury Construction*

¹⁰⁴WALTER JAEGER, WILLISTON ON CONTRACTS THIRD EDITION, Baker, Voorh's and Co., Inc. (1968) Vd. 11 Sect. 1418.

¹⁰⁵ John Edward Murray, Jr., Murray on Contracts Matthew Berder & Company, 2001 P. 261

¹⁰⁶ Barnhart v. Civil Service Employees Insurance Company, 398 P2d 873, 876 (1965)

¹⁰⁷ Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 130 (1924)

Company.¹⁰⁸ The *Moses H. Cone* case involved a North Carolina Hospital and an Alabama Contractor. Justice Brennan in *Moses H. Cone* opined, “there is a liberal federal policy favoring arbitration,” and his words from that decision have appeared in a significant number of cases sustaining the current liberal federal policy toward arbitration. Those words have been used to by-pass consideration of equity principles in the legal analysis of arbitration clauses by federal courts.

The liberal federal policy soon found its way from federal courts into state court cases and pre-empted contrary state law. *Southland v. Keating*,¹⁰⁹ a California case, held that a California statute which invalidated specific performance under certain arbitration agreements deemed covered by the FAA violated the Supremacy Clause and the California statute was thus pre-empted by the FAA. This was one of the first cases to disavow the state law claims argument that claims arising in state court involving state laws are not subject to the FAA’s federal preemption. The state law claims argument

¹⁰⁸ *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, 460 U.S. 1 (1983)

The hospital, a North Carolina corporation, and the contractor, an Alabama Corporation entered into a contract for construction of additions at the hospital. The contract contained a binding arbitration clause. According to Justice Brennan, who wrote the opinion in this case, there is a liberal policy favoring arbitration agreements under the FAA. The opinion stated the FAA created a body of federal substantive law of arbitrability. “Questions of arbitrability are to be addressed with a healthy regard for the federal policy favoring arbitration.

¹⁰⁹ *Southland v. Keating*, 465 U.S. 1 (1984). A California investment law which invalidated arbitration agreements in investment cases was found to contradict the Federal Arbitration Act and was held to violate the Supremacy Clause. *Southland* was the first in a line of cases that moved the federal policy in favor of arbitration into the state court system. Justice O’Connor’s dissent in *Southland* reiterated the view that the FAA was only applicable in Federal courts.

was that the FAA is a federal procedural act under Article III and should only cover federal claims in federal court. The majority in *Southland* held that Congress intended for the Commerce Clause to be read broadly and, therefore, the FAA presumptively applies in *all* state and federal courts to *all* arbitration agreements.¹¹⁰ However, Justice O'Connor's dissent in *Southland* stated significant reasons to keep the traditional view of the FAA's application limited to federal courts as an Article III procedural act, and not as a substantive law statute.¹¹¹ Justice O'Connor pointed out the FAA's legislative history was unambiguous, and that from the outset Congress viewed the FAA as a procedural statute only applicable in federal courts.

A few years later, the United States Supreme Court held in *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*¹¹² that California law could prescribe procedures for the

¹¹⁰ Id.

¹¹¹ Id.

¹¹² *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University* 489 U.S. 468 (1989)

Volt was a contractor that agreed to install electrical conduit on the Stanford campus in a contract containing a choice of law provision designating California law under which the contract would be enforced. Following a dispute over payment for additional work, Stanford sued Volt in a California Court. Volt moved to send the case to arbitration, but the court refused under a California statute which provides arbitration must be stayed until related litigation is resolved. The California Court of Appeal affirmed and the California Supreme Court refused to hear the case on discretionary review. The U.S. Supreme court affirmed the trial court and held that the FAA will not automatically preempt state law if the parties have contracted for state law to govern the arbitration between them. Opponents of binding arbitration thought initially that this case represented a change in direction for the high court, but subsequent cases demonstrated this case dealt with a very specific law and was not a movement to allow states to pen their own brand of arbitration.

arbitration process that were different from those described in the Federal Arbitration Act as long as the contract between the parties had agreed California law would be used to govern the arbitration agreement. The state law the of California was named by the parties as the governing law of contract in the *Volt* case. Justice Rehnquist's majority opinion in *Volt* stated that the FAA was designed to overcome the judicial hostility toward arbitration, but it was not designed to make every case arbitrable every time.¹¹³ The FAA was designed to put arbitration clauses on the same footing as other contracts.¹¹⁴ *Volt* was temporarily viewed as a softening of the U.S. Supreme Court's substantive law stance on the applicability of the FAA, but a New York case and an Alabama case soon proved that the U.S. Supreme Court was not backing down from its substantive law policy regarding the FAA's specific performance mandates regarding pre-dispute arbitration agreements.

In 1995, the U.S. Supreme Court issued its opinions in *Mastrobuono v. Shearson Lehman Hutton*¹¹⁵ and *Allied Bruce Terminex v. Dobson*.¹¹⁶ These

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995). Justice Steven's majority opinion in this case proved to be a major setback for those seeking New York law to govern the issue of punitive damages in arbitration. Although New York law did not allow arbitrators to award punitive damages in arbitration and the contract stated it was governed by the laws of New York, the U.S. Supreme court opinioned found language in the underlying National Association Security Dealers (NASD) arbitration process that might permit punitive damages. The thrust of this case appears to be that a party can receive the same relief in arbitration that is available in a court of law.

¹¹⁶ See *Allied Bruce Terminex v. Dobson*, 513 U.S. 265 (1995).

two cases affirmed the court's pre-*Volt* stance of pre-empting any state law in conflict with the FAA's specific performance mandates on grounds that the FAA is the substantive law of the land applicable in all courts.¹¹⁷ In *Mastrobuono* the court held that a New York statute which disallowed punitive damages in arbitration, could not be used to disallow punitive damages awarded by arbitrators.¹¹⁸ The Supreme Court held that the parties' contract contained no reference to punitive damages being excluded and, therefore, punitive damages were permissible.¹¹⁹ Although the contract stated it would be governed by the laws of the state of New York, which disallows punitive damages, the contract also designated the National Association of Securities Dealers (NASD) arbitration rules as the process rules for the arbitration. The NASD rules allowed arbitrators to return punitive damages and other relief, and the Supreme Court interpreted the NASD rules permitted punitive damages under the FAA.¹²⁰ *Mastroubouno* implied that a party could get the same relief in arbitration as in court, which may have been the underlying message the Supreme Court was endeavoring to send about arbitration's separate, but allegedly equal forum status.

¹¹⁷ See *Southland v. Keating* Supra, FN 8.

¹¹⁸ See *MASTROBUONO*. Supra, FN 115.

¹¹⁹ Id.

¹²⁰ See *MASTROBUONO*, Supra, FN 115.

Allied Bruce Terminex v. Dobson involved an Alabama homeowner who purchased a house with an existing termite guarantee plan.¹²¹ A termite infestation caused damage to the house and following failed attempts to correct the damage, the homeowner sued Terminex. The termite plan was not a contract between the homeowner and Terminex, but had been transferred as a part of the closing documents when the homeowner purchased the house from the prior owner.¹²² The Supreme Court of Alabama refused to order specific performance of an arbitration provision in the termite plan based upon Alabama's anti-predispute arbitration statute which declared pre-dispute agreements to arbitrate unenforceable.¹²³

The U.S. Supreme Court in *Terminex* held that the Alabama statute prohibiting specific performance of pre-dispute arbitration agreements was unconstitutional if the contract containing the arbitration clause led to a transaction involving interstate commerce.¹²⁴ The shipment of pest control chemicals from outside the state of Alabama into Alabama to treat the house was deemed sufficient to bring the contract under the Commerce Clause and thus subject it to the Supremacy Clause. The Alabama statute conflicted with the FAA mandates for specific performance of an arbitration agreement, and

¹²¹ See TERMINEX, *Supra*, FN 116.

¹²² *Id.*

¹²³ *Id.* See also Ala. Code 8-1-41(3). Specific performance is not available for pre-dispute agreements to arbitrate.

¹²⁴ *Id.*

it was pre-empted by the FAA under the Supremacy Clause.¹²⁵ Although the pre-dispute arbitration clause in the termite plan was unenforceable under Alabama law, specific performance of the arbitration agreement was enforced rigorously under the FAA.¹²⁶ Alabama law was the law of the contract, but Alabama law was not allowed to govern the contract's arbitration clause. The *Terminex* decision and the *Mastroburono* decision created a judicial oddity. The arbitration clauses were enforceable under federal law, while the remainder of the contracts were subject to state law.

There was much confusion in Alabama's legal community, over the U.S. Supreme Court's opinion in *Terminex*. The Alabama Supreme Court's *Terminex* opinion after the remand expressed some of that confusion.¹²⁷ The Alabama Supreme Court ruling on remand of the *Terminex* decision contained a concurring opinion that could best be described as an indication of one justice's frustration with the views of his fellow justices.¹²⁸

Alabama's code law on arbitration was effective before the FAA became effective federal policy.¹²⁹ Some in Alabama's legal community felt

Terminex was an intrusion into Alabama's right to establish its own contract

¹²⁵ Id.

¹²⁶ See Ala-code 8-1-41(3) compared to the *Terminex* opinion.

¹²⁷ See *Allied-Bruce Terminex v. Dobson* 684 So. 2d 102 (Ala. 1996) Justice Maddox's concurrence questioned the attitude of his fellow justices regarding Alabama's statute denying specific performance in arbitration cases. His fellow justices stated that contract interpretation could be based upon whether the scope of the arbitration clause was broad enough to encompass the clause.

¹²⁸ Id.

¹²⁹ See Ala. Code 8-1-41(3). This statute had a history dating to 1923.

law pertaining to arbitration. As will be shown later in this note, Alabama's Supreme Court did not accept the U.S. Supreme Courts' broad reading of the commerce power of Congress and took the initiative to preserve Alabama's public policy.¹³⁰

It is easy to understand why state courts felt they had a "green light" from the United States Supreme Court to apply state contract law to arbitration clauses contained in a contract governed by a named state law. The *Volt* case created that presumption. Apparently, the United States Supreme Court in the *Volt* opinion was not stating that any state law could be applied to arbitration agreements contained in a contract governed by state law, but only state law that allowed arbitration clauses to operate on the same footing as other contracts.¹³¹ The *Volt* case also led to the assumption that states could limit the enforcement of arbitration clauses, as long as the clauses were not struck down in their entirety. This soon proved to be an erroneous assumption.

In *Doctor's Associates v. Casarotto*¹³² the U.S. Supreme Court effectively removed state law policies regarding specific performance

¹³⁰ *Sisters of Visitation v. Cochran Plastering Co., Inc.*, 775 So. 2d 759 (2000).

¹³¹ *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989).

¹³² *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996)

A Montana opinion styled *Cassarotto v. Lombardi* 901 P.2d 596 (Mont. 1995) held that a notice requirement regarding contract arbitration did not conflict with the FAA. The U.S. Supreme Court reversed by holding the additional notice requirement violated the FAA's requirement that arbitration clauses be given the same treatment as any other contract-the U.S. Supreme Court held that the Capital

restrictions in arbitration cases. The *Cassaroto* case involved a Montana statute that required any contract subject to arbitration to contain a capital letter notification regarding the arbitration clause on the first page of the contract.¹³³ The U.S. Supreme court pre-empted Montana’s notice statute upon the grounds that it violated the “same footing as other contracts” language of the FAA.¹³⁴ The *Cassorotto* opinion served notice on the states that they were not free to place their own restrictions on the specific performance mandates of the FAA.

The above referenced U.S. Supreme Court decisions put to rest the state law claims arguments against specific performance in binding consumer arbitration and to some extent encouraged federal courts to engage in judicial activism in favor of binding arbitration. In addition to pre-empting any contrary state law prohibiting specific performance in arbitration contracts, the United States Supreme Court also rendered decisions which removed long-standing traditional doctrines such as the intertwining claims doctrine. The intertwining doctrine as stated in *DeLanire v. Birr, Wilson and Co.*¹³⁵ is that arbitration should be denied where common law claims are intertwined with rights based claims such as statutory violations of security

letter notice requirement went beyond the requirement of the FAA and was thus pre-empted under the Supremacy Clause. This opinion made it clear that states do not have the right to pass laws that restrict the effectiveness of the FAA.

¹³³ Id.

¹³⁴ Id.

¹³⁵ *De Lance v. Birr, Wilson & Co.*, 648 F.2d 1255 (9th Cir. 1981).

laws. The United States Supreme Court rejected the intertwining doctrine in *Dean Witter Reynolds, Inc. v. Byrd*¹³⁶ and held that the FAA requires federal courts to compel arbitration in cases where the grounds of the various claims are mixed. The Supreme Court's opinion in *Byrd* stated that the strong federal policy in favor of arbitration was not an admonition to use alternative dispute resolution methods to settle cases, but a mandate for specific enforcement of arbitration contracts.¹³⁷

The United States Supreme Court has made the weight of the mandate for specific performance in arbitration cases vividly clear. Longstanding traditions notwithstanding, the Supreme Court has established a bright line test for the applicability of specific performance to arbitration clauses in the courts of this land.¹³⁸ Federal law now favors specific performance of arbitration clauses, and any order denying specific performance of a valid arbitration clause must contain adequate and articulated reasons for the denial of specific performance.¹³⁹ Thus, case law has evolved from treating arbitration agreements as totally unenforceable in the cases decided prior to the FAA, to completely enforceable in most cases decided since the mid-1980s'.

¹³⁶ *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

WHY IS SPECIFIC PERFORMANCE AND BINDING ARBITRATION A MARRIAGE OF CONVENIENCE?

The United States Supreme Court and the sundry federal courts can issue all the legal decisions they desire regarding binding arbitration, but absent the power of enforcement through the equitable remedy of specific enforcement these decisions would be of little effect. The only remedy a court of law can award is damages or dismissal, but a court with equity powers can order the parties to take a course of action.¹⁴⁰ Therefore, to avoid court orders enforceable only by a grant of compensatory damages, the courts had to marry the equity enforcement powers of specific performance to contract law governing arbitration agreements to achieve the goal of forcing parties to take a course of action. Some members of the bar have become very troubled that existing contract law defenses and other legal defenses related to their clients legal rights have been unsuccessful in overcoming specific performance orders. However, one only has to look at the nature of these defenses to understand why they fail against specific performance. Asserting a legal defense to an equitable remedy will not work because law is subservient to equity. Using the federal law versus state law

¹⁴⁰ *Wikipedia article on "Equity,"* Wikipedia. Org (2004)

analogy, equity preempts law. A legal right may not be exercised against an equity order.¹⁴¹ Although courts of equity and courts of law are generally merged, equity Maxims are still independently viable.¹⁴² Equity has clear supremacy over law.¹⁴³ The attorneys representing clients who wish to set aside pre-dispute arbitration agreements face a significant hurdle. Legal defenses are unavailable to challenge an equitable remedy, but the courts have severely curtailed, and to some extent eliminated, the equitable defenses to specific performance. Thus, the marriage of law to equity in arbitration is not only marriage of convenience, it is a marriage of power.

EQUITY MAXIMS:

The enforcement of arbitration clauses through the equitable remedy of specific performance is not a problem free environment. If a party seeks an equitable remedy, that party allegedly subjects himself or herself to the Maxims of Equity.¹⁴⁴ The Maxims, or fundamental principles of equity are as follows:

1. Equity will not allow a Right to be without a Remedy.
2. Equity follows the Law.
3. He who seeks Equity must do Equity.

¹⁴¹ Proivneias O’Cillin, “*History of Law in Ireland*” law course, cs. Ted. Ie (2004).

¹⁴² American Brake Shoe & Foundry Co. v. New York Rys Co., 293 F. 633, 637 1923).

¹⁴³ See PROIVNEIAS O’CILLIN, *Supra*, FN 141.

¹⁴⁴ *Id.*

4. He who comes into Equity must come with Clean Hands.
5. Delay defeats Equity.
6. Equality is Equity.
7. Equity views the Intent rather than the Form.
8. Equity regards as Done what ought to be Done.
9. Equity imputes an Intention to fulfill an Obligation.
10. Equity acts in Personam.
11. If the equities are equal, the first in time Prevails.
12. If the equities are equal, the Law prevails.¹⁴⁵

Clearly, the supporters of binding arbitration love specific performance, but from time to time seem to have difficulty with some of the Maxims of Equity. These Maxims should theoretically be accepted to gain enforcement of arbitration agreements through specific performance. Maxim one provide that a party's statutory rights must be preserved. Drafting techniques are used to limit this Maxim's equity defense by requiring parties to waive their rights prior to any actual controversy. Most federal arbitration decisions have held the aggrieved party's rights were waived by contract when the arbitration agreement was signed. Constitutional law cases regarding waiver usually mention the words "freely", "voluntarily" and "knowingly"

¹⁴⁵ Id.

somewhere in the decision. Perhaps more time should be devoted to a discussion of whether legal and equitable rights can be freely, voluntarily and knowingly waived if the party who waives them is unaware of their existence or the effect of the waiver.

Maxim two is generally followed, except in the special rules applicable to arbitration agreements. The so-called separability doctrine is one of these special rules. Although arbitration clauses may be examined under the general principles of contract law, the enforceability of the arbitration clause itself must be examined separately from the underlying contract.¹⁴⁶ If the container contract is void, the arbitration clause may still be valid if a separate analysis of the clause reveals it is enforceable.¹⁴⁷

Due to case law in arbitration, the courts have carved out an exception for arbitration clauses, which state that the arbitration clause must be examined on a stand alone basis for its own validity.¹⁴⁸ Therefore, it is possible that the container contract will be void ab initio, while the arbitration clause will be held valid, because the parties seeking to set it aside cannot prove that the agreement to arbitrate was procured on the same

¹⁴⁶ Stevens/Lein Weber/ Sullivan's, Inc. v. Holm Development and Management, Inc., 795 P.2d 1308 (1990)

¹⁴⁷ Id at 1311.

¹⁴⁸ David S. Schwarty, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33-36, 60-98, 111-126 (1997)

basis as the container contract.¹⁴⁹ In other words, to successfully attack an arbitration agreement which is part of a voided container contract, the complaining party must prove that the arbitration agreement itself was procured by fraud or some other valid contract defense. This is an exceedingly difficult burden for a complainant to carry, and it has resulted in arbitration agreements being held valid which might have otherwise been rejected as a part of the container contract. Although the Doctrine of Severability of individual contract parts is not new to the area of contract law, the Separability Doctrine is a new concept created to sustain what would normally be unsustainable pre-dispute arbitration clauses in agreements.

The doctrine of severability, upon which the separability doctrine is based, held that if a container contract was void because of a defense leading to its recession, then the arbitration clause may survive.¹⁵⁰ However, under the severability doctrine, if the contract was void ab initio then even the arbitration clause would be invalid and unenforceable.¹⁵¹ Under the separability doctrine the courts treat the arbitration clause as a separate

¹⁴⁹ RAASCH v. NCR Corp. 254 F. Supp. 2d 847 (2003)

¹⁵⁰ Tanya J. Monestier, “*Nothing comes of nothing-or does it???* A critical re-examination of the doctrine of separability in American Arbitration”, 12 AM. REV. INT’L AVG. 223 (2001)

¹⁵¹ Id. at 227.

agreement which may be enforced independently of the underlying contract, and may be held valid even if the contract as a whole was void ab initio.¹⁵²

Equity Maxims four and five were problematic for arbitration's supporters until the "shrink wrap" cases. "Shrink wrap" cases are those opinions which have held that arbitration agreements are valid that were included in a package of documents delivered with a product.¹⁵³ The consumer purchaser neither read nor signed the agreements prior to the delivery of the product. Although these "agreements" have the appearance of an ambush, they have generally been held to be valid. This article will discuss the "shrink wrap" cases in a discussion of *Hill v. Gateway*.¹⁵⁴

Maxim seven requires the court to look at intent rather than form in making a decision regarding whether to order the parties to specifically perform. This Maxim provides a nice bridge between the first six Maxims which appear to favor the consumer, and the last five Maxims which appear to favor the business community. The intent of the consumer may have been to preserve the right to a jury trial, whereas the intent of the business may have been to avoid a jury trial at all cost. Therefore, Maxim seven seems to "cut" from both sides of the proverbial "card deck", and it stacks an equal number of "cards" on each side. If there was no clear intent by the

¹⁵² Id. at 228.

¹⁵³ *Hill v. Gateway*, 105 F. 3d 1147 (1997)

¹⁵⁴ Id.

consumer to accept the arbitration agreement, perhaps mutuality is lacking. On the other hand, if a consumer accepted the term proposed by the business, then the consumer should be held to the contractual terms. Unfortunately, the federal courts are not so well versed on Maxim seven, and have held that arbitration agreements are not invalid due to lack of mutuality.¹⁵⁵

The Equity Maxims eight through twelve are an integral part of many arbitration decisions in favor of specific performance. These decisions require contract enforcement by the persons involved based upon the law (FAA) and with a view toward fulfillment of the parties obligations to each other under the contract.

LESSONS LEARNED FROM GILMER v. INTERSTATE/JOHNSON LANE CORP.

Although statutory claims could presumably be ordered to arbitration after *Shearson* in 1987, it was generally assumed civil rights claims could not be arbitrated. The 1991 case of *Gilmer v. Interstate Johnson Lane Corp.*,¹⁵⁶ held that civil rights claims can be ordered to arbitration. The trial

¹⁵⁵ RAASCH Supra, FN 149.

¹⁵⁶ *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991). Plaintiff contended his ADEA claim was not subject to arbitration. However, the U.S. Supreme Court held that the securities agreement signed by plaintiff could subject plaintiff to compulsory arbitration. The Supreme Court held that age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application.

court in *Gilmer* denied arbitration based upon the *Alexander v. Gardner-Denver*¹⁵⁷ case decided by the U.S. Supreme Court some seventeen years earlier. The area of civil rights was thought to be different from other statutory claims prior to *Gilmer*. The *Gilmer* case eliminated some of the last bastions of resistance to arbitration in two areas: Civil rights and employment claims. Prior to *Gilmer* most courts treated employment claims as non-arbitrable due to the language of the Federal Arbitration Act. Following *Gilmer* a rise occurred in the number of arbitration clauses inserted in employment contracts. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), held employment contracts to be subject to the FAA.

In 1998, the U.S. Supreme Court held that a general arbitration clause in a collective bargaining agreement did not require a union member to

Arbitration of registered securities representative's age discrimination claim was not inadequate, despite representative's contention that arbitration procedures did not provide for broad equitable relief and class actions, inasmuch as arbitrators had power to fashion equitable relief.

Gilmer is bound by his agreement to arbitrate unless he can show an inherent conflict between arbitration and the ADEA's underlying purposes.

The unequal bargaining power between employers and employees is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.

“[B] y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

The burden is on *Gilmer* to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims.

¹⁵⁷ *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). Prior to *Gilmer*, this case was interpreted as prohibiting compulsory arbitration of civil rights claims.

arbitrate a disability claim.¹⁵⁸ The high court refused to compel an employee to forego litigation of an American with Disabilities Act claim as a result of being a union member.¹⁵⁹ *EEOC v. Waffle House*¹⁶⁰ allowed the EEOC to proceed outside arbitration, even though the employee of Waffle House was bound by the arbitration agreement. *Gilmer* served notice that there are no “sacred cows” in enforcement of arbitration agreements. Arbitration can be enforced under the FAA without contravening federal civil rights anti-discrimination policies or violating employees rights.¹⁶¹

HILL v. GATEWAY:

While attorneys and judges were still pondering the long reaching effects of *Gilmer*, a new case came along that opened a Pandora’s Box in this area of law. Federal courts ruled that parties may be held to binding arbitration agreements they have signed (*Southland v. Keating*) and

¹⁵⁸ *Wright v. Universal Marine Service Corp.*, 525 U.S. 70 (1998) Wright was a longshoreman and was a member of a union. Wright filed an action against Universal Marine when it refused to employ him after he settled a disability claim. The district court dismissed the case with prejudice because Wright failed to pursue arbitration under the collective bargaining agreement. The U.S. Supreme held that the collective bargaining agreement did not force Wright to arbitrate his ADA claim. The court held that “in order for a union to waive employee’s rights to a judicial forum for statutory claims, the agreement to arbitrate must clear and unmistakable.”

¹⁵⁹ *Id.*

¹⁶⁰ *EEOC v. Waffle House*, 534 U.S. 279 (2000) Employment agreement selecting arbitration as forum for resolution of disputes does not bar EEOC from pursuing victim – specific judicial relief based upon allegations of a violation of Americans with Disabilities Act. Binding arbitration agreement between employee and employer does not bind EEOC.

¹⁶¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) Arbitration agreements can be enforced under the FAA without contravening federal anti-discrimination policies. The 9th Circuit had held that all employment contracts are beyond the reach of the FAA. The U.S. Supreme Court held that only transportation workers are exempt from the FAA. There fore, employment agreements are subject to the FAA. Reversed and remanded with directions to compel arbitration.

arbitration agreements contained in contracts under which they sought relief (*Allied Bruce Terminex v. Dobson*), however, following *Hill v. Gateway*¹⁶² held that parties may also be ordered to specifically perform on arbitration agreements contained in shipping documents they have not signed.¹⁶³ In the *Hill v. Gateway* case, parties were held to have waived their right to litigate a warranty claim by presumed assent to an arbitration agreement contained in shrink wrap inside a shipping container.¹⁶⁴

Gateway did not receive acceptance in all federal courts. A Kansas federal court held that Gateway's shrink-wrap "documents in the box approach" was not part of the original agreement, but rather constituted additional terms to which the customer as a consumer had not consented.¹⁶⁵ Legal scholars have criticized the holding in *Hill v. Gateway* because it appears to allow businesses to hide arbitration agreements in a group of shrink wrap documents and force customers to search for the pre-dispute

¹⁶² *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Circ. 1997).

Circuit Judge Easterbrook's opinion in this case seemed to cross a mythical line for some consumer advocates. An arbitration agreement was sent in a set of packing documents inside a computer box, and was held to be binding upon the consumers who accepted the box and the documents and elected not to return the computer. According to the Gateway opinion, the failure to return the computer resulted in an acceptance of the terms contained in the box, including the arbitration agreement.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Klocek v. Gateway, Inc.*, 104 F.Supp. 2d 1332 (2000).

Klocek, a Missouri resident, purchased a Gateway computer. Inside the Gateway computer box was a copy of Gateway's "Standard Terms and Conditions Agreement." Although there was some disagreement between Gateway and Klocek over how he obtained the computer, when a dispute arose between Gateway and Klocek, Gateway endeavored to enforce the arbitration agreement. When Klocek filed suit against Gateway, Gateway moved the court to compel arbitration. The court found that Gateway's Standard Terms and Condition's Agreement were not part of the original transaction between Gateway and Klocek, but were additional terms as contemplated by the UCC. The Klocek court rejected the *Hill v. Gateway* shrink-wrap case logic and refused to dismiss the Klocek case.

waiver or suffer the consequences.¹⁶⁶ According to one scholar quoted in a newspaper article the Supreme Court rewrote the FAA “as a service to corporations that don’t like jury trials.”¹⁶⁷

Some plaintiff attorneys complain vigorously that the cost of arbitration is prohibitive for enforcement of rights, but this argument has not been sustained in any case, including *Hill v. Gateway*, where it was shown that the consumer would have to pay almost triple the amount of the product purchased in order to arbitrate a warranty claim.¹⁶⁸ However, the *Klocek* case examined the financial status of the consumer as opposed to the financial status of a business entity when dealing with arbitration agreements. *Klocek v. Gateway*,¹⁶⁹ held that a consumer could not be held subject to the same standards as a business.

In many regrets, the Seventh Circuit’s reasoning in *Hill v. Gateway* is difficult to understand. Judge Easterbrook cited insurance and other businesses that operate on the buy now, terms later plan, but he failed to explain Gateway’s limited return policy.¹⁷⁰ The Seventh Circuit assumed

¹⁶⁶ Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, FLA. BAR JOURNAL, November 1997.

¹⁶⁷ Reynolds Holding, *Private Justice: Millions are losing their Legal Rights*, SAN FRANCISCO CHRONICLE, October 7, 2001. The author quoted Professor Paul Harrington’s comment about the Supreme Court and the FAA.

¹⁶⁸ *Green Tree Financial v. Randolph*, 531 U.S. 79 (2000). The cost argument was made but the Supreme Court declined to respond to it because no proof of cost was contained in the record.

¹⁶⁹ *Klocek*. *Supra*, FN 165.

¹⁷⁰ *Id.* The court ruled that the Hills had thirty days from receipt of the computer to return the computer, but this ruling seems to be difficult to understand in light of Gateway’s return policy of thirty days from date

the Gateway return policy was valid for thirty days from the Hill's receipt of the computer, but Gateway's actual language limited the return period to thirty days from date of shipment. The "acceptance" period could vary from as much as three weeks under average shipping conditions, to an expired return policy upon arrival if a substantial delay occurred during shipping. The Hills could have been placed in the unique situation of returning a product under the return policy upon receipt, even though the return period on that product had expired before they gained possession of the computer or the arbitration agreement. How could a customer demand specific performance in arbitration under terms that had expired before the customer received the product?

Many of the criticisms of *Hill v. Gateway* focus on the Seventh Circuit's alleged accommodating attitude toward businesses at the expense of consumers.¹⁷¹ However, if the Gateway return policy on the computer had already expired when the Hills brought their claims in federal court, why would the result be unfair to Gateway or to the Hills?¹⁷² The court would simply be enforcing the terms of Gateway's return policy. A computer

of shipment. Under Judge Easterbrook's reasoning the Hills would have enjoyed thirty days in which to return the computer, but they may have received a computer that was out of warranty when it arrived.

¹⁷¹ Richard G. Kunkel, *Recent Developments in Shrink Wrap, Clickwrap and Browsewrap Licenses in The United States*, 9 MURDOCK UNIVERSITY JOURNAL OF LAW 3, 19 (2002).

¹⁷² See Gateway Service Plan, *Supra* FN 167. Reynolds Holding, *Private Justice: Millions are losing their Legal Rights*, SAN FRANCISCO CHRONICLE, October 7, 2001. The author quoted Professor Paul Harrington's comment about the Supreme Court and the FAA.

manufacturer, and likely other businesses as well, do not exist to accommodate customers at every turn to the detriment of their stockholders. Customers are free to “vote” for or against products with their ability to purchase from competitors that utilize less restrictive terms. The *Hill v. Gateway* case is but one case in a line of cases often cited by pro-consumer groups as indicative of the trampling of consumer rights by a judicial system, which favors business.¹⁷³ However, it is probably the best, or perhaps worst, example of a federal court enforcing an agreement for specific performance to arbitrate through presumptive assent and laches, while ignoring the equity Maxims of fairness that accompany specific performance.

DEFENSES TO BINDING PRE-DISPUTE ARBITRATION

AGREEMENTS:

There are two categories of defenses to arbitration: Pre-arbitration hearing defenses and post-arbitration hearing defenses. There are a number of defenses that have been successful in either stopping the arbitration process before it starts or setting aside the results. There have also been a

¹⁷³ Reynolds Holding, *Private Justice: Millions are Losing Their Legal Rights*, SAN FRANCISCO CHRONICLE, October 7, 2001. Quoting Montana Supreme Court Justice Terry Trieweiler, the article states “Mandatory arbitration allows corporations to undermine the whole system by which we hold them accountable. Every day it becomes more pervasive and more oppressive.” The author adds “A private brand of civil justice, one without laws or juries or constitutional rights, has swept quietly across the nation’s commercial landscapes, shielding corporations from costly verdicts, compromising judges and stripping the public of its right to a day in court.

number of defenses in both categories that have failed to either stop the process or overturn the arbitrator's award. In general, there are very few effective defenses to specific performance in arbitration that work consistently, either before or after the hearing.

Pre-hearing defenses that have worked successfully in some cases include the entire contract, *including* the arbitration clause was void ab initio.¹⁷⁴ The theory is that if there is no contract for arbitration from the outset, there can be no agreement to arbitrate. However, because courts now view the arbitration agreement as a separate contract under the separability doctrine, the effectiveness of this argument is limited to situations where both the container contract and the arbitration agreement were void from the outset. A closely related defense to “no contract” is “no arbitration clause” applicable to the party seeking to avoid the arbitration.¹⁷⁵ This defense has been used successfully when some of the parties agreed to arbitrate, while others did not agree to waive their litigation rights.

¹⁷⁴ National Auction Group, Inc. v. Hammett, Supreme Court of Alabama Case No. 1012145, January 31, 2003.

Homeowner purchased condominium at an auction. The homeowner's problems with the Auction Group could not be resolved, and the homeowner sued the Auction Group for fraud and negligence in the sale of the condominium. The Auction Group moved to compel arbitration via an arbitration agreement signed by condominium owner's association. The homeowner was not a signatory to that agreement and the court held the homeowner could not be bound by it.

¹⁷⁵ Johnson Mobile Homes v. Hathcock, Supreme Court of Alabama Case No. 1992310, February 21, 2003. This mobile home fraud, negligence and bad faith case was filed in a circuit court, which denied the seller's motion to compel arbitration. The Supreme Court of Alabama found no allegation of fraud against the arbitration clause, but an allegation of fraud in the procurement of the container contract. The seller was within its rights to compel arbitration against the buyer who signed the arbitration agreement. The co-purchaser who did not sign the arbitration agreement was not compelled to arbitrate. Fraud in the inducement of the container contract is arbitrable.

Arbitration agreements have also been set aside when they were unilaterally given by one party and there is no evidence the other party assented to arbitrate.¹⁷⁶ Fraud in the procurement of the contract as a whole will not render the contract non-arbitrable, but allegations of fraud in the procurement of the arbitration agreement must be litigated.¹⁷⁷ If the terms of the contract are unconscionable, the courts may deny a motion to compel specific performance of the arbitration agreement.¹⁷⁸ If the contract and arbitration rules in the arbitration clause result in a rigged process, the court may refuse to compel arbitration.¹⁷⁹

One of the oldest contract principles is a meeting of the minds. Mutual assent to terms is generally required to form a valid contract. This has been a well-understood principle of contract law for centuries. For a contract to be valid and enforceable there must be assent in writing, if significant amounts of money or property are involved. However, in recent arbitration cases

¹⁷⁶ *Bodie v. Bank of America*, 79 Cal. Rptr. 2d 273 (Cali. App. 1998) Credit card customers held not to consent to envelope stuffers containing arbitration agreement.

¹⁷⁷ *Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903 (1997). Court ruled that HMO patient detrimentally relied on HMO's arbitration agreement after HMO made misrepresentations about its arbitration process.

¹⁷⁸ *Sears Termite & Pest Control v. Robinson*, Supreme Court of Alabama Case No. 102034, May 23, 2003.

The trial court denied Sears motion to compel arbitration because the Sears contract limited the homeowner's damages in arbitration and was, therefore, unconscionable. The Alabama Supreme court held that limitation of damages language does not render an arbitration clause unenforceable. Although the homeowner contended that her signature on the first page of the contract was insufficient to bind her the arbitration clause printed in a different section of the contract, the court held the homeowner's signature on the contract was sufficient to bind her to all of its terms.

¹⁷⁹ *Hooters of America v. Phillips*, 173 F. 3d 933 (1999). Sexual harassment case against restaurant chain was not sent to arbitration because restaurant's procedure was biased in favor of restaurant.

mutual assent has been found in a variety of ways, and is not limited to the traditional views of mutual assent.

Some defenses to specific performance do not seem to work at all against arbitration, while others do not work well.¹⁸⁰ Courts do not provide protections for the unwary, but do attempt to enforce arbitration clauses to specifically perform in spite of legal contract defenses.¹⁸¹ Unconscionability and other fairness defenses to contracts are often difficult to prove.¹⁸² If the parties agree to arbitrate, they are likely to be held to their bargain.¹⁸³ Courts

¹⁸⁰ See HILL Supra, FN 153.

¹⁸¹ Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1040-1047 (1998) See FN 9.

¹⁸² Potts v. Baptist Health System, Inc., Supreme Court of Alabama Case No. 1011234, Dec. 20, 2002.

Nurse filed action against medical center for breach of contract, defamation, intentional infliction of emotional distress, invasion of privacy, and wrongful termination. Circuit Court, granted center's motion to compel arbitration. The Supreme Court, held that: (1) Federal Arbitration Act (FAA) preempted state statute prohibiting enforcement of agreement to submit controversy to arbitration, and (2) circumstances surrounding signing of arbitration agreement did not render agreement unconscionable.

Affirmed.

¹⁸³ Board of Ed. Of Berkeley County v. W. Harley Miller, Inc. 236 S.E.2d 439 (W.Va. 1977)

The Circuit Court refused to grant motion for summary judgment to enforce award of arbitrators, on ground it lacked jurisdiction, and certified jurisdictional question to the Supreme Court of Appeals. The Supreme Court of Appeals, held that: (1) where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract and where the parties bargained for the arbitration provision, arbitration is mandatory and specifically enforceable on motion for summary judgment, and any causes of action arising under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award; (2) arbitration agreement is not "bargained for," so as to be binding and specifically enforceable, in the contract of adhesion situation, or where a party can bring arbitration clause within the unconscionability provisions of the Uniform Commercial Code, or where arbitration is wholly inappropriate given the nature of the contract and could only have been intended to defeat just claims, and (3) arbitration provision in contract between board of education and contractor for excavation and removal of rock was specifically enforceable despite contention of board that law of arbitration in West Virginia at time it entered into the contract was such as to make the whole procedure of arbitration a nullity. This is the infamous "rabbits", and "wolves" case, where the Supreme Court of Appeals used an animal analogy to support its reasoning in the opinion. "Wolves" vote with "wolves" and "rabbits" vote with "rabbits", but the other animals must be analyzed as to their relationship.

One might conclude that squirrels look like rabbits, wolves look like foxes, and elephants ought surely to be impartial.

can ill afford to spend the time necessary to craft individual relief for each aggrieved party in a contract. The theory of specific performance in arbitration has been appealing to modern judges who are overworked, but at least in some measure it should appeal to litigants who must wait years in the long lines at the courthouse to obtain justice.¹⁸⁴

If a party states they failed to read the contractual terms prior to signing, their inattention does not provide a sufficient ground for setting aside an agreement to arbitrate.¹⁸⁵ Lack of consideration for the arbitration clause is usually a losing defense, because most courts have gone out of their way to find implied consideration to support the agreement to arbitrate.¹⁸⁶

The contracts of adhesion defense does not work unless there is

As soon as the law attempts to incorporate protections for the unwary in the law of arbitration, then the entire purpose of arbitration is defeated. In the hypothetical above, this is the case where the rabbits plead “wolfery” and demand a hearing with full-blown court proceedings, thus avoiding speedy, economical, conflict resolution.

¹⁸⁴ See HAAGEN, *Supra*, FN 181.

¹⁸⁵ *Tindler v. Pinkerton Security*, 305 f. 728 (2002)

Title VII, Employer moved to stay trial proceedings and compel arbitration of dispute. Employee’s affidavit that she never saw brochure introducing binding arbitration program did not raise triable issue of fact as to existence of agreement to arbitrate that would preclude compelled arbitration.

Employer’s promise to continue employing an at-will employee could constitute consideration for an employee’s promise to forego certain rights.

¹⁸⁶ *RAASCH v. NCR Corporation*, 254 F.Supp.2d 847 (2003)

On employer’s motion to dismiss action and compel arbitration, the District Court, held that: (1) arbitration agreement between the parties was not invalid for lack of mutuality of obligations; (2) fee-splitting provision in arbitration agreement, which required employee to pay upfront half the costs of arbitration of disputes with employer, was not unconscionable under Ohio law; (3) employer’s promise to continue employing at-will employee, and its promise to be bound by terms of arbitration agreement, in return for employee’s consideration for agreement; (4) employee’s act of continuing to work for employer after employer stated that his doing so would constitute acceptance of arbitration agreement, demonstrated employee’s assent to, or acceptance of, terms, and thus agreement was not invalid or revocable for lack of acceptance; and (5) arbitration agreement was not invalid contract of adhesion.

The Supreme Court has made it clear that as long as an arbitral forum is provided for vindicating statutory rights, there is no moment that the right to vindicate same in a court has been denied.

Defendant’s Motion to Dismiss and Compel Arbitration. SUSTAINED.

accompanying unconscionability.¹⁸⁷ The reasonable expectations of the parties has worked in some cases, but not in others to set aside the agreement to arbitrate.¹⁸⁸ Lack of assent often fails to set aside an agreement to arbitrate, because courts usually find assent by the parties' actions.¹⁸⁹

Post-Hearing defenses are even more limited than pre-hearing defenses. The Federal Arbitration Act provides four grounds upon which an arbitrator's award may be vacated by a court.¹⁹⁰ The grounds are as follows:

1. The award was procured by corruption, fraud or undue means.
2. Where there was evident partiality or conduct in the arbitrators.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the arbitration hearing, or refusing to hear material evidence at the hearing or other violations of parties' rights.

¹⁸⁷ *Torrance v. Aames Funding Corporation*, 242f.Supp.2d 862 (2002)

Limitation on damages for UTPA claim would be unconscionable; confidentiality clause would be unconscionable; arbitration agreement would be unconscionable due to requirement that mortgagors pay arbitrator fees; and unconscionable provisions were nonseverable from arbitration agreement.

Defendant argues that the limitation on damages is enforceable because it applies to both parties. Requiring payment of arbitrator's fees, as opposed to reasonable costs, is not permitted as a condition of arbitration. Although the Agreement to Arbitrate permits plaintiffs to recoup those fees should they prevail, those fees should not be borne by plaintiffs even if they lose, just as a party is not required to pay for the services of the judge regardless of the outcome in court.

¹⁸⁸ *Broemmer v. Aborting Services of Phoenix*, LTD 840 P. 2d 1013 (1992).

¹⁸⁹ *Lewis Tree Service, Inc. v. Lucent Technologies Inc.*, 239 F.Supp.2d 332 (2002)

On defendant's motion to compel arbitration with one purchaser, the District Court, held that: (1) arbitration clause in purchase agreement between sellers and purchaser was enforceable with respect to purchaser's claim under the New Jersey Consumer Fraud Act (NJCFRA); (2) arbitration clause was enforceable with respect to all remaining claims, absent showing that purchaser signed agreement under circumstances creating unenforceable contract of adhesion; and (3) where all of the purchaser's claims were arbitrable, dismissal of its action, rather than stay, was warranted.

Motion granted.

Because Ironman has not demonstrated that the Purchase Agreement was signed under circumstances creating an unenforceable contract of adhesion, the provision requiring all of Ironman's claims to be arbitrated is enforceable.

¹⁹⁰ 9 U.S.C. 10

4. Where the arbitrators exceeded their powers.

An arbitration award may be modified on the following grounds:¹⁹¹

1. Evident mistake in the description of anything referred to in the award including a material miscalculation of figures.
2. The arbitrators ruled on a matter not submitted to them.
3. The award is imperfect and does not address the merits of the controversy.

The essence of these defenses is that unless the award is either illegal or the arbitrators engaged in misconduct the award will be affirmed. Charges of the award is not fair, the award is not well reasoned or the award contains a few minor errors are all insufficient grounds upon which to set aside an award. Arbitrators are not required to follow the letter of law in crafting their awards.¹⁹² They are not required to be logical or fair.¹⁹³

One post-award defense finding a good home in some states is the manifest disregard of the law as a ground for vacating an arbitral award.¹⁹⁴ A decision made by arbitrators who ignored the law can result in an award that harms the parties' rights, rather than protecting those rights. Although the Federal Arbitration Act does not specifically list manifest disregard of the

¹⁹¹ 9 U.S.C. 11

¹⁹² Greenberg v. Bear, Sterns & Co., 220 F.3d 22 (2000).

¹⁹³ Id.

¹⁹⁴ Montes v. Shearson Lechman Brothers, 128 F.3d 1456 (11th Cir. 1997) Arbitrator was urged by one party to disregard the law.

law as a ground for vacatur, it does hint at the idea in the first ground under undue means.¹⁹⁵ Federal courts have allowed this ground, but have limited the use of this defense.¹⁹⁶

Arbitrator bias has shown some promise as a post-hearing defense.

Alabama courts use a reasonable impression of partiality standard to review awards for bias by the arbitrators.¹⁹⁷ However, courts are only willing to set aside awards for partiality of the arbitrators when the facts make that partiality clear.¹⁹⁸ Arbitrators are required to disclose prior conflicts of interest.¹⁹⁹ Courts avoid creating protections for the unwary and finding bias

¹⁹⁵ 9 U.S.C. 10

¹⁹⁶ John W. Hinchey and Thomas Burch, *Georgia Adopts "Manifest Disregard" as a Ground for Vacating Arbitration Awards*, 9 GA. Bar JOURNAL 11, 14, 16 (February 2004). Georgia became the first state to statutorily adopt manifest disregard of law standard for vacatur of arbitration awards. However, federal courts have placed restrictions on the use of this defense and cases where manifest disregard is alleged may require significant proof the arbitrator knew the law and ignored it.

¹⁹⁷ *Waverlee Homes v. McMichael*, Supreme Court of Alabama Case No. 1010966, February 14, 2003.

Mobile home buyers signed arbitration agreement with mobile home seller. Mobile home buyers brought action against seller for fraud. Trial court ordered the case to arbitration, and the arbitrator entered an award in favor of buyers. The trial court entered the arbitrator's award as the judgment in the case and denied seller's motion to set aside the award on ground of bias of the arbitrator. There was evidence that the arbitrator had been co-counsel with buyer's attorney on a prior case and had made similar rulings in favor of the clients of the former co-counsel in other cases. The Supreme Court held this evidence was sufficient to support an inference of bias and that the trial court should have used reasonable impression of partiality standard on review of the award. The Supreme Court reversed and remanded with directions.

¹⁹⁸ *Forsy International v. Gibbs Oil Company*, 915 F. Supp. 2d 1017 (1990)

If an arbitrator's decision rests on an adequate basis, the failure of the arbitrator to address all the issues raised does not render the arbitration fundamentally unfair. The arbitrator is not bound to hear all of the evidence tendered by the parties before rendering award. The grounds for vacatur are narrow.

¹⁹⁹ *Refining ad Marketing Company v. Stratheros Shipping of Monrovia*, 761 F. Supp. 293 (1991)

Arbitrators must make full disclosure of possible conflicts of interest. A party asserting evident partiality by an arbitrator has the burden of showing that a reasonable person would conclude the arbitrator was biased to one party.

Crow Construction Company v. Jeffrey Brown Assoc., 2003 WL 21221021 (ED. Pa)

Appearance of bias rather than actual bias is the standard to be applied to vacating an award based upon alleged bias of the arbitrator. Arbitrator failed to disclose prior contact with one of the parties and appearance of bias was found.

in every practice by arbitrators.²⁰⁰ California has recently enacted requirements that arbitrators disclose their prior dealings with either party to an arbitration.²⁰¹

Many lawyers assert the defense of unconscionable contract in response to contracts of adhesion. However, all contracts of adhesion are not unconscionable, but to be deemed unconscionable the contract must contain elements of harshness and oppression or inadequate consideration.²⁰² The uniform commercial code recognizes two types of unconscionability in UCC 2-302.²⁰³ The two types listed in the UCC are procedural unconscionability

²⁰⁰ Board of Ed. Of Berkeley County v. W. Harley Miller, Inc., 236 S.E.2d 439 (W.Va. 1977)

The Circuit Court refused to grant motion for summary judgment to enforce award of arbitrators, on ground it lacked jurisdiction, and certified jurisdictional question to the Supreme Court of Appeals. The Supreme Court of Appeals, held that: (1) where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract and where the parties bargained for the arbitration provision, arbitration is mandatory and specifically enforceable on motion for summary judgment, and any causes of action arising under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award; (2) arbitration agreement is not “bargained for,” so as to be binding and specifically enforceable, in the contract of adhesion situation, or where a party can bring arbitration clause within the unconscionability provisions of the Uniform Commercial Code, or where arbitration is wholly inappropriate given the nature of the contract and could only have been intended to defeat just claims, and (3) arbitration provision in contract between board of education and contractor for excavation and removal of rock was specifically enforceable despite contention of board that law of arbitration in West Virginia at time it entered into the contract was such as to make the whole procedure of arbitration a nullity. This is the infamous “rabbits”, and “wolves” case, where the Supreme Court of Appeals used an animal analogy to support its reasoning in the opinion. “Wolves” vote with “wolves” and “rabbits” vote with rabbits, but the other animals must be analyzed as to their relationship.

One might conclude that squirrels look like rabbits, wolves look like foxes, and elephants ought surely to be impartial.

As soon as the law attempts to incorporate protections for the unwary in the law of arbitration, then the entire purpose of arbitration is defeated. In the hypothetical above, this is the case where the rabbits plead “wolfery” and demand a hearing with full-blown court proceedings, thus avoiding speedy, economical, conflict resolution.

²⁰¹ Cal. Civil Proc. Code 1281.9 requires arbitrators to disclose the arbitrator’s experience over the past five years including parties’ names and damages awarded.

²⁰² Arthur L. Corbin, *Corbin on Contracts*, WEST PUBLISHING, St. Paul (1952)

²⁰³ Joseph D. Calamari and Joseph M. Perrillo, *Contracts*, WEST GROUP, St. Paul (1999), p 330, 331

and substantive unconscionability.²⁰⁴ Procedural unconscionability is described as unfair surprise, where reasonable people would not expect to find unfair terms in the fine print.²⁰⁵ The second type of unconscionability is described as oppression or a contract being unfairly balanced toward one side.²⁰⁶ The case of *Broemer v. Abortion Service of Phoenix*²⁰⁷ would be an example of procedural unconscionability, whereas the *Hooters v. Phillips*²⁰⁸ case would be an example of substantive unconscionability. There is a third type of unconscionability which can be drawn from case law, and that is an agreement that contains both surprise and oppression.²⁰⁹ Such a case might be *Engalla v. Permanente*,²¹⁰ here both the procedural and substantive elements of unconscionability are combined in one case. The plaintiff alleged fraud, an unfair process and a rigged process to guarantee abnormal delays. Engalla's Kaiser HMO required him to abide by an arbitration agreement when he disputed Kaiser's handling of his cancer treatment. The Kaiser contract contained numerous procedural "hoops", but the purpose of these "hoops" appeared to be delay. Kaiser's contract was so heavily

²⁰⁴ Id. at 331.

²⁰⁵ Id.

²⁰⁶ Id.

²⁰⁷ *Broemer v. Abortion Services of Phoenix*, 840, p. 2d 1013 (1992)

²⁰⁸ *Hooters of America v. Phillips*, 173 F. 3d 933 (1999)

²⁰⁹ See *Calmar & Perillo*, *Supra*, FN 203.

²¹⁰ *Engalla v. Permanente Medical Group*, 938 p. 2d 903 (1997)

weighed in favor of the HMO, Engalla died while endeavoring to comply with Kaiser's procedures.

In order for the defense of fraud to work, it must be asserted against the making of the arbitration agreement, and not merely the container contract. The *Engalla v. Permanente*²¹¹ court also set aside the arbitration agreement on the basis of fraud. Not only did the defendant in *Engalla* attempt to hold the plaintiff to an unconscionable contract, the court held the defendant fraudulently represented the terms of the contract regarding the arbitration clause.²¹² The defendant's self-administered arbitration process rigged the process in favor of the defendant.²¹³ Therefore, if an arbitration plaintiff can prove the defendant defrauded the plaintiff in the formation of the agreement by misrepresenting the facts or in the process by placing the plaintiff at a disadvantage, the plaintiff has a decent chance of setting aside the arbitration agreement.

The defense of concealment is the sin of knowing omission rather than commission. Rather than actively misrepresenting a major point upon which the aggrieved party detrimentally relied, concealment involves leaving out

²¹¹ Id.

²¹² Id.

²¹³ Id.

pertinent facts which should have been disclosed. If too many facts are omitted, then the contract to arbitrate may not be valid and enforceable.²¹⁴

One-sided obligations in contract language are the basis for the defense of inadequacy of consideration. If the parties do not agree to mutually resolve their disputes through the arbitration process, and one side is free to pursue litigation, the arbitration clause will likely fail due to inadequacy of consideration.²¹⁵ In such circumstances, consideration will not be implied from the conduct of the parties.

Although laches has proven to be a good defense to the specific enforcement of “stale” contracts, it has not gained wide acceptance in the field of arbitration law. Parties have been able to exercise their rights to demand arbitration in the middle of litigation, regardless of the laches defense. Laches was actually used against the plaintiff in the *Hill Gateway* case.²¹⁶

CREATIVE STATE LAW DEFENSES TO PRE-DISPUTE

ARBITRATION AGREEMENTS:

Alabama provides the best example for creative state law defenses to pre-dispute arbitration agreements mandating specific performance.

²¹⁴ *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464 (S.D.N.Y. 1983).

²¹⁵ *Gibson v. Neighborhood Health Clinics, Inc.* 121 F3d 1126 (1997).

²¹⁶ See *Hill*, *Supra*, FN 153.

Alabama Code Section 8-1-41(3) forbids specific performance of pre-dispute arbitration clauses in Alabama contracts. Thus, Alabama’s public policy is anti-pre-dispute arbitration. Prior to *Terminex*,²¹⁷ the courts in Alabama understood that interstate contracts were subject to the mandates of the FAA.²¹⁸ Alabama’s Supreme Court used a much narrower interpretation than the federal courts of the phrase “a contract evidencing a transaction involving commerce.”²¹⁹ In Alabama, “involving commerce” meant having a substantial impact on interstate commerce.²²⁰ The Alabama public policy against specific performance of pre-dispute arbitration clauses was not effectively eradicated by the United States Supreme Court decision in *Terminex*.²²¹ The Alabama Supreme Court continued to look for a way to revive the limitations of Ala. Code 8-1-41 (3) and five years post-*Terminex* they discovered it. In 2000, the Alabama Supreme Court examined the United States Supreme Court holding in *United States v. Lopez*,²²² a criminal

²¹⁷ *Terminex*, Supra FN 116.

²¹⁸ *Old Republic Ins. Co. v. Lanier*, 644 So. 2d 1258 (Ala. 1994)

²¹⁹ *Terminex*, Supra FN 116.

²²⁰ *Allied Bruce Terminex v. Dobson*, 628 So. 2d 354 (Ala. 1994)

²²¹ *Terminex*, Supra, FN 116.

²²² *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995).

This criminal case actually had an impact on Alabama arbitration cases. The Supreme Court held that the Commerce Clause is not without limitations, and that making it a federal crime to possess a firearm in a local gun free school zone under the Gun-Free School Zone Act exceeded Congress’ Commerce Clause authority. The language used in the opinion indicated the test for determining whether an activity falls under Congress’ power to regulate commerce is whether the activity substantially affects commerce. The Supreme Court of Alabama used the language in *Lopez* to construct a prong test in *Sisters of the Visitation v. Cochran Plastering Company*, 775 So.2d 759 2000. The U.S. Supreme Court in *Citizen’s Bank v. ALAFABCO*, 539 U.S. 52, 123 S.Ct. 2037 (2003), specifically disapproved of the

case, and used the certain parts of *Lopez* to craft a five-prong test for specific performance of arbitration in Alabama. The Alabama Supreme Court opinion in *Sisters of the Visitation v. Cochran Plastering Co.*²²³ represented a high water mark for creativeness by Alabama's highest court.

The Alabama Supreme Court used *Lopez* language about the Commerce Clause as a springboard, but used its own narrow definition of interstate commerce to create its test.²²⁴ The *Sisters of the Visitation* opinion was an immediate success in Alabama, because it revived Alabama's comatose public policy against pre-dispute arbitration agreements. Cases which could overcome the five-prong test hurdle, were ordered to arbitration under the

Alabama Supreme Court's use of *Lopez* to construct the Sister's tests, calling the Alabama Court's efforts "misguided."

²²³ *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (2000). A Mobile, Alabama, monastery engaged a Mobile plastering company to perform repairs on the wall and ceiling of the monastery's chapel. The repair work did not go as anticipated and allegedly resulted in damage to the ceiling's decorative paintings. The monastery demanded arbitration under its contract with Cochran, and Cochran sued the monastery for an injunction to stop the arbitration. The United States Supreme Court in the United States v. *Lopez*, (see previous footnote) ruled that Congress' commerce power was not unlimited. The Alabama used that case to develop a five prong test to determine whether a set of case facts have a substantial impact on interstate commerce. The tests were:

1. Citizenship of Parties;
2. Tools and equipment used on the project;
3. Allocation of costs and materials;
4. Subsequent movement across state lines; and
5. Degree of separability from other contracts.

The Alabama court found the parties were citizens of Alabama, no substantial effect on interstate commerce resulted from the purchase and use of the tools and equipment by Cochran, no out of state workers or materials were used by Cochran, nothing subsequently moved across state lines because the work site was fixed in Alabama, and the monastery's other contracts with out of state residents were separable from the contract with Cochran. For those reasons, the Alabama Supreme Court elected to enforce Ala. Code 8-1-41(3) and prohibit enforcement of the arbitration agreement. This case created two streams of cases in Alabama. One stream affirmed arbitration under the FAA, and the other stream denied arbitration under Ala. Code 8-1-41(3). The Sisters five-prong test was used to determine whether the case was arbitrated or litigated. In the summer of 2003, the U.S. Supreme Court struck down the Sisters five prong test in *Citizen's Bank v. Alafabco*, 123 S.ct. 2037 (2003).

²²⁴ *Id.*

authority of the Federal Arbitration Act, while the cases which failed the five-prong hurdle test, remained in litigation under Ala. Code 8-1-41(3).²²⁵

Sisters created two streams of Alabama arbitration cases: one stream allegedly involved strictly state law matters that did not “substantially” impact interstate commerce and were governed by Ala. Code 8-1-41(3) while the other stream involved cases with significant interstate commerce contracts that “affected” commerce, were governed by the FAA and were ordered to arbitration.²²⁶ Alabama plaintiffs who could demonstrate that all five hurdles were not met were allowed to litigate. Defendants who could get over all five hurdles imposed by *Sisters of the Visitation* were allowed to obtain an order for specific performance of arbitration.

There is a long list of cases on both sides of the *Sisters* opinion, but a few are included in this article to demonstrate how the Alabama courts used their own interpretation of “affecting” commerce. The Alabama case of *Huntsville Utilities v. Consolidated Construction Company*²²⁷ resulted in a

²²⁵ Id.

²²⁶ Id.

²²⁷ *Huntsville Utilities v. Consolidated Construction Company*, Supreme Court of Alabama, May 23, 2003.

A Delaware general contractor subcontracted a roofing project in Huntsville, Alabama to a Tennessee contractor doing business in Alabama. The Tennessee contractor subcontracted the work to an Alabama contractor. Huntsville Utilities was sued by the general contractor for non-payment, negligence, fraud and a variety of other allegations. Huntsville Utilities moved to compel arbitration. The trial court denied the motion holding only Alabama transactions were involved. The Supreme Court of Alabama affirmed using the prong test set out in *Sisters of the Visitation v. Cochran Plastering Company*, 775 So. 2d 759 (2000). Justice See dissented, and the language of his dissent in this case bears a close resemblance to the opinion of the United States Supreme Court in *Citizens Bank v. ALAFABCO*, 123 S.Ct. 2037 (2003). Justice See opined that the Alabama Supreme Court erred in the

denial of arbitration, while the Alabama case of *Parkway Dodge v. Hawkins*²²⁸ resulted in an order to arbitrate. In some instances, the five-prong hurdle test was not applied due to the nature of the case. For example, *Health Insurance Corporation of Alabama v. Smith*²²⁹ by-passed the *Sisters* prong test because an insurance policy issued in another state obviously passed over all the hurdles and involved interstate commerce. *Sears Termite & Pest Control v. Robinson*²³⁰ avoided the *Sisters* test, because it was decided by declaring the contract unconscionable based upon a limitation of damages clause. *National Auction Group, Inc. v. Hammett*²³¹ was decided by

Sisters opinion by imposing a narrow view of involving interstate commerce contrary to the broader view of affecting commerce set forth in *Allied Bruce Terminex v. Dobson* 513 U.S. 265 (1995). This case was effectively overturned by *ALAFABCO* which overturned *Sisters*.

²²⁸ *Parkway Dodge v. Hawkins*, Supreme Court of Alabama Case No. 1010898, February 7, 2003.

Car buyer brought action against car dealer for suppression and misrepresentation regarding sales transaction containing arbitration agreement, credit life insurance and a service contract. The car dealer moved to compel arbitration and the trial court granted the motion. Supreme Court held that car buyers purchase of out of state insurance and a service contract with an out of state company were sufficient interstate commerce contracts under the FAA. The arbitration agreement arose from the same transaction and could not be treated as a separate contract involving only Alabama law.

²²⁹ *Health Insurance Corporation of Alabama v. Smith*, Supreme Court of Alabama Case No. 1010570, April 11, 2003.

Reversing the trial court's denial of motion to compel arbitration of a fraud action based on insurance policies, the Alabama Supreme Court held that the sale of insurance policies substantially affects interstate commerce. The court held that a pre-dispute arbitration agreement in an insurance policy is enforceable under the FAA even though the policy holders purchased the policies from an in-state insurance agency. The policies were issued in Washington and mailed to the Alabama policy-holders. This opinion by Justice See marked a departure for the Alabama Supreme Court from the analysis previously used in *Sisters of the Visitation v. Cochran Plastering Company* 775 So. 2d 759 (2000).

²³⁰ *Sears Termite & Pest Control v. Robinson*, Supreme Court of Alabama Case No. 102034, May 23, 2003.

The trial court denied Sears motion to compel arbitration because the Sears contract limited the homeowner's damages in arbitration and was, therefore, unconscionable. The Alabama Supreme court held that limitation of damages language does not render an arbitration clause unenforceable. Although the homeowner contended that her signature on the first page of the contract was insufficient to bind her the arbitration clause printed in a different section of the contract, the court held the homeowner's signature on the contract was sufficient to bind her to all of its terms.

²³¹ *National Auction Group, Inc. v. Hammett*, Supreme Court of Alabama Case No. 1012145, January 31, 2003.

ordinary contract law (privity) and it was not necessary to apply the *Sisters* prong test. *McDonald v. H & S Homes, LLC and Olympia*²³² turned on the trial court's substitution of AAA rules for the agreed upon rules in the parties contract. Some Alabama cases that had been ordered to arbitration were later set-aside on grounds of bias of the arbitrators,²³³ while other Alabama opinions clarified trial court orders that were somewhat ambiguous.²³⁴

Homeowner purchased condominium at an auction. The homeowner's problems with the Auction Group could not be resolved, and the homeowner sued the Auction Group for fraud and negligence in the sale of the condominium. The Auction Group moved to compel arbitration via an arbitration agreement signed by condominium owner's association. The homeowner was not a signatory to that agreement and the court held the homeowner could not be bound by it.

²³² *McDonald v. H & S Homes, LLC and Olympia*, Supreme Court of Alabama Case No. 1011805, January 10, 2003.

Manufactured home buyer sued manufactured home seller and its general manager for misrepresentation, negligence and conversion. The language of the retail installment contract signed at time of sale required arbitration, and that arbitrator(s) be selected by the assignee of retail installment contract with consent of buyer. The trial court ordered arbitration, but also ordered the arbitrator(s) be selected jointly by buyer and seller using the rules of the American Arbitration Association. The Supreme Court held that arbitration was proper, but the trial court's order as to the manner in which the selection of arbitrator(s) took place was inconsistent with terms of the arbitration agreement. The case was remanded with instructions.

²³³ *Waverlee Homes v. McMichael*, Supreme Court of Alabama Case No. 1010966, February 14, 2003.

Mobile home buyers signed arbitration agreement with mobile home seller. Mobile home buyers brought action against seller for fraud. Trial court ordered the case to arbitration, and the arbitrator entered an award in favor of buyers. The trial court entered the arbitrator's award as the judgment in the case and denied seller's motion to set aside the award on ground of bias of the arbitrator. There was evidence that the arbitrator had been co-counsel with buyer's attorney on a prior case and had made similar rulings in favor of the clients of the former co-counsel in other cases. The Supreme Court held this evidence was sufficient to support an inference of bias and that the trial court should have used reasonable impression of partiality standard on review of the award. The Supreme Court reversed and remanded with directions.

²³⁴ *Cavalier Manufacturing v. Clarke, et. al.*, Supreme Court of Alabama Case No. 1011012, 1011014, 1011106, April 25, 2003.

Mobile home buyers brought actions against dealers and manufacturer in negligence, intentional misrepresentation and breach of warranty. The parties were ordered by the circuit court to arbitrate and the dealers and manufacturer appealed contending the trial court ordered arbitration under the wrong agreement. In essence, the defendants sought to have the arbitration conducted under the contract which contained more limited damages than the other contracts. In a per curium decision, the Alabama Supreme Court affirmed the trial court's order as to all but one defendant, and directed the trial court to order arbitration with that defendant under the contract applicable to it. In affirming the trial court, the Alabama Supreme Court held that when defendants prepare and execute multiple contracts with a

Occasionally, the Alabama Supreme Court remanded cases back to a circuit court to determine whether there was an agreement to arbitrate.²³⁵

The Supreme Court of Alabama occasionally used the separability doctrine to decide a case, and compelled the parties to arbitrate because an allegation of fraud in the inducement was not against the arbitration agreement, but against the contract as a whole.²³⁶ The Alabama Supreme Court held that intentional torts fall outside the commerce clause in *Ex Parte Webb*²³⁷ and should not be ordered to arbitration. The Alabama court revisited *Terminix*

consumer and those contracts contain ambiguities, the ambiguities will be construed against the defendants. In this case, all of the contracts contained arbitration clauses, but some were more favorable to the defendants.

²³⁵ Mountain Heating and Cooling v. Van Tassel-Proctor Inc., Supreme Court of Alabama Case No. 1011835, May 2, 2003.

The Supreme Court of Alabama reversed and remanded this case to the circuit court to determine whether language in the contract between a subcontractor and contractor formed an agreement to arbitrate. The arbitration clause stated the parties agreed to “settle” their disputes through arbitration. The Alabama Supreme Court held that the words “settle” and “arbitrate” are contradictory terms, and the case was remanded to the circuit court for a jury trial on whether the parties intended to arbitrate. The court of Civil Appeals affirmed the trial court in Mountain Heating and Cooling v. Van Tassel-Proctor, Alabama Court of Civil Appeals case No. 201 0333, June 14, 2002, and held that “settled by arbitration” was an agreement to arbitrate. Justice Yates dissent in that opinion formed the basis of the per curium opinion in the Alabama Supreme Court case. Justice See dissented with the per curium opinion pointing out that the word “settle” instead of the word “resolve” should not render the arbitration agreement ambiguous, because the word “settle” does not create doubt as to the parties’ intentions.

²³⁶ Johnson Mobile Homes v. Hathcock, Supreme Court of Alabama Case No. 1992310, February 21, 2003.

This mobile home fraud, negligence and bad faith case was filed in a circuit court which denied the seller’s motion to compel arbitration. The Supreme Court of Alabama found no allegation of fraud against the arbitration clause, but an allegation of fraud in the procurement of the container contract. The seller was within its rights to compel arbitration against the buyer who signed the arbitration agreement. The co-purchaser who did not sign the arbitration agreement was not compelled to arbitrate. Fraud in the inducement of the container contract is arbitrable.

²³⁷ Ex Parte Webb, Supreme Court of Alabama Case No 1000651, February 21, 2003

The Supreme Court of Alabama reversed the trial courts grant of arbitration for this intentional tort case, holding that intentional torts are not contemplated within the Commerce Clause. Justice See dissented based upon the intentional tort at issue arising from an employment situation covered by an employment agreement containing an arbitration clause. This case would probably be reversed under current law due to Citizens Bank v. ALAFABCO 123 S.Ct. 2037 (2003).

in *Orkin Exterminating Co. Inc. v. Larkin*²³⁸ but held that the arbitration agreement did not cover claims that pre-existed the agreement. The Alabama Supreme Court also held that tort claims falling outside the contract agreement are not arbitrable.²³⁹

One of the more interesting issues dealt with by the Alabama Supreme Court was reported in *Cook's Pest Control v. Rebar*.²⁴⁰ The homeowners in

²³⁸ *Orkin Exterminating Co., Inc. v. Larkin*, Supreme Court of Alabama Case No. 1012181, March 7, 2003.

The facts in this case are remarkably similar to the facts in *Allied Bruce Terminex v. Dobson* 513 U.S. 265 (1995), except that in *Terminex* the controversy arose after the agreement was in effect, and in this case the controversy arose before the termite agreement was in effect. The Alabama Supreme Court held that contract principles governed, and pre-dispute arbitration agreements could not govern matters arising before the pre-dispute arbitration agreement became effective. The controversy centered around a wood inspection report by Orkin that was prepared prior to the Larkin's assuming an existing termite agreement. In *Terminex*, the problem arose after Dobson assumed the termite agreement with Terminex. This case is questionable law due to its interpretation of pre-contract related issues as separate transactions.

²³⁹ *Lee L. Saad Construction Company, Inc. v. DPF Architects, P.C.*, Court of Alabama Case No. 1010505. Nov. 27, 2002.

Contractor filed action against architects, structural engineers, and electrical engineers, alleging breach of contract, misrepresentation, negligence, and intentional interference with a contractual relationship. Circuit Court, granted summary judgment for defendants. The Supreme Court, held that (1) contractor's tort claims were not within scope of submission to arbitration in dispute with project owner and thus res judicata did not bar contractor from asserting those claims; (2) arbitrator did not actually decide that defendants were not responsible for wrongful acts that contractor alleged and thus collateral estoppel did not apply; (3) doctrine of satisfaction of judgment, based on arbitration award, did not bar claims; and (4) structural engineer's affidavit addressing merits of claims shifted burden to contractor for producing evidence in support of its claims.

Tort claims were not within scope of submission to **arbitration** in dispute, and thus res judicata did not bar contractor from asserting those claims in subsequent action. **Arbitration** clause was unambiguously limited to matters concerning interpretation of contract of breach of contract.

²⁴⁰ *Cook's Pest Control, Inc. v. Rebar*, Supreme Court of Alabama Case No. 1010897, Dec. 13, 2002.

Home owners brought action against pest control for company's alleged failure to treat and control termite infestation and repair damage. Company brought motion to compel arbitration, and the Circuit Court, denied the motion. The Supreme Court, held that: (1) home owners were not attempting unilaterally to modify an existing contract when they submitted addendum along with contract renewal fee which eliminated company's right to arbitrate disputes; (2) company's continued service and treatment and acceptance of renewal fee constituted an acceptance of the addendum; and (3) agency principles did not preclude company's adoption of the addendum.

Affirmed.

that case sent an envelope stuffer to the pest control company containing an addendum, which allegedly relieved them from a duty to arbitrate their claims under the contract. The trial court upheld the validity of the homeowner's addendum and the Alabama Supreme Court affirmed.²⁴¹ The Alabama court reasoned that if businesses can impose a duty to arbitrate through a unilateral change in terms, a customer should be allowed to modify the contract in the same way.

Although the Alabama court continued to rule on exceptional cases such as the ones cited in the previous paragraphs on a case-by-case basis, the *Sisters* five prong hurdle test was utilized to decide cases involving regular in-state contracts containing a pre-dispute arbitration clause.²⁴² The *Sisters*

Pest control company's continued service was an acceptance of modifications to that agreement which home owners' proposed through addendum which differed materially from those proposed by company in its renewal offer. Company did not make counter-offer to the proposed addendum.

²⁴¹ Id.

²⁴² For cases affirming the FAA's mandate to arbitrate and passing the *Sisters* five prong hurdle test see the following:

Health Insurance Corporation of Alabama v. Smith, Supreme Court of Alabama Case No. 1010570, April 11, 2003.

Reversing the trial court's denial of motion to compel arbitration of a fraud action based on insurance policies, the Alabama Supreme Court held that the sale of insurance policies substantially affects interstate commerce. The court held that a pre-dispute arbitration agreement in an insurance policy is enforceable under the FAA even though the policy holders purchased the policies from an in-state insurance agency. The policies were issued in Washington and mailed to the Alabama policy-holders. This opinion by Justice See marked a departure for the Alabama Supreme Court from the analysis previously used in *Sisters of the Visitation v. Cochran Plastering Company* 775 So. 2d 759 (2000).

McGuffey Health and Rehabilitation Center v. Gibson and Jackson, Alabama Supreme Court Case 1020289, May 9, 2003.

Justice Houston's majority opinion continued the current Alabama Supreme Court's departure from the *Sisters of the Visitation v. Cochran Plastering Company*, 775 So. 2d 759 (2000) tests relied upon in 2000, 2001 and 2002 opinions by the Alabama Supreme Court. This medical malpractice case against a nursing home reached the Alabama Supreme Court via a denial by the circuit court of a motion to compel arbitration. In reversing the trial court, the Alabama Supreme Court held that Medicare funds moving

test continued until the summer of 2003, when the U.S. Supreme Court dealt with the *Sisters* test in *Citizens Bank v. Alafabco*.²⁴³ The U.S. Supreme Court called Alabama's attempt to limit the effect of the words "in commerce" in

across state lines to pay for the plaintiffs care must be considered in establishing a necessary nexus to interstate commerce. Therefore, the admissions arrangement had a substantial effect on interstate commerce. The court also opined that in addition to the admissions agreement the equipment and supplies used to treat the plaintiffs moved across state lines.

Huntsville Utilities et al v. Consolidated Construction Company, Supreme Court of Alabama Case No. 1020195, May 23, 2003

General contractor brought action against corporation, two of its employees, and its architect, alleging negligence, breach of warranty, fraud, violation of Prompt Pay Act, and other claims. Circuit Court denied corporations and its employee's motion to compel arbitration. The Supreme Court held that: (1) renovation transaction from which dispute arose had to have a substantial impact on interstate commerce in order to trigger Federal Arbitration Act (FAA); (2) renovation did not substantially impact interstate commerce, and thus trial court could not compel arbitration pursuant to FAA; and (3) corporation's acquisition of out-of-state materials for renovation, as opposed to contractor's acquisition of such materials, was relevant to determining what portion of contract price was allocable to interstate versus intrastate commerce, for purposes of determining whether renovation triggered FAA.

Bowen v. Security Pest Control, Inc. Supreme Court of Alabama Case No. 1010783, Feb. 28, 2003

Homeowners sued termite extermination contractor, asserting numerous claims. Contractor filed motion to compel arbitration. Circuit Court granted contractor's motion. The Supreme Court held that contractor failed to establish that transaction substantially affected interstate commerce, as was required to enforce written arbitration agreement under Federal Arbitration Act (FAA).

Reversed and remanded. This case used the *Sisters* test.

Bowen v. Security Pest Control, Supreme Court of Alabama Case No. 1010783, February 28, 2003

This case upheld the five-prong *Sisters of the Visitation v. Cochran Plastering Company* test. See 775 So. 2d 759 (Ala 2000). Justice See dissented and his dissent closely tracked the reasoning of the U.S. Supreme Court in *Citizens Bank v. Alafabco* 539 U.S. 52, 123 S.Ct. 2037 (2003), which overruled *Sisters* five-prong test. The facts of *Bowen v. Security Pest Control* were similar to the facts in *Allied-Bruce Terminex v. Dobson*, 513 U.S. 265 (1995), in which the U.S. Supreme Court reversed the Alabama Supreme Court's denial of arbitration based on Ala. Code 8-1-41(3). This case is no longer good law due to ALAFABCO's effect on *Sister*'s.

Ala. Sup. Ct. Case No. 1010703, August 30, 2002. This case held that a debt restructuring agreement failed to meet the test of *Sisters* and was not a transaction that affected interstate commerce. The reversal of this case by the U.S. Supreme Court put an end to the *Sisters* test.

²⁴³ *Citizens Bank v. ALAFABCO*, 539 U.S. 52, 123 S.Ct. 2037 (2003). The U.S. Supreme Court reiterated its opinion in *Allied Bruce Terminex v. Dobson*, 513 U.S. 265 (1995), that the terms "involving commerce" in the FAA are the functional equivalent of "affecting commerce" under the Commerce Clause. Therefore, the terms "involving commerce" should be given the broadest reading permissible under the exercise of the Commerce Clause. This case specifically dealt with the "misguided" reasoning behind *Sisters of the Visitation v. Cochran* 775 So. 2d 759 (2000), and overruled the *Sisters* prong test. The Supreme Court of Alabama in *ALAFABCO v. Citizens Bank*, Ala. Sup. Ct. Case No. 1010703, August 30, 2002, had held that a debt restructuring agreement between a builder and a bank did not have a sufficient relation to a transaction affecting interstate commerce to be governed by the FAA using the *Sisters* prong test analysis. The United States Supreme Court reversed holding that the FAA encompasses a wider range of transactions than those actually "in commerce." This case overturned *Sisters* and its progeny and limited the application of ALA. Code 8-1-41(3) dramatically.

Sisters was “misguided.”²⁴⁴ The *Sisters* test and Alabama’s two streams of cases were effectively “killed” by *Citizens Bank v. Alafabco*.²⁴⁵ It remains to be seen if the Alabama judiciary will concede that Ala. Code Section 8-1-41(3) is a dead statute, or if some other creative attempt will be made to revive it in another form.

The costs to specifically perform in arbitration have long been debated by business lawyers and plaintiff’s counsel.²⁴⁶ A 2000 Alabama case that went to the U.S. Supreme Court almost addressed that issue. *Green Tree Financial Corp.-Alabama v. Randolph*²⁴⁷ side-stepped the direct issue of costs for the consumer in arbitration, but addressed it indirectly by holding the court would have considered the issue had the consumer attached proof that the costs of arbitration would have kept her from pursuing her truth in lending claims in the arbitration forum. This case led to a new procedure for

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ J. Clark Kelso, Thomas J. Stipanowich, *Protecting Consumers In Arbitration*, DISPUTE RESOLUTION MAGAZINE, Fall 1998

There are three great justifications by business for arbitration, to wit: It saves on enormous litigation expenses, it virtually eliminates runaway verdicts and punitive damage awards and it unburdens the court system. For business interests arbitration is predictable, controllable and less costly, but is it just another form of tort reform? Is it impartial between business and consumers? Is the cost allocation in arbitration between consumers and business fair? Can lawyers who represent business in their practice serve as fair and impartial arbitrators?

²⁴⁷ *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). The court decided the case based upon whether a party’s claims being ordered to arbitration accompanied by a dismissal of the court action regarding those claims is a final decision under the Federal Arbitration Act. The court held that such was the case. The court also touched upon whether the silence of the arbitration agreement regarding costs of arbitration made the agreement to arbitrate unenforceable. The court held that silence regarding costs and fees did not make the agreement unenforceable. There was no proof in the record of the amount of the costs and fees and the court declined to rule on prohibitive costs without proof.

attorneys challenging the costs of arbitration. Attorneys began attaching affidavits regarding the costs of arbitration to their complaints in Alabama, in an effort to prove that arbitration was a cost-prohibitive forum.²⁴⁸ The costs of performance in consumer arbitration continues to be a “core defense” with consumer groups and plaintiff’s attorneys.²⁴⁹

WHY IS SPECIFIC PERFORMANCE UNDER THE FAA RESISTED BY CONSUMER GROUPS AND PROMOTED BY BUSINESS INTERESTS?

The answer may be that consumer groups perceive any advantage for business as a disadvantage for consumers.²⁵⁰ This view does not acknowledge the benefits of arbitration for the consumer, such as reduced expenses, time savings, speedy payment of awards and lower attorney fees. The answer to the controversy may lie in the perspectives of consumer groups and plaintiffs’ lawyers regarding arbitration. Their view is radically different from the view of those in the business community.²⁵¹ The business community does not view arbitration as a means to cheat customers. For businesses, arbitration is a process that allows less risk at less cost than litigation. The consumer is a non-issue in the business perspective on arbitration.

²⁴⁸ The author of this article received several phone calls inquiring about such affidavits.

²⁴⁹ See CAPPALLI. *Supra*, FN 26.

²⁵⁰ See KELSO, *Supra*, FN 246.

²⁵¹ *Id.*

A television commercial for a brand of treated lumber bearing a yellow tag may be analogous to some of the questions currently being raised about consumer arbitration.²⁵² The commercial begins with the representative of the lumber company pitching his company's new slogan by giving away yellow T-shirts containing the words, "yellow fever – catch it!"²⁵³ The lumber person is perplexed because no one wants the T-shirts, and he asks a famous football player who also appears in the commercial, "why are the T-shirts not being well received?" The football player responds, "It's a disease, Jimmy!"²⁵⁴

Arbitration is viewed by the business community as a process which allows a jury trial to be avoided and replaced by specific performance under an agreement to arbitrate. The business community's perspective on the avoidance of a jury trial is that it is a good thing.²⁵⁵ The business community views arbitration as a method to escape the cost of litigation. The business perspective appears to be at odds with the perspectives of consumer groups and plaintiffs' lawyers who believe that escaping litigation is a very bad

²⁵² Television commercial for Great Southern Wood Treatment Company featured company spokesman "Jimmy" and former quarterback Archie Manning.

²⁵³ Id.

²⁵⁴ Id.

²⁵⁵ John Wilkinson, *Streamlining Arbitration of the Complex Case*, DISPUTE RESOLUTION JOURNAL, August/October 2000 Businesses realize arbitration is faster and more efficient than litigation. It tends to produce fair and impartial results.

thing.²⁵⁶ The business leaders view arbitration as a process which can be utilized to avoid potential financial disaster, while consumer groups and plaintiffs' lawyers view consumer arbitration as a process which can be used by the business community to avoid responsibility. In other words, the arbitration process is the equivalent of a "disease" to consumer advocates.²⁵⁷ These two divergent views of consumer arbitration appear to be incapable of reconciliation. Consumer advocates and those in the business community appear unlikely to acknowledge the merits of each other's perspectives regarding arbitration.²⁵⁸

In most jurisdictions there has been little effort to negotiate a middle ground between the consumer and business views regarding arbitration. Consumer arbitration has become a battleground where each side has asserted a "winner take all" position.²⁵⁹ Federal court and state court views

²⁵⁶ See FOHMY. *Supra*, FN 72.

²⁵⁷ A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 VAND. J. TRANNA'TL L. 1219 1276-1283 (2001)

The methods and mechanisms available to resolve consumer disputes varies greatly from state to state. Attitudes regarding these processes and their enforceability also differ from one jurisdiction to the next. The U.S. and the European Union use arbitration to resolve consumer disputes, but in the U.S. arbitration has become a hotly contested area in contract law and federalism. The U.S. federal courts have rejected the contemplation of the parties test to determine assent to waive the constitutional right to access to the judicial system. The general contract law principles have also been limited by federal decisions in favor of arbitration. There is hostility toward arbitration and denial of access to the courts, but it appears the access to justice issues involved may be subject to attitudes regarding social policy and contract law policy. Federalism and consumer values become intertwined in the access to justice issues involved with binding arbitration.

²⁵⁸ *Id.*

²⁵⁹ Jean R. Sternlight, *Gateway Widens Door to Imposing Unfair Binding Arbitration on Consumers*, 71 NOV FLA. B.J. 8 (1997)

Professor Sternlight questioned the legal reasoning behind the *Hill v. Gateway* decision from the Seventh Circuit Court of Appeals. Placing a binding arbitration clause in shipping documents inside a

also conflict on this issue. State court judges, who are elected, seem more receptive to limitations being placed ordering specific performance of pre-dispute arbitration agreements in consumer cases. Federal judges, who are appointed, are more inclined to expand the use of consumer arbitration in accordance with the U.S. Supreme Court's opinions. As a result of these diametrically opposed positions on consumer arbitration, it has become one of the most hotly contested areas of law. The focus of the battle appears to be the solidified positions of the parties, rather than their true interests.²⁶⁰

Consumer arbitration can be distinguished from other types of arbitration due to the disparity of skill levels between the major participants.²⁶¹ In labor arbitration powerful unions are pitted against business representatives and in commercial business arbitration sophisticated business representatives are pitted against each other.²⁶² However, in consumer arbitration, sophisticated business owners are arbitrating against

product box, and requiring the consumer to read it and return the product or be bound by the arbitration agreement seems to call into question the basic principle of contract law. The transaction for the sale of the product did not include an arbitration agreement. The agreement was added at the time of delivery.

²⁶⁰ Jeremy Senderowicy, *Consumer Arbitration and Freedom of Contract: A proposal to facilitate consumers' informed consent to arbitration clauses in form contracts*, 32 COLUMN. J.L. & SOC. PROBO. 275, 277, 286 (1999).

Adhesion contracts are a common feature of service contracts, and most adhesion contracts are drafted by companies who are familiar with the advantages of arbitration. Repeat players likely disadvantage the consumers by writing out undesirable elements such as primitive damages, and writing in waiver of procedural safe guards. Forum selection in these contracts also poses a major hurdle for the unwary consumer.

²⁶¹ Id.

²⁶² Id.

normally less sophisticated consumers.²⁶³ The businesses are armed with “take it or leave it” contracts of adhesion, while the consumers are armed with “yes” or “no.”²⁶⁴ The consumer can either accept the arbitration agreements as written or shop elsewhere for products or services.²⁶⁵ The underlying interests of selling products and purchasing products gets lost in a power struggle over terms and conditions of dispute resolution before a dispute ever arises.

Changes occur often in this field of law as a result of the ever-increasing body of case law. Some of the lower court cases appear to create new issues, while most of the U.S. Supreme court cases settle old ones.²⁶⁶ There appears to be no end in sight for the final resolution of this high stakes controversy. The business interests allege millions of dollars are at stake, and consumer groups contend basic guaranteed rights are at risk.²⁶⁷ In the middle of the fray are contract law and equity, which may be forever altered by the far-reaching principles set forth in the U.S. Supreme Court’s

²⁶³ Id.

²⁶⁴ Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DE PAUL L. REV. 1191, 1220-1252 (2001)

Consumers don’t get to bargain for the exclusion of an arbitration clause from a contract of adhesion. Even though the arbitration clauses are often hidden in fine print in an obscure portion of the contract, the courts routinely hold such clauses valid. The concealment of these arbitration clauses and the subsequent enforcement of arbitration under than begs the question of informed waiver of rights and adequate procedural safeguards. Was it the intent of congress to allow consumer’s rights to the judicial system to be eliminated in adhesion contracts? Consumers are at an obvious disadvantage in these contracts, so should Congress amend the FAA to protect consumers?

²⁶⁵ Id.

²⁶⁶ See REUBEN, *Supra*, FN 25.

²⁶⁷ Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1040-1047 (1998) See FN 9.

interpretations of contract law and specific performance as applicable to pre-dispute arbitration clauses under the FAA.

CAN THE MARRIAGE OF CONVENIENCE SURVIVE? REALITY v.

THEORY:

How well does the reality of specific performance of binding pre-dispute arbitration agreements measure up to the theory of arbitration? In order to answer that question with any degree of accuracy one must not only look at the efficiency of the process but also take into account the results parties obtain when using specific performance to carry out binding arbitration contracts.²⁶⁸ If arbitration and litigation are really “separate but equal” forums how do arbitration awards compare to jury verdicts in similar cases? Why are class actions and punitive damages routinely excluded from arbitration if the process of arbitration is equal to litigation?²⁶⁹ Given the fact that litigation is a public process with readily available statistical data regarding results obtained in trials, and given the fact that arbitration is a

²⁶⁸ F. Paul Bland, Jr., *Some Winning Arguments for Consumers Resisting Mandatory Arbitration Abuse* ATLA Annual Convention Materials, VOLUME 2, July 2002

Bland discusses arbitrator conflicts of interest and the unconscionable nature of some arbitration agreements. He cites clear examples of unconscionability in contracts heavily weighted toward business, and those that lack mutuality of obligation. Bland criticizes decisions barring class actions from arbitration because they leave consumers as a group with no remedy.

²⁶⁹ Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?* BOSTON PUBLIC INTEREST LAW JOURNAL 367-376 Summer 2001 See FN 26.

private process with little available research data, the task of obtaining reliable data for comparison purposes is next to impossible.

The theory behind the FAA has changed through the years. Although the FAA started out as procedural, not substantive law, Federal decisions in this area of the law in the past fifty years have held the FAA is substantive law applicable to every court in the land.²⁷⁰ Some of these opinions state that the FAA has always been a substantive law act designed to overcome judicial hostility, because that was the original intent of Congress.²⁷¹ However, a review of the hearings held on the Federal Arbitration Act before its passage make it clear that the drafters of the arbitration act intended it to be an Article III procedural act applicable only in federal courts.²⁷² Justice Sandra Day O'Connor has brought the original procedural

²⁷⁰ *Hamilton Life Insurance Company of New York v. Republic National Life Insurance Company* 291 F. Supp. 225 (1968)

The Texas Arbitration Act did not qualify under the McCarran-Ferguson Act as the regulation of insurance by a state. Therefore, the FAA pre-empts the Texas Arbitration Act. This arbitration principle remains good law. In order for the McCarran-Ferguson Act to make the FAA inapplicable under the regulation of insurance by a state, the state statute must specifically govern only insurance and not other types of contracts in addition to insurance. The statute in this case was a general arbitration act that governed all contracts and preserved the jurisdiction of state courts over business matters. The case also held that if fraud is alleged in the formation of the container contract that matter is to be decided by arbitrators. If fraud is alleged to have formed the basis for the arbitration clause separately from the container contract, that is a matter for the courts.

²⁷¹ See *Southland v. Keating*, 465 U.S. 1. Congress intended to use the FAA to stop any state legislative attempts to make arbitration unenforceable.

²⁷² David H. Taylor and Sara M. Cliffe, *Civil Procedure By Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1133-1145 (2002)

Due to the increasing utilization of pre-litigation agreements the traditional views of contract law have been turned upside down. Some have charged that judges have allowed their own self-interests in docket management overcome their concern for the rights of litigants. Forum selection clauses such as pre-dispute arbitration clauses are an about face for the judiciary. Enforcement of pre-dispute arbitration clauses rests upon judge created interpretations of the FAA. The federal courts have used the FAA and

nature of the Federal Arbitration Act to the attention of her fellow justices on the United States Supreme Court on at least two occasions.²⁷³ The origin of the Federal Arbitration Act no longer appears to be an important factor in the theory analysis utilized by the U.S. Supreme Court in arbitration decisions.

Supreme Court decisions have blurred the line between theory and reality in arbitration to such an extent that it may no longer be possible to distinguish between the two. Cases like *Citizens Bank v. ALAFABCO*²⁷⁴ and *Allied Bruce Terminex v. Dobson*²⁷⁵ give rise to the assertion that theory is reality in cases subject to the Federal Arbitration Act mandates on specific performance. In other words, a substantive justice theoretically equal to that achieved in litigation is assumed by compelling specific performance of arbitration agreements. Binding arbitration will be enforced by federal courts regardless of any realities associated with unjust outcomes.²⁷⁶ Congress has not acted to repeal or limit the Federal Arbitration Act in

the Commerce Clause to create a body of law that could be described as judicial legislation, and this favorable body of law has resulted in the proliferation of pre-dispute arbitration agreements. The courts have refused to revisit the legislative history of the FAA and have become pro-arbitration. The FAA was a creature of Congress' Article III authority, but recently has become the enforcer of the Commerce Clause through judicial slight of hand. The authors urge Congress to take a second look at the current mess and endeavor to establish some guidelines for enforcement of pre-dispute arbitration agreements under the FAA.

²⁷³ See *TERMINEX*, *Supra* FN 116. 513 U.S. 265 Justice O'Connor's concurring opinion. See also her dissent in 465 U.S. 1 (1984).

²⁷⁴ *Citizens Bank v. ALAFABCO*, 539 U.S. 52, 123 S.Ct. 2037 (2003).

²⁷⁵ *Allied-Bruce Terminex v. Dobson*, 513 U.S. 265 (1995).

²⁷⁶ F. Paul Bland, Jr., See FN 268.

response to the federal decisions favoring binding arbitration.²⁷⁷ Federal courts are quick to point out that they must be correctly interpreting the intent of Congress regarding the scope, application and enforcement of the Federal Arbitration Act, because Congress has not acted to revise or repeal the Federal Arbitration Act following these federal decisions.

The Clinton impeachment hearings revealed the United States Congress is filled with politicians who have a tendency to vote along partisan lines. There are also groups of politicians who normally cast their votes consistently with the goals of their constituency. A senator from a manufacturing state may be more likely to vote for bills favoring the interests of business than a senator from a predominantly rural state. There is enough balance in the U.S. Congress between the parties and the interest groups to allow substantial delays in the passage of legislation that is not bipartisan in nature. Substantial changes to the Federal Arbitration Act have been proposed from time to time, but the supporters of these changes were unable to muster enough support to effect passage of their proposed legislation. To state that the U.S. Congress could and would pass legislation

²⁷⁷ Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069, 1080-1092 (1998)

State statutes which restrict or limit the use of arbitration clauses are preempted by the FAA. Contract defenses to arbitration clauses are different to prove and are unavailable in most cases. Public policy defenses do not work due to the favorable status granted to arbitration by the federal courts. The article urges the FAA be amended to permit judicial review of statutory claims which would require arbitrators to prepare a written rationale for the award.

to limit, revise or repeal the Federal Arbitration Act if it were unhappy with federal court decisions interpreting the FAA mandates is a statement with little merit, even though it is based on a generally recognized principle of separation of powers in the three branches of government. It often takes congress years, if not decades, to address and correct perceived activism by the federal judiciary.

Binding arbitration agreements are becoming more common in modern sales contracts between businesses and customers. Specific performance in consumer arbitration remains a hybrid creature of contract and equity.²⁷⁸ An obligation to arbitrate arises when the consumer signs a contract with a business at the time of purchase of goods or services, if that contract

²⁷⁸ Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington and Haagen)*, McGEORGE LAW REVIEW, 196-219, Winter 1998.

Arbitration law is a part of contract law and is subject to contract law defenses. Much of the law governing consumers' freedom to contract is anti-contract law, but the law governing consumer arbitration is an exception to anti-contract consumer law. The U.S. Supreme Court has applied the contract law contained in the FAA to the letter amid allegations that its decisions may be result-oriented and intended to conserve judicial resources. This is a definite shift in the law from pre-FAA days when arbitration agreements were unenforceable. The question of genuine assent to arbitrate was present prior to the FAA, and there is much discussion about it in light of recent decisions. The point is made that people who sign pre-dispute arbitration agreements in adhesion contracts are less likely to consider what they are really doing compared to those who sign post-dispute agreements. Professor Ware challenges the assertion that consumers are not free to contract with regard to contracts of adhesion, because they are free to walk away and not sign the contract. A case in point which validates Professor Ware's Theory can be found in a comparison between automobile dealerships in Alabama and Georgia. In Alabama, the auto customer is almost always required to sign an arbitration agreement, while customers in adjacent Georgia are almost never required to sign an arbitration agreement. Therefore, the Alabama consumers are free to vote with their feet and purchase a car from a Georgia auto dealer rather than sign an arbitration agreement. Professor Ware points out that contracts require mutual manifestations of assent and not actual assent. Therefore, the consumer's actual assent is not required to form a binding contract. Professor Ware points out that while critics of arbitration complain that the process alienates rights, the idea behind contracts in general is to create a process where rights can be alienated.

contains a pre-dispute binding arbitration clause.²⁷⁹ Recent cases have held that unilateral arbitration agreements such as mailing stuffers inserted with monthly bills and packing documents inside a product box can also give rise to a duty to arbitrate.²⁸⁰ However, not all the federal courts presume the customer read the documents and agreed to arbitrate.²⁸¹ The marriage of convenience between law and equity that is binding arbitration appears healthy and capable of surviving a very long time.

ACCESS TO JUSTICE WAIVERS AND OTHER ISSUES:

The marriage is not without its critics. The question of whether a party has assented to an arbitration agreement has always been a controversial issue with regard to pre-dispute arbitration agreements. The United States Constitution in the Seventh Amendment guarantees every citizen the right to a trial by jury in matters involving a controversy of over \$25. The right to a trial by jury is not an inalienable right, because like most statutory and constitutional rights, it can be freely, knowingly and voluntarily waived. Some scholars have argued that under the restatement of

²⁷⁹ Id.

²⁸⁰ Jean R. Sternlight, *Gateway Widens Door to Imposing Unfair Binding Arbitration on Consumers*, 71 NOV FLA. B.J. 8 (1997)

Professor Sternlight questioned the legal reasoning behind the Hill v. Gateway decision from the Seventh Circuit Court of Appeals. Placing a binding arbitration clause in shipping documents inside a product box, and requiring the consumer to read it and return the product or be bound by the arbitration agreement seems to call into question the basic principle of contract law. The transaction for the sale of the product did not include an arbitration agreement. The agreement was added at the time of delivery.

²⁸¹ See Klocek v. Gateway, 104 F. Supp. 2d 1332 (D. Kan 2000)

contracts, the idea of actual mutual assent to binding arbitration is not required in order to waive the constitutional right to a jury trial.²⁸² However, if a constitutional right is to be waived properly, it must be done so by freely, knowingly and voluntarily waiving the right after a full understanding of that right.²⁸³ It is a stretch to state that a shrink-wrapped arbitration agreement contained in the middle of other shipping documents could constitute a knowing and voluntary waiver of the right to litigate.²⁸⁴ Perhaps this stretched waiver is the price the federal judiciary is willing to pay to maintain the benefits of specific performance of arbitration agreements.

The Magnuson Moss Warranty Act prohibits product warranty cases from being arbitrated.²⁸⁵ It has been the longstanding view of the Federal Trade Commission that warranty and arbitration are two words which do not belong in the same sentence.²⁸⁶ However, there have been some federal case rulings allowing binding arbitration with regard to warranty claims.²⁸⁷

In addition to the statutory battle between the Magnuson-Moss Warranty Act and the FAA, another statutory face-off looms on the horizon. The

²⁸² See WARE, *Supra*, FN 278.

²⁸³ Jay Folberg, *Pre-Dispute Arbitration Agreements-Can they all be right?*, 38 U.S. F. L REV. 1, 2 (2003).

²⁸⁴ Sternlight, *Supra*, FN 21.

²⁸⁵ 15 U.S.C. 2301 (1).

²⁸⁶ 16 C.F.R. 703.5

²⁸⁷ In *R American Homestar of Lancaster, Inc.*, 2001 Tax. LEXIS 51 (2001) *Hill v. Gateway*, 105 F. 3d 1147 (1997) and *Brower v. Gateway* 676 N.Y.S. 2d 569 (1998).

McCarran-Ferguson Act allows the individual states to regulate insurance within their borders.²⁸⁸ The principle behind McCarran-Ferguson is that insurance regulation is one of those areas that should be reserved for the states, and that the federal government should not intervene in the states' regulation of insurance companies within their borders.²⁸⁹ However, the federal cases on this issue indicate that the courts will construe the language of McCarran-Ferguson very narrowly in situations where the complainants assert McCarran-Ferguson removes the case from the authority of the Federal Arbitration Act and places it under the authority of the McCarran-Ferguson Act.²⁹⁰ In the cases decided thus far, the federal courts have indicated that the states will be allowed to regulate insurance and will be allowed to rule out arbitration clauses in insurance policies, but only if the

²⁸⁸ McCarran Ferguson Act 15 U.S.C.A. 1012.

²⁸⁹ *Id.*

²⁹⁰ *American Heritage Life Ins. Co. v. Harmon* 147 F. Supp. 2d 511 (2001)

This was a conspiracy theory case seeking reverse preemption of the FAA. The case failed to reverse pre-empt the FAA under McCarran Ferguson Act, because the party opposing arbitration failed to show any specific state statute regulating only insurance that would reverse pre-empt the FAA. Harmon relied upon the informal policies of state officials rather than a state statute, in his effort to reverse pre-empt the FAA. The federal court held to reverse pre-empt any federal statute under McCarran-Ferguson, three things must be shown: the federal statute the party is seeking to reverse pre-empt does not regulate insurance, a state statute was enacted to regulate insurance and the federal statute operates to invalidate, or supercede the state law enacted to regulate insurance. The informal policy of the Mississippi Commissioner of Insurance was insufficient to meet this three-prong test. The court also held that a party cannot obtain a jury trial in contravention of a federal statute merely by demanding one. This case also contained an interesting twist. The plaintiff signed an arbitration agreement with only one of the defendants in the state court action, but the federal court held that plaintiff must arbitrate claims against the remaining defendants who were not signatories to the arbitration agreement, because all of their claims were intertwined and could not be separated into individual actions.

state statutes doing this are specifically designed and worded to cover only insurance matters, rather than general contract law.²⁹¹

The essence of the federal decisions in this area thus far have been that the states will be able to maintain their rights to control insurance business, so long as those rights do not conflict with existing federal law, and that in doing so the states have constructed insurance statutes that relate only to insurance.²⁹² The United States Supreme Court has yet to rule on any of the cases involving the McCarran-Ferguson Act and the FAA, but it will be interesting to see if the United States Supreme Court maintains the existing trend among federal courts to occasionally allow McCarran-Ferguson Act to trump the Federal Arbitration Act under certain specified circumstances.

Arbitration is a very actively litigated area of law, and as these cases reach the federal court system and eventually the United States Supreme Court, attitudes toward binding arbitration within the Judiciary could certainly shift in a moment of time. It is unlikely that any one case, state or federal, will resolve once and for all the controversy surrounding specific

²⁹¹ Standard Security Life Insurance Company v. West, 127 F. Supp. 2d 1064 (2000).

This case involved a Missouri state statute designed to regulate insurance (Missouri Rev. Stat. 435.350). The Missouri insurance statute rendered an arbitration clause in an insurance contract unenforceable. The insurance company removed the action from a Missouri state court to the Western District of Missouri, Central Division, U.S. District Court, seeking preemption of the Missouri statute. The federal court held that the Missouri statute specifically regulated only insurance matters, fell within the scope of McCarran-Ferguson and was not pre-empted by the FAA. The federal court held that the Missouri law made the insurance company's arbitration clause unenforceable.

²⁹² Id.

performance of binding consumer arbitration. As Justice Sandra Day O'Connor stated in her concurring opinion in the case of *Allied Bruce Terminex v. Dobson*,²⁹³ this controversy was created by Congress and this controversy will have to be resolved by the United States Congress. The courts can do little else other than interpret the intent of Congress from the wording of the FAA.

Justice O'Connor's astute observation has proven true during the nine years since the *Terminex* decision. Various interpretations of the effect of the FAA on contracts have been rendered across the land, but there appear to be few "bright line" tests involved in these decisions. The underlying theme of the federal judiciary in arbitration cases seems to be to compel specific performance of arbitration agreements whenever possible.

CONCLUSION:

Consumer arbitration has a good side. The cost of this process is much less than the average jury trial. The process does not tie up valuable court time or the time and efforts of court personnel. Therefore, it is an efficient marshalling of resources. In addition to costing less than litigation, arbitration brings about binding results quicker than litigation. The appellate process in arbitration is quicker and cheaper than the appellate process in

²⁹³ *Terminex*, *Supra*, FN 116.

litigation. Due to the Federal Arbitration Act and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an arbitration award is enforceable nationwide and in numerous foreign countries.

Consumer arbitration also has a bad side. The up front costs to consumers is generally higher than litigation, even though the overall costs are lower. There are no due process rules in arbitration, and the parties play by the rules they agree upon in their contract or mutually agree upon prior to arbitration. The arbitrators may not be independent from the conflict, and are sometimes experts in the field in which they arbitrate (labor, construction, etc.). If a party receives a bad result in arbitration, there are very few grounds for appeal of the award. The separability doctrine allows an arbitration clause to stand when the contract it is contained in fails, unless the protesting party can defeat the validity of the arbitration clause separate from the contract.

Arbitration as a dispute resolution process pre-dates jury trials by centuries.²⁹⁴ It has provided a procedure for parties to receive a binding resolution at less costs than the public dispute resolution system. Although

²⁹⁴ William A. Forsyth, *History of Trial By Jury Frederick D. Linnad Company*, JERSEY CITY (1875).

No one seems to know just when the jury trial originated. In England it seems to have been traced to the Anglo-Saxon times, but others argue about it was a product of the ancient courts of Teutonic nations. Although there is some evidence that the Scandinavians may have enjoyed the benefits of the jury trial as early as 750 A.D., the earliest clues pointing to a jury trial originate in ancient Rome. There is a popular legend that the Romans borrowed the jury trial from the ancient Greeks.

the process was not enforceable at common law, the FAA married law and equity by combining specific performance with arbitration and thereby mandating its enforcement. The future of binding pre-dispute arbitration seems secure, due to the favorable view of arbitration by the federal judiciary. Arbitration generally results in lower overall costs to the parties and reduced attorneys fees. Considering the benefits of arbitration the attacks leveled against it may seem puzzling to some.

The affordable justice arbitration seems to provide has been questioned by scholars concerned about arbitration's effect on consumer rights.²⁹⁵

Access to justice issues are a serious matter, and some scholars have suggested the U.S. Congress take a closer look at the effect of the FAA in consumer transactions with a view toward placing some restrictions on the use of arbitration in consumer cases.²⁹⁶ A possible solution might be to

²⁹⁵ Daniel Woska, *Arbitration Clauses in Consumer Retail Installment Sales Contracts After the Green Tree Financial v. Randolph Decision*, 55 *Consumer Fin. L. Q. Rep.* 107, (2001)

Woska points out that business has no inherent right to arbitrate its disputes with consumers. The U.S. Supreme Court requires consumers to have "compelling" contractual or equitable defenses in order to set aside the enforceability of an arbitration agreement. In *Green Tree Financial Corp. v. Randolph* the U.S. Supreme Court placed the burden of proving arbitration costs are rights prohibitive squarely upon the shoulders of the consumer. In other words, the business does not have to prove the cost of arbitration compared to litigation is equal or even reasonable, but it is the consumer who must prove arbitration places them at a disadvantage at law. The Supreme Court in *Randolph* acknowledged that the consumer might well be forced to bear unreasonable costs, but she did not prove it. (The *Randolph* case resulted in a plethora of affidavits regarding costs being attached to actions seeking to avoid arbitration.) Woska points out that businesses should be sure the arbitration clause is clear and unambiguous regarding the selection of the forum and the costs allocation.

²⁹⁶ Frederick L. Miller, *Arbitration Clauses In Consumer Contracts: Building Barriers to Consumer Protection*, 78 *MICH. B.J.* 302 (1999)

The U.S. Supreme Court took an about face on arbitration clauses in the early 1980's, and has created a liberal policy favoring arbitration applicable in state and federal courts. The pre-emption of state statute designed to ban or restrict arbitration has been the subject of much controversy. Consumers

allow the parties to contract for judicial review in consumer cases.²⁹⁷

Certainly, the problems with binding arbitration are not insurmountable.

Courts and Congress have found methods to streamline other areas of the law in years past, and there is little reason to assume the problems associated with consumer cases are incapable of resolution.²⁹⁸

It does not appear that the FAA will be repealed anytime soon. The courts appear to have a vested interest in seeing to it that arbitration continues, because it eliminates numerous cases from their over crowded dockets.²⁹⁹ The courts will likely continue to address any major problems

do not create these clauses, but are sometimes forced to pay very high fees to enforce their rights in arbitration proceedings. The consumer's best chance of avoiding these arguments appears to be in the area of unconscionability. The courts should realize that fundamental fairness is involved when the goals of consumer laws are blocked by barriers created by adhesive predispute arbitration clauses.

²⁹⁷ David H. Taylor and Sara M. Cliffe, *Civil Procedure By Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1133-1145 (2002)

Due to the increasing utilization of pre-litigation agreements the traditional views of contract law have been turned upside down. Some have charged that judges have allowed their own self-interests in docket management overcome their concern for the rights of litigants. Forum selection clauses such as pre-dispute arbitration clauses are an about face for the judiciary. Enforcement of pre-dispute arbitration clauses rests upon judge created interpretations of the FAA. The federal courts have used the FAA and the Commerce Clause to create a body of law that could be described as judicial legislation, and this favorable body of law has resulted in the proliferation of pre-dispute arbitration agreements. The courts have refused to revisit the legislative history of the FAA and have become pro-arbitration. The FAA was a creature of Congress' Article III authority, but recently has become the enforcer of the Commerce Clause through judicial slight of hand. The authors urge Congress to take a second look at the current mess and endeavor to establish some guidelines for enforcement of pre-dispute arbitration agreements under the FAA

²⁹⁸ Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, DISPUTE RESOLUTION JOURNAL, August 1998

Professor Stipanowich argues for Consumer Due Process Protocol. The principles of the protocol access to information about the information about the processes, independent and impartial neutrals, reasonable costs, reasonable hearing locations and proceedings within a reasonable time.

²⁹⁹ Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1040-1047 (1998)

Federal policy favors arbitral dispute resolution in response to overcrowded dockets, but the extent of favoritism granted to arbitration is a major departure from previous practice and the early interpretations of the FAA. The individual state no longer have the power to regulate arbitration

that arise with pre-dispute arbitration agreements, but there is little, if any, chance of a divorce in the marriage of convenience. Those who like it and those who don't like it will likely be living with it for some time to come.

Some scholars have observed that when it comes to binding arbitration agreements, businesses write the rules in their adhesive contracts, escape the legal system and control their own destiny in one fell swoop.³⁰⁰ While this statement has some merit, it must be remembered that the FAA was passed in response to a litigation system that was costly, hostile to any alternative forum and unable to resolve disputes quickly and efficiently. Since 1925, when the FAA was enacted, the legal system has become much more costly, time-consuming and frustrating to litigants. If arbitrators are allowed to work with parties and their counsel it is likely that the dispute can be reasonably resolved by arbitration in much less time and with less costs than in litigation.³⁰¹

agreements due to the federal policy favoring arbitration. Adhesive contracts of employment containing arbitration clauses are being used to determine employee statutory rights. The logic behind the federal courts interpretation of the FAA rests on two assumptions: Arbitration is different but not inferior to courts, and that parties should be allowed to judge their own best interest. In *Allied Bruce Terminex v. Dobson*, the U.S. Supreme Court rejected the arguments of 20 state attorney's general against extending the reach of the FAA. In *Doctors Associates v. Casarotto* the U.S. Supreme Court rejected Mortano's requirement that the notice of a pre-dispute arbitration agreement in a contract be in bold letters. States are not allowed to police the fairness of an arbitration agreement due to preemption by the FAA.

³⁰⁰ Reginald Alleyne, *Arbitrator Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. FALL 2003. Lab. & Emp. L.

³⁰¹ John Wilkinson, *Streamlining Arbitration of the Complex Case*, DISPUTE RESOLUTION JOURNAL August/October 2000.

Many of the defenses asserted against arbitration and the criticisms leveled at this process stem from viewing the legal system as the only place where “true” dispute resolution can take place.³⁰² Binding Arbitration under the FAA is not litigation, and attempts to “legalize” it will fail because it is a hybrid creature of law and equity. The process began as an adjunct to the system of public dispute resolution in the days of Moses. The process has been altered and changed through the centuries, but now has come full circle to its original purpose. It is an alternative forum to the public dispute resolution forum.

More effort could be made to address the rights’ litigation and access to justice issues raised by arbitrations opponents, but the arbitration process appears to serve a viable need as an adjunct to the overburdened legal system. Parties are free to contract for this process to be whatever they desire it to be, but under the FAA the parties are not free to agree to arbitrate and subsequently change their minds. Arbitration is a time efficient and cost effective method of dispute resolution, and as long as parties freely consent to its use they should be allowed the benefit of their bargain.

³⁰² Andrew W. McThinia and Thomas L. Shaffer, *Comment: For Reconciliation*, 94 YALE L.J. 1660 (1985) This comment was a response to Professor Owen Fiss’ article “Against Settlement” wherein Professor Fiss criticized non-traditional methods of dispute resolution.