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Charge Me, Pay Me, But Don't Even Think of Litigating Me: The Dominance of Arbitration in Truth-In-Lending Claims

M. Susan Hale*

INTRODUCTION

When I was sixteen, my mother gave me a lesson in consumer credit. She tossed a flurry of "introductory offer" mailers from credit card companies on the table and told me to find the "best deal." I compared one card, which offered a rate of 2.9% for the first three months, 8.9% for the next six months, and a final permanent rate of 18% with a card having a rate of 6.9% for the first six months before increasing to a permanent rate of 18%. Struggling with this nightmarish word problem, I somehow managed to persevere and choose the first offer.¹

People sift through the offers in the mail, on TV, and on the web struggling to get the best deal without ever knowing that before 1968, this was an impossibility.² Today, the Truth In Lending Act (TILA) governs consumer credit by ensuring consumers are given the information needed to make informed decisions.³

This article analyzes the impact of the courts' ever increasing priority to enforce arbitration agreements in TILA claims and reform. Part I entails a general discussion of TILA's logistics; the goals, the means, and the remedies.⁴ Part II briefly traces the rise of arbitration as well as evaluating its vari-

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1. I reasoned both credit cards have the same final interest rate, so the "best deal" is whichever card that has a reduced rate for the longest period of time. The first offer has a reduced rate for nine months making it the best deal.

Of course, I could have just used imaginary balances. If both cards had initial balances of one-thousand dollars, I could have applied the interest rates to determine which amount would be lower. Apparently this method was too direct for me, but my dad told me I was right anyway.

2. See *infra* note 16.

3. *Id.*

4. See *infra* notes 9-56 and accompanying text.

ous advantages and disadvantages.⁵ Part III reports on the current emphasis of enforcing arbitration agreements in federal courts by explaining the basis of enforcing the agreement.⁶ Part IV explores the impact of arbitrating TILA claims on the claim and on individuals.⁷ Part V provides an analysis of class actions under TILA and examines the impact of enforcing arbitration agreements on class action procedure.⁸

I. TILA

Quiz Show ended in scandal, Camelot was long since gone, and business was booming. After World War II, the United States experienced Promethean economic growth and with it came a new phenomenon in consumer transactions: a large availability of consumer credit.⁹ With this availability came scurrilous interest rates that were neither standard nor accurate.¹⁰ The first consumer credit-cost disclosure bill was introduced in 1960 by Senator Paul Douglas of Illinois, but it was a long, eight year wait for federal legislation.¹¹ President Johnson in his message on consumer protection lauded credit¹² while also praising the aims of TILA.¹³ In response Congress enacted TILA through the Consumer Credit Protection Act (CCPA)¹⁴ in 1968 to level the

5. See *infra* notes 57-83 and accompanying text.

6. See *infra* notes 84-108 and accompanying text.

7. See *infra* notes 109-123 and accompanying text.

8. See *infra* notes 124-157 and accompanying text.

9. At the time of TILA's passage, the interest cost of consumer credit amounted to \$13 billion. H.R. REP. NO. 90-1040 (1967), reprinted in 1968 U.S.C.C.A.N. 1962, 1965.

As of 1998, outstanding consumer credit amounted to \$350 billion; assuming an interest rate of 16% this creates a cost of \$52 billion. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES no. 824 (119 ed. 1999).

10. There is much debate to this point. See *infra* note 16 and accompanying text.

11. FEDERAL REGULATION OF CONSUMER CREDIT ¶ 1.02 (Peter T. Mangione et al. eds., 1981) [hereinafter MANGIONE].

12. President Johnson said about credit:

Consumer credit has become an essential feature of the American way of life. It permits families with secure and growing incomes to plan ahead and to enjoy fully and promptly the ownership of automobiles and modern household appliances. It finances higher education for many who could not otherwise afford it. To families struck by serious illness or other financial setbacks, the opportunity to borrow eases the burden by spreading the payments over time.

H.R. REP. NO. 90-1040 (1967), reprinted in 1968 U.S.C.C.A.N. 1962, 1965.

13. President Johnson said, "I recommend legislation to assure—full and accurate information to the borrower; and simple and routine calculations for the lender. This legislation is urgently needed to close an important gap in consumer information [and] protect legitimate lenders against competitors who misrepresent credit costs." *Id.*

14. The CCPA includes TILA (Title I, Chapters 1-3), the Fair Credit Billing Act (the FCBA is Title I, Chapter 4), the Consumer Leasing Act of 1976 (this Act is Title I, Chapter 5),

playing field between consumers and creditors as well as to foster competition among creditors.¹⁵

Congress drafted TILA to protect consumers from unfair credit practices¹⁶ and to enhance economic stabilization¹⁷ by ensuring consumers' informed use of credit.¹⁸ Congress rationalized knowing the cost of a loan, pro-

the Fair Credit Reporting Act (the FCRA is Title VI), the Equal Opportunity Act (the EOA is Title VII), the Fair Debt Collection Practices Act (the FDCPA is Title VIII), and the Electronic Funds Transfer Act (the EFTA is Title IX). MICHAEL HALES, *HANDBOOK OF CONSUMER BANKING LAW* 3 (1989).

15. Cathleen M. Combs, *Class Action Developments*, 989 P.L.I. COM. L. & PRAC. COURSE HANDBOOK SERIES 189, 201 (1997).

16. By promoting the informed use of credit, consumers would be protected. 15 U.S.C. § 1601 (2000); 12 C.F.R. § 226.1(b) (2000). Whether or not consumers were being railroaded by credit companies prior to TILA is at issue. In *Mourning v. Family Publication Services*, the Supreme Court clearly states that consumers were "ignorant of the nature of their credit obligations and of the costs of deferring payment." 411 U.S. 356, 363 (1973) (attributing this ignorance to sometimes fraudulent practices by creditors). Senator Paul Douglas, Chairman of the National Commission on Urban Affairs, argued the following in support of TILA:

It is only in the field of consumer credit that confusion and obfuscation prevail. Here borrowers are being forced to pay interest on amounts which they have already repaid. They are not told this, however. In fact, this is carefully concealed from them.

When the consumer is faced with this jumble of rate methods and complicated financial terms, it is no wonder that he throws up his hands and asks merely to see the size of the monthly payments. For unless he is a skilled mathematician, he will be utterly confused and thoroughly misled if he attempts to compare rates quoted by various lenders.

Hearing on S.5 before the Subcomm. On Fin. Instit. of the S. Comm. On Banking and Currency, 90th Cong., 41 (1969).

But some argue the plethora of state laws adequately protected the consumer, thus there was no need for federal legislation. Nathaniel E. Butler, *Truth and Confusion in Lending*, reprinted in *LIVING WITH TRUTH IN LENDING AND DISCLOSURE LEGISLATION . . . A PRACTICAL APPROACH*, 103-07, at 103 (James J. Egan, Jr. et al. eds., 1969); Elwin Griffith, *Recent Developments in the Effort to Simplify Truth In Lending*, 19 TULSA L.J. 30 (1983).

In response, creditors had no uniform way to calculate interest, thus a lower interest rate may actually result in a more expensive loan. ELIZABETH RENUART & KATHLEEN E. KEEST, NATIONAL CONSUMER LAW CENTER, *TRUTH IN LENDING* 33-34 (4th ed. 1999) (providing excellent examples to illustrate this point). Additionally, a 1964 survey shows that consumers were not aware of the true cost of a loan. *Id.* at 33 (citing H.R. REP. NO. 1040, reprinted in 1968 U.S.S.C.A.N. 1962, 1970).

17. The concept is to regulate, not by tampering with market mechanisms, but to improve conditions under which the market operates. JOHN R. FONSECA, *HANDLING CONSUMER CREDIT CASES* § 8.1, 299 (1986). It follows, a credit provider may charge whatever interest rate it desires, but it may not conceal that rate.

18. 15 U.S.C. § 1601 (2001).

vided by mandatory material disclosures,¹⁹ equated informed choices about a loan.²⁰ Because this statute is very much in favor of aiding unsophisticated consumers,²¹ TILA is strictly limited to consumer credit transactions,²² and limits necessary disclosures to those that are material and germane.²³ Along with enacting TILA, Congress granted authority to the Board of Governors of the Federal Reserve Board (FRB) to create regulations to implement TILA.²⁴ The FRB, in turn, created Regulation Z²⁵ to govern TILA.²⁶ Regulation Z provides statutory interpretations that protect both consumers and creditors.²⁷

TILA works for a variety of reasons. Early theories explain that TILA provides unsophisticated debtors with legal leverage in defending against creditors.²⁸ There is also a widespread belief that by promulgating a theory of strict liability, TILA creates near absolute compliance because even a failure to comply with a technicality results in a violation.²⁹ In recent years, Con-

19. The following are currently considered material facts to disclose: (a) the true cost in terms of an interest rate and dollar amount; (b) any finance charges; (c) the amount financed; (d) total payments; and (e) payment schedule. 15 U.S.C. § 1602 (u). For a detailed analysis of calculating the above numbers, please refer to HALES, *supra* note 14, at 28-55.

20. 15 U.S.C. § 1601(a).

21. The following all cite TILA's goals as "to aid the unsophisticated consumer" so that he would not be easily misled as to the cost of financing. *Tomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3rd Cir. 1980); *Shepard v. Quality Siding & Window Factory, Inc.*, 73 F. Supp. 1295, 1299 (D. Del. 1990); *Morris v. Lomas & Nettleton Co.*, 708 F. Supp. 1198, 1203 (D. Kan. 1989); *Goldberg v. Delaware Olds, Inc.*, 670 F. Supp. 125, 127 (D. Del. 1987).

Some studies have shown that TILA has been ineffective in educating "high risk" consumers about the cost of credit. FONSECA, *supra* note 17, at § 8.1, 296 (referencing Nat'l Comm. on Consumer Fin., *Consumer Credit in the U.S.* 179 (1972)).

22. Congress sets forth certain exempted transactions without listing exactly what TILA encompasses. 15 U.S.C. § 1603. Specific limitations to TILA's application include (a) the transaction must include a consumer; (b) creditors must extend credit regularly; (c) the transaction must be payable in more than four transactions; and (d) the loan must be less than \$25,000 unless secured by real property. 12 C.F.R. § 226.1 (listing the first three limitations); 12 C.F.R. § 226.3(b) (discussing the fourth limitation). *See also* HALES, *supra* note 14, at 15 fig. 2.1 (1989) (illustrating a detailed analysis to determine if TILA applies to the situation).

23. Because transactions differ, each agreement need not contain the same information. For example, an agreement to purchase a car must include the total number of payments while an agreement for a credit card has no finite number of payments, thus this "material fact" is inapplicable. HALES, *supra* note 14, at 16-18.

24. 15 U.S.C. § 1604(a).

25. 12 C.F.R. § 226. All FRB regulations are in the 200 series of volume 12 of the code of Federal Regulations. The letter a regulation is assigned corresponds numerically to its place in the register, e.g. Regulation B can be found at 12 C.F.R. § 202. Accordingly, Regulation Z is found at 12 C.F.R. § 226.

26. *Mourning v. Family Publ'n Servs.*, 411 U.S. 356 (1973).

27. 12 C.F.R. § 226.1.

28. FONSECA, *supra* note 17, at § 8.1, 297.

29. *Werts v. Fed. Nat'l Mort. Assoc.*, 48 B.R. 980 (1985)(saying "[t]here is no such thing

gress amended TILA to put creditors "in a better position to know whether a consumer may properly rescind a transaction"³⁰ and to eliminate TILA's leverage function.³¹ While this language seems mild, it illustrates a definite shift in Congress' attitude towards TILA's goals; the consumer no longer reigns supreme in a TILA transaction.³² This transition started in 1980 when Congress passed the Truth In Lending Simplification and Reform Act,³³ which had two main goals, to strengthen the agencies' authority over creditors³⁴ and to simplify disclosures.³⁵ Regardless, TILA is an effective mechanism.

as substantial compliance with the Truth in Lending Act, either you are or you aren't"); *Mason v. General Fin. Co.*, 542 F.2d 1226, 1233 (4th Cir. 1976)(holding use of term "Contract Rate" is incompatible with the mandatory terminology "Finance Charges" and "Annual Percentage Rate"); *Pennino v. Morris Kirschman & Co.*, 526 F.2d 367, 370 (5th Cir. 1976) (holding failure to use the term "new balance" is a violation of the Act).

30. John Roddy, *Reversing Field: Is There a Trend Toward Abrogating Truth In Lending?*, 772 P.L.I. COM. L. & PRAC. COURSE HANDBOOK SERIES 643 (1998); S. Rep. No. 368, 29, reprinted in 190 U.S.C.C.A.N. 236, 264.

31. FONSECA, *supra* note 17, at § 8.1, 297.

32. TILA was first amended in 1980. This amendment reduced the sting of TILA remedies, but preserved the original goals. The 1995 amendments, however, gutted the goals; one author likening it to "having most of its teeth extracted." Roddy, *supra* note 30, at 639 (1998).

Perhaps this is because in the past ten years, TILA disclosures have resulted in greater consumer knowledge. The FRB found an almost 200% increase in consumer awareness of prevailing APRs. FRB, *Regulatory Analysis of Revised Regulation Z*, 46 Fed. Reg. 20,941 at 10,943 (quoting an agency study that in 1969 less than 15% of consumers were aware of prevailing APRs and in 1977 almost 55% were familiar with the numbers). Congress certainly attributed this increase to the Act's effects on competition. S. Rep. No. 368, reprinted in 180 U.S.C.A.N. 236, 252.

33. Most amendments of the Simplification and Reform Act were enacted on October 1, 1982; the law, however, was passed on March 31, 1980. Pub. L. No. 96-221, as amended Pub. L. No. 97-110.

34. FONSECA, *supra* note 17, at § 8.1, 299. See DENNIS REPLANSKY, *TRUTH-IN-LENDING AND REGULATION Z: A PRACTICAL GUIDE TO CLOSED-END CREDIT* 14-47 (1984)(providing an in depth discussion of TILA's coverage).

35. One major complaint of TILA prior to 1980 was the disclosure forms were too long for consumers to understand. REPLANSKY, *supra* note 33, at 7.

In response the amendment had four substantial changes as follows: (1) decrease the amount of information that must be revealed to the consumer; (2) decreased creditor liability for statutory remedies; (3) authorized model disclosure forms to limit civil liability; and (4) strengthened administrative enforcement. *Id.* at 6-7.

At the behest of Congress, the FRB created model disclosure forms; use of these forms is compliance with TILA. 15 U.S.C. § 1604(b). Obviously this presumption does not extend to the numerical entries provided in each transaction. Besides looking to those listed in Regulation Z, there are myriad publications that compile examples of complying documents. See, e.g., ALVIN L. ARNOLD, *TRUTH-IN-LENDING AND FAIR CREDIT REPORTING FORMS GUIDE* (1971); CARL FELSEN-

Enforcement of TILA is through a combination of administrative actions,³⁶ criminal prosecution,³⁷ and private litigation.³⁸ Because so many credit agencies were already regulated by agencies, Congress fragmented the administrative enforcement of TILA by distributing control among nine different agencies.³⁹ Primarily, however, the Federal Trade Commission (FTC) governs TILA when not otherwise specifically enumerated in the statute.⁴⁰ Criminal sanctions, which are rarely charged, apply only if the creditor willfully and knowingly violates the act.⁴¹

As for private litigation, consumers act as their own "private attorney general"⁴² seeking three types of damages, actual damages, statutory damages, and attorney's fees.⁴³ A claim of actual damages, to which there is no cap, may be recovered for any violation assuming the plaintiff can show actual injury.⁴⁴ Statutory damages, applying in both open-end⁴⁵ and close-end⁴⁶ credit transactions, are awarded if the consumer was given incorrect information, regardless of whether the transaction was minor or there were no damages.⁴⁷ In open-end transactions, statutory damages may be imposed for inadequate initial disclosure or periodic statements.⁴⁸ In close-end transactions, statutory damages may be awarded if the credit company fails to disclose the amount financed, the finance charge, the annual percentage rate, the number

FELD & ALAN SIEGEL, SIMPLIFIED CONSUMER CREDIT FORMS (Cum. Supp. 1986).

36. 15 U.S.C. § 1607.

37. 15 U.S.C. § 1611.

38. 15 U.S.C. § 1640(a)(1).

Rescission is another valuable remedy, which applies in transaction dealing with the purchase of a house. This is a complex and ever changing area of TILA into which I will not delve. While this Act is primarily about disclosure, rescission is one of the few areas of substantive consumer protection. In a transaction involving the creditor receiving a security interest in the consumer's home, consumers were given the right to rescind the contract within three days of proper disclosure. For an explanation of this remedy, consult RENUART & KEEST, *supra* note 16, at 337-413.

39. 15 U.S.C. § 1607(a).

40. 15 U.S.C. § 1607(c).

41. Indeed, this sanction is quite rare because it is difficult to prove. The penalty is a fine not to exceed \$5,000 or an imprisonment not to exceed 1 year or both. 15 U.S.C. § 1611 (1998).

42. REPLANSKY, *supra* note 34, at 231.

43. 15 U.S.C. § 1690(The Simplification Act clarified the attorney's fees allowed).

44. 15 U.S.C. § 1640(a)(1). Damages are computed by the excess interest charged.

45. Open-end credit is ongoing or revolving credit. HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION § 285 (1986).

46. Close-end credit refers to one-time credit purchases, such as financing a car. *Id.*

47. Statutory damages for individuals are governed by 15 U.S.C. § 1640(a)(2)(A).

48. *Id.* Prior to the 1980 amendment, any instance of non-compliance resulted in statutory damages, even if the fact was non-material. *See In re Smith*, 737 F.2d 1549 (11th Cir. 1984) (failing to list consumer's residence would have resulted in statutory damages had the statute of limitations not run). Today the non-compliance must be material. 15 U.S.C. § 1640(a)(2)(A).

of payments, the payment schedule, or the security interest schedule.⁴⁹ Statutory damages are equal to twice the amount of any finance charge involved in the transaction and have a \$200 minimum with a \$2000 maximum.⁵⁰

Defenses to a alleged TILA violation have multiplied since its inception. Of course, the statute of limitation is an adequate defense to TILA actions, unless the creditor initiates a suit against the consumer, wherein the consumer is not barred from asserting a violation.⁵¹ Originally, a creditor's act done in good faith conformity with any rule, regulation, or interpretation of TILA and Regulation Z was an adequate defense to a TILA violation.⁵² The Simplification Act; however, created model forms to facilitate compliance making good faith claims harder to prove if not using the model forms.⁵³ Prompt correction is also a defense; if within 60 days of discovering the faulty disclosure, the consumer is notified and adjustments are made, then a TILA action does not lie.⁵⁴ A harder defense to employ is that of bona fide error, which applies only to the most technical errors.⁵⁵ While Congress has loosened the teeth of TILA,⁵⁶ it has restricted the possible defenses to maintain its effectiveness.

II. ARBITRATION

Arbitration is a dispute resolution process where a neutral third party renders a decision after each party has stated his case. While this process has only gained great attention in the past 20 years, there is a long history of arbitration throughout the world from both the Phoenician and Greek traders to early North American merchants.⁵⁷ Even President Lincoln lauded alternatives

49. 15 U.S.C. § 1640(a)(2)(A).

50. *Id.*

51. The statute of limitations is one year from the date of the violation. 15 U.S.C. § 1640(e).

52. FONSECA, *supra* note 17, at § 8.9, 327.

53. *Id.*

54. 15 U.S.C. § 1640(b). Some courts have restricted the discovery of error to mathematical and clerical errors only. *E.g.* Hamilton v. Southern Discount Com., 656 F.2d 150, n.62 (5th Cir. 1981).

55. 15 U.S.C. § 1640(c). The company must, by a preponderance of the evidence, prove the violation was not intentional, notwithstanding the maintenance of reasonable procedures adapted to avoid the error. *Mirable v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976), *overruled on other grounds* *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 603 (7th Cir. 1982).

56. *See supra* note 32.

57. BETTE J. ROTH ET AL., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 1.1, 2

to litigation:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.⁵⁸

In addition to its long history, arbitration provides many advantages to traditional resolution in courts. The process of arbitration is quickly initiated and with relaxed rules of evidence, arbitration eases the difficulties of suing a party represented by a large firm.⁵⁹ Additionally, arbitrators with special expertise may be found for a particularly complex case, thus providing a resolution that best suits both parties' needs.⁶⁰ Because of arbitration's de-emphasis on perpetuating the adversarial system, antagonization between the parties decreases.⁶¹ The privacy of the decision is also of great benefit to companies.⁶² Of course, arbitration is significantly cheaper; there may be more direct costs, but overall fees are greatly reduced.⁶³ Even the company benefits in a TILA

(1993).

58. THE COLLECTED WORKS OF ABRAHAM LINCOLN, Vol II, 81-2 (Roy P. Basler, et al., ed. 1953-55).

59. A party is able to quickly move towards resolution, instead of waiting for an opening in the dockets. National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* at 13 (1983)[hereinafter *Paths to Justice*], reprinted in Administrative Conference of the U.S., Sourcebook: Fed. Agency Use of Alt. Means of Disp. Res. at 21 (Office of the Chairman; 1987)[hereinafter SOURCEBOOK].

60. *Paths to Justice*, supra note 59, at 10, reprinted in Sourcebook, supra note 59, at 18; Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive, 42 WM. & MARY L. REV. 22 (2000)[hereinafter Sternlight, *Mandatory*].

61. Laurie A. Rich & Kenneth Jacobson, *Alternative Dispute Resolution-Opening Doors to Settlements-*, CHEMICAL WEEK, August 14, 1985, at 29, reprinted in SOURCEBOOK, supra note 59, at 72. This is most often seen in cases involving two business. For example, in a case involving breach of contract for failing to deliver goods to a retailer, courtroom based litigation almost assures that the parties will not work together in the future. In an arbitration situation, however, the situation is not as adversarial, thus possibly saving the relationship. Joseph T. McLaughlin, *Resolving Disputes in the Financial Community: Alternatives to Litigation*, 41 ARB. J. 16, 21 (1986).

62. *Paths to Justice*, supra note 59, at 10, 13, reprinted in Sourcebook, supra note 59, at 18, 21. A company is not tarnished by accusations, or even findings, as it would in a trial. Hugh R. Jones, *Arbitration from the Viewpoint of the Practicing Attorney: An Analysis of Arbitration Cases Decided by the New York State Court of Appeals From January, 1973 to September, 1985*, 14 Fordham Urb. L.J. 523, 526 (1986) (praising virtue of privacy as to fact of controversy and result).

63. Arbitration is less expensive because of relaxed evidentiary standards; the costs associated with document authentication and production of a record is nil in arbitration. ROBERT F. MILLMAN, ARBITRATION 2 (1981); ROTH, supra note 56, at § 3.5. *Contra* DONNA STIENSTRA & THOMAS E. WILLGING, ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS? 25 (1995) (arguing these claims are unsubstantiated).

class action; if the lender loses, it has only legal bill for one case.⁶⁴ Most importantly, arbitration seems to empower individuals more, perhaps because an individual is more likely to defeat a corporation in arbitration than in a courtroom setting.⁶⁵ There is also a general feeling of goodwill the public has about arbitration; people like it⁶⁶ and believe it is fair.⁶⁷

Even with these advantages, disadvantages always exist. The largest concern with arbitration is that it creates a dearth of precedent leaving many fundamental issues of law unsettled.⁶⁸ Additionally, this can allow parties to hide

While the following studies have small sample sizes, it is adequate proof that arbitration is cheaper. In one United States District Court, there was a 20% decrease in the cost of a case, even after there was some litigation prior to the cases being sent to arbitration. *Id.* at 29 (citing ALLEN LIND, *ARBITRATING HIGH STAKES CASES: AN EVALUATION OF COURT ANNEXED ARBITRATION IN ONE UNITED STATES DISTRICT COURT*, 39-41 (Rand Institute for Civil Justice 1990)). Another survey of those who had participated in court ordered arbitration after initial appearances in court, showed there was approximately a \$6,000 difference between litigation and arbitration. BARBARA S. MEIERHOEER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* 85 (1990). Additionally, the attorneys in these cases felt that they had saved time (60% agreed) and that the cost was less (62% agreed) because of the arbitration. *Id.*

Realize the cost can be decreased even more when the parties go directly to arbitration because of contractual arbitration agreements. This allows a much needed improvement in access to legal remedies. *Paths to Justice*, *supra* note 59, at 8, *reprinted in Sourcebook*, *supra* note 59, at 16 (estimating 1% of the United States receives 95% of all legal services provided).

64. See Charles T. DuMars & Marilyn C. O'Leary, *Class Action Damages Under The Truth In Lending Act: The Consumer Perspective*, 58 U. Det. J. Urb. L. 699, 705 (1981). TILA allows the prevailing consumer to collect attorney's fees. 15 U.S.C. § 1640 (a).

65. Corporations win 83% of the time in suits against individuals and only 63% of the time in arbitration proceedings against individuals. Sarah Baxter, *Appeals from Arbitration Orders Under the Federal Arbitration Act: Pro-arbitration Policy Clashes With The Right to Appeal Final Decisions*, 2000 J. DISP. RESOL. 165 (2000).

66. 59% of Americans would automatically chose arbitration over litigation. And once informed of the cost of litigation, the percentage of approval jumps 24% to 83% in favor of arbitration. *Roper Poll Reveals Americans; Preference for Resolving Legal Issues; Majority Believe Arbitration is Their Best Option*, PR NEWSWIRE, Nov 15, 1999, available at The National Arbitration Forum's web site (visited February 16, 2002) <<http://www.arb-forum.com/about/questions.asp#23>>. *Contra* STEINSTR & WILLGING, *supra* note 63, at 23 (arguing that public satisfaction does not warrant doing away with precedent).

67. Of a study of ten pilot court ordered arbitration programs, which included 6,248 cases, 80% of the parties involved in the arbitration thought the proceedings were fair; 92% of the attorneys thought the proceedings were fair. MEIERHOEER, *supra* note 63, at 63 (1990).

68. *Paths to Justice*, *supra* note 59, at 10, 13, *reprinted in Sourcebook*, *supra* note 59, at 18, 21; JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 113 (1983) (discussing complaint that "[d]ominant business interests . . . would use compulsory arbitration clauses as a shield for their efforts to control prices, suppress competition, and thwart legislative regulation while they removed their private rules from public supervision")(emphasis added).

their actions from public scrutiny, which may result in other companies not taking preventative measures.⁶⁹ Also with severely limited discovery, there is little chance to crystallize the issues causing disputants to make decisions about which they are not fully informed.⁷⁰

As to the cost, there is no argument that litigation is expensive, but in many cases, the precedential value is worth the cost.⁷¹ Up front costs of arbitration deter many consumers from proceeding with arbitration.⁷² Some lawyers are unwilling to take these binding arbitration cases on contingency, so even when a consumer can afford the arbitration fees, his case may still be thwarted by his inability to fund a retainer.⁷³ First USA, which adopted arbitration in 1977, maintains that it is beneficial to both consumers and corporations because arbitration is cheaper, thus allowing more claims to be brought.⁷⁴ Contrary to the official corporate statement, arbitration is used more by companies than consumers; of the more than 50,000 claims concerning First USA, all but four of the complaints were made by the corporation.⁷⁵ These advantages and disadvantages have been widely criticized, but there has been a gradual acceptance of arbitration in both the legislature and judiciary.

69. *Paths to Justice*, *supra* note 59, at T.3, *reprinted in Sourcebook*, *supra* note 59, at 21, 41. If a decision is private, there is no possibility for reprimands from the community.

The privacy of a decision also affects other corporations actions. If one corporation is liable, most corporations change their policy to comply. If the decision is private, corporations will remain static. Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 312-13 (1995).

70. *Paths to Justice*, *supra* note 59, at 11, 15, *reprinted in Sourcebook*, *supra* note 59, at 19, 23.

71. Arbitration is not necessarily corrective, i.e. if the problem is not fixed, more people must sue for the correction to become economically viable to the corporation. Accordingly, the corporation does an analysis of how many people it thinks will sue and because arbitration is "cheaper" there must be more people to sue who to make correction economically viable.

72. The International Chamber of Commerce requires a fee of \$4,000 for claims that involve less than \$50,000. The National Arbitration Forum charges \$49 for claims that have less than \$1000 in dispute and \$149 for claims that have less than \$15,000 in dispute. Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us;'* *Arbitration Clauses Block Consumers From Taking Companies to Court* WASH. POST, May 22, 1999, at A1 [hereinafter Mayer, *Hidden*]; *Paths to Justice*, *supra* note 59, at 15, *reprinted in Sourcebook*, *supra* note 59, at 23.

73. Mayer, *Hidden*, *supra* note 72, at A1. This is especially true in TILA claims, when the dispute only concerns a \$29 late fee. *Id.*

74. *Id.*

75. *Id.* First USA began mandatory arbitration in 1997. It wins approximately 99.6% of the time. Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum's Rulings Called One-Sided*, WASH. POST, March 1, 2000, at E1 [hereinafter Mayer, *Win*]. Of the 51,622 claims against consumers, the forum has made 19,075 awards, only 87 of those were in favor of consumers (3,600 cases were still pending at the time of publication of the Mayer article). *Id.*

This gradual acceptance originated with private organizations. The formation of the Arbitration Society of America⁷⁶ in 1922 was the driving force behind the passage of the Federal Arbitration Act (FAA) in 1925.⁷⁷ The FAA is a dramatic piece of legislation enforcing arbitration agreements in both maritime transactions and in contracts involving commerce.⁷⁸ The Act is used solely to enforce the terms of arbitration agreements.⁷⁹ The passage of the FAA spurred state support for the enforcement of arbitration agreements; all 50 states now have some arbitration enforcement provision enacted.⁸⁰ What started as a small policy groups has created a nationwide preference for arbitration.

It is seemingly impossible to identify exactly how many companies use arbitration agreements in everyday contracts, but the number has multiplied

76. ROTH, *supra* note 57, at 3. This organization later merged with the Arbitration Forum in 1926 to form the American Arbitration Association (AAA). *Id.*

77. 9 U.S.C. § 1 et seq. The FAA's passage was motivated by congressional desire to enforce arbitration agreements to arbitrate and overrule the court's longstanding refusal to enforce these agreements. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468. This distrust of arbitration apparently "lie[s] in 'ancient times,' when the English courts fought 'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'" *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 211 (1956) (Frankfurter J., concurring) (quoting *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (SDNY 1915)).

While the FAA is a federal law, it does not provide federal jurisdiction, accordingly the FAA only applies in cases that have independent subject matter jurisdiction. *S.J. Groves & Sons v. Am. Arb. Assoc.*, 452 F. Supp. 121 (D. Minn. 1978) (dismissing the suit for lack of subject matter jurisdiction because the only possible federal claim was the arbitration agreement).

78. 9 U.S.C. § 2.

79. 9 U.S.C. § 1 et seq. The only exceptions are those remedies grounded in equity or at law for the revocation of a contract. 9 U.S.C. § 2.

While originally conceived to apply to disputes in federal courts, the FAA also applies in state courts. *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA applies in state as well as federal court, and that it preempts conflicting state statutes). *Contra* IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* at 117 (arguing "the hearings confirm what is already clear from the prior background and the bills themselves [the proposed USAA (the FAA)] was intended to apply only in federal courts").

80. ROTH, *supra* note 57, at § 2.1, 2. 34 of these states have adopted the Uniform Arbitration Act (UAA). These include Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wyoming. The District of Columbia has also adopted the UAA. *Id.* at § 2.2, 3.

exponentially for credit companies.⁸¹ The next time you receive a credit card solicitation, check the brochure for an arbitration agreement. If one is not there, it will be when you are sent all the information. Having likened the inclusion of binding arbitration agreements to popcorn⁸², one expects that “virtually all major banks and lending institutions will implement consumer arbitration procedures within the next five years [2003].”⁸³

III. ENFORCEMENT OF ARBITRATION AGREEMENTS⁸⁴

After early resistance to ADR, courts have increasingly favored enforcing arbitration agreements.⁸⁵ From the early 1980s, there have been thirteen cases before the Supreme Court of the United States about contractual arbitration with all enforcing the agreements that evidenced a transaction involving commerce.⁸⁶ In fact, the high court states the goals of the FAA supersede all

81. See *infra* note 87.

82. “People who draft contracts have been including [mandatory arbitration provisions] like popcorn.” Mayer, *Hidden*, *supra* note 72, at A1 (citing Edward Anderson, the Managing Director of the National Arbitration Forum).

83. Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator?* 7 BUS. L. TODAY 24, 28 (1998).

84. For an extensive and almost assuredly exhaustive reference to federal cases dealing with arbitration, please consult Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns* 72 TUL. L. REV. 1 (1997) [hereinafter Sternlight, *Rethinking*].

85. The first court recognition of binding arbitration was in 1855. *Burchell v. Marsh*, 58 U.S. 344 (1854). Although a landmark case in arbitration's history, this case did not enforce the arbitration agreement.

86. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688-89 (1996) (reversing a Montana Supreme Court decision that refused to enforce an arbitration clause for failure to comply with Montana's statutory notice requirement, and further holding that the statute was preempted by the FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding that the FAA applies to the full extent of Congress' permitted regulation under the Commerce Clause); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing federal policy favoring arbitration in holding that claims brought under the Age Discrimination in Employment Act may be required to be arbitrated); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (taking note of federal policy favoring arbitration in holding that federal securities fraud claims may be required to be arbitrated); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (holding that securities fraud and RICO claims can be arbitrated, and stating that in light of federal favoritism toward arbitration, “[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (stating that while “the parties' intentions control . . . those intentions are generously construed as to issues of arbitrability.”); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (holding that the FAA applies in state as well as federal court, and that it preempts conflicting state statutes).

other policy considerations, even when not judicially economical.⁸⁷

Avoiding an arbitration provision is difficult. The FAA defines arbitration agreements as “valid, irrevocable, and enforceable, save upon such grounds exist at law or inequity for the revocation of any contract.”⁸⁸ Because an agreement to arbitrate any claims in the future is a contract, courts use typical contract remedies to avoid the terms of these agreements, which includes fraud and substantive unfairness.⁸⁹ There are extreme constraints on the usage of these avoidance remedies; the questions against arbitrability must be well supported by the evidence.⁹⁰ Indeed, the Supreme Court has ruled unless a party can show that “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue” no remedy will lie.⁹¹

Fraud, typically difficult to prove in contract disputes, is even more difficult when the contract provides for an arbitration proceeding.⁹² Courts are not willing to enforce arbitration agreements that have been induced by fraud.⁹³ While this seems quite simple, courts are very exacting when it comes to setting a contract aside for fraud.⁹⁴ The arbitration agreement is enforceable even if the contract was induced by fraud.⁹⁵ The arbitration agreement will only be

87. Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985) (holding a claim may be arbitrated even if all pendent claims that supported the arbitration agreement are severed); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

88. 9 U.S.C. § 2.

89. The FAA applicability to TILA claims is quite straightforward. As TILA is a federal law, federal courts have original jurisdiction. 28 U.S.C. § 1331. As such, the FAA mandates the enforcement of arbitration agreements that concern TILA violations. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

90. *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

91. *Id.* at 628. As clarified in a later case, this intent may be found in the statute’s text, its legislative history, or an inherent conflict between arbitration and the underlying purpose of the statute. *Gilmer*, 500 U.S. at 26 (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)). However, all questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. *Gilmer*, 500 U.S. 20, 26 (quoting *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

92. *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988) (holding that a reliance on an alleged misrepresentation is not reasonable where the party could, by reading the contract, have ascertained the truth); Sternlight, *Rethinking, supra* note 83, at 31-32.

93. ROBERT M. RODMAN, *COMMERCIAL ARBITRATION* § 5.1, 175 (1984); See *Prima Paint Corp. v. Flood & Conklin Manuf. Co.*, 388 U.S. 395 (1967) (holding the arbitrator decides if an agreement is induced by fraud).

94. *Prima Paint*, 388 U.S. at 397.

95. *Id.*

set aside if the arbitration clause, itself, was induced by fraud. Specifically, courts have enforced clauses when an agent states the signing is just a mere formality⁹⁶ or even when an agent falsely states that signing does not compromise any rights.⁹⁷

If a contract is substantively unfair or unconscionable, the court may set the agreement aside.⁹⁸ A contract is unconscionable when enforcement of the contract would create a gross miscarriage of justice.⁹⁹ Very few recent cases are claiming arbitration clauses unconscionable if it imposes an unreasonable financial burden;¹⁰⁰ however, this last ditch effort is a nebulous concept that is rarely found.¹⁰¹ As an example of the court's reluctance, American Express notified its customers of the change in its litigation procedures by inserting a notice in the monthly statement.¹⁰² The notice proclaims the consumer is bound to arbitration if he uses the card after a certain date.¹⁰³

This is a perfect example of a contract of adhesion, yet courts rarely look to principles of adhesion to set the contract aside because all commerce as we know it would stop. Simply because a contract is adhesive does not render it invalid.¹⁰⁴ Contracts of adhesion are enforceable unless: (1) the contract or clause was not within the "reasonable expectations" of the weaker or adhering party, or (2) the contract or clause is unduly oppressive, unconscionable, or against public policy.¹⁰⁵ The strident federal policy in favor of arbitration makes a finding of unscionability because of adhesion unlikely.¹⁰⁶

Despite this view, California has considered one arbitration agreement an unenforceable contract of adhesion.¹⁰⁷ In *Graham v. Scissor-Tail, Inc.*, the court denied a music group's form contract with a music promoter. The contract was adhesive because most musical performers are members of the

96. *Smith Barney Shearson, Inc. v. DeFries*, 1994 WL 455178, at *2 (S.D.N.Y. 1994).

97. *Benoay v. E.F. Hutton & Co.*, 699 F. Supp. 1523, 1529 (S.D. Fla. 1988) (upholding the arbitration clause reasoning that "[a] party who signs an instrument is presumed to know its contents" even though the broker had failed to inform the client of the ramifications).

98. *Knepp v. Credit Acceptance Corp.*, 1999 229 B.R. 821 (N.D. Ala. 1999); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998).

99. *Knepp*, 1999 229 B.R. 821 (N.D. Ala. 1999).

100. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29-34.

101. Even when it is a state court that is not bound to the Supreme Court's elevated standards. *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388 (S.C. Ct. App. 1998); *Roberson v. Money Tree of Ala.*, 954 F. Supp. 1519 (M.D. Ala. 1997).

102. *Mayer, Hidden*, *supra* note 72, at A1.

103. *Id.*

104. *Dillard v. Merrill Lynch*, 961 F.2d 1148, 1154 (5th Cir. 1992).

105. *Finkle & Ross v. Becker Paribas*, 622 F.Supp. 1505, 1512 (S.D.N.Y. 1985)

106. *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59 (1984); *Fustok v. Conticommodity Servs., Inc.*, 577 F. Supp. 852 (S.D.N.Y. 1984).

107. *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (1981).

union, and anyone wishing to promote a concert with a union member must sign the contract.¹⁰⁸ This view is decidedly without many supporters in federal courts; most cases hold there is nothing inherently unfair or oppressive about arbitration clauses.¹⁰⁹ Binding arbitration agreements, even those no one actually signs, are enforced without a second of thought.

IV. IMPACTS

Very few cases have ruled on whether TILA precludes arbitration of disputes arising under the Act.¹¹⁰ The court in *Sagal v. First USA Bank* refused to elicit an exception to the FAA for TILA claims.¹¹¹ Regardless, lenders are feverently using mandatory arbitration clauses.¹¹² As the downside of arbitrating TILA claims is increasingly known, this shift away from litigation should be carefully considered.

Drafters of arbitration agreements will always try to draft to their advantage, because these agreements are NOT voluntary, the consumer has no choice.¹¹³ Indeed, companies try to minimize the cost of actual payment by using arbitration.¹¹⁴ Some arbitration agreements also regulate both substantive issues and procedural issues; i.e. the statute of limitations, what claims may be brought, the right to relief, or even the burdens of persuasion.¹¹⁵ As some

108. *Id.* at 175-77.

109. *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 446 n.3 (S.D.N.Y. 1985).

110. *Thompson v. Ill. Title Loans, Inc.*, 2000 WL 45493, at *1 (N.D. Ill. 2000); *Sagal v. First USA Bank, N.A.*, 69 F. Supp.2d 627, 632 (D. Del. 1999); *Lopez v. Plaza Finance Co.*, 1996 WL 210073, at *1 (N.D. Ill. 1996).

111. *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d at 631 (D. Del. 1999)(stating the plaintiff has the burden to show that Congress intended to make an exception to the FAA).

The Court's preference for arbitration is unquestionable; it has allowed arbitration of anti-trust claims for an international business transaction and for securities fraud claims. *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 665 (1985); *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 227 (1987).

112. *See infra* note 117.

113. Jean R. Sternlight, *Panacea or Corporate Tool? Debunking The Supreme Courts Preference For Binding Arbitration*, 74 WASH. U.L.Q. 637, 680-82 (1996) [hereinafter Sternlight, *Panacea*].

114. Erik Moller et al., PRIVATE DISPUTE RESOLUTION IN THE BANKING INDUSTRY 7-8, 11 (1993) (citing a Rand Institute for Civil Justice survey of five banks wherein all the banks admitted they had instituted arbitration to decrease the likelihood of large jury awards). Indeed, substantially fewer consumers filed complaints after the adoption of mandatory arbitration. *Id.* at 21-21.

115. *Pickett v. Brown*, 462 U.S. 1, 18 (1983) (concerning the statute of limitations);

companies are want to do with forum selection clauses, the company chooses a distant forum to discourage claims.¹¹⁶ The Supreme Court has even upheld an agreement that prohibited punitive damages.¹¹⁷ It is shameless to suggest that all companies that use binding arbitration clauses are unfair; the protocol of the AAA suggests that all clauses should be detailed enough to disclose material rights, use clear and plain language, and be fair.¹¹⁸ Presumably, companies try to emulate these goals. However, one person humorously decrying mandatory arbitration clauses hypothesized; “if the provisions are so wonderful, why are the clauses always hidden?”¹¹⁹

The reduced discovery often found in arbitration affects the integrity of the system. Discovery is often limited in arbitration proceedings to speed up the process and thus decrease costs.¹²⁰ This can be problematic because consumers cannot delve into the depths of corporate records to establish a pattern of harm.¹²¹ It is blatantly unfair where one party has substantially greater access to relevant witnesses and evidence, thus they may be denied the opportunity to prevail in arbitration.¹²² This also seems to be in direct conflict with the Court’s recognition that adequate discovery may be essential to comply with “[b]asic considerations of fairness.”¹²³

Also, the inadequate discovery may preclude the arbitrator from adequately assessing statutory damages. Statutory damages are determined by

DeGaetano, 1996 WL 44226, at * 5-6 (concerning the type of claim that may be brought); *Graham Oil v. Arco Prods. Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (concerning the types of damages awarded); *Santosky v. Kramer*, 455 U.S. 745, 756-58 (1982) (concerning the burden of persuasion).

116. This works for myriad reasons. Primarily, the cost of transport may be prohibitive. Or the laws or even language is foreign to the consumer. Sternlight, *Panacea*, *supra* note 113, at 637 n. 262.

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

118. Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered by a Consumer Lender*, 1172 P.L.I. COM. L. & PRAC. COURSE HANDBOOK SERIES 17 (2000)[hereinafter Kaplinsky & Levin, *Anatomy*]. It is worth noting the authors filed an amicus brief on behalf of the American Bankers Association et al. In Support of Petition for En Banc Consideration, *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir. 1999) as well as the amicus brief of the Chamber of Commerce of the United States in support of the Petitioners, *Randolph v. Green Tree Fin. Corp.*, 531 U.S. 79 (2000).

119. Mayer, *Hidden*, *supra* note 72, at A1 (citing Mark Budnitz, a Georgia State University Law professor who is a strong opponent to mandatory arbitration clauses).

120. Mayer, *Hidden*, *supra* note 72, at A1.

121. *Id.*

122. Sternlight, *Rethinking*, *supra* note 83, at 27; *Contra Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (refusing to set aside an arbitration agreement on the ground that discovery was inadequate).

123. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986).

considering “among other relevant factors, the amount of any actual damages awarded, *the frequency and persistence of failures of compliance by the creditor*, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor’s failure of compliance was intentional.”¹²⁴ The limited discovery usually found in arbitration severely undermines its effectiveness.

V. IMPACTS ON CLASS ACTIONS

Class actions¹²⁵ are praised for being efficient¹²⁶ and providing improved

124. 15 U.S.C. § 1640(a) (paragraph following (a)(4)) (emphasis added).

125. Class actions, a permissive procedure, are governed by Rule 23 of the Federal Rules of Civil Procedure. This rule lists the requirements of a class, the basic fact scenarios, and the procedure for certification. FED. R. CIV. P. 23.

There are four basic requirements for a class, which are numerosity, commonality, typicality, and adequate representation. FED. R. CIV. P. 23(a). To meet the numerosity requirement, a class must have enough members that joinder of all members through traditional methods is impractical. FED. R. CIV. P. 23(a)(1). Generally, a class that has more than fifty members meets the numerosity requirement. *Kornick v. Talley*, 86 F.R.D. 714 (N.D. Ga. 1980). There is a split in jurisdictions in certifying classes with more than thirty and less than fifty members. *Swanson v. Am. Indust.*, 415 F.2d 1326 (7th Cir. 1969). Although, some courts have certified a class with as few as twenty members. *Ark. Educ. Ass’n v. Bd. of Ed.*, 446 F.2d 763 (8th Cir. 1971). The number of members is not the only critical element to numerosity; other relevant factors are the concentration of the class members and the magnitude of the claims. *Swanson v. Am. Indust.*, 415 F.2d 1326 (7th Cir. 1969).

Commonality requires that there be questions of law or fact common to the entire class. FED. R. CIV. P. 23(a)(2). Courts take two methods when approaching a question of commonality. Is there a common nucleus of operative facts. *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968). Or are there liability issues common to the class, and will this common issue predominate over individual issues. *Steiner v. Equimark Corp.*, 96 F.R.D. 603 (W.D. Pa. 1983).

Often viewed as somewhat duplicative of the commonality requirement in (a)(2), typicality asks if the claims or defenses of the class representative must be typical of the claims or defenses of the class. FED. R. CIV. P. 23(a)(3); *Scott v. Univ. of Delaware*, 601 F.2d 76 (3d Cir. 1978). Courts construe this requirement as the class representative must have claims substantially similar to claims of the entire class. *Allen v. Isaac*, 99 F.R.D. 45 (N.D. Ill. 1983).

The final requirement of a class is that there is adequate representation by the class representative and the attorneys. FED. R. CIV. P. 23(a)(4). Specifically, the class representative cannot have any claims antagonistic to the class, and the attorney must be qualified and exercise a vigorous representation. *Sosna v. Iowa*, 419 U.S. 393 (1975). However, courts will only disavow a class on this requirement if there is a genuine legal conflict relative to the litigation. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977).

There are three basic fact scenarios where class action applies. FED. R. CIV. P. 23(b). First is where separate actions would create a risk of inconsistent or varying adjudications, which would

access to litigation,¹²⁷ but recent class actions have been criticized because it “serve[s] the interests of plaintiffs’ attorneys more than” the plaintiffs.¹²⁸ Companies often use binding arbitration as a way to minimize the impacts of litigation and especially class actions.¹²⁹ In fact, the National Arbitration Forum encourages companies to adopt arbitration clauses specifically to avoid class actions;¹³⁰ potential defendants know the plaintiff will not pursue the claim individually because it is not economically viable.¹³¹

A. *How TILA Works With Class Actions*

TILA claims are uniquely suited for class actions for a variety of reasons. The violation is built into documents that are sent to many consumers all over the country, which easily meets the numerosity requirements.¹³² As for commonality, members will be alleging the same TILA violation, the only unique factor is the member’s actual damages. Again, typicality is not an issue because the representative is alleging the same TILA violation as the class. Because the class representative has the same claims as the class, there is no legal conflict between the representative and the class. Jurisdiction is not a problem as it is in many class actions because TILA is a federal law and the courts have original jurisdiction.¹³³

Even with this clear application, there was great debate whether TILA litigation could support a class action. Defendants and some courts argued the

establish incompatible standards of conduct. FED. R. CIV. P. 23(b)(1). Second is where a class is seeking injunctive or equitable remedy such as in enforcement of civil rights legislation. FED. R. CIV. P. 23(b)(2). Third is where common questions of law or fact common to the members of the class predominate over individual claim. FED. R. CIV. P. 23(b)(3).

As for procedure, the court determines “as soon as practicable” if this can be brought as a class action. At this point, the court evaluated the above requirements and decides if the action may proceed. FED. R. CIV. P. 23.

126. Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U.L. REV. 514, 514 (1996).

127. *Amchem*, 521 U.S. at 617-18.

128. Sternlight, *Mandatory*, *supra* note 60, at 34, nn 123-126.

129. Kaplinsky & Levin, *Predator*, *supra* note 83, at 25.

130. Mayer, *Hidden*, *supra* note 72, at A1.

131. Sternlight, *Mandatory*, *supra* note 60, at 9. Sternlight quotes Attorney Edward Wood Dunham bluntly describing his strategy; “absent unusual circumstances, . . . the franchisor with an arbitration clause should be able to require each franchisee in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, and because arbitrators typically do not issue runaway awards, strict enforcement of an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure.” *Id.* at 10.

132. *Id.* at § 8.8.1, 498.

133. 28 U.S.C. § 1331. However, jurisdiction is often problematic when federal jurisdiction is based on diversity. RENUART & KEEST, *supra* note 16, at § 8.8.2.2, 501.

\$100 minimum civil penalty plus attorney's fees would be an "annihilating punishment, unrelated to any damage to the purported class."¹³⁴ To answer this and following cases,¹³⁵ Congress amended TILA to eliminate recovery of statutory minimums in class actions.¹³⁶ Statutory damages have an overall ceiling of \$500,000 or one percent of the net worth of the creditor, whichever is lower.¹³⁷ A class may also recover actual damages.¹³⁸ Even after this shift in policy, some courts refuse to certify a class when the basis of the TILA violation is a technicality, even though the technical violation would support a TILA claim.¹³⁹

B. The Procedure of Arbitration and Class Actions

The class representative must file the case in federal court and wait for the defendant to demand arbitration at which point the court must decide whether to enforce individual arbitration, a judicial class action, or classwide arbitration.¹⁴⁰ One way corporations impede class actions is by demanding a arbitration of the claim of any plaintiff who sought to be a class representa-

134. *Ratner v. Chem. Bank N.Y. Trust Co.*, 329 F. Supp. 270, 274 (S.D.N.Y. 1971) (arguing holding the company liable for \$13 million for a technical violation of TILA on a point that Regulation Z was initially silent would create a Frankensteinian monster).

135. *Ratner v. Chem Bank N.Y. Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971); *Shields v. Valley Nat'l Bank* 56 F.R.D. 448 (Ariz. 1971) (holding "[a]t a time when large business firms in general appear to be a scapegoat for a great many of our Nation's problems, the Court should not gratuitously add the final straw. . . . [A TILA class action] could be the means of curing an illness by killing the patient . . ."); *Rogers v. Coburn Fin. Corp.*, 54 FRD 417 (N.D. GA 1972); *Wilcox v. Commerce Bank*, 55 F.R.D. 134 (D.C. Kan. 1972); *Kenney v. Landis Fin. Group, Inc.*, 349 F. Supp. 939 (N.D. Iowa 1972); *Buford v. Am. Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971).

136. One caveat, Congress only intended to allow class actions, not express a preference for this type of litigation. *Agostine v. Sidcom Corp.*, 69 F.R.D. 437, 444 (E.D. Pa. 1975); *Fitzgerald v. Northeastern Hosp. of Philadelphia*, 418 F. Supp. 1041 (E.D. Pa. 1975).

137. 15 U.S.C. § 1640(a)(2)(B). Interestingly this effectively limits the class to 5,000 members because once the class exceeds this number, each member will receive less than in an individual action.

138. *Ransom v. S & S Food Ctr., Inc.*, 700 F.2d 670, 677 (11th Cir. 1983). *Contra McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 10 (E.D. Mich. 1976)(rejecting proposed formula for actual damages for all class members).

139. *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1383-84 (11th Cir. 1984); *Cf Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 403 (6th Cir. 1980).

140. *ROTH, supra* note 57, at § 15.8, 10.

tive, thus preventing the representative from serving.¹⁴¹

For certification, there are two options, the arbitrator or the court.¹⁴² Arbitrator certification is generally to be discouraged because the FAA does not provide for adequate discovery to determine commonality nor may the arbitrator be able to adequately protect the Due Process rights of absent class members raised in *Phillips Petroleum Co. v. Shutts*¹⁴³ as well as confuse appealability issues.¹⁴⁴ An arbitrator has the discretion to certify a class, although expect an argument from the service provider that it should have the agreement enforced on its terms.¹⁴⁵ Whether a matter may be pursued by class action affects damages allowed, so a clause that does not enumerate the right to proceed with a class destroys a remedy.¹⁴⁶

C. *Can Class Actions be Combined With Arbitration*

Recall; however, that Rule 23 of the Federal Rules of Civil Procedure is permissive, thus consumers have no statutory right to bring a class action.¹⁴⁷ The potential for class action litigation in TILA litigation is considerably less when in arbitration because as of 1998 one federal court of appeals and these federal district courts have considered whether it may certify a class for an

141. *Id.* at § 15.1, 2.

142. *Id.* at § 15.9, 10.

143. 472 U.S. 797 (1985)(holding if the forum state wishes to bind absent plaintiffs concerning a claim for monetary damages, the state must provide minimum procedural due process protections).

144. ROTH, *supra* note 57, at § 15.9, 11. Specifically, is the order certifying the class immediately appealable as it is in federal courts or must the parties wait until a resolution of the arbitration? Roth provides an interesting conundrum as follows: "In general, under Section 16 of the FAA [9 U.S.C. § 16] which was added in 1988, orders denying arbitration are immediately appealable, whereas orders favoring arbitration are not. Such orders may also involve the rejection or approval of a classwide arbitration . . . A court might deny a petition or motion to compel classwide arbitration but order arbitration on an individual basis, or it might order classwide arbitration. In such cases, Section 16 does not provide a clear answer. For example, in an order *denying* a petition to compel classwide arbitration while *ordering* an individual arbitration to proceed appealable under 9 U.S.C. §§ 16(a)(1)(B) and (C) or is it nonappealable under 9 U.S.C. §§ 16(b)(2) or (3)?" Only one court has ruled on this issue and found the order unable to be appealed because it was an "embedded proceeding." *Perera v. Siegel Trading Co., Inc.*, 951 F.2d 780 (7th Cir. 1992).

145. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393 (Ct. App. 1998). The arbitrator granted the consumer's motion for class certification. *Id.* Once granted, Green Tree sought a preliminary injunction in federal District Court, which was dismissed for lack of subject matter jurisdiction. *Id.* The state appellate court held the arbitration agreement should be enforced on its terms. *Id.*

146. Sternlight, *Rethinking*, *supra* note 83, at 680.

147. *Kaminski v. Shawmut Credit Union*, 416 F. Supp. 1119 (D. Mass. 1976); 15 U.S.C. § 1641(a).

arbitration proceeding.¹⁴⁸ All four courts held that certifying a class would fall outside of the scope of the arbitration agreement.¹⁴⁹ Accordingly, unless the arbitration agreement expressly allows a class, the court may not consider certification.¹⁵⁰

The court in *Champ v. Siegel Trading Company* did certify a class but later vacated that motion because of the negative treatment of even consolidation in four federal Circuit courts.¹⁵¹ The Sagal court also found no “congressional command” to ignore the FAA and certify a TILA class.¹⁵² Another appellate court; however, denied a motion to compel arbitration of claims under TILA because the inability to obtain class-wide relief “seems contrary to the underlying purpose of TILA.”¹⁵³ California has a system wherein the court can certify a class binding all members to the arbitration.¹⁵⁴

148. Kaplinsky & Levin, *Predator*, *supra* note 83, at 24,26. Arbitration effectively eliminates the ability to participate in a class action.

149. *Gammara v. Thorp Consumer Disc. Co.*, 828 F. Supp. 673 (D. Minn. 1993) (holding that the court did not have the authority to certify a class when there was no such provision in the arbitration clause); *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997) (N.D. Cal. 1994) (holding the court had no authority to overrule the order of the court below compelling arbitration until the arbitration was complete); *Randolph v. Green Tree Financial Corp.*, 991 F. Supp. 1410 (M.D. Ala. 1997) (arguing the same), *overruled by* 531 U.S. 79 (2001) (holding that a contractual provision to arbitrate a TILA claim is enforceable regardless if it causes plaintiffs to be precluded from using class actions); *Champ v. Siegel Trading Co. Inc.*, 55 F.3d 269 (7th Cir. 1995) (holding that absent a provision allowing for class treatment, there is no basis for certifying a class).

150. *Id.*

151. *Perera v. Siegel Trading Co.*, 951 F.2d 780 (7th Cir. 1992). It is worth noting that the National Association of Securities Dealers (NASD) adopted Rule 12(d) which exempts claims that can be pursued by a class action from arbitration.

152. *Sagal v. First USA Bank*, 69 F.Supp.2d 627 (D.Del. 1999) (relying on *Champ v. Siegel Trading Co.*, 55 F.3d 269, which held “where an enforceable arbitration clause allows only for individual arbitration, a class will not be certified”).

153. *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 266 (D. Del. 1999); *See also* *In re Knepp*, 229 B.R. 821 (N.D. Ala. 1999) (holding that when arbitration effectively eliminates the ability to participate in a class action, the agreement is prejudicial).

But see *Dimick v. First USA Bank*, No. 99-2550 (D. N.J. 2000) (holding the FAA neither conflicts nor frustrates the policies of TILA); *Thompson v. Illinois Title Loans, Inc.*, no 99 C 3952 (N.D. Ill. 2000) (holding “TILA neither requires class actions nor grants substantive rights to them.”); *In re Piper Funds*, 71 F.3d 298, 302-03 (8th Cir. 1995) (holding a party’s “contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management”).

154. *Keating v. Superior Court*, 645 P.2d 1192 (Cal. App. 1982). *But see*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding the FAA has valid arbitration provision and states have

There is of course the similarity between certification and consolidation to consider. The First and Second Circuits have held that the court may order consolidation of separate arbitration proceedings.¹⁵⁵ The Fifth, Eighth, Ninth, and Eleventh Circuits hold that arbitration proceedings may be consolidated only if the arbitration clause in dispute expressly allows for it.¹⁵⁶

While judicial intervention may be necessary for class certification, the hybrid classwide arbitration is compatible with the FAA because it “advances the goals of arbitration—speed, economy, finality, and the liberal enforcement of arbitration agreements.”¹⁵⁷ It seemed classwide arbitration would get a boost with *Shearson/American Express, Inc. v. McMahon*, but in 1992 the rule barring arbitral class action was unanimously adopted by the Securities Industry Conference on Arbitration.¹⁵⁸

CONCLUSION

The phenomenon of this shift is being monitored. Jim Michaels, the Managing Counsel of the Division of Consumer Affairs for the FRB, said the agency is keeping a close watch on all consumer credit agreements to make sure “consumers are not being deprived of their rights.”¹⁵⁹ The Trial Lawyers for Public Justice has started a “Mandatory Arbitration Abuse Prevention Project” while also recognizing that mandatory arbitration can be “quite useful.”¹⁶⁰ Indeed; however, Congress created Truth in Lending Laws to protect the consumer, and we must make sure that our current policies are still meeting our original goals.

no power to require a judicial forum).

155. *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5-6 (1st Cir. 1988), *cert denied* 489 U.S. 1077 (1989). *Compania Espanola Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2nd Cir. 1975), *cert denied* 426 U.S. 936 (1976). Both cases relied on Rule 81 (a)(3) of the Federal Rules of Civil Procedure which provides “these rules apply . . . to the extent that matters of procedure are not provided for in . . . [the FAA]” and Rule 42 which allows consolidation of actions involving common questions.

156. *Del E. Webb Const. v. Richardson Hops. Authority*, 823 F.2d 145 (5th Cir. 1987); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Protective Life Insurance Corp., v. Lincoln National Life Insurance Corp.*, 873 F.2d 281 (11th Cir. 1989). These courts all held that Section 4 of the FAA requires enforcement of arbitration agreements “according to their terms.”

157. Daniel R. Waltcher, *Classwide Arbitration and 10b-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon*, 74 CORNELL L. REV. 38, 403 (1989) Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, at 509 (1987).

158. Sternlight, *Mandatory*, *supra* note 60, at 46 and nn 171-78.

159. *Id.*

160. *Id.*