



**Scorecard on where Federal and State Appellate Courts
and Statutes Stand
on Enforcing Class Action Waivers in Pre-Dispute
Consumer Arbitration Agreements**

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Federal Circuit Court Opinions
Upholding Validity of Class Action Waivers

Second Circuit

JLM Industries, Inc. v. Stolt-Nielson SA, 387 F.3d 163 (2nd Cir. 2004) (in dictum, Court states in footnote 9, in relevant part: “We also note that we do not understand JLM to be making an argument to the effect that its assertion of class claims should serve as a bar or deterrent to sending the instant case to an arbitral panel. We would likely view such an argument skeptically because [f]ederal courts have ... consistently enforced arbitration provisions in the context of class action lawsuits where federal statutory claims have been at issue. Lewis Tree Serv., Inc. v. Lucent Techs, Inc., 239 F. Supp. 2d 332, 338 (S.D. N.Y. 2002).”

Third Circuit

Cappalli v. National Bank of Great Lakes, 281 F.3d 219 (3d Cir. 2001) (in context of usury action under Section 85 of National Bank Act involving claim of \$33.02, rejecting plaintiff’s contention that the arbitration agreement made it difficult for individuals to vindicate their rights “in small claim consumer cases”)

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), cert. denied, 531 U.S. 1145 (2001) (no non-waivable right to class action under Truth in Lending Act)

Lloyd v. MBNA America Bank, N.A., 2001 U.S. Dist. LEXIS 8279 (D. Del. Feb. 22, 2001), aff’d, 27 Fed. Appx. 82, 2002, WL 21932 (3d Cir. Jan. 7, 2002) (because right to a class action is “merely procedural” and may be waived, “an arbitration clause barring classwide relief for claims brought under Truth in Lending Act is not unconscionable”)

Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627 (D. Del. 1999), aff’d, 254 F.3d 1078 (3d Cir. 2001) (enforcing a class action waiver in an arbitration agreement despite plaintiff’s contention that consumer claims are “too small to litigate” on an individual basis)

Delta Funding Corporation v. Harris, No. 04-1951 (3rd Cir. July 27, 2005) (petition to New Jersey Supreme Court to determine whether class action waiver is unconscionable). New Jersey Supreme Court granted petition. Docket No. 58,437, 185 N.J. 255 (2005)

Delta Funding Corporation v. Harris, No. 04-1951, 2006 U.S. App. LEXIS 24649 (3d Cir. Oct. 3, 2006) (Court affirms the opinion of the District Court, which compelled arbitration after upholding the validity of class action waiver based on the New Jersey Supreme Court opinion in Delta Funding Corp. v. Harris, A44 September Term 2005, 2006 WL 2277984 (Aug. 9, 2006))

Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007) (in context of a claim for \$39.92 under the Federal Credit Repair Organizations Act and the Pennsylvania Credit Services Act, Court enforces class action waiver after enforcing a Nevada choice-of-law clause and then stating that the result would be the same under Pennsylvania law because the FAA

preempts Pennsylvania law invalidating class action waivers). In Puleo v Chase Bank USA, N.A., No. 08-3837, 2010 WL 1838762 (3d Cir. May 10, 2010 (en banc)), the Third Circuit stated in footnote 2: “While perhaps dicta itself, it is worth noting our agreement that Gay’s discussion of Pennsylvania law was indeed dicta, since our holding in Gay was that Virginia law governed the parties’ arbitration agreement. Gay, 511 F.3d at 390. In any event, the New Jersey case law at issue in Homa did not evince hostility toward arbitration clauses, which was the concern about Pennsylvania law expressed in Gay. Compare Homa, 558, F.3d at 230 with Gay, 511 F.3d at 394-95.”

Cronin v. Citifinancial Services, Inc., No. 09-2310, 2009 WL 2873252 (3rd Cir. Sept. 9, 2009) petition for rehearing den’d, Dec. 21, 2009 (in context of Fair Credit Reporting Act (“FCRA”) claim, enforcing a class action waiver noting that “Cronin sought actual and punitive damages, costs and attorneys’ fees, all of which are permitted under the FCRA and potentially recoverable in an arbitration under that statute We have noted that the statutory ability to recover attorneys’ fees helps to preserve an individual’s ability to pursue claims, even in those situations where the class forum has been foreclosed.”)

Kaneff v. Delaware Title Loans, Inc., No. 08-1007, 2009 WL 4042926 (3rd Cir. Nov. 24, 2009) petition for rehearing den’d, Dec. 21, 2009 (affirms order compelling individual arbitration after enforcing class action waiver under Pennsylvania law even though the dollar amount of the claim was less than \$900)

Fourth Circuit

Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) (arbitration compelled despite inability to maintain class action under Fair Labor Standards Act)

Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002), cert. denied, 537 U.S. 187 (2002) (class action waiver not unconscionable under Maryland law)

Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra, 198 F.3d 473 (4th Cir 1999), cert denied, 529 U.S. 1109 (2000) (“The parties here did not include in their agreement an express term providing for class arbitration. Thus, one could say that through the proper application of 9 U.S.C. §4, the FAA has already provided the type of procedure to be followed in this case, namely, non-class arbitration.”)

In Re Cotton Yarn Antitrust Litigation, Nos. 05-2392, 05-2393, 505 F.3d 274 (4th Cir. Oct. 12, 2007) (Class action waiver is enforceable under federal antitrust laws.)

Fifth Circuit

Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004) (class action waiver not unconscionable under Texas law and no non-waivable right to class action exists under Fair Labor Standards Act)

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, No. 379 F.3d 159 (5th Cir. 2004) (class action waiver not unconscionable under Louisiana law; also suggests that FAA would preempt state law if it invalidated class action waiver)

Sixth Circuit

Burden v. Check into Cash of Kentucky, LLC, 267 F.3d 483 (6th Cir. 2001) cert. denied, 535 U.S. 970 (2002) (court suggests that there is no non-waivable right to maintain class action under Truth in Lending Act, RICO, and Kentucky law)

Seventh Circuit

Caudle v. American Arbitration Association, 230 F.3d 920 (7th Cir. Oct. 17, 2000) (“A procedural device aggregating multiple persons’ claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants.”)

Livingston v. Associates Finance, Inc., 339 F.3d 553 (7th Cir. 2003) (court enforced class action waiver based on FAA principle that arbitration agreement must be enforced in accordance with its terms)

Iowa Grain v. Brown, 171 F.3d 504 (7th Cir. 1999) (“Because arbitration is based fundamentally on an agreement between parties, [a class action] is normally unavailable in arbitration.”)

Champ v. Siegel Trading Co., Inc., 55 F.3d 269 (7th Cir. 1995) (“Since the parties’ arbitration agreement does not expressly provide for class arbitration, the district court correctly concluded that it was prohibited from reading such a procedure into these arbitration agreements.”)

Eighth Circuit

Cicle v. Chase Bank, USA, No 08-1362, 2009 WL 3172157 (8th Cir. Oct. 6, 2009) (holding that class action was not unconscionable under Missouri law or contrary to the public policy permitting class actions under the Missouri Merchandising Practices Act)

Pleasants v. American Express Company, 541 F.3d 853 (8th Cir. 2008) (holding that class action waiver was not unconscionable under Missouri law because of fee-shifting feature in Truth in Lending Act and the fact that class action waiver was prominently disclosed; court distinguished Missouri Court of Appeals opinion in Whitney on the basis that the American Express arbitration provision did not limit the plaintiff’s remedy)

In re Piper Funds, Inc., 71 F.3d 298 (8th Cir. 1995) (a party’s “contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management”)

Dominium Austin Partners, L.L.C. v. M.J. Emerson, 248 F.3d 720 (8th Cir. 2001) (“[B]ecause the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals.”)

Ninth Circuit

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) cert. denied, 540 U.S. 811 (2003) (FAA preempts provision under California Consumer Legal Remedies Act creating non-waivable right to class action)

Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618 (9th Cir. 2001) (“Appellants’ contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action [under the Fair Labor Standards Act] is insufficient to render an arbitration clause unenforceable”)

Lozano v. AT&T Wireless Services, Inc., 504 F.3d 718 (9th Cir. 2007) (Court affirms order of District Court denying certification of a national class for claims based on Federal Communications Act because of the need for a state-by-state inquiry into the enforceability of the arbitration agreement and class action waiver with the result that individual questions would predominate over class-wide questions.)

Eleventh Circuit

Bowen v. First Family Financial Services, Inc., 233 F.3d 1331 (11th Cir. 2000)

Randolph v. Green Tree Fin. Corp. – Ala., 244 F.3d 814 (11th Cir. 2001) and Baron v. Best Buy Co., Inc., 260 F.3d 625 (11th Cir. 2001) (no non-waivable right to class action under Truth-in-Lending Act)

Jenkins v. First American Cash Advance of Georgia, LLC and First National Bank in Brookings, 400 F.3d 868 (11th Cir. 2005), rehearing and rehearing en banc denied, 143 Fed. Appx. 311 (2005), cert. denied, 126 S. Ct. 1457 (2006) (class action waiver is not unconscionable under Georgia law)

Caley v. Gulfstream Aerospace Corporation, 428 F.3d 1359 (11th Cir. 2005) (same; also suggests that FAA would preempt state law if it invalidated class action waiver)

Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL 6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

- (1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?
- (2) Is the class action waiver provision in plaintiff’s contract with Sprint procedurally unconscionable under Florida law?
- (3) Is the class action waiver in plaintiff’s contract with Sprint substantively unconscionable under Florida law?

(4) Is the class action waiver provision in plaintiff's contract with Sprint void under Florida law for any other reason?

U.S. Supreme Court

Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., No. 08-1198, 2010 WL 1655826 (April 27, 2010) (Although not dealing directly with validity of class action waiver, the Court held that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act.) On May 3, 2010, the U.S. Supreme Court, in American Express Co. v. Italian Colors Restaurant, No. 08-1473 granted the petition for a writ of certiorari of the Second Circuit opinion in In re American Express Merchants Litigation, 2009 WL 214525 (2d Cir. Jan. 30, 2009). It vacated the judgment of the Second Circuit and remanded it to that Court for further consideration in light of Stolt-Nielsen. This is very significant because the American Express case involves a class action waiver.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (Although not dealing with validity of class action waiver, the Court held that federal statutory age discrimination claim was subject to arbitration under the FAA "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator.")

Federal Circuit Court Opinions Invalidating Class Action Waivers¹

¹ In most of these opinions, the courts held that there was some degree of procedural unconscionability as well as substantive unconscionability under state law. Many companies now give consumers and employees the unconditional right to opt out of or reject the arbitration provision without it having any adverse repercussions. Courts in states that require that there be both procedural as well as substantive unconscionability in order to invalidate a contract based on unconscionability have validated class action waivers and other arbitration features that they considered substantively unconscionable when an opt-out right was provided to the consumer or employee. See, e.g., Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002); Providian National Bank v. Screws, 894 So. 2d 625 (Ala. Oct. 3, 2003); Tsadilas v. Providian Nat'l Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (1st Dep't. 2004); Marley v. Macy's South, No. CV 405-227, 2007 WL 1745619, at *3 (S.D. Ga. June 18, 2007) (court enforced arbitration clause in employment agreement because "[w]hile Ms. Marley states that she did not have a choice to enter the arbitration process because she was 'in jeopardy of losing [her] job' if she did not, the record indicates that each employee was mailed an election form to opt-out of the program at their home address"). Pivoris v. TCF Financial Corporation, No. 07-C 2673, 2007 U.S. Dist. LEXIS 90562 (N.D. Ill. Dec. 7, 2007); SDS Autos, Inc. v. Chrzanowski, Case No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) (Invalidates class action waiver for holders of small claims under Florida Deceptive and Unfair Trade Practices Act whose attorney's fees are limited by the amount of their actual damages.) (arbitration agreement with class action waiver not procedurally unconscionable where "[p]laintiff had the absolute right to reject the arbitration provision without affecting her account contract or the status of her account"); Honig v. Comcast of Georgia, LLC, Civil Action No. 1:07-cv-1839-TCB, 537 F.Supp. 2d 1277 (N.D. Ga. Jan. 31, 2007) ("Finally, and most importantly . . . , Honig was free to reject the terms of the arbitration provision without a single adverse consequence. Specifically, the arbitration provision gave her the right to opt out within thirty days without adversely affecting her cable service, but she never exercised that right. Honig's ability to opt out of the arbitration provision dilutes her unconscionability argument because the provision was not offered on a take-it-or-leave-it basis. Courts have stressed the importance of such opt-out provisions in enforcing class action waivers in arbitration agreements."); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J-33HTS (M.D. Fla. Jan. 14, 2008) (class action waiver provision was not unconscionable where arbitration provision allowed subscribers to opt out); Davidson v. Cingular Wireless, LLC, No. 2:06-cv- 00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007) (class action waiver in contract for cell phone service not unconscionable where plaintiff failed to opt out); Martin v. Delaware Title Loans, Inc., No. 08-3322, 2008 WL 444302 (E.D. Pa. Oct. 1, 2008) (finding plaintiff could not establish procedural unconscionability under PA law in light of 15 day opt-out right); Columbia Credit Services, Inc. v. Billingslea, No. B190776, 2007 WL 1982721 (Cal. Ct. App. July 10, 2007) (court affirmed lower court's confirmation of arbitration award after
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rejecting unconscionability challenge based in part on the fact that cardholder was given the right to opt out of the arbitration provision and failed to do so); Eaves-Leanos v. Assurant, Inc., No. 07-18, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008) (finding arbitration agreement with class waiver not unconscionable as plaintiff had opportunity to opt out); Enderlin v. XM Satellite Radio Holdings, Inc., No. 06-0032, 2008 WL 830262 (E.D. Ark. March 25, 2008) (finding plaintiff could not establish procedural unconscionability in light of opt-out right); Crandall v. AT&T Mobility, LLC, No. 07-750, 2008 WL 2796752 (S.D. Ill. July 18, 2008) (class action waiver in cell phone service contract not unconscionable where plaintiff failed to opt out); Webb v. ALC of West Cleveland, Inc., No. 90843, 2008 WL 4358554 (Ohio Ct. App., 8th App. Dist. Sept. 25, 2008) (citing *Ahmed supra*, the buyer in an automobile retail installment contract “could not demonstrate that the arbitration clause was unconscionable because the contract gave her the right to reject the arbitration clause”); Wright v. Circuit City Stores, Inc., Case No. CV 97-B-0776-5 (N.D. Ala. Feb. 5, 2001) (employment arbitration provision with opt-out right is enforced); Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410 (1998) (unconscionability challenge is rejected where credit card issuer gave the cardholder the right to reject the arbitration provision and those who opted out had their 2% APR reduction in interest rate reinstated to its previous rate: “Stiles was given a clear choice in this case; he could take the arbitration provision or leave it”); Guadagno v. E*Trade Bank, No. CV 08-03628 SJO (JCX), 2008 WL 5479062 (C.D. Calif. Dec. 29, 2008) (Class action waiver does not violate fundamental policy of California because of opt-out right: “Here, Guadagno had a meaningful opportunity to opt out of the Arbitration clause, which contained the class action waiver, by notifying E*Trade in writing within 60 days of receiving the Agreement. The Agreement highlighted the Arbitration clause, and the introduction to the Arbitration clause highlighted the opt-out term. Because the Arbitration clause containing the waiver was not presented on a take-it-or-leave-it basis, but gave Guadagno sixty days to opt out, it was not unconscionable. Thus, application of Virginia law does not contradict California’s fundamental policy against enforcing unconscionable consumer class action waivers.”); Magee v. Advance America Servicing of Ark, Inc., No. 6:08-CV-6105, 2009 WL 890991 (W.D. Ark. April 1, 2009) (Court enforces class action waiver after noting that the arbitration agreement was clearly set off from the rest of the contract and provided the consumers with a 30-day opt-out period – a period which was actually longer than the term of the loan); Fluke v. CashCall, No. 08-05776 (E.D. PA. May 21, 2009) (Court enforces class action waiver under Pennsylvania law: “We predict that the Pennsylvania Supreme Court would agree with the reasoning of the district courts in Guadagno and Honig. An opt-out provision, like the one in Fluke’s agreement with FBD, seriously undermines a consumer’s contention that the arbitration agreement is unconscionable. Fluke was given the option to say “no” to the arbitration provision and he was given a full 60 days to do so. In that way, he had complete control over the terms of the agreement and it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave-it basis. Furthermore, like the agreements in Guadagno and Honig, the FBD loan agreement requires that FBD pay the filing fee and any costs and fees charged by the arbitrator regardless of which party initiated the arbitration. Moreover, under § 503 of the Loan Interest and Protection Law,

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First Circuit

Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006) (invalidating class action waiver where claims were asserted under federal and state antitrust laws because enforcing the waiver would shield defendants from private consumer antitrust liability, impede consumers from effectuating their statutory rights and frustrate the goals underlying the antitrust laws)

Skirchak v. Dynamics Research Corporation, 508 F.3d 49 (1st Cir. Nov. 19, 2007) (Without reaching the argument that class action waivers violate either the Fair Labor Standards Act or public policy, the Court holds that a class action waiver is

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a borrower or debtor who prevails in an action “shall” recover a reasonable attorneys’ fee. 41 Pa. Cons. Stat. § 503. This should alleviate any concern regarding the availability and willingness of counsel to represent him. Accordingly, this case differs materially from Thibodeau and is more analogous to Guadagno and Honig. We predict that the Pennsylvania Supreme Court would hold that the arbitration provision in the loan agreement in issue is not unconscionable and is enforceable.”); Credit Acceptance Corporation v. Davisson, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009) (in rejecting Davisson’s argument that the arbitration provision violated the Ohio Consumer Sales Practice Act since it purported to waive access to the court for vindicating a claim under it, the Court noted that Credit Acceptance Corporation did not “waive her recourse to the courts” because of the opt-out feature); Freedman v. Comcast Corporation, Nos. 435, 2102, Sept. Term 2008, 2010 Md. App. LEXIS 12 (Ct. of Spec. App. of Md. Jan. 28, 2010 (court holds that there is no procedural unconscionability under Maryland law as a result of 30-day opt-out feature); Clerk v. ACE Cash Express, Inc., No. 09-05117, 2010 U.S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010) (court holds that there is no procedural unconscionability when payday loan borrower was given a 30-day right to reject the arbitration provision without it having any adverse effect on the loan); Jackson v. The Payday Loan Store of Illinois, Inc., (Case No. 09 C 4189 (N.D. Ill. March 17, 2010) (“Considering the totality of the circumstances relevant to the class action waiver at issue here, the Court concludes that the waiver is enforceable. The parties agreed to the Agreement as a whole, including the waiver, and failed to opt-out as allowed by the provision for doing so described above. This allowed either party to elect arbitration, and contains a clear and legible notice to Plaintiffs that it limited certain rights, including the right to pursue a claim as a class action. Hante is therefore barred by the terms of the Agreement from bringing a claim in arbitration on a class basis”); Ambrose v. Comcast Corporation, No. 3:09-cv-182, 2010 WL 1270712 (E.D. Tenn. Mar. 31, 2010) (“the court finds that the arbitration provision was not a ‘contract of adhesion’ because plaintiff was provided with an opportunity to ‘opt-out’ of arbitration with no adverse affect on his relationship with Comcast. The 30-day window to ‘opt-out’ of arbitration afforded the consumer [plaintiff] with a realistic opportunity to bargain . . .”). But, see Duran v. Discover Bank, 2009 WL 1873651 (Call. App. 2d Dist. June 19, 2009 (unreported)) (class action waiver invalidated despite opt-out feature).

unconscionable under Massachusetts law because of the timing (it was implemented two days before the Thanksgiving holiday), the language (there was language which arguably conflicted with the waiver) and format of the presentation (the communication was in the form of an e-mail which required no acknowledgement by the employee and the waiver was buried in the document)

Second Circuit

In re American Express Merchants Litigation, 2009 WL 214525 (2nd Cir. Jan. 30, 2009) (invalidating class action waiver where claims were asserted under Section 4 of the Clayton Act challenging AMEX's "Honor all Cards" rule based on a vindication of statutory rights analysis. Plaintiff had demonstrated that the size of the recovery by any individual plaintiff would be too small to justify the expenditure of bringing an individual action, which in this case exceeded several hundreds of thousands of dollars for an expert report which would not be recoverable in arbitration). On May 3, 2010, the U.S. Supreme Court (No. 08-1473) granted certiorari, vacated the Second Circuit judgment and remanded the case to the Second Circuit for further proceedings in light of the Supreme Court's opinion in Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., No 08-1198, 2010 WL 1655826 (April 27, 2010)

Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008) (In upholding the arbitrators' ruling that an arbitration agreement that is silent on the issue of class-wide arbitration could be interpreted to permit class arbitration, the Court rejected Stolt-Nielsen's argument that the FAA itself precludes the imposition of class-wide procedures unless they are expressly provided for in arbitration agreement), cert. granted No. 08-1198 (June 15, 2009). On April 27, 2010, the U.S. Supreme Court, in a 5-3 decision, reversed the Second Circuit decision and held that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act. No. 08-1198, 2010 WL 1655826.

Third Circuit

Homa v. American Express Company, 558 F.3d 225 (3rd Cir. 2009) (court refuses to enforce Utah choice-of-law clause after concluding that class action waiver violates fundamental policy of New Jersey in light of New Jersey Supreme Court opinion in Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (NJ 2006); there is no FAA preemption of Muhammad; Third Circuit opinion in Gay v. CreditInform, 511 F.3d 369 (3rd Cir. 2007) saying that the FAA preempts Pennsylvania Superior Court opinion in Lytle v. Citifinancial Services, Inc., 2002 Pa. Super. 327 (2002) may be dicta)

Ninth Circuit

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), cert. denied, 540 U.S. 811 (2003) (court follows California Court of Appeal's opinion in Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (2002) and holds that class action waiver is unconscionable under California law)

Ingle v. Circuit City Stores, 328 F.3d 1165 (9th Cir. 2003), cert. denied, 540 U.S. 1160 (2004) (same)

Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101 (9th Cir. 2003), cert. denied, 540 U.S. 1160 (2004) (same)

Ramsdell v. Lenscrafters, Inc., 135 Fed. Appx. 130, 2005 WL 14329241 (9th Cir. 2005) (in this unpublished conclusory opinion, court follows Ingle, Ting, and California Court of Appeal opinion in Szetela and holds that class action waiver is unconscionable under California law)

Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005) (in clause burdened by other unfair features, court, in a divided opinion, also invalidated class action waiver under Washington law; dissent points out that majority opinion may conflict with opinion in Stein v. Geonerc, 17 P. 3d 1266 (WA 2001))

Tamayo v. Brainstorm USA, 154 Fed. Appx. 564 (9th Cir. 2005) (in this unpublished conclusory opinion, court follows California Supreme Court's opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) and holds that class action waiver is unconscionable under California law, that the Ohio choice-of-law provision does not require a different result and that the FAA does not preempt California law)

Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976 (9th Cir. Aug. 17, 2007) (Court holds that class action waiver is unconscionable under California law and that there is no FAA preemption)

Douglas v. U.S. Dist. Ct., 495 F.3d 1062 (9th Cir. 2007) (per curiam) (court grants writ of mandamus, refuses to apply New York law dealing with class action waivers and holds that such waivers are unconscionable under California law)

Laster v. T-Mobile, USA, Inc., No. 06-55010, 252 Fed. Appx 777 (9th Cir. Oct. 25, 2007) (Court, in unreported opinion, follows Shroyer opinion), cert. denied, 128 S. Ct. 2500 (2008)

Ford v. Verisign, Inc., 252 Fed. App'x 781, 2007 WL 3194743 (9th Cir. 2007) (court, in unreported opinion, follows Shroyer opinion), cert. denied sub nom; T-Mobile USA, Inc. V. Ford, 128 S. Ct. 2503 (2008)

Lowden v. T-Mobile USA, No. 06-35395, 513 F.3d 1213 (9th Cir. Jan 22, 2008) (Court holds that class action waiver is unconscionable under the Washington Supreme Court's opinion in Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007) and that there is no FAA preemption in light of Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976 (9th Cir. 2007))

Janda v. T-Mobile USA, Inc., No. 06-15712, 267 Fed Appx. 968 (9th Cir. Feb. 25, 2008) (Court, in unreported opinion, holds that class action waiver is unconscionable relying upon Shroyer opinion)

Hoffman v. Citibank (South Dakota), N.A., 546 F.3d 1078 (9th Cir. 2008) (court remands order of district court denying motion to compel individual arbitration to conduct a fact finding regarding Citibank's opt-out right)

Davis v. Chase Bank USA, No. 07-55561, ___ Fed. Appx. ___, 2008 WL 48322998 (9th Cir. Nov. 3, 2008) (unpublished) (class action waiver was unconscionable because it was "in the form of a bill stuffer the consumer would be deemed to accept if he did not close his account")

Doe 1 v. AOL, LLC, No. 07-15323 (9th Cir. Jan. 16, 2009) (*per curiam*) (forum selection clause calling for jurisdiction only in Virginia state court is unenforceable as to California resident plaintiffs bringing class action claims under California consumer law since class actions are not available in Virginia state court)

Chalk v. T-Mobile USA, Inc., No. 06-35909, 2009 WL 792517 (9th Cir. Mar. 27, 2009) (Court follows Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or. App. 553, and holds that class action waiver is unconscionable under Oregon law because it is contained in a consumer adhesion contract where individual damages are likely to be small)

Oestreicher v. Alienware Corporation, No. 07-16531, 2009 WL 902341 (9th Cir. April 2, 2009) (unpublished) (court refused to apply Florida choice-of law clause and held that class action waiver was unconscionable under California law even in the context of a plaintiff's claim of \$4,000 for a defective computer)

Creighton v. Blockbuster, Inc., 321 Fed. Appx. 637, 2009, U.S. App. LEXIS 7238 (9th Cir. April 6, 2009) (unpublished) (Court holds that class action waiver in adhesion contract is unconscionable under Oregon law)

Detwiler v. T-Mobile USA, Inc., 305 Fed. Appx 353, 2008 WL 5213704 (9th Cir. 2008) (Court holds that class action waiver is unlawful under Florida law after applying Washington choice-of-law rules which called for application of the law of Florida, the state where the plaintiff resides.)

Kaltwasser v. Cingular Wireless, LLC, No. 08-15962, 2009 WL 3157688 (9th Cir. Oct. 1, 2009) (Court holds that class action waiver is unlawful under California law after refusing to enforce Virginia choice-of-law clause; court also rules that AT&T's "bump-up" provision does not change the result)

Laster v. AT&T Mobility, LLC, No. 08-56394, 2009 WL 3429559, 584 F.3d 849 (9th Cir. Oct. 27, 2009) (in affirming District Court order denying motion to compel arbitration, Ninth Circuit holds that AT&T's "bump-up" provision (which provides for a "premium payment of \$7,500, the jurisdictional limit of California's small claims court, and double counsel fees if the arbitrator awards the customer an amount greater than AT&T's last written settlement offer made before the selection of an arbitrator) does not save the class action waiver from being unconscionable under California law; court concludes that actual damages are "predictably small" because AT&T will pay alleged overcharges to anyone who might initiate arbitration and few customers will actually initiate the arbitration and receive the premium; court finds no FAA preemption) AT&T has filed a

Petition for a Writ of Certiorari with the U.S. Supreme Court sub nom. ATT Mobility LLC v. Concepcion, No. 09-893. It is fully briefed and on May 24, 2010 the U.S. Supreme Court shall act on the Petition.

Masters v. DirecTV, Inc., 2009 WL 4885132 (9th Cir. Nov. 19, 2009) (unpublished) (court holds that California law governs the enforceability of class action waivers in the contracts of customers of California-based businesses even when those contracts choose the law of the customer's home state)

Omstead v. Dell, Inc., No. 08-16479, 2010 WL396089 (9th Cir. Feb. 5, 2010 (court holds that class action waiver is unlawful under California law after refusing to enforce Texas choice-of-law clause)

Eleventh Circuit

Rollins, Inc. v. Garrett, No. 05-14127, 176 Fed. Appx. 968, 2006 WL 1024166 (11th Cir. 2006) (per curiam) (in affirming the District Court's order denying the plaintiff's motion to vacate an AAA Clause Construction Award concluding that under Florida law classwide arbitration could be entertained when the arbitration provision contains no class action waiver, the 11th Circuit held: "Under Florida law, a consumer contract that prohibits class arbitration is unconscionable because it 'preclude[s] the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone' Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. 1st DCA 1999). Accordingly, the arbitrators did not exceed their power by interpreting the contract to allow class arbitration, see 9 U.S.C. §10(a)(4) nor did the arbitration award violate public policy.")

Dale v. Comcast Corporation, 498 F.3d 1216 (11th Cir. Sept. 4, 2007) (Court holds that class action waiver is substantively unconscionable under Georgia law because of the lack of a contractual fee-shifting feature in the face of a claim under the federal Cable Communications Policy Act of 1984, which does not provide for the award of attorneys' fees to a prevailing consumer.)

Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL 6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

- (1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?
- (2) Is the class action waiver provision in plaintiff's contract with Sprint procedurally unconscionable under Florida law?
- (3) Is the class action waiver in plaintiff's contract with Sprint substantively unconscionable under Florida law?

(4) Is the class action waiver provision in plaintiff's contract with Sprint void under Florida law for any other reason?

Federal Statute Invalidating Arbitration Agreements

John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, Section 670(a), to be codified at 10 U.S.C. Chap. 49, by adding § 987 (Oct. 17, 2006). Effective October 1, 2007, it shall be unlawful for any creditor to extend consumer credit to an active duty member of the military or his or her dependent which requires him or her to submit to arbitration. (Section 987(e)(3)). It also provides that no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against such persons. (Section 987(f)(4))

**State Court Appellate Opinions and Statutes Upholding
Validity of Class Action Waivers**

California

Parrish v. Cingular Wireless, LLC, 28 Cal. Rptr. 3d 802 (Ct. App. 1st Dist. 2005) (class action waiver is not unconscionable under California law), vacated by California Supreme Court in light of Discover Bank v. Superior Court, 2005 Cal. LEXIS 9357 (Aug. 24, 2005)

Discover Bank v. Superior Court, 105 Cal. App. 4th 326 (Ct. App. 2d Dist. 2003), (pet. for review granted, 65 P.3d 1285 (2003) (FAA preempts California law even if class action waiver is unconscionable under California law), rev'd and remanded, 36 Cal 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1108 (2005). On remand, Court of Appeal upholds validity of class action waiver based on Delaware choice-of-law clause, 134 Cal. App. 4th 886, 36 Cal. Rptr. 3d 456 (2005), pet. for review denied (Mar. 29, 2006)

Vernon v. Drexel Burnham & Co., 125 Cal. Rptr. 147 (Cal. Ct. App. 1975) (compelled arbitration of claims of named-plaintiffs and held that “the policy of the law favoring arbitration prevails over the policy of law pertaining to class actions”); Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 97 Cal. Rptr. 811 (Cal. Ct. App. 1971) (same); Patterson v. ITT Consumer Financial Corp., 18 Cal. Rptr. 2d 563 (Ct. App.) rev. denied, 18 Cal. Rptr. 2d 563 (Cal. App. 1st Dist. 1993) (same), rehearing denied (May 13, 2005), review denied (Aug. 12 1993), cert. denied 510 U.S. 1176 (1994)

Vannier v. Gateway Companies, Inc., No. B179663, 2006 WL 121962 (Cal. Ct. App., 2nd Dist. Jan. 18, 2006) (held in unpublished opinion that FAA and South Dakota choice-of-law provision precluded a consumer who had agreed to arbitrate disputes from initiating a class action alleging violations of the California Consumer Legal Remedies Act (the “CLRA”)²)

² The United States Court of Appeals for the Ninth Circuit has held that the FAA preempts the class action anti-waiver language in the CLRA because the CLRA only applies to consumer contracts. The only state law preserved from preemption by Section 2 of the FAA are state laws which apply to all contracts within the state of California. See Ting v. AT&T, 319 F.3d 1126, 1147-48 (9th Cir. 2003), cert. denied, 540 U.S. 811 (2003); Provencher v. Dell, Inc., 409 F. Supp. 2d 1196 (C.D. Cal. 2006), Accord Bradley v. Harris Research, Inc., 275 F.3d 884, 892 (9th Cir. 2001) (holding that the FAA preempted Cal. Bus. & Prof. Code Section 20040.5 because it “is not a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements.”). See also KKW Enters. Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp., 184 F.3d 42 (1st Cir. 1999); OPE Int’l LP v. Chet Morrison Contractors, Inc., 258 F.3d 443 (5th Cir. 2001); Doctor’s Assocs. Inc. v. Hamilton, 150 F.3d 157, 163 (2d Cir. 1998), cert. denied 525 U.S. 1103 (1999), Management Recruiters Int’l, Inc. v. Bloor, 129 F.3d 851, 856 (6th Cir. 1997); Alphagraphics Franchising, Inc. v. Whaler Graphics,

(continued...)

Gentry v. Superior Court, 135 Cal. App. 4th 944, 37 Cal. Rptr. 3d 790 (Cal. Ct. App., 2nd Dist. 2006) (compelled arbitration of claim of named plaintiff after concluding that class action waiver in employment agreement is neither procedurally unconscionable as a result of the existence of an opt-out right nor substantively unconscionable because of the potential substantial damages and penalties available to the employee if he prevails)³

Jones v. Citigroup, 135 Cal. App. 4th 1491, 38 Cal. Rptr. 3d 461 (Cal. Ct. App., 4th Dist. 2006) (reverses trial court's denial of motion to compel arbitration after holding that there is no procedural unconscionability by virtue of the fact that Citibank allowed a cardholder to opt out of the arbitration provision without his or her account being closed until the end of the cardholder's current membership year or the expiration date on the card)³

Cardenas v. Chase Manhattan Bank, USA, N.A., No. G033939, 2006 WL 1454778 (Cal. Ct. App. 4th Dist. May 26, 2006) (in unpublished opinion, reverses trial court's denial of motion to compel arbitration after upholding validity of class action waiver based on Delaware choice-of-law clause and the Court of Appeal, Second District's opinion in Discover Bank v. Superior Court, 134 Cal. App. 4th 886, 36 Cal. Rptr. 3d 456 (2005); in ruling that the class action waiver was not contrary to a fundamental California policy, the Court of Appeal concluded that there was no procedural unconscionability by virtue of the fact that Chase allowed its cardholders to opt out of the arbitration provision without their accounts being closed)

Konig v. U-Haul Company of California, No. B190547, 52 Cal. Rptr. 3d 244 (Calif. Ct. App., 2nd App. Dist., Div. 5 Dec. 19, 2006) (Court upholds validity of class action waiver after determining that the claims of plaintiff and each member of the putative class did not involve a "predictably . . . small amount of damages" per class member as required

(...continued)

Inc., 840 F. Supp. 708 (D. Ariz. 1993); Michael v. NAP Consumer Elecs. Corp., 574 F. Supp. 68 (D.P.R. 1983); Battle v. Nissan Motor Acceptance Corp., No. 05-C-0669, 2006 U.S. Dist. LEXIS 37917 at *14-15 (E.D. Wis. Mar. 9, 2006). The California Court of Appeal has recently determined that the CLRA does not apply to loan or credit transactions. Berry v. American Express Publishing, Inc., No. G036848, 147 Cal. App. 4th 224, 54 Cal. Rptr. 3d 91, (Calif. Ct. App., 4th App. Dist. Jan. 31, 2007); Credit Acceptance Corporation v. Davisson, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009)

³ On April 26, 2006, the California Supreme Court granted review in both the Gentry and Jones cases, which had the effect of depublishing the cited opinions. See Gentry, No. S141502, 43 Cal. Rptr. 3d 748, 135 P.3d 1 (Cal. April 26, 2006); Jones, No. S141753, 43 Cal. Rptr. 3d 749 135 P.3d 2 (Cal. April 26, 2006). On November 28, 2007, the California Supreme Court transferred the Jones case to the Court of Appeal with directions to vacate its decision and to reconsider it in light of the decision in Gentry. The Court of Appeal ordered new briefing. Thereafter, the Jones case settled on an individual basis. The Gentry case has been reversed.

by the California Supreme Court’s opinion in Discover Bank v. Superior Court in order to invalidate a class action waiver)

Arguelles-Romero v. Superior Court (AmeriCredit Financial Services, Inc.) No. B219178 (Calif. Ct. App, 2nd App. Dist., Div. 3 May 13, 2010). (Court affirms holding of trial court that claim seeking to eliminate \$16,000 deficiency balance after repossession and sale of auto because of alleged failure to comply with post-repossession notice requirements of California Automobile Sales Finance Act (the “CASFA”) was sufficiently large so as to not make class action waiver substantively unconscionable; however, the Court remanded the case to the trial court for it to do a discretionary analysis on whether a class action is a significantly more effective practical means of vindicating unwaiverable rights under the CASFA to bring a class action as required by the California Supreme Court’s opinion in Gentry v. Superior Court, 42 Cal. 4th 443 (2007).)

Colorado

Rains v. Foundation Health Systems Life & Health, 23 P.3d 1249 (Ct. App. Colo. 2001) (“arbitration clauses are not unenforceable simply because they might render a class action unavailable)

Delaware

Westendorf v. Gateway 2000, Inc., 41 UCC Rep. Serv. 2d 1110 (Del. Ch. 2000), aff’d, 763 A.2d 92 (2000) (compelled arbitration of named-plaintiff’s claims under Delaware Consumer Fraud Act)

District of Columbia

Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. Ct. App. 2002) (upholds validity of forum selection clause in putative class action stipulating for application of Virginia law even though class actions are not available in Virginia)

Florida⁴

⁴ See Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL 6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

- (1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?
- (2) Is the class action waiver provision in plaintiff’s contract with Sprint procedurally unconscionable under Florida law?

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America Online, Inc. v. Booker, 781 So. 2d 423 (Fla. Ct. of App., Third Dist. 2001) (“Florida plaintiffs cannot defeat otherwise valid provisions requiring suit in other states simply by asserting a cause of action in the name of a putative class”)

Fonte v. AT&T Wireless Services, Inc., 903 So. 2d 1019 (Fla. Ct. of App., 4th Dist. 2005) (“We find that neither the text nor our review of the legislative history of [the Florida Deceptive and Unfair Trade Practices Act] suggest that the legislature intended to confer a non-waivable right to class representation. Moreover, there are numerous enforcement mechanisms which can protect consumers other than class actions.”), review denied, 918 So. 2d 292 (2005)

Reeves v. ACE Cash Express, Inc., 937 So 2d 1136 (Fl. Ct of App, 2nd Dist. Aug. 11, 2006), reh’g denied, Sept. 29, 2006 (follows Fonte, Supra and concludes that class action waiver is valid)

Georgia

Crawford v. Great American Cash Advance, Inc., 284 Ga. App. 690, 644 S.E. 2d 522 (Ga. App. March 29, 2007) (affirms trial court order compelling arbitration and implicitly rejects the notion that the inability to prosecute a class action is unconscionable under Georgia law)

Hawaii

Brown v. KFC U.S.A., 82 Haw. 226, 921 P.2d 146 (Haw. 1996), recons. denied, 922 P.2d 973 (Haw. 1997) (compelled arbitration and rejected an argument that arbitration is inherently unfair to employees because of the “alleged elimination of the opportunity for class actions”)

Illinois

Hutcherson v. Sears Roebuck & Company, 342 Ill. App. 3d 109, 793 N.E. 2d 886 (Ill. App. 2003), rev. denied, 205 Ill. 2d 582, 803 N.E. 2d 482 (2003) (class action waiver is not unconscionable under Arizona law and FAA requires class action waiver to be enforced in accordance with its terms)

Rosen v. SCIL, LLC and Saks Incorporated, 343 Ill. App. 3d 1075, 799 N.E. 2d 488 (Ill. App. 2003), rev. denied, 207 Ill. 2d 627, 807 N.E. 2d 982 (2004) (class action waiver is not unconscionable under Illinois law)

(...continued)

- (3) Is the class action waiver in plaintiff’s contract with Sprint substantively unconscionable under Florida law?
- (4) Is the class action waiver provision in plaintiff’s contract with Sprint void under Florida law for any other reason?

Ragan v. AT&T Corp., 291 Ill. Dec. 933, 824 N.E. 2d 1183 (Ill. App. 2005) (class action waiver is not unconscionable under New York law)

Hubbert v. Dell Corporation, 359 Ill. App. 3d 976, 835 N.E. 2d 113 (Ill. App. Ct. 5th Dist. 2005) (class action waiver is not unconscionable under Texas law), appeal denied, 217 Ill. 2d 601 (2006)

Kansas

Wilson v. Mike Steven Motors, Inc., 111 P.3d 1076 (Table) (Kan. Ct. App. May 27, 2005) (class action waiver is not unconscionable under Kansas law)

Maine

Stenzel v. Dell, Inc., 870 A.2d 133 (Me. 2005) (class action waiver is not unconscionable under Texas law)

Maryland

Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735 (Md. 2005) (upholds validity of class action waivers in light of “the strong policy made clear in both federal and Maryland law that favors the enforcement of arbitration provisions”)

Doyle v. Finance America, LLC, 173 Md. App. 370, 918 A.2d 1266 (Md. App. Mar. 15, 2007) (follows Walther and upholds validity of class action waiver)

Gilman v. Wheat, First Securities, Inc. 345 Md. 361, 692 A.2d 454 (1997) (upholds validity of forum selection clause in putative class action stipulating for application of Virginia law even though class actions are not available in Virginia)

Freedman v. Comcast Corporation, Nos. 435, 2102, September Term, 2008, 2010 Md. App. LEXIS 12 (Ct. of Spec. App. of Md. Jan. 28, 2010) (Court follows Walther v. Sovereign Bank, 386 Md. 412 (2005) and holds that class action waiver is valid under Maryland law; Court further holds that there was no procedural unconscionability because of provision giving customer 30 days to opt out of arbitration provision)

Mississippi

Mississippi has no class action rule or statute and Mississippi state courts do not recognize class actions. American Bankers Ins. Co of Florida v. Booth, 830 So. 2d 1205, 1213 (Miss. 2002); Marx v. Broom, 632 So. 2d 1322, 1325 (Miss. 2004)

New Jersey

Gras v. Associates First Capital Corp., 346 N.J. Super. 42, 786 A.2d 886 (App. Div. 2001), review denied (Sup. Ct.) (enforced class action waiver stating that there is no “overriding public policy in favor of class actions”)

Delta Funding Corporation v. Harris, 189 NJ 28, 912 A.2d 104 (N.J. Supreme Court Aug. 9, 2006) (upholds validity of class action waiver in context of high-value claim)

Muhammad v. County Bank of Rehoboth Beach, Delaware, 379 N.J. Super 222, 877 A.2d 340 (2005) (follows Gras, supra), petition for review before New Jersey Supreme Court granted, 185 N.J. 254 (2005). This case was reversed, 189 NJ 1, 912 A.2d 88 (2006).

New Mexico

Fiser v. Dell Computer Corporation, 165 P.3d 325 (N.M. Ct. App. 2007), cert. granted, No. 30,424 (June 26, 2007) (Class action waiver in arbitration provision in terms and conditions of sale contained in “approve-or-return” contracts is neither procedurally unconscionable (because plaintiff did not establish a lack of other alternatives in purchasing a computer) or substantively unconscionable as a matter of Texas law and such a result did not violate New Mexico policy.) This opinion was reversed by the New Mexico Supreme Court, No. 30,424 (June 27, 2008).

New York

Ranieri v. Bell Atlantic Mobile, 304 A.D. 2d 353, 759 N.Y.S. 2d 448 (N.Y. App. Div. 1st Dep’t 2003), leave denied, 1 N.Y. 3d 502, 775 N.Y.S. 2d 240, 807 N.E. 2d 290 (2003) (class action waiver is not unconscionable or contrary to public policy)

Brower v. Gateway 2000, 246 A. D. 2d 246 (N.Y. 1st Dep’t 1998) (same)

Tsadilas v. Providian National Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (N.Y. App. Div. 1st Dep’t 2004), reargument denied, 2005 N.Y. App. Div. LEXIS 247 (Mar. 8, 2005), appeal denied, 5 NY 3d 702, 832 N.E. 2d 1189, 799 N.Y.S. 2d 773 (June 4, 2005) (same)

Johnson v. Chase Manhattan Bank, N.A., 2 Misc. 3d 1003(A), 784 N.Y.S. 2d 921 (table), 2004 WL 413213 (N.Y. Sup.) 2004 N.Y. Slip. Op. 50086(U) (2004), aff’d, 786 N.Y.S. 2d 302 (N.Y. App. Div. 2004) (same)

Hayes v. County Bank, 2006 NY Slip Op 1460, 26 AD3d 465, 811 N.Y.S. 2d 741 (Feb. 28, 2006) (same)

Harris v. Shearson Hayden Stone, 82 A. D. 2d 87, 441 N.Y.S. 2d 70 (1981); aff’d 56 N.Y. 2d 627, 450 N.Y.S. 2d 482, 435 N. E. 2d 1097 (1982)

North Carolina

Tillman v. Commercial Credit Loans, Inc., 177 N.C. App. 568, 629 S.E. 2d 865 (N.C. Ct. App. June 6, 2006) (North Carolina Court of Appeals, reversing the trial court, upheld the validity of the class action waiver in defendants’ financing contracts. The court relied heavily on prior federal circuit court decisions holding that a class action waiver in an arbitration agreement is not per se unenforceable and is not unconscionable where the prevailing plaintiff is permitted to recover attorney’s fees and costs under applicable

substantive fee-shifting statutes. The court emphasized that “[t]he great majority of federal and state jurisdictions who have addressed this issue” have upheld the validity of class action waivers and have recognized that such waivers do not choke off the supply of attorneys willing to represent consumers on an individual basis where applicable substantive law permits successful plaintiffs to recover fees and costs.). This opinion was reversed by the North Carolina Supreme Court, 362 N.C. 93, 655 S.E. 2d 362 (2008).

North Dakota

Strand v. U.S. Nat’l Bank, N.A., 2005 N.D.68, 693 N.W. 2d 918 (N.D. March 31, 2005) (upholds validity of class action waiver: “Merely restricting the availability of a class action is not, by itself, a restriction on substantive remedies. The right to bring an action as a class action is purely a procedural right”)

Ohio

Hawkins v. O’Brien, No. 224900, 2009 WL 50616 (Ohio App. 2 Dist. Jan. 9, 2009) (court upholds the validity of the class action waiver in a payday lender’s arbitration provision and distinguished the earlier Ohio Court of Appeals opinion in Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150 (2004), based on the fact that in Eagle case the dealer’s arbitration agreement contained certain unfair features, including a confidentiality provision: "The private attorney general and class action provisions of R.C. 1345.09(D) are procedural mechanisms that aid consumers in their prosecution of SCPA violations. They confer no additional substantive rights. The arbitration clause in the present case preserves the statutory substantive rights and remedies Hawkins sought in the action he commenced. Therefore, and because no showing has been made that those statutory rights and remedies are not arbitrable, the arbitration clause in the contract between Hawkins and Kentucky Check is enforceable. The trial court did not err when it held the issues in the action Hawkins commenced are referable to arbitration, and stayed the litigation until arbitration is had. R.C. 2711.02.")

Alexander v. Wells Fargo Financial Ohio 1, Inc., No. 89277, __ WL____ (Ohio Ct. App., 8th App. Dist., Cuyahoga Cty. Sept. 17, 2009) (class action waiver contained in arbitration agreement which was part of mortgage loan is neither procedurally not substantively unconscionable or against public policy; court distinguishes Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150 (2004) on the basis that Eagle, unlike Alexander, specifically addressed class actions under the Consumer Sales and Practices Act (the “CSPA”) and that the arbitration provision in Eagle, unlike Alexander, contained a confidentiality clause; court distinguishes Schwartz v. Alltel Corp., 2006 WL 2243649 (Ohio App. 8th Dist. June 29, 2006), on the basis that in Schwartz, as in Eagle, the plaintiff filed his claims under the CSPA and presented considerable evidence of procedural unconscionability.

Garber v. Buckeye Chrysler-Jeep-Dodge of Shelby, L.L.C., No. 2007-CA-0121, 2008 WL 2789074 (Ohio App. 5 Dist. July 14, 2008) rev. den. by Ohio Sup. Ct. (although the case does not deal with the validity of a class action waiver as such, the court holds that because appellants’ complaint did not challenge the arbitration clause and instead alleged

only that defendants committed various acts which were unfair, deceptive and unconscionable in selling a used car, appellants waived any such challenge and the trial court did not err in compelling arbitration based solely on its review of the pleadings and the motion to compel arbitration without giving the appellants the right to oppose such motion)

Tennessee

Pyburn v. Bill Heard Chevrolet, 63 S.W. 3d 351 (Tenn. Ct. App. May 9, 2001) (FAA preempts any non-waivable right which might exist to maintain class action under Tennessee Consumer Protection Act)⁵

Spann v. American Express Travel Related Services Company, Inc., No. M2004-02786 - COA - R3 - CV December 16, 2005 Term; 224 S.W. 3d 698 (Tenn. Ct. App. Aug. 30, 2006) (applies Utah choice-of-law clause in cardholder agreement and holds that class action waiver is not unconscionable under Utah Common law; new Utah statute validating class action waivers is cited as additional support)

Chapman v. H&R Block Mortg. Corp., 2005 WL 3159774 (Tenn. Ct. App. 2005) (class action waiver is valid)

Texas

AutoNation USA Corporation v. Leroy, 105 S.W. 3d 190 (Tex. App. Hous. (14 Dist.) 2003) (right to arbitrate under the FAA trumps right to maintain a class action)

Utah

Act of March 1, 2006, Chapter 172, Utah Laws of 2006, effective March 15, 2006 (to be codified at Utah Code Ann. §§ 70C-3-104, 70C-4-102, 70C-4-105) (validates class action waivers in consumer credit transactions as long as they are disclosed in all capital letters or bold-face type)

Virginia

Virginia has no class action rule or statute. Nationwide Mut. Ins. Co. v. Housing Opportunities Made Equal, Inc., 259 Va. 8, 22, 523 S.E. 2d 217 (2000) (quoting W.S. Carnes, Inc. v. Bd of Supervisors, 252 Va. 377, 478 S.E. 2d 295, 300 (Va. 1996))

⁵ The Tennessee Supreme Court denied the plaintiff's petition for review and ordered the Court of Appeal's opinion to be published which means that the decision "may be relied upon by the bench and bar of [Tennessee] as representing the present state of the law with the same confidence and reliability the published opinions of [the Tennessee Supreme] Court." Meadows v. State, 849 S.W. 2d 748, 752 (Tenn. 1993)

Washington

Stein v. Geonerco, Inc., 105 Wash. App. 41, 17 P.3d 1266 (WA 2001) (court rejects argument that arbitration agreement is unenforceable because it prevented plaintiff from bringing class action)

Heaphy v. State Farm Mutual Automobile Insurance Co., 117 Wash App. 438 (2003), review denied, 150 Wash. 2d 1037 (2004) (same)

State Court Appellate Opinions Invalidating Class Action Waivers⁶

⁶ In most of these opinions, the courts held that there was some degree of procedural unconscionability as well as substantive unconscionability under state law. Many companies now give consumers and employees the unconditional right to opt out of or reject the arbitration provision without it having any adverse repercussions. Courts in states that require that there be both procedural as well as substantive unconscionability in order to invalidate a contract based on unconscionability have validated class action waivers and other arbitration features that they considered substantively unconscionable when an opt-out right was provided to the consumer or employee. See, e.g., Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002); Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002); Providian National Bank v. Screws, 894 So. 2d 625 (Ala. Oct. 3, 2003); Tsadilas v. Providian Nat'l Bank, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (1st Dep't. 2004); Marley v. Macy's South, No. CV 405-227, 2007 WL 1745619, at *3 (S.D. Ga. June 18, 2007) (court enforced arbitration clause in employment agreement because "[w]hile Ms. Marley states that she did not have a choice to enter the arbitration process because she was 'in jeopardy of losing [her] job' if she did not, the record indicates that each employee was mailed an election form to opt-out of the program at their home address"). Pivoris v. TCF Financial Corporation, No. 07-C 2673, 2007 U.S. Dist. LEXIS 90562 (N.D. Ill. Dec. 7, 2007); SDS Autos, Inc. v. Chrzanowski, Case No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) (Invalidates class action waiver for holders of small claims under Florida Deceptive and Unfair Trade Practices Act whose attorney's fees are limited by the amount of their actual damages.) (arbitration agreement with class action waiver not procedurally unconscionable where "[p]laintiff had the absolute right to reject the arbitration provision without affecting her account contract or the status of her account"); Honig v. Comcast of Georgia, LLC, Civil Action No. 1:07-cv-1839-TCB, 537 F.Supp. 2d 1277 (N.D. Ga. Jan. 31, 2007) ("Finally, and most importantly ..., Honig was free to reject the terms of the arbitration provision without a single adverse consequence. Specifically, the arbitration provision gave her the right to opt out within thirty days without adversely affecting her cable service, but she never exercised that right. Honig's ability to opt out of the arbitration provision dilutes her unconscionability argument because the provision was not offered on a take-it-or-leave-it basis. Courts have stressed the importance of such opt-out provisions in enforcing class action waivers in arbitration agreements."); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J-33HTS (M.D. Fla. Jan. 14, 2008) (class action waiver provision was not unconscionable where arbitration provision allowed subscribers to opt out); Davidson v. Cingular Wireless, LLC, No. 2:06-cv-00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007) (class action waiver in contract for cell phone service not unconscionable where plaintiff failed to opt out); Martin v. Delaware Title Loans, Inc., No. 08-3322, 2008 WL 444302 (E.D. Pa. Oct. 1, 2008) (finding plaintiff could not establish procedural unconscionability under PA law in light of 15 day opt-out right); Columbia Credit Services, Inc. v. Billingslea, No. B190776, 2007 WL 1982721 (Cal. Ct. App. July 10, 2007) (court affirmed lower court's confirmation of arbitration award after rejecting unconscionability challenge based in part on the fact that cardholder was given the right to opt out of the arbitration provision and failed to do so); Eaves-Leanos v. Assurant, Inc., No. 07-18, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008) (finding arbitration agreement with class

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waiver not unconscionable as plaintiff had opportunity to opt out); Enderlin v. XM Satellite Radio Holdings, Inc., No. 06-0032, 2008 WL 830262 (E.D. Ark. March 25, 2008)(finding plaintiff could not establish procedural unconscionability in light of opt-out right); Crandall v. AT&T Mobility, LLC, No. 07-750, 2008 WL 2796752 (S.D. Ill. July 18, 2008) (class action waiver in cell phone service contract not unconscionable where plaintiff failed to opt out); Webb v. ALC of West Cleveland, Inc., No. 90843, 2008 WL 4358554 (Ohio Ct. App., 8th App. Dist. Sept. 25, 2008) (citing *Ahmed supra*, the buyer in an automobile retail installment contract “could not demonstrate that the arbitration clause was unconscionable because the contract gave her the right to reject the arbitration clause”); Wright v. Circuit City Stores, Inc., Case No. CV 97-B-0776-5 (N.D. Ala. Feb. 5, 2001) (employment arbitration provision with opt-out right is enforced); Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410 (1998) (unconscionability challenge is rejected where credit card issuer gave the cardholder the right to reject the arbitration provision and those who opted out had their 2% APR reduction in interest rate reinstated to its previous rate: “Stiles was given a clear choice in this case; he could take the arbitration provision or leave it”); Guadagno v. E*Trade Bank, No. CV 08-03628 SJO (JCX), 2008 WL 5479062 (C.D. Calif. Dec. 29, 2008) (Class action waiver does not violate fundamental policy of California because of opt-out right: “Here, Guadagno had a meaningful opportunity to opt out of the Arbitration clause, which contained the class action waiver, by notifying E*Trade in writing within 60 days of receiving the Agreement. The Agreement highlighted the Arbitration clause, and the introduction to the Arbitration clause highlighted the opt-out term. Because the Arbitration clause containing the waiver was not presented on a take-it-or-leave-it basis, but gave Guadagno sixty days to opt out, it was not unconscionable. Thus, application of Virginia law does not contradict California’s fundamental policy against enforcing unconscionable consumer class action waivers.”); Magee v. Advance America Servicing of Ark, Inc., No 6:08-CV-6105, 2009 WL 890991 (W.D. Ark. April 1, 2009) (Court enforces class action waiver after noting that the arbitration agreement was clearly set off from the rest of the contract and provided the consumers with a 30-day opt-out period – a period which was actually longer than the term of the loan); Fluke v. CashCall, No. 08-05776 (E.D. PA. May 21, 2009)(Court enforces class action waiver under Pennsylvania law: “We predict that the Pennsylvania Supreme Court would agree with the reasoning of the district courts in Guadagno and Honig. An opt-out provision, like the one in Fluke’s agreement with FBD, seriously undermines a consumer’s contention that the arbitration agreement is unconscionable. Fluke was given the option to say “no” to the arbitration provision and he was given a full 60 days to do so. In that way, he had complete control over the terms of the agreement and it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave-it basis. Furthermore, like the agreements in Guadagno and Honig, the FBD loan agreement requires that FBD pay the filing fee and any costs and fees charged by the arbitrator regardless of which party initiated the arbitration. Moreover, under § 503 of the Loan Interest and Protection Law, a borrower or debtor who prevails in an action “shall” recover a reasonable attorneys’ fee. 41 Pa. Cons. Stat. § 503. This should alleviate any concern regarding the availability and willingness of counsel to represent him. Accordingly, this case differs materially from Thibodeau and is more analogous to Guadagno and Honig. We predict that the Pennsylvania Supreme Court would hold that the arbitration provision in the loan agreement in issue is not unconscionable and is enforceable.”); Credit Acceptance Corporation v. Davisson, Case No. 1:08 CV 107 (N.D. Ohio June 30, 2009)

(continued...)

Alabama

Leonard v. Terminix Int'l. Co., 854 So. 2d 529 (Ala. 2002) (in clause burdened by other unfair features, court invalidates clause containing class action waiver)

California

Discover Bank v. Superior Court of Los Angeles, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) (class action waiver in a consumer contract of adhesion is unconscionable if California law applies when the dispute involves small amounts of damages and is not preempted by the FAA; case remanded to determine whether Delaware choice-of-law clause should be enforced)

Mandel v. Household Bank (Nevada) N.A., 129 Cal. Rptr. 2d 380 (Cal. Ct. App., 4th Dist. 2003), rev. granted and opinion superseded pending appeal, 132 Cal. Rptr. 2d 525, 65 P.3d 1284 (Cal. 2003), rev. dismissed, 29 Cal. Rptr. 3d 1, 112 P.3d 1 (Cal. 2005) (class action waiver unconscionable under Nevada law)

Castillo v. Dollar Financial Group, 2004 WL 2191551 (Cal. App. 4th Dist. 2004) (class action waiver unconscionable in employment arbitration agreement because it was unilateral)

(...continued)

(in rejecting Davisson's argument that the arbitration provision violated the Ohio Consumer Sales Practice Act since it purported to waive access to the court for vindicating a claim under it, the Court noted that Credit Acceptance Corporation did not "waive her recourse to the courts" because of the opt-out feature); Freedman v. Comcast Corporation, Nos. 435, 2102, Sept. Term 2008, 2010 Md. App. LEXIS 12 (Ct. of Spec. App. Of Md. Jan. 28, 2010 (court holds that there is no procedural unconscionability under Maryland law as a result of 30-day opt-out feature); Clerk v. ACE Cash Express, Inc., No. 09-05117, 2010 U.S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010) (court holds that there is no procedural unconscionability when payday loan borrower was given a 30-day right to reject the arbitration provision without it having any adverse effect on the loan); Jackson v. The Payday Loan Store of Illinois, Inc., (Case No. 09 C 4189 (N.D. Ill. March 17, 2010) ("Considering the totality of the circumstances relevant to the class action waiver at issue here, the Court concludes that the waiver is enforceable. The parties agreed to the Agreement as a whole, including the waiver, and failed to opt-out as allowed by the provision for doing so described above. This allowed either party to elect arbitration, and contains a clear and legible notice to Plaintiffs that it limited certain rights, including the right to pursue a claim as a class action. Hante is therefore barred by the terms of the Agreement from bringing a claim in arbitration on a class basis"); Ambrose v. Comcast Corporation, No. 3:09-cv-182, 2010 WL 1270712 (E.D. Tenn. Mar. 31, 2010) ("the court finds that the arbitration provision was not a 'contract of adhesion' because plaintiff was provided with an opportunity to 'opt-out' of arbitration with no adverse effect on his relationship with Comcast. The 30-day window to 'opt-out' of arbitration afforded the consumer [plaintiff] with a realistic opportunity to bargain . . ."). But, see Duran v. Discover Bank, 2009 WL 1873651 (Call. App. 2d Dist. June 19, 2009 (unreported)) (class action waiver invalidated despite opt-out feature).

Ramirez v. Circuit City Stores, Inc., 90 Cal. Rptr. 2d 916 (Cal. App. 1st Dist. 1999), review granted and opinion superseded pending appeal, 94 Cal. Rptr. 2d 1, 995 P.2d 137 (Cal. 2000), review dismissed, cause remanded, 101 Cal. Rptr. 2d 199, 11 P.3d 955 (Cal. 2000) (class action waiver unconscionable in employment agreement)

Parrish v. Cingular Wireless, LLC, No. A105518, 2005 Cal. App. Unpub. LEXIS 9021, 2005 WL 2420719 (Calif. Ct. App., 1st App. Dist., Div. 5 Oct. 3, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), as modified on denial of rehearing (Nov. 2, 2005), pet. for review denied (Dec. 14, 2005), cert. denied in U.S. Supreme Court

Mendoza v. Cingular Wireless, LLC, No. A105518, 2005 Cal. App. Unpub. LEXIS 9021 (Cal. Ct. App., 1st App. Dist., Div. 5 (Oct. 3, 2005) (follows Discover Bank v. Superior Court, in unpublished opinion), cert. denied in U.S. Supreme Court

Meoli v. AT&T Wireless Services, Inc., Nos. A106061, A106340 and A106341, 2005 Cal. App. Unpub. LEXIS 8994 (Calif. Ct. App., 1st App. Dist., Div. 5 Sept. 30, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), cert. denied in U.S. Supreme Court

Bucy v. AT&T Wireless Services, Inc., A105910, 2005 Cal. App. Unpub. LEXIS 8993 (Calif. Ct. App., 1st App. Dist., Div. 5 Sept. 30, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), cert. denied in U.S. Supreme Court

Wing v. Cingular Wireless, LLC, No. A105906, 2005 Cal. App. Unpub. LEXIS 9005 (Calif. Ct. App., 1st App. Dist., Div. 5 Oct. 3, 2005) (follows Discover Bank v. Superior Court in unpublished opinion), cert. denied in U.S. Supreme Court

Independent Association of Mailbox Center Owners, Inc. v. Superior Court, 133 Cal. App. 4th 396, 34 Cal. Rptr. 3d 659 (Calif. Ct. App., 4th App. Dist., Div. 1 2005) (follows Discover Bank v. Superior Court)

Patton v. Cingular Wireless, No. A108816, 2006 WL 1413537 (Cal. Ct. App., 1st Dist., Div. 1 May 23, 2006) (in this unpublished opinion, court follows California Supreme Court opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1106 (2005) and holds that class action waiver is unconscionable under California law)

Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 118 Cal. Rptr. 2d 862 (4th Dist. Div. Three 2002), cert. denied, 123 S. Ct. 1258 (2003) (class action waiver is unconscionable under California law); Mandel v. Household Bank (Nevada), N.A., 105 Cal App. 4th 75 (4th Dist. Div. 3 2003) (same)

Lee v. AT&T Wireless Services, Inc., No. B186240, 2006 WL 1452936 (Cal. Ct. App. 2nd Dist. Div. 5 May 26, 2006) (in this unpublished opinion, court follows California Supreme Court opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1106 (2005) and holds that class action waiver is unconscionable under California law)

America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 90 Cal. App. 4th (2001) (invalidated Virginia forum selection clause in connection with putative class action filed under California Consumer Legal Remedies Act because that Act contains non-waivable right to maintain a class action)

Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 36 Cal. Rptr. 3d 229 (Calif. Ct. App., Second Dist., Div. 4 2005) (invalidated Georgia forum selection clause and class action waiver after refusing to enforce Georgia choice-of-law clause because the class action was just a California statewide class action asserting a claim under California Business & Professions Code §17200)

Klussman v. Cross Country Bank, 134 Cal. App. 4th 1283, 36 Cal. Rptr. 3d 728 (Cal. Ct. App., 1st Dist., Div. One 2005) (in clause where class action waiver was not express but covered by implication because of the incorporation by reference of the NAF's rules and where there are California claims in a California-only statewide class action, the court refuses to apply the Delaware choice-of-law clause)

Cohen v. DirecTV, Inc., 142 Cal. App. 4th 1442, 48 Cal. Rptr. 3d 813 (Cal. Ct. App., 2nd Dist., Div. Eight 2006) (applies Discover Bank v. Superior Court in a case involving an individual claim of \$1,000)

Merritt v. Cingular Wireless, LLC, No. B 178947, 2006 WL 2744357 (Cal. Ct. App., 2nd Dist., Div. 1 Sept. 27, 2006) (in this unpublished opinion, court follows California Supreme Court opinion in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1106 (2005) and holds that class action waiver is unconscionable under California law)

Firchow v. Citibank (South Dakota), N.A., No. B187081 2007 WL 64763 (Cal. Ct. App., Second Dist., Div 7 Jan. 10, 2007) (Court affirms denial of motion to compel arbitration after holding that class action waiver: (1) is substantively unconscionable under the California Supreme Court's opinion in Discover Bank v. Superior Court; (2) is procedurally unconscionable because it would not renew a credit card issued to a person opting out of the arbitration provision, thus making the opt-out right illusory; (3) is contrary to a fundamental public policy of California which has a materially greater interest than South Dakota - the state where Citibank is located and designated in the choice-of-law provision in the cardholder agreement. The Court also found no FAA preemption)⁷

⁷ During the week of April 9, 2007, the California Supreme Court granted review of this case, which had the effect of depublishing the opinion. The Court deferred briefing pending decision in Gentry v. Superior Court, which was reversed on August 30, 2007. The Supreme Court on November 28, 2007 dismissed review of Firchow in light of its Gentry opinion.

In re Cingular Cases, No. D047603, 2007 WL 93229 (Cal. Ct. App., Fourth Dist, Div. 1 Jan. 16, 2007) (Court affirms denial of motion to compel arbitration after holding that class action waiver and arbitration agreement: (1) is procedurally unconscionable because the arbitration provision was “at the end of three pages of single-spaced extremely small print that is, at best, difficult to read” and was sent to one of the plaintiffs “as a filler, in his billing”; (2) is substantively unconscionable based on the California Supreme Court’s opinion in Discover Bank v. Superior Court despite the fact that the amount in controversy is between \$1,000 - \$2,000. The Court also found no FAA preemption)

Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007) (Class action waiver is unconscionable), *cert. denied*, 128 S. Ct. 2501 (2008)

Gentry v. Superior Court, 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (Cal. Aug. 30, 2007) (In some cases, class action waiver undermines the vindication of employees’ unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state’s overtime laws. The Supreme Court also holds that the existence of an opt-out right did not, in and of itself, preclude a finding of procedural unconscionability in light of two factors: (1) the employee handbook touted the benefits of arbitration while omitting any mention of the remedial limitations and shortening of the statute of limitations; and (2) the likelihood that employees felt at least some pressure not to opt out of the arbitration agreement.), *cert denied*, 128 S. Ct. 1743 (2008)

Murphy v. Check ‘N Go of California, Inc., No. A11442, 156 Cal. App. 4th 138, 67 Cal. Rptr. 3d 120 (Cal. Ct. App. Oct. 17, 2007) (Class action waiver is unconscionable under California law.)

America Online, Inc. v. Superior Court of Alameda County (Mendoza), 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (AOL’s forum selection clause is unconscionable because the clause violated California public policy on two grounds: (1) enforcement of the forum selection clause violated California’s public policy that strongly favors consumer class actions; and (2) enforcement of the forum selection clause violated the anti-waiver provision of the Consumer Legal Remedies Act)

Sanchez v. Western Pizza Enterprises, Inc., No. B203961, 2009 WL 683701 (Cal. Ct. App., 2nd Dist., Div. 3 March 17, 2009) (follows Gentry v. Superior Court, 42 Cal. 4th 443, and holds that the class action waiver undermines the vindication of employees’ unwaivable statutory rights under the laws requiring employers to reimburse employees for job expenses and to pay a minimum wage. The Court also held that the language in the arbitration agreement saying that it “is not a mandatory condition of employment” did not, in and of itself, preclude a finding of procedural unconscionability in light of two factors: (1) the inequality in bargaining power between the low-wage employees and their employer makes it likely that the employees felt at least some pressure to sign the arbitration agreement; and (2) the agreement suggests that there are multiple arbitrators to choose from and fails to mention that the designated arbitration provider includes only one arbitrator.)

Franco v. Athens Disposal Company, Inc., 171 Cal. App. 4th 1277, 90 Cal. Rptr.3d 539 (Cal. Ct. App., 2nd App. Dist. 2009) (follows Gentry v. Superior Court, 42 Cal. 4th 443, and holds that class action waiver is unconscionable with respect to the alleged violations of the meal and rest period laws given the modest size of the potential individual recovery (\$10,250), the potential for retaliation against members of the class and the fact that absent class members of the class may be ill-informed about their rights; in addition, because the arbitration agreement prevents plaintiff from acting as a private attorney general, it conflicts with the Labor Code Private Attorneys General Act of 2004 – an act that furthers Gentry's goal of comprehensively enforcing state labor laws through statutory sanction.)

Olvera v. El Pollo Loco, Inc., No. 3205343, 2009 WL 1110828 (Cal. Ct. App. 2nd App. Dist. Div. Three April 27, 2009) (follows Gentry v. Superior Court, 42 Cal. 4th 443, and holds that class action waiver is unconscionable (i) procedurally unconscionable because of the inequality in bargaining power between the low-wage employees and their employer makes it likely that the employees felt at least some pressure to sign the acknowledgement and agree to the new dispute resolution policy and the explanatory materials describing the policy were misleading; and (ii) substantively unconscionable because a class action is the only effective way for the employees (many of whom are low-wage earners with limited English language skills who are likely ill-informed of their statutory rights) to vindicate their rights.)

Duran v. Discover Bank, 2009 WL 1873651 (Cal. App. 2d Dist. June 19, 2009) (unpublished) (court held class action waiver invalid despite existence of opt-out provision and Delaware choice-of-law provision)

Vu v. Superior Court, No. B213988, 2009 WL 3823383 (Cal. Ct. App., 2nd App. Dist., Div. 7 Nov. 17, 2009) (Because the employer's arbitration agreement contains multiple defects, including a class action waiver, the Court grants the petition for writ of mandate of trial court order granting petition to compel arbitration)

Florida⁸

Bellsouth Mobility LLC v. Christopher, 819 So. 2d 171 (Fla. Ct. App. 2002) (in clause burdened by numerous other unfair features, court holds that class action waiver is substantively unconscionable), rehearing denied (June 27, 2002)

Powertel, Inc. v. Bexley, 743 So 2d 570 (Fla. App., 1st Dist. 1999) (in clause burdened by numerous other unfair features, court also holds that class action waiver is unconscionable), review denied, 763 So. 2d 1044 (2000)

America Online, Inc. v. Paseika, 870 So. 2d 170 (Fla. Dist. Ct. App. 2004) (invalidated Virginia forum selection clause in putative class action brought under Florida Deceptive and Unfair Trade Practices Act), review denied, 880 So. 2d 1209 (2004)

SDS Autos, Inc. v. Chrzanowski, Case no. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) (Invalidates class action waiver for holders of small claims under Florida Deceptive and Unfair Trade Practices Act whose attorney's fees are limited by the amount of their actual damages)

Illinois

Kinkel v. Cingular Wireless, LLC, 357 Ill. App. 3d 556, 828 N.E. 2d 812, 293 Ill. Dec. 502 (Ct. App., Fifth District 2005) (class action waiver is invalid, finding procedural unconscionability because waiver was in extremely small print in the middle of a long paragraph and substantive unconscionability because the waiver left consumers with small claims without an effective remedy in that the clause (1) did not contain a provision under which the company would pay arbitration costs, (2) did not provide for recovery of

⁸ See Pendergast v. Sprint Nextel Corporation, No. 09-10612, 2010 WL6745 (11th Cir. Jan. 4, 2010) Court certifies the following questions to the Florida Supreme Court:

- (1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?
- (2) Is the class action waiver provision in plaintiff's contract with Sprint procedurally unconscionable under Florida law?
- (3) Is the class action waiver in plaintiff's contract with Sprint substantively unconscionable under Florida law?
- (4) Is the class action waiver provision in plaintiff's contract with Sprint void under Florida law for any other reason?

attorney's fees if permitted by applicable law and (3) put limitations on awarding punitive damages.

Kinkel v. Cingular Wireless LLC, 223 Ill. 2d 1, 857 N.E. 2d 250 (Ill. Sup. Ct. 2006) (Court affirmed the judgment of the Illinois Court of Appeals and held that a class action waiver in a cellular telephone service burdened by numerous other unfair features is unconscionable “because it is contained in a contract of adhesion that fails to inform the customer of the cost of her arbitration, and that does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged in either a judicial or arbitral forum”; in doing so, however, the Court cautioned that it was not adopting a rule that class action waivers are per se unconscionable: “It is not unconscionable or even unethical for a business to attempt to limit its exposure to class arbitration in litigation, but to prefer to resolve the claims of clients individually. Indeed, it has been suggested as a matter of economic theory consumers may benefit from reduced costs if companies are allowed to engage in this strategy.”)

Wigginton v. Dell, Inc., 382 Ill. App. 3d 1189, 890 N.E. 2d 541, 321 Ill. Dec. 819 (Ill. App. Ct., Fifth Dist. 2008) (class action waiver in computer contract with Texas choice-of-law clause is invalidated after court concludes that waiver violates a fundamental public policy of Illinois.

Peach v. CIM Ins. Corp., 352 Ill. App. 3d 691, 816 N.E. 2d 668 (5th Dist. 2004), appeal den., 212 Ill. 2d 536, 824 N.E. 2d 285 (2004) (class action waiver in arbitration provision unconscionable)

Keefe v. Allied Home Mortgage Corporation, No. 04-L-502, 2009 WL 2027244 (Ill. App. Ct., 5th Dist. July 10, 2009) (class action waiver unconscionable even though the borrower was given the option to decline signing the stand-alone arbitration agreement and still obtain the loan)

Louisiana

Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc., 776 So. 2d 589 (La. Ct. App. 3d Cir. 2000), writ den., 787 So. 2d 316 (La. 2001) (class action waiver unenforceable)

Maine

Public Law, Chapter 248 LD 1343, item 1, 124th Maine State Legislature (titled “An Act to Promote Consumer Fairness in Tax Refund Anticipation Loans”) adds 9-A MRSA § 10-310 2.E. (7), which prohibits a facilitator of refund anticipation loans or refund anticipation checks from including a class action waiver in a refund anticipation loan application or agreement.

Massachusetts

Feeney v. Dell Inc., No. SJC-10259, 908 N.E.2d 753, 454 Mass., 192 Mass Sup. Jud. Ct. July 2, 2009) (language in arbitration provision saying that the arbitration “will be limited

solely to the dispute or controversy between customer and Dell” is contrary to fundamental public policy of state favoring class actions under G.L.C. 93A and refused to apply Texas choice-of-law clause; complaint, however, dismissed for failure to state a claim under 93A)

Minnesota

Minnesota Statutes, § 270 C.445, Subdivision 3(18)(vii), prohibits a tax preparer from including a class action waiver in any document provided or signed in connection with the provision of tax preparation services.

Minnesota Statutes, Chapter 68, S.F. No. 806, adds § 47.601, Subdivision 2, to prohibit a person making a consumer short-term loan from including a class action waiver in loan documents

Missouri

Whitney v. Alltel Communications, Inc., 173 S.W. 3d 300 (Mo. App. W.D. 2005) (in clause burdened by other certain features, including a provision which prohibited an award of any incidental, consequential, punitive or exemplary damages as well as attorneys’ fee and which required the customer to bear the costs of arbitration, court invalidates clause containing class action waiver)

Woods v. QC Financial Services, Inc., No. ED 90949, 2008 WL 5454124 (Mo. App., Eastern Dist, Div. Three Dec. 23, 2008) (court invalidates class action waiver, severs it and affirms trial court’s decision ordering class-wide arbitration)

Ruhl v. Lee’s Summit Honda, No. WD 70189, 2009 WL 2571309 (Mo. App. Western Dist. Nov. 3, 2009) (court invalidates class action waiver, severs it and orders arbitration; the court follows Whitney and Woods and completely ignores the Eighth Circuit opinions enforcing class action waivers under Missouri law)

Brewer v. Missouri Title Loans, Inc., No. ED 92569, 2009 WL 4639899 (Missouri App. Eastern Dist., Div. 3 Dec. 8, 2009) (Based on Woods v. QC Financial Services, Inc. opinion, court affirms order invalidating class action waiver and then orders classwide arbitration)

Shaffer v. Royal Gate Dodge, Inc. No. ED 92839, 2009 WL 4638850 (Missouri App. Eastern Dist., Div. 2 Dec. 8, 2009) (Court affirms trial court order denying motion to compel arbitration after invalidating class action waiver in lawsuit alleging violation of Missouri Merchandising Practices Act which contains non-waivable right to bring class action lawsuits)

New Jersey

Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (N.J. 2006) (invalidates class action waiver in context of low-value consumer claim in adhesive contract; court does not consider choice-of-law argument or FAA preemption argument)

New Mexico

Fiser v. Dell Computer Corporation, 144 N.M. 464, 188 P.3d 1215 (2008) (invalidates arbitration agreement in small dollar (\$10 - \$20) consumer claim after refusing to enforce Texas choice-of-law provision and holding that class action waiver is contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims)

Sections 44-7A-1(b)(4)(f) and 44-7A-5 of New Mexico Stat. Ann. Provides in Revised Uniform Arbitration Act that a class action waiver in an adhesion consumer arbitration agreement is unenforceable. This should be preempted by the FAA.

New York

Section 32 of the Tax Code, as amended by Section 2 of part VV of chapter 59 of the laws of 2009 prohibits a facilitator of a tax refund anticipation loan from including a class action waiver in any documents provided or signed to obtain a refund anticipation loan or refund anticipation check.

North Carolina

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93 655 S.E.2d 362 (2008) (Court holds that class action waiver is unconscionable when coupled with a cost-shifting ("loser pays") provision for arbitration proceedings exceeding eight hours, the cost-shifting provision for *de novo* appeal from the initial arbitration, the \$15,000 cap on the value of claims that can be pursued outside of arbitration, and the exclusion of foreclosure claims from arbitration)

Ohio

Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150, 809 N.E. 2d 1161 (2004) (court in dictum states that inability to prosecute class action is violative of Ohio Consumer Sales Practices Act; court invalidates arbitration clause burdened by several unfair features)

Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649 (Ohio App. 8th Dist. June 29, 2006) (Court holds that class action waiver in a cellular phone contract runs afoul of the state's public policy regarding consumer protection and is thus substantively unconscionable when combined with a provision prohibiting an award of attorneys' fees that are statutorily authorized)

Oklahoma

12 Okla. Stat. Ann. §1880 (added by Laws, 2005, c. 364, §30 effective Jan. 1, 2006). Provides in Revised Uniform Arbitration Act that class action waivers, among other features of an arbitration agreement in a standard form adhesion contract, "shall be closely reviewed for unconscionability based on unreasonable one-sidedness and understandable or unnoticeable language or lack of meaningful choice and for balance

and fairness in accordance with reasonable standards of fair dealing.” This should be preempted by the FAA.

Bilbrey v. Cingular Wireless, L.L.C., No. 102973, 164 P.3d 131 (Okla. June 26, 2007) (Class action waiver is unconscionable when applied retroactively to dismiss an already pending class action pertaining to an earlier contract which did not contain an arbitration provision.)

Oregon

Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or. App. 553, 152 P. 3d 940 (2007) (Court affirms denial of motion to compel arbitration after concluding that class action waiver is unconscionable in an individual action where (i) the plaintiffs did not speak English, the language used in the contract, (ii) the defendant misrepresented to the plaintiffs that they could “go to court after submitting to arbitration,” and (iii) the arbitration agreement saddled the plaintiffs with arbitration fees they could not afford)

Sprague v. Quality Restaurants Northwest, Inc., No. 050504650, A131182 (Or. Ct. App. June 27, 2007) (Arbitration clause is not unconscionable because of silence with respect to availability of class-wide arbitration since court held that incorporation of AAA rules authorizes class-wide arbitration.)

Pennsylvania

Lytle v. Citifinancial Services, Inc., 2002 Pa. Super. 327, 810 A.2d 643 (2002) (remands to trial court for determination of whether class action waiver is unconscionable)⁹

Dickler v. Shearson Lehman Hutton, 408 Pa. Super 286, 596 A.2d 850 (1991) (Court held that class action arbitration should be held in the face of an arbitration agreement that was silent with respect to the issue.)

McNulty v. H&R Block, 2004 Pa. Super 45, 843 A.2d 1267 (2004) (While not dealing directly with the validity of a class action waiver, the Court, in the context of a putative class action invalidated an arbitration agreement based on the fact that the arbitration fee of \$50 to obtain at most \$30 precluded the individual presentation of claims.)

⁹ The recent Pennsylvania Supreme Court opinion in Salley v. Option One Mortgage Corp., No. 50 EAP 2005, 592 Pa 323, 925 A.2d 115 (Pa. May 31, 2007) casts serious doubt on the continued viability of these two opinions. Furthermore, the even more recent Third Circuit opinion in Gay v. CreditInform, 511 F.3d 369 (3d Cir. Dec. 19, 2007) holds that the law created by these opinions is preempted by the FAA. Another later panel of the Third Circuit has stated that the discussion of FAA preemption in Gay is probably dicta.

Thibodeau v. Comcast Corporation, 2006 Pa. Super 346, 912 A.2d 874 (2006) (Court affirms denial of motion to compel arbitration after holding that class action waiver in Comcast’s customer agreement is unconscionable; Court largely adopts opinion of trial court issued on January 27, 2006 in the Philadelphia Court of Common Pleas, March Term 2004, No. 4526, 2006 WL 416863; Court refuses to do a choice-of-law analysis even though the plaintiff resides in Massachusetts since it concluded that Massachusetts law is the same as Pennsylvania law.)⁷

South Carolina

Herron v. Century BMW, Opinion No. 26805, 2010 S.C. LEXIS 118 (S.C. April 19, 2010) (class action waiver is against public policy expressed in the South Carolina Regulation of Manufacturers, Distributors and Dealers Act which expressly provided plaintiffs with the right to bring class action lawsuits for violations of such Act – a holding which is flatly contrary to the FAA; court further concludes that there is no procedural unconscionability and does not deal with substantive unconscionability)

Washington

Scott v. Cingular Wireless, 160 Wash. 2d 843, 161 P.3d 1000 (2007) (Class action waiver is unconscionable on the ground that it undermines the public policy of the Washington Consumer Protection Act by “dramatically decreasing” the possibility that Cingular customers would be able to act as private attorneys general and bring meritorious suits on minor claims and because it effectively exculpated Cingular from liability for those claims allegedly too small to warrant arbitration on an individual basis.)

Dix v. ICT Group, Inc., 160 Wash. 2d 826, 161 P.3d 1016 (2007) (Because forum selection clause calls for filing lawsuit in Virginia and Virginia state courts do not permit class actions, such clause is invalid in a small-value claim brought under the Washington Consumer Protection Act.)

Dix v. ICT Group, Inc., 125 Wash. App. 929, 106 P.3d 841 (Wash. Ct. App. 2005) (invalidated Virginia forum selection clause in putative class action brought under Washington Consumer Protection Act because Virginia does not permit class actions), reconsideration denied (Apr. 14, 2005).

McKee v. AT&T Corporation, No. 81006-1, 2008 WL 3932188 (Wa. Sup. Ct. Aug. 28, 2008) (court refuses to apply New York law, applies Scott supra and invalidates class action waiver based on small dollar amount of claim)

Olson v. The Bon, Inc., 183 P.3d 359 (Wash. Ct. App. Div. 3 2008) (class action waiver unconscionable in case involving less than a couple of hundred dollars)

Townsend v. The Quadrant Corporation, No. 62700-7-1, 2009 WL 3337228 (Wash. Ct. App. Div. 1 Oct. 19, 2009) (court compels arbitration of putative class action and distinguishes Scott and Dix opinions based on the fact that the arbitration provisions in those cases, unlike this case, contained class action waivers)

West Virginia

State of West Virginia ex. rel. James Dunlap v. Berger, 567 S.E. 2d 265 (W.Va. 2002) (in clause burdened by other unfair features, court also determined that inability to prosecute a class action was unconscionable), cert. denied, Friedman’s Inc. v. West Virginia ex rel. Dunlap, 537 U.S. 1087, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002)¹⁰

Wisconsin

Eastman v. Conseco Finance Servicing Corp., No. 01-1743, 2002 WL 1061856 (Wis. Ct. App. May 29, 2002) (in certifying case for immediate review by Wisconsin Supreme Court, court suggests that an arbitration clause with several unfair features, including class action waiver, may be unconscionable)

Wisconsin Auto Title Loans v. Jones, 714 N.W. 2d 155, 2006 WI 53 (2006) (“[A]lthough the arbitration provision is silent on class actions, the parties assume the borrower must pursue his claims individually in arbitration and not as the representative of a class. Even if it were possible to pursue class claims in arbitration, and we do not address this issue, the relief available to the putative class appears to be substantially broader in circuit court than in arbitration. Under the Wisconsin Consumer Act, a class action may be maintained for injunctive relief. No such injunctive relief is available in arbitration. The arbitration provision, therefore, limits the meaningful remedies available to the borrower.”).

Coady v. Cross Country Bank, 299 Wisc. 2d 420, 729 N.W. 2d 732 (WI Court of Appeals 2007) (Court affirms denial of motion to compel arbitration after concluding that arbitration provision is unconscionable because (1) the standard choice-of-law clause in the cardholder agreement calling for the application of Delaware and Federal law have the effect of precluding the plaintiffs from asserting claims or remedies under the Wisconsin Consumer Act either in court or arbitration; (2) the class action waiver is substantively unconscionable; and (3) it was in small type, the Bank did not explain to the unsophisticated plaintiffs the meaning or effect of the arbitration provision, the credit cards were adhesion contracts opened in response to a solicitation from the Bank, the plaintiffs did not read and were not otherwise aware of the arbitration provision, the credit card agreements were not provided to the plaintiffs at the time they signed up for

¹⁰ Several federal district courts in West Virginia and the Fourth Circuit have held that this opinion is preempted by the FAA. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe, 313 F. Supp. 2d 603, 615 (S.D. W.Va. 2004); Schultz v. AT&T Wireless Services, Inc., 376 F. Supp. 2d 685 (N.D. W.VA. 2005); Miller v. Equifirst Corporation of West Virginia, Civil Action No. 2:00-0335, 2006 WL 2571634 (S.D. W. Va. Sept. 5, 2006); Strawn v. AT&T Mobility, Inc., Civil Action No. 2:06-0988 (S.D. W.Va. Jan. 20, 2009); Wince v. Easterbrooke Cellular Corporation, 681 F. Supp. 2d 679 (N.D. W. Va. 2010); Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83 (4th Cir. 2005)

the credit cards, and the Bank did not demonstrate that the plaintiffs could have obtained other credit cards without arbitration provisions)

Final Tally:

Federal Circuits

Class action waivers OK:

Third (because of FAA preemption of PA law), Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh (as long as fee-shifting feature exists)

Class action waivers not OK:

First (in antitrust case and in employment case involving bad facts), Second (in antitrust case under vindication of statutory rights analysis), Ninth (based on Discover Bank v. Superior Court); and Third (based on NJ opinion in Muhammad v. County Bank)

Yet to weigh in:

Tenth

State Courts and Statutes:

Class action waivers OK (14 states):

Colorado^{*}, Delaware, District of Columbia, Hawaii, Kansas^{*}, Maryland, Mississippi^{***}, New York^{*}, North Dakota, Ohio^{*}, Tennessee^{*}, Texas^{*}, Utah^{**} and Virginia^{***}

States uncertain (2 states):

Florida (11th Circuit just certified issue to Florida Supreme Court), South Carolina (invalid for claim under Auto Dealers statute)

Class action waivers probably not OK (although it is not completely clear because of other unfair features) (8 states):

Alabama^{****}, Illinois^{****}, Louisiana, North Carolina, Oregon^{*}, Pennsylvania^{*}, West Virginia, Wisconsin

* Opinions issued by intermediate appellate court, not state's highest court. A Third Circuit opinion in Gay v. CreditInform, 511 F.3d 269 (3d Cir. 2007) and a Pennsylvania Supreme Court opinion in Salley v. Option One Mortgage Corp., 592 PA. 323, 925 A.2d 115 (2007) have cast considerable doubt on the continued viability of the Pennsylvania and New Jersey opinions. In Ohio, the validity of the class action waiver may turn on whether the rest of the arbitration provision is considered fair.

** By statute.

*** Class actions are not allowed in state court.

**** Several Federal District Courts in Alabama and Illinois have upheld the validity of class action waivers after distinguishing the Alabama Supreme Court and Illinois Supreme Court opinions.

Class action waiver invalid for small consumer claims in “take-it-or-leave-it contract (6 states):

California, Massachusetts, Missouri*, New Jersey, New Mexico, Washington

Class action waiver in certain types of arbitration agreements statutorily invalidated or subject to higher scrutiny (4 states):

Maine, Minnesota, New York, Oklahoma

Courts applying the laws of 26 states (and the District of Columbia) have held that class action waivers are enforceable under state law, at least when the arbitration agreement neither imposes higher arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration:

Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Kansas, Louisiana, Maryland, Mississippi, Missouri, New York, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and West Virginia

Pending: Kentucky: Schnuerle v. Insight Comme’ns Co., No. 2008-SC-000789