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Expert Analysis

Supreme Court and Congress Focus On Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues

By Andrew L. Sandler, Esq., and Victoria Holstein-Childress, Esq.
BuckleySandler LLP

For more than a decade, the use of mandatory pre-dispute arbitration clauses in consumer financial services contracts has been a source of extensive litigation.

This litigation most recently has focused on the enforceability of class-action waiver provisions that expressly preclude consumers from arbitrating claims on a class-wide basis or commencing class-action litigation. Courts nationwide have struggled with the validity of such waivers, resulting in a split of authority regarding their enforceability under the Federal Arbitration Act.

In a widely anticipated decision handed down April 27, the U.S. Supreme Court upheld the validity of class-action waivers in *AT&T Mobility LLC v. Concepcion*.[1] The court clarified the preemptive reach of the FAA and reaffirmed that arbitration is the preferred method for resolving disputes between individuals and companies.

Specifically, *Concepcion* held that the FAA preempts state laws prohibiting the use of class-action waivers in mandatory arbitration agreements in consumer contracts. Under *Concepcion,* an arbitration agreement including a class-action waiver is enforceable provided the terms of arbitration are fair to the consumer.

Within hours of the *Concepcion* decision, U.S. Sen. Al Franken, D-Minn., and others reintroduced the Arbitration Fairness Act of 2011, S. 987, H.R. 1873, which would eliminate the use of class-action waivers and more broadly ban all mandatory pre-dispute arbitration agreements in consumer, employment and civil rights matters.

There has been much speculation that class-action waivers also will be attacked by the newly created Consumer Financial Protection Bureau, which Congress has directed pursuant to the Dodd-Frank Act to examine mandatory arbitration agreements involving consumers and to promulgate rules that limit or eliminate such agreements if warranted by the study results.

As discussed below, there is a real question as to whether consumer protection is best advanced by renewed attacks on mandatory arbitration or whether legislative and regulatory action should focus on ensuring that arbitration agreements contain sufficient procedural safeguards to guarantee a fair process for all parties.

There is a real question as to whether consumer protection is best advanced by renewed attacks on mandatory arbitration.

AT&T MOBILITY V. CONCEPCION

Vincent and Liza Concepcion, customers of AT&T Mobility, sued the company for on fraud and false advertising over a $30.22 sales tax on a phone that had been advertised as "free" with the purchase of an AT&T service plan.

The plaintiffs' cellular phone service contract with AT&T provided for arbitration of all disputes but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[2]

AT&T filed a motion to compel arbitration, which the District Court denied, declaring the class-action waiver provision invalid under California's so-called "*Discover Bank* rule," named for the seminal case *Discover Bank v. Superior Court,* 113 P.3d 1100 (Cal. 2005).[3]

The *Discover Bank* court held that class-action waiver provisions in consumer contracts of adhesion such as that in the AT&T arbitration agreement are unconscionable and violate California public policy against exculpation when a party with superior bargaining power is alleged to have "cheat[ed] large numbers of consumers out of small sums of money."[4]

AT&T appealed and the 9th U.S. Circuit Court of Appeals affirmed.

The Supreme Court reversed in a 5-4 decision.

Justice Antonin Scalia, writing for the majority, held that the FAA preempted the *Discover Bank* rule and that an arbitration agreement precluding class arbitration can be valid.[5]

The court premised its decision on its long-standing view that Congress designed the FAA to promote arbitration and that the act embodies a national policy favoring arbitration, which has as its principal purpose ensuring that courts enforce arbitration agreements according to their terms.[6]

The court found that the 9th Circuit's effects-based unconscionability analysis conflicted with the terms and purpose of the FAA.[7] In particular, the Supreme Court ruled that the FAA preempts state jurisprudence that is "applied in a fashion that disfavors arbitration" or otherwise "interferes with" or "stands as an obstacle to" the pro-arbitration objectives of the FAA.[8]

The *Concepcion* decision clarifies the preemptive scope of the FAA and reaffirms the view that bilateral arbitration among individual parties pursuant to arbitration provisions that contain adequate due process protections is the preferred method for resolving disputes. This ruling follows the Supreme Court's decision last year in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775-76 (2010).

In *Stolt-Nielsen*, the court held that an arbitration panel could not require or allow an arbitration to proceed on a class-wide basis when the arbitration agreement between the parties was silent regarding whether class or consolidated arbitration was permitted.[9]

Citing *Stolt-Nielsen*, the Supreme Court in *Concepcion* reiterated its disfavor for class-wide arbitration, stating that arbitration "is poorly suited to the high stakes of class litigation" and that class-wide arbitration sacrifices the principal advantage of bilateral arbitration — its informality — and makes the process slower, more costly and more likely to generate procedural morass than final judgment."[10]

THE FAA AND CHALLENGES TO CLASS-ACTION WAIVERS

Section 2 of the FAA requires parties to rely on generally applicable contract defenses, such as fraud, duress or unconscionability, in challenging the enforcement of arbitration agreements, requiring that courts enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."[11]

Unconscionability is the contract-law ground most frequently relied upon by courts in declining to enforce mandatory pre-dispute arbitration agreements.

Before *Concepcion*, a number of state and federal courts invalidated class-action waivers in adhesive arbitration agreements on unconscionability grounds, reasoning that:

- Class-action waivers discourage con-sumers from pursuing small claims because the cost of arbitrating them on an individual basis can exceed their value.
- Such waivers are one-sided because corporations are unlikely to pursue claims against a class of consumers.
- Class waivers effectively immunize companies from liability for large-scale, small-dollar fraud.[12]

In *Discover Bank*, the California Supreme Court similarly reasoned:

> [W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Cal. Civ. Code § 1668. Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[13]

The cases adopting the effects-based analysis set forth in *Discover Bank* long have been criticized for focusing on the reduction in value of the aggregatable claim to the exclusion of the benefits arbitration affords the consumer, such as quicker decisions and better product pricing.

At its core, the *Discover Bank* approach focuses on an *ex poste* assessment regarding the enforceability of the contract that is unrelated to any defect in the formation of the arbitration agreement.

Such considerations should not be the basis for invalidating an arbitration clause because an *ex poste* analysis of the fairness of arbitration provisions threatens to deprive companies and consumers of the benefits of arbitration that the FAA was intended to safeguard and promote.[14]

An ex post analysis of the fairness of arbitration provisions threatens to deprive companies and consumers of the benefits of arbitration that the FAA was intended to safeguard and promote.

Consistent with this view, Justice Clarence Thomas' concurring opinion in *Concepcion* reiterated that the FAA preempts state public policy decisions on whether an arbitration clause is unconscionable, but clarified that *Concepcion* does not foreclose arguments challenging the formation of the agreement, including allegations that the agreement is the result of fraud or coercion.[15]

It is not entirely clear whether, after *Concepcion*, federal courts will also still have the power to invalidate class-action waivers on federal substantive-law grounds.

The 2nd Circuit recently invalidated a class arbitration waiver on the basis of the "federal substantive law of arbitrability," not under state contract law principles, in a decision reaffirming an earlier decision that had been vacated by the Supreme Court for reconsideration in light of *Stolt-Nielsen*, 130 S. Ct. at 1776.[16]

In *In re American Express Merchants' Litigation*, 634 F.3d 187, 197 (2d Cir. 2011), the 2nd Circuit reasoned that enforcement of the clause, which would forbid parties from pursuing anything other than individual claims in the arbitral forum, would effectively deprive plaintiffs of the ability to vindicate their federal statutory rights under the antitrust laws and would act as a *de facto* immunization of liability.[17]

Other federal appellate courts similarly have evaluated the enforceability of class-action waivers under the federal substantive law of arbitrability.[18] Although *Concepcion*, which rested on federal preemption grounds, does not necessarily affect this analysis, the majority's opinion suggests strong disfavor for any challenge to the validity of a class arbitration waiver unrelated to any defect in its formation.

Congress should address fairness considerations by implementing specific procedural rules to balance arbitral mechanisms between businesses and their consumers or employees.

CONGRESSIONAL ACTION: ARBITRATION FAIRNESS ACT OF 2011 AND THE CFPB

The same day that *Concepcion* was decided, Sens. Franken and Richard Blumenthal, D-Conn., along with U.S. Rep. Hank Johnson, D-Ga., responded by immediately reintroducing the Arbitration Fairness Act of 2011, S.987, H.R. 1873.

The bill, first introduced in 2007, seeks to forbid pre-dispute mandatory arbitration agreements in employment, consumer or civil rights disputes. In addition, Section 1028 of the Dodd-Frank Act requires the newly created Consumer Financial Protection Bureau to study and report to Congress on mandatory arbitration agreements involving consumers and empowers the CFPB to promulgate regulations that "prohibit or impose conditions" on the use of such agreements if warranted by the results of its study.[19]

Neither legislative initiative would prohibit or restrict a consumer from voluntarily entering into an agreement to arbitrate a dispute with a business after a dispute has arisen.

While it is not yet clear what action, if any, the CFPB might take against such arbitration agreements, an examination of the Arbitration Fairness Act, as proposed, reveals a number of significant deficiencies in its approach that should be addressed before any congressional or federal agency action is taken to limit or eliminate the use of mandatory arbitration agreements.

In particular, rather than limit enforcement of arbitration clauses to post-dispute agreements, Congress should address the fairness considerations identified by implementing specific procedural rules to balance arbitral mechanisms between businesses and their consumers or employees.

THE AFA

Proponents of the Arbitration Fairness Act assert that the Supreme Court's decision in *Concepcion* has heightened the need for legislation to protect the dispute-resolution rights of consumers.[20]

In a statement regarding the proposed bill, Franken said *Concepcion* "essentially insulates companies from liability when they defraud a large number of customers of a relatively small amount of money" and that the law would allow consumers to continue to "play an important role in holding corporations accountable."[21]

The proposed bill, however, exhibits several flaws.

Among these, the congressional findings section of the AFA gratuitously attacks arbitration as being inferior to litigation for individuals and declares that "mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review."[22]

The findings further criticize current mandatory arbitration methods, including among other perceived disadvantages to consumers, a lack of choice on the part of the consumer or employee and disparities in sophistication and bargaining power of the parties.[23]

The root cause of these defects, according to these findings, are contract provisions that impose pre-dispute agreements to mandatory, binding arbitration, forcing potential plaintiffs to forfeit their right to a day in court to vindicate their claims.

Numerous consumer advocacy groups already have expressed support for the AFA.[24] Echoing the AFA's findings, these groups assert that mandatory arbitration has "none of the safeguards of our civil justice system" and that it suffers from a number of due process deficiencies, including limited discovery, the lack of an impartial judge or jury, exorbitant costs and "loser pays" rules.[25]

These groups further argue that the AFA is necessary to prevent companies from using mandatory arbitration to "shield themselves from accountability for wrongdoing."[26]

These criticisms, however, are easily rebutted and none support a total ban on mandatory pre-dispute arbitration agreements.

First, these findings and observations bear little relation to modern practice of many companies, which tend to avoid using potentially objectionable or onerous procedural provisions in arbitration agreements in order to foreclose unconscionability defenses to their enforcement. Indeed, the agreement at issue in *Concepcion* favored the consumer and incorporated a number of procedural safeguards intended to eliminate perceived difficulties associated with mandatory arbitration.[27]

Second, the assertion that streamlined arbitration procedures unfairly limit discovery or otherwise impede a claimant's ability to vindicate substantive rights is unwarranted and has been expressly rejected by the Supreme Court.[28]

In fact, major arbitration providers, including the American Arbitration Association and alternative dispute resolution provider JAMS, have rules and procedures specifically designed to safeguard consumer rights and due process considerations.[29]

Rather than ban pre-dispute arbitration agreements, it would be more effective to bridge the gap between consumer and industry advocates by enacting legislation that establishes a mandatory due process protocol for arbitration proceedings.

Thus, for example, the AAA's consumer due process protocol sets forth guidelines regarding the competence and neutrality of the arbitrators; the right to obtain information material to a dispute; the handling of hearings including convenient location, reasonable costs, efficiency and adequate representation; the availability of remedies and awards; and the preservation of the right to opt for small claims court.[30]

Third, the view that mandatory arbitration agreements requiring individual arbitrations immunizes corporations from liability for small-dollar, large-scale fraud is premised on a false assumption: the notion that precluding the aggregation of claims will eliminate consumers' ability to hold companies accountable for wrongdoing.

It is unclear, however, whether consumers are worse off if required to arbitrate rather than litigate their claims.[31] Litigation typically is slow and costly. Aggregating claims in class-action litigation only exacerbates these difficulties.

Moreover, the benefits received by class members — such as coupons of little value for products they do not want — are often *de minimis* in comparison to the financial windfall recovered by class counsel.[32]

Congress has recognized that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed."[33] In fact, many consumer disputes, notably including those alleging fraud, are not suitable for class-action treatment.[34]

Indeed, the view that class actions are uniquely suited to vindicating consumer rights disregards the significant role of federal and state agencies that are fully empowered to pursue claims against corporate interests on behalf of consumers, with little or no cost to such individuals.

In fact, before *Concepcion*, a number of courts had relied on the availability of government enforcement actions in upholding the validity of class-action waivers in arbitration agreements.[35] Notably, with respect to the consumer financial services industry, Congress has repeatedly favored robust administrative enforcement over private actions, including, presumably, class actions.

Many consumer protection statutes do not rely on private actions for enforcement and instead look to federal and state agencies to ensure compliance.

For example, pursuant to Dodd-Frank, the CFPB has broad authority to issue rules, applicable to virtually all providers of consumer financial products and services, identifying as unlawful acts or practices it defines as "unfair, deceptive, or abusive" in connection with the offer or provision of a consumer financial product or service to a consumer.[36]

Congress did not, however, provide a private right of action for violation of CFPB rules. Instead, the CFPB has been conferred a number of enforcement powers to impose monetary penalties and injunctive or other equitable relief.[37]

Congress also authorized state attorneys general to bring civil actions to enforce provisions of Dodd-Frank or CFPB rules against virtually all providers of consumer financial services (including federally chartered providers), and state regulators are empowered to bring such actions against state-chartered entities.[38]

In sum, there is nothing to indicate that the availability of mandatory pre-dispute arbitration agreements represents a free pass for companies engaged in wrongdoing.

Consequently, the notion that the availability of class-action process is necessary to vindicate the rights of any particular consumer is not compelling.

A TOTAL BAN IS NOT THE ANSWER: A CALL FOR A DUE PROCESS PROTOCOL

Arbitration may not be perfect, but a total ban would eliminate the many indisputable benefits of the process for all parties without remedying any of the fairness considerations identified by proponents of the AFA — many of which may be equally applicable to post-dispute arbitration agreements that the bill and the CFPB would still allow.

The proposed legislation makes no effort to regulate or control the use of particular terms and conditions in arbitration clauses claimed to be offensive, such as terms restricting application of law, class-action waivers, damages, discovery and jury trials.

But an outright ban on arbitration agreements would have severe consequences. Prohibiting mandatory pre-dispute agreements likely would leave many consumers and employees without access to a viable dispute-resolution forum, and would reward only the trial lawyers' bar, which would stand to profit from the inevitable increase in litigation.

Ultimately, a shift from individual arbitrations to more costly class litigations would hurt all consumers financially.

Increased litigation costs must be borne by someone, and if the business itself does not absorb them, they will be passed along in the form of price increases for goods and services.[39]

Rather than ban pre-dispute arbitration agreements, it would be more effective to bridge the gap between consumer and industry advocates by enacting legislation that establishes a mandatory due process protocol for arbitration proceedings. Such a protocol should be designed to ensure fairness in the arbitration process. At a minimum, these safeguards should include:

- Adequate notice in the arbitration agreement of the meaning and consequences of such an agreement.
- Adequate notice of hearings and an opportunity to be heard.
- A right to access material information.
- Reasonable costs.
- A reasonable location for proceedings.
- An unbiased and competent arbitrator.
- No limitation on remedies otherwise available at law or equity.

A similar approach has been endorsed by at least one recent legislative proposal, the Fair Arbitration Act of 2011, S. 1186, which was introduced June 13 by U.S. Sen. Jeff Sessions, R-Ala.

If enacted, this bill would amend the FAA to require a number of due process safeguards to ensure fairness in the arbitration process.

Based largely on the AAA's Consumer Due Process Protocol, this bill (and similar ones previously introduced by Sessions in 2000, 2002 and 2007) seeks to ensure the

continuing viability of arbitration while enhancing its effectiveness through certain reforms.

In particular, the bill's approach suggests the right balance between safeguarding consumer rights and the need to maintain a viable alternative to traditional litigation.

THE CFPB

While Congress has yet to act on any broad amendment to the FAA, legislative reform directed at pre-dispute arbitration agreements may emanate from the CFPB.

The CFPB has supervisory and consumer-compliance examination authority over depository institutions and credit unions with more than $10 million in assets;[40] non-bank financial services companies including most mortgage lending industry participants; payday and private student lenders; larger participants in the consumer financial markets; and companies engaged in conduct deemed to pose risks for consumers.[41]

The CFPB also has broad authority to promulgate rules governing virtually all providers of consumer financial products and services, identifying as unlawful those acts or practices it defines as "unfair, deceptive, or abusive" in connection with the offer or provision of a consumer financial product or service to a consumer.[42]

Congressional and regulatory action should be directed at regulating arbitration to ensure the availability of a fair process for all parties.

Regarding arbitration, the CFPB is empowered to "conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."[43]

The CFPB is also authorized, as part of its rulemaking authority, to limit or ban the use of pre-dispute arbitration agreements in consumer contracts. Any such limitations on consumer arbitration agreements must be preceded by the CFPB's study, CFPB rulemaking and a 180-day waiting period after the effective date of the regulation, as set forth in the Dodd-Frank Act.

These powers, while broad, are not unchecked. As is the case with all other federal agencies, Congress has oversight over CFPB rulemaking and if it is unhappy with a rule, it may overturn it.[44]

Moreover, the CFPB is subject to judicial review to be certain that it operates only within the authority granted by Congress and otherwise acts in accordance with law. If it fails to do so, the courts can overturn its actions.

CONCLUSION

Although *Concepcion* is unlikely to settle with finality the validity of arbitration provisions including class-action waivers, its broad holding signals the expectations of the U.S. Supreme Court that courts must carefully question the notion that mandatory arbitration agreements containing a ban on class actions are inherently unfair to consumers.

Congress and the CFPB would be well-advised to adhere to the court's admonition.

Given the many benefits of arbitration to all parties, the protections already afforded to consumers and the potential safeguards available through new legislation, congressional and regulatory action should be directed at regulating arbitration to ensure the availability of a fair process for all parties.

NOTES

1 *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1744 (*citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-76 (2010)).

2 *Id.*

3 *Laster v. T-Mobile USA, Inc.,* No. 05-cv-1167, 2008 WL 5216255, *14 (S.D. Cal. Aug. 11, 2008).

4 113 P.3d at 1162-63.

5 *Concepcion*, 131 S. Ct. at 1153.

6 *Id.* at 1148-49.

7 *Id.* at 1152-53.

8 *Id.* at 1760.

9 *Stolt-Nielsen*, 130 S. Ct. at 1776.

10 *Concepcion*, 131 S. Ct. at 1750-51 (citing *Stolt-Nielsen*, 130 S. Ct. at 1775-76).

11 *Doctor's Assocs. v. Casarotto*, 116 S. Ct. 1652, 1653 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions."); *see* 9 U.S.C. § 2.

12 *See, e.g., Feeney v. Dell Computer,* 908 N.E. 2d 753, 762-765 (Mass. 2009); *Wigginton v. Dell Inc.,* 890 N.E. 2d 541, 548-49 (Ill. App. Ct. 2008); *Fiser v. Dell Computer Corp.,* 188 P.3d 1215, 1221 (N.M. 2008); *Kristian v. Comcast Corp.,* 446 F.3d 25, 63 (1st Cir. 2006) (invalidating class-action waiver based on federal substantive law of arbitrability, which court stated "mirrored" state law unconscionability analysis); *Thibodeau v. Comcast Corp.,* 912 A.2d 874, 883-85 (Pa. Super. Ct. 2006); *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 162-163 (Cal. 2005); *Ting v. AT&T,* 319 F.3d 1126, 1150-51 (9th Cir. 2003).

13 *Discover Bank*, 30 Cal. Rptr. 3d at 87.

14 *See* Aaron-Andrew P. Bruhl, *Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1443-44 (2008).

15 *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring) (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-404 (1967) (stating Sections 2 and 4 of the FAA require enforcement of arbitration agreements unless a party successfully asserts a defense "concerning the formation of the agreement to arbitrate"); *see* 9 U.S.C. §§ 2, 4.

16 *See In re Am. Express Merchants' Litig.,* 634 F.3d 187, 197 (2d Cir. 2011).

17 *Id.*

18 *See, e.g., Gay v. CreditInform,* 511 F.3d 369, 394-95 (3d Cir. 2007) (class-action waiver enforceable under Section 2 of the FAA notwithstanding claim that waiver was unconscionable under state law); *Kristian*, 446 F.3d at 63 ("Although plaintiffs' challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration.").

19 P.L. 111-203 § 1028.

20 *See, e.g.,* Letter from Alliance for Justice *et al.* to U.S. Sen. Patrick Leahy, Chairman, U.S. Sen. Judiciary Comm. (May 17, 2011), *available at* http://www.aclu.org/files/assets/AFA_Senate_Support_Letter_-_May_17_2011.pdf.

21 Press Release, U.S. Sen. Al Franken, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts against Corporations (Apr. 27, 2011), *available at* http://franken.senate.gov/?p=press_release&id=1466.

22 S.987 § 2; H.R. 1873 § 2.

23 *Id.*

24 *See, e.g.,* Alliance Letter, *supra* note 20 (signed on behalf of 48 consumer rights groups).

25 *Id.*

26 *Id.*

27 The AT&T agreement included provisions requiring AT&T to pay all costs for nonfrivolous claims; allowing consumers the option of arbitration in person, by telephone, or based only on submissions for claims under $10,000; retaining the right to proceed in small claims court, and guaranteeing a $7,500 minimum recovery and twice the amount of the claimant's attorney fees in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer. *Concepcion*, 131 S. Ct. at 1744.

28 *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 30 (1991).

29 *See, e.g.,* Am. Arbitration Ass'n, Consumer Due Process Protocol, Statement of Principles of the National Consumer Disputes Advisory Committee, available at www.adr.org/sp.asp?id=22019; JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, *available at* http://www.jamsadr.com/rules-consumer-minimum-standards/.

30 *See* Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, 53 Disp. Resol. J. 8, 12-13 (August 1998).

[31] *See, e.g.,* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-62 (2006) (noting the likely cost savings to consumers generated by arbitration).

[32] *See* Adam S. Zimmerman, *Funding Irrationality,* 59 Duke L.J. 1105, 1127-31, 1132-55 (2010); S. Rep. No. 109-14 at 15 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 16 (Senate Committee Report on the Class Action Fairness Act, noting the "numerous class-action settlements approved by state courts in which most — if not all — of the monetary benefits went to the class counsel").

[33] Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4; Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 Fordham L. Rev. 1177, 1189 (2009) ("In some settlements, such as 'coupon' settlements, ... class counsel receive large fees while class members receive little or nothing of actual value.").

[34] *See, e.g., Castano v. Am. Tobacco Co.,* 84 F.3d 734, 744 (5th Cir. 1996) ("a fraud class action cannot be certified when individual reliance will be an issue"); *Hudson v. Delta Air Lines,* 90 F.3d 451, 457 (11th Cir. 1996) (affirming denial of class certification on the basis that alleged false assurances were not susceptible to class-wide proof because a showing of each plaintiff's reliance on such assurances would "necessarily" involve "highly individualized" inquiries).

[35] *See, e.g., Johnson v. West Suburban Bank,* 225 F.3d 366, 375-76 (3d Cir. 2000) (even if class actions are not available in arbitration, numerous administrative mechanisms exist to enforce the Truth in Lending Act, 15 U.S.C. § 1601); *accord, Gay*, 511 F.3d at 381; *Randolph v. Green Tree Fin. Corp.-Ala.,* 244 F.3d 814, 818 (11th Cir. 2001).

[36] P.L. 111-203 § 1031.

[37] *Id.* §§ 1053-55.

[38] *Id.* § 1042.

[39] *See* Ware, *supra* note 31; *see also* Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 Ga. St. U. L. Rev. 761, 767 (2003) ("Arbitration is also less expensive than litigation.").

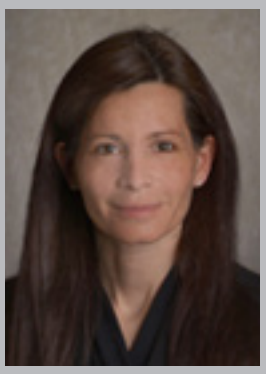
[40] P.L. 111-203 §§ 1061(b)-(c).

[41] *Id.* § 1024(a); see generally David H. Carpenter, CRS Report for Congress, Limitations on the Secretary of the Treasury's Authority to Exercise the Powers of the Bureau of Consumer Financial Protection (May 18, 2011), *available at* http://www.llsdc.org/attachments/files/314/CRS-R41839.pdf.

[42] *Id.* § 1031.

[43] *Id.* § 1028.

[44] *See* Hearing Before H. Subcomm. on Fin. Inst. & Consumer Credit of the Comm. on Fin. Servs. (Mar. 16, 2011) (testimony of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau), *available at* http://www.consumerfinance.gov/speech/testimony-of-elizabeth-warren-before-the-house-financial-services-committee/.



Andrew L. Sandler (left), chairman and executive partner of **BuckleySandler LLP** in Washington and CEO of **Treliant Risk Advisors LLP**, is a recognized leader in financial services litigation, enforcement and compliance. He has been listed in *Chambers USA 2010* and *Best Lawyers in America* and named a "legal visionary" by the *Legal Times* in June 2010. **Victoria Holstein-Childress** (right) is counsel in the Washington office of BuckleySandler. She represents individuals and corporations including insurers, banks, mortgage lenders and other financial services institutions in government enforcement proceedings and complex civil litigation before state and federal trial and appellate courts.