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Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver

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Circumventing *Concepcion*: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver

Aaron Blumenthal*

In the wake of the Supreme Court's decision in AT&T Mobility v. Concepcion, class action waivers have become seemingly invulnerable to attack. Class action attorneys have become dispirited that consumer rights seem impossible to enforce. While the Federal Arbitration Act has been written about at length, this Note adds to that scholarship by proposing several new solutions to the problems posed by class action waivers. In addition, this Note seeks to consolidate other proposals, respond to major objections to these proposals, and in its conclusion, compare the effectiveness of these various proposals to settle on one preferred solution. Ultimately, the solutions to the problem of class action waivers fall into three broad categories: (1) methods that would allow consumers to viably pursue their claims individually in arbitration, (2) methods that would allow consumers to escape from their arbitration agreements and pursue class litigation in court, and (3) methods that bypass the class action device entirely by instead relying on government enforcement of consumer protection laws. After proposing and evaluating several solutions in each category, this Note concludes that the latter category—improved government enforcement of consumer protection laws—is likely to be the most effective.

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INTRODUCTION

The death knell of the consumer class action has sounded.¹ The Supreme Court’s decision in *AT&T Mobility v. Concepcion* struck a decisive blow to class action litigation by requiring states to enforce class action waivers in most consumer contracts.² Class action waivers now serve as such a powerful tool for companies to avoid liability that it has “become malpractice for corporate counsel not to include such clauses in consumer . . . contracts.”³ As Professor Jean Sternlight notes, “potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable.”⁴

Without the availability of class relief, many consumer protection laws will not be enforced. Prior to *Concepcion*, most enforcement of consumer protection laws occurred in the private sector through class action litigation.⁵ Class actions were responsible for major victories that have, for example, forced car companies to end racially discriminatory practices in auto lending and forced banks to stop employing unfair practices to maximize overdraft

1. See generally Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

2. See 131 S. Ct. 1740, 1753 (2011).

3. Gilles, *supra* note 1, at 377.

4. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 9 (2000).

5. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1206–07 (2012) (arguing that class action litigation became necessary to enforce consumer rights due to the void left by public enforcement); *id.* at 1167 (“[T]o the extent the class action mechanism is necessary to private regulation of wrongdoing, [class action] waivers may subvert the operation of significant portions of our regulatory state.” (footnote omitted)).

fees.⁶ However, with the ubiquity of class action waivers, new approaches are needed to ensure that companies cannot harm consumers and escape scot-free. This Note seeks to outline a few such approaches.

In Part I, this Note examines the history of how the Supreme Court made class action waivers nearly invulnerable to attack. Part II explores why, in the post-*Concepcion* regime, consumers are frequently unable to vindicate their rights without the availability of class action litigation. In Parts III, IV, and V, this Note proposes three different types of solutions to the problems posed by class action waivers: Part III examines solutions that would enable consumers to profitably pursue their claims in arbitration, without violating the terms of their arbitration clauses; Part IV explores methods by which consumers can escape arbitration agreements and pursue their claims in class action litigation; Part V proposes approaches that would shift enforcement of consumer protection laws to the government, since the government can bring consumer protection litigation on a consumer's behalf without being bound by the consumer's agreement to arbitrate.

I.

HISTORY OF THE SUPREME COURT'S EXPANSION OF THE FEDERAL ARBITRATION ACT TO PROTECT CLASS ACTION WAIVERS IN CONTRACTS OF ADHESION

Congress enacted the Federal Arbitration Act (FAA) in 1925 to compel *federal* judges to enforce arbitration agreements as written.⁷ At the time, the enforcement of arbitration agreements between merchants was anemic because federal judges allowed either party to withdraw from arbitration at any time and refused to enforce arbitration awards (as contrary to public policy).⁸ Congress reacted to this judicial intransigence by enacting the FAA, which provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁹

6. See PUB. CITIZEN & NAT'L ASS'N OF CONSUMER ADVOCATES (NACA), JUSTICE DENIED, ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S *CONCEPCION* DECISION ARE PLAINLY EVIDENT 23–25 (Apr. 2012), <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf> (injunctive relief ordered to end racially discriminatory pattern of charging African Americans and Latinos more for car loans); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 103 (2012) [hereinafter Sternlight, *Procedurally Difficult Claims*] (class actions brought against fifty banks to end practices designed to inflate the overdraft fees charged to consumers).

7. See generally 9 U.S.C. §§ 1–16 (2012).

8. Steven A. Certilman, *This Is a Brief History of Arbitration in the United States*, 3 N.Y. DISP. RESOL. L., Spring 2010, at 10, 12.

9. 9 U.S.C. § 2.

Due to the interpretations of the Commerce Clause and Article III that were in force at the time, Congress did not believe this provision could be applied to the states or to contracts of adhesion (in which one party has all the bargaining power and offers terms only on a take-it-or-leave-it basis).¹⁰ However, subsequent changes in the Supreme Court's interpretations of Article III and the Commerce Clause also had the unforeseen consequence of greatly expanding the reach of the FAA.¹¹ As a result, in modern times, the Supreme Court has given the FAA broad preemptive effects, holding that the Act prevents states from passing any laws to protect consumers from class action waivers in arbitration agreements.¹² If Congress were reconsidering the issue today, it is hard to believe that Congress would pass a law that completely insulated companies from all suits by consumers. Yet, that is the effect that the Supreme Court has given the FAA.

A. The Supreme Court Gave the FAA a Broader Sweep than Congress Intended

Although Congress did not originally intend to include the states and contracts of adhesion within the purview of the FAA, subsequent Supreme Court decisions, such as *Erie Railroad Co. v. Tompkins* and *Wickard v. Filburn*, inadvertently gave it that effect.¹³

1. Supreme Court Decisions Expanded the Reach of the FAA to the States

When enacting the FAA, Congress did not believe the Act could be applied to the states. Proponents of the FAA assured Congress that the bill would not function as an exercise of the “[f]ederal bludgeon to force an individual [s]tate into an unwilling submission to arbitration enforcement.”¹⁴ Proponents stated that “[t]he statute [could] not have that effect.”¹⁵ Congress had reason to believe the proponents’ assertion that the FAA would not apply to the states because in 1925, the federal courts possessed their own body of substantive common law, known as the “general law.”¹⁶ Under the general law, federal judges sitting in diversity jurisdiction applied their own substantive rules to contract disputes in federal court instead of applying state common law.¹⁷ In enacting the FAA, Congress believed it was regulating the “general

10. See *infra* Part I.A.

11. See *infra* Part I.A.

12. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

13. See *infra* Part I.A.1–2.

14. *Arbitration of Interstate Commercial Disputes: J. Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comm. on the Judiciary*, 68th Cong. 40 (1924) (statement of Julius Cohen, Member, Committee on Commerce, Trade and Commercial Law; General Counsel, New York State Chamber of Commerce).

15. *Id.*

16. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71–73 (1938).

17. See *id.*; GREGORY KLASS, *CONTRACT LAW IN THE USA* 22 (2010) (“The vast majority of contracts in the United States [were] governed by state common law.”).

law” by exercising its Article III powers to control the procedures applied in the federal courts.¹⁸

However, the Supreme Court’s subsequent decision in *Erie* changed the effect given to the FAA, necessitating that the Act be construed to preempt all contrary state laws. In 1938, the Supreme Court’s decision in *Erie* abolished the “general law,” requiring federal courts to instead apply state substantive rules of common law.¹⁹ In *Erie*, the Supreme Court stated, “There is no federal general common law. Congress has no power to declare substantive rules of common law.”²⁰ Therefore, if courts continued to construe the FAA as an attempt by Congress to declare a substantive rule of general law, the FAA would have been effectively overruled by *Erie*.²¹

Thereafter, to avoid an interpretation that would have rendered the FAA without effect, the Supreme Court in *Prima Paint v. Flood & Conklin Manufacturing* held that the FAA should be considered to have been enacted pursuant to Congress’s Commerce Clause authority.²² The natural result of this holding was that the FAA, just like any law enacted pursuant to the Commerce power, had to be given broad preemptive effects.²³ In *Southland Corp. v. Keating*, the Supreme Court gave the FAA just this effect, holding that “[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims.”²⁴ The Court thus gave the FAA a meaning that preempted all contrary state laws, which ultimately brought the Act in conflict with many states’ consumer protection laws.²⁵

18. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 445–46 (2011) (“[T]he vast majority of scholars believe that Congress understood the statute to be a federal procedural rule that neither applied in state court nor preempted state law.”); A.B.A. Comm. on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 154 (1925) (“The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.”).

19. 304 U.S. at 73, 78.

20. *Id.* at 78.

21. See Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 392 (1992).

22. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

23. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

24. *Id.*

25. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (O’Connor, J., concurring) (“The reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers, see, e.g., Mont. Code Ann. § 27–5–114(2)(b) (1993) . . . , and state procedural requirements aimed at ensuring knowing and voluntary consent, see, e.g., S. C. Code Ann. § 15–48–10(a) (Supp. 1993) . . . ” (parentheticals omitted)).

2. *Supreme Court Decisions Expanded the Reach of the FAA to Contracts of Adhesion*

Congress did not believe that the FAA would extend to most consumer contracts of adhesion because the Commerce Clause, at that time, did not cover most intrastate activity. During debates about the FAA, Senator Walsh asked a proponent of the bill whether the FAA would apply to adhesive employment and insurance contracts offered on a “take it or leave it” basis.²⁶ The bill’s proponent responded that the FAA would not apply in such a situation because the legislation would only apply to “contract[s] between merchants.”²⁷ While the FAA contains no such express limitation, Congress at the time believed that its legislative power did not extend to *intrastate* commerce, which—in 1925—meant that only large merchants, who were sophisticated enough to transact across state lines, would be subject to the Act.²⁸

Subsequent Supreme Court decisions, however, expanded the reach of the Commerce Clause, which meant that the FAA could be applied to nearly every transaction in the United States. In 1938, the Supreme Court held for the first time in *Wickard v. Filburn* that Congress’s Commerce Clause power extended to wholly intrastate activity, as long as that activity (when aggregated with similar activities) had a “substantial effect” on interstate commerce.²⁹ The *Wickard* decision thereby expanded Congress’s Commerce Clause power to “nearly every market transaction” that occurs in the United States.³⁰ Therefore, when the Supreme Court held in *Allied-Bruce v. Dobson* that the FAA extended to the “limits” of Congress’s Commerce Clause authority, virtually no market transaction in the United States could escape the FAA’s reach.³¹ Despite Congress’s original intent, *Wickard* ultimately expanded the FAA’s reach to include arbitration clauses in nearly every contract signed in the United States, including consumer contracts of adhesion.

26. See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. 9–10 (1923).

27. See *id.*

28. See Horton, *supra* note 18, at 448 (understanding its Commerce Clause powers at the time, Congress thought that the FAA “would have applied only to parties sophisticated enough to broker deals across state lines”). Congress would have also believed that it had no power to regulate labor contracts because the Supreme Court at the time did not consider “labor” to be “commerce.” See *Hammer v. Dagenhart*, 247 U.S. 251, 272–73 (1918) (holding that Congress did not have the power to regulate child labor because “labor” was not “commerce”).

29. See *Wickard v. Filburn*, 317 U.S. 111, 129 (1942).

30. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 113 (1999).

31. See *id.*; *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995).

B. *The Supreme Court Extended the FAA to Protect Class Action Waivers in Binding Arbitration Agreements*

After the Supreme Court's decisions in *Southland* and *Allied-Bruce* (holding that the FAA should be considered to be enacted pursuant to Congress's Commerce power and that the FAA's preemptive effects should extend to the "limits" of Congress's Commerce Clause authority), companies began realizing that they could employ binding arbitration in a strategic manner to foreclose class action litigation. As Professor Myriam Gilles notes, "In the late 1990s, trade-journal articles first appeared encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions."³² Corporate counsel began advising their clients that class action waivers were a good way to avoid liability.³³ However, many state supreme courts (including those in California, Washington, and Illinois) reacted by crafting per se rules that class action waivers in consumer contracts were void as against public policy.³⁴ In the wake of this judicial hostility at the state level, major companies began holding "high-level, top-secret meetings" to discuss litigation strategies that could ensure the enforcement of class action waivers at the federal level.³⁵ Many companies began to carefully draft their arbitration agreements in the event that an appeal made its way to the Supreme Court.³⁶

AT&T Mobility was one such company. AT&T developed its arbitration clause in consultation with Professor Richard Nagareda of Vanderbilt University Law School.³⁷ Despite containing a class action waiver, AT&T's arbitration clause appeared consumer friendly because it offered to pay all of a consumer's arbitration costs, prohibited AT&T from seeking attorney's fees if AT&T won, and required AT&T to make a good faith effort to quickly settle a consumer's claim for the full amount.³⁸ All of these provisions sought to

32. Gilles, *supra* note 1, at 396.

33. *Id.* at 396–97.

34. See *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008–09 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1111–12 (Cal. 2005), *overruled by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

35. See Gilles, *supra* note 1, at 398–99 (noting that the factual allegations in *Ross v. American Express* constituted a "fascinating story of an entire industry conspiring to avoid class action exposure by working together on drafting, implementing, and defending collective action waivers," including filing amicus briefs in federal court "for the purpose of persuading courts to enforce onerous and one-sided arbitration clauses" (quoting Compl. ¶¶ 97–118, *Ross v. Bank of Am.*, 05 Civ. 7116 (S.D.N.Y. 2005))).

36. See, e.g., Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party, at 14 & n.5, *T-Mobile USA, Inc. v. Laster*, 553 U.S. 1064 (2008) (No. 07-976), 2008 WL 534808 [hereinafter Brief of AT&T] (noting that AT&T dismissed its appeal in *Scott v. Cingular Wireless* because AT&T wanted the more carefully drafted version of its arbitration agreement to appear before the Supreme Court). AT&T was directing the *Cingular* litigation because Cingular and AT&T merged in 2004. See *Cingular Timeline*, AT&T (last visited Mar. 8, 2015), https://www.att.com/Common/merger/files/pdf/Cingular_timeline7.pdf.

37. Brief of AT&T, *supra* note 36, at 14–15.

38. *Concepcion*, 131 S. Ct. at 1744.

encourage consumers to pursue their claims in arbitration if AT&T either refused to settle or offered too small a settlement.³⁹ The clause provided that if a consumer won an award in arbitration that was larger than AT&T's last settlement offer, AT&T was required to pay the consumer \$7,500 and twice the amount of the consumer's attorney's fees.⁴⁰

Upon challenge in court, the seemingly favorable nature of the arbitration clause helped AT&T in creating favorable law (from its perspective). In *AT&T Mobility v. Concepcion*, the Supreme Court held that states cannot prohibit the enforcement of class action waivers in arbitration clauses.⁴¹ The plaintiffs in that case, Vincent and Liza Concepcion, were aggrieved that AT&T had charged them \$30.22 in sales tax for what AT&T advertised as a "free" cell phone.⁴² The Conceptions had been able to secure the assistance of an attorney only by joining a class action lawsuit against AT&T.⁴³ AT&T responded to the Conceptions' class action complaint by invoking the class action waiver in its binding arbitration agreement and moving to compel arbitration on an individual basis.⁴⁴ The federal district court and the Ninth Circuit both held that AT&T's class action waiver was invalid under California's *Discover Bank* rule, which prohibited the enforcement of class action waivers against consumers with small-value claims.⁴⁵ The Ninth Circuit reasoned that a rule prohibiting such class action waivers did not violate the FAA because the rule applied equally to waivers in contracts with and without arbitration clauses and thus did not violate the FAA's proscription that courts cannot discriminate against arbitration agreements.⁴⁶

However, the Supreme Court held that even if a state law or rule of decision did not facially target arbitration clauses, the FAA still preempted it if the rule had a "disproportionate impact" on arbitration by "interfer[ing] with fundamental attributes of arbitration."⁴⁷ The Supreme Court held that the FAA preempted the California Supreme Court's *Discover Bank* rule, which compelled a company that wanted to proceed in arbitration to do so on a class-wide basis, because the *Discover Bank* rule altered the "fundamental attributes" of arbitration, such as its "informality," "lower costs," and "greater efficiency and speed."⁴⁸

39. *See id.*

40. *Id.*

41. *Id.* at 1753.

42. *Id.* at 1744.

43. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 100–01 (2011).

44. *Concepcion*, 131 S. Ct. at 1745.

45. *Id.*

46. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 858 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

47. *Concepcion*, 131 S. Ct. at 1747–48.

48. *Id.* at 1748, 1751.

Although the dissenting justices vigorously stressed that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” the majority responded that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable.”⁴⁹ In addition, the majority did not believe that the Concepcions’ claim would slip through the legal system.⁵⁰ The majority stated that “the Concepcions [appeared] *better off* under their arbitration agreement with AT & T [sic] than they would have been as participants in a class action” because AT&T was forced to offer a speedy settlement or face paying “the \$7,500 premium . . . if a dispute was not resolved informally.”⁵¹ Thus, the seemingly pro-consumer nature of AT&T’s arbitration clause appears to have influenced the Court’s decision in AT&T’s favor.

In overturning California’s *Discover Bank* rule, *Concepcion* gave corporations the green light to place class action waivers in their arbitration agreements without much fear that they might be invalidated. Section 2 of the FAA does allow courts to invalidate an arbitration agreement for “fraud, duress, or unconscionability.”⁵² But the Supreme Court made even this result unlikely in *Rent-a-Center v. Jackson* by holding that an arbitration agreement can require the parties to challenge the enforceability of the agreement in arbitration, rather than in court.⁵³ Because they have a financial stake in hearing the case, arbitrators are less likely to find an arbitration clause unenforceable.⁵⁴ Thus, by preventing consumers from even *challenging* an arbitration clause in court, the FAA allows companies to deny a consumer his or her day in court entirely.

II.

ARBITRATION AGREEMENTS WILL PREVENT MOST ENFORCEMENT OF CONSUMER PROTECTION LAWS

A. *Class Action Waivers Cause Fewer Consumer Claims to Proceed Because Consumers Rarely Proceed Alone in Arbitration*

Post-*Concepcion*, consumer protection laws will go largely unenforced because consumers will almost always be subject to class action waivers and will rarely bring individual claims in arbitration. Since the United States relies mostly on private litigants to enforce consumer protection laws,⁵⁵ corporations

49. *Id.* at 1753.

50. *Id.* at 1745, 1753.

51. *Id.*

52. *See id.* at 1746.

53. *See Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010).

54. *See* Jennifer Schulz, *Arbitrating Arbitrability: How the U.S. Supreme Court Empowered the Arbitrator at the Expense of the Judge and the Average Joe*, 44 LOY. L.A. L. REV. 1269, 1285 (2011) (arguing that arbitrators may be biased by their “significant financial incentives to resolve the question of arbitrability in favor of arbitration”).

55. *See* Glover, *supra* note 5, at 1206–07.

with class action waivers can flout the law without much fear of reprisal. *Concepcion* thus frustrates the enforcement of consumer protection laws.

Consumers today cannot help but waive their right to pursue class action litigation because class action waivers are everywhere. A study by Professor Theodore Eisenberg found that prior to *Concepcion*, arbitration provisions appeared in 77 percent of consumer contracts, and 100 percent of these arbitration clauses contained class action waivers.⁵⁶ And *Concepcion* likely rendered such agreements all the more “ubiquitous.”⁵⁷ For example, after consumers recently filed class action lawsuits against Sony and Netflix, both companies reacted by adding arbitration clauses to their consumer contracts to foreclose future suits.⁵⁸ Because entire industries are adopting binding arbitration clauses, consumers are left with no choice but to sign such agreements if they want to secure necessary items, such as credit cards or cell phones.⁵⁹

Even consumers who did not initially sign an arbitration agreement with a company can later be subjected to such an agreement if the company modifies the contract. For example, Judy Resnik, a professor at Yale Law School, received a unilateral amendment to her cell phone contract adding an arbitration clause, and she was unsuccessful in her negotiations with the company to have the clause removed.⁶⁰ If a company will not yield to the demands of a Yale Law School professor, there is little hope for the average consumer. Consumers simply lack the bargaining power necessary to convince companies to remove binding arbitration provisions.

The Court’s decision in *Concepcion*, combined with the arbitration clauses employed by most companies, have not only prevented consumers from filing complaints in court, but also precipitated a significant decline in consumer complaints overall, despite the option to arbitrate. In his dissent in *Concepcion*, Justice Breyer predicted this result, noting that if a company with a binding arbitration clause cheated seventeen million consumers out of thirty dollars each, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for

56. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 120–21 (2008); see also PUB. CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1 (Sept. 14, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (finding, as consistent with Eisenberg et al., that arbitration clauses appeared in 75 percent of consumer contracts).

57. See PUB. CITIZEN & NACA, *supra* note 6, at 4.

58. Alison Frankel, *How SCOTUS’s Amex Ruling May Help Businesses Evade Class Actions*, REUTERS (Aug. 22, 2013), <http://blogs.reuters.com/alison-frankel/2013/08/22/how-scotuss-amex-ruling-may-help-businesses-evade-class-actions/>.

59. See PUB. CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE, *supra* note 56, at 1.

60. Resnik, *supra* note 43, at 118.

\$30.”⁶¹ Justice Breyer’s prediction has largely come to pass. As Professor Jean Sternlight notes, “[R]elatively few individual consumers bring claims in arbitration.”⁶² For example, the American Arbitration Association (AAA)—which is the main destination for consumer arbitrations⁶³—handles only one thousand consumer cases per year, which is approximately 0.5 percent of the AAA’s total caseload.⁶⁴ In contrast, prior to *Concepcion*, consumer complaints constituted 40 percent of cases filed in court.⁶⁵ Thus, the number of consumer complaints filed in arbitration is paltry compared to the number formerly filed in court. In addition, a report to the Consumer Financial Protection Bureau (CFPB) revealed that of the millions of consumers who complained about Wachovia’s overdraft fees from 2003 to 2008, *none* filed an arbitration claim under Wachovia’s binding arbitration clause.⁶⁶ Similarly, of the hundreds of thousands of consumers who complained about Wells Fargo’s overdraft fees, only *one* filed an arbitration proceeding against Wells Fargo.⁶⁷ Consumers rarely, if ever, file claims in arbitration.

Companies are aware that consumers will not proceed on their own in arbitration and treat consumers accordingly. For example, a number of consumers—some who were subject to arbitration provisions and some who were not—initiated class action litigation against AmeriCredit Financial Services.⁶⁸ AmeriCredit offered a nearly full recovery to consumers in the subclass that was not subject to arbitration, whereas AmeriCredit refused to settle with the subclass of consumers that *was* subject to arbitration for more than sixty cents on the dollar.⁶⁹ In addition, after the settlement, AmeriCredit stopped employing the complained-of business practices against consumers who could sue AmeriCredit in court but continued using the complained-of

61. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

62. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 99.

63. The National Arbitration Forum (NAF) once handled more consumer claims, but after being sued for colluding with the debt-collection industry, the NAF agreed to give up its consumer practice pursuant to a consent decree with the Minnesota Attorney General. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 99.

64. *Id.* AAA handles one thousand consumer cases per year; comparatively, JAMS—the only other major arbitration provider—handles only a few hundred consumer cases per year. JOHN K. BOYCE III, AN ARBITRATION PRIMER 1 (Aug. 1, 2004), available at <http://boyceadr.com/wp-content/uploads/2013/07/Arbitration-Primer.pdf> (noting that AAA handles approximately 174,000 cases per year).

65. See Peter Svensson, *Feel Cheated? Small Claims Court Brings Big Wins*, USA TODAY (Mar. 2, 2012, 4:48 PM), http://usatoday30.usatoday.com/sports/golf/2012-03-02-0_x.htm (“A study by the National Center for State Courts, published in 1992, found 40 percent of cases in the 12 courts studied were consumer complaints.”).

66. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 100 n.76.

67. *Id.*

68. NAT’L ASS’N OF CONSUMER ADVOCATES (NACA), CONSUMER ATTORNEYS REPORT: ARBITRATION CLAUSES ARE EVERYWHERE, CONSEQUENTLY CAUSING CONSUMER CLAIMS TO DISAPPEAR 15 (June 23, 2012).

69. See *id.* (finding that consumers without arbitration clauses received a near-full recovery, whereas consumers with arbitration clauses only received 57 percent of their money back).

business practice against consumers who were subject to arbitration agreements.⁷⁰ AmeriCredit's differential treatment of its customers reflected its belief that it was not likely to be sued on an individual basis in arbitration.⁷¹

B. *Why Consumers Rarely Proceed Alone in Arbitration*

Before examining potential solutions to protect consumers from unfair treatment by corporations, this Note first seeks to understand why consumers rarely pursue individual claims. There are three main reasons why consumers currently do not file individual arbitration claims: first, most claims for small amounts are “negative-value” claims that cost more to pursue than the potential benefit; second, consumers often cannot pursue claims successfully without an attorney; and third, consumers are often unaware either that they have been wronged or that the wrong they have suffered is legally cognizable.

1. *Costs of Pursuing Individual Claims Often Outweigh the Benefits*

Small-value claims are often not worth pursuing on an individual basis. Scholars call a legal claim a “negative-value” claim if the cost of pursuing it is greater than the potential payoff.⁷² The reason that only a “lunatic or a fanatic” would sue for thirty dollars in arbitration is because such a small claim is a negative-value claim.⁷³ Arbitration fees alone are enough to deter most consumers with small-value claims. For example, consumers pursuing small-value claims with the AAA pay an average of ninety-six dollars in administrative and arbitrator's fees.⁷⁴ Few consumer claims are large enough to make paying these fees worthwhile. In addition, some consumers may face a “loser pay[s]” provision—requiring the consumer to pay the defendant's attorney's fees if the consumer loses—which potentially exposes the consumer to “catastrophic debt in return for the chance to pursue what is a relatively minor claim.”⁷⁵ Most consumers would not risk paying thousands of dollars in attorney's fees in exchange for pursuing a thirty-dollar claim. Even if a consumer faced a very consumer-friendly arbitration provision, such as AT&T Mobility's, which requires the corporation to pay the full cost of arbitration and

70. NACA & NAT'L CONSUMER L. CTR. (NCLC), COMMENTS REGARDING CFPB NOTICE AND REQUEST FOR INFORMATION REGARDING SCOPE, METHODS, AND DATA SOURCES FOR CONDUCTING STUDY OF PRE-DISPUTE ARBITRATION AGREEMENTS, 77 FED. REG. 25148-05, Docket No. CFPB-2012-0017 (June 23, 2012), at *37.

71. *Id.* (“AmeriCredit kn[ew] that, without a class action (the arb[itation] clauses ban group action), it w[ould] never get sued or only one by one . . .”).

72. See Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 113–14.

73. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

74. CHRISTOPHER R. DRAHOZAL, ARBITRATION COSTS AND ACCESS TO JUSTICE (2011), <http://www.law.gwu.edu/News/2010-2011Events/Documents/Drahozal%20Submission.pdf> (for claims of less than \$10,000, consumers pay an average of ninety-six dollars in administrative and arbitrator fees).

75. NACA & NCLC, *supra* note 70, at 11–12.

prevents the corporation from recovering attorney's fees, "the cost of pursuing a claim is never zero."⁷⁶ Even if a person loses only his or her time, time is still a valuable commodity.⁷⁷ Thirty dollars is typically not enough money to make it worthwhile for a consumer to take hours of her free time to brave the frustration of educating herself about the arbitration process, to amass the necessary evidence, to file the claim, and to appear at the necessary hearings.⁷⁸ Negative-value claims are generally only worth pursuing if they are aggregated together, such that the value of the claims is greater than the cost of pursuing them.

2. *Arbitration Clauses Leave Consumers with No Choice but to Proceed Pro Se, Which Is Not a Legitimate Option for Most Consumers*

Consumers do not proceed in individual arbitrations because they usually cannot find an attorney who will prosecute a small-value claim for them, yet most consumers require an attorney's help to navigate the complexities of the legal process.

a. *Attorneys will not take on small-value claims*

Attorneys rarely take consumer claims on an individual basis because the potential monetary recovery is too small to make it worth their while. The Concepcions, for example, could not find an attorney who would take their case until they agreed to join a class action lawsuit as named plaintiffs.⁷⁹ As Justice Breyer noted in his *Concepcion* dissent, "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?"⁸⁰ Plaintiff's attorneys, who operate mostly on a contingency-fee basis, on average require a claim of \$50,000 before they will take a case.⁸¹ Consumers can easily clear this hurdle in a class action lawsuit by aggregating their claims together, but an individual consumer will almost never have a large enough claim to attract an attorney's attention. Even if a consumer protection statute guaranteed attorney's fees to a prevailing plaintiff, the "functional uncertainty surrounding fee recovery" is enough to

76. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 114.

77. See Emily Oster, *Time Is Money: So How Much Is Yours Worth?*, SLATE (Feb. 6, 2013, 6:30 AM), http://www.slate.com/articles/double_x/doublex/2013/02/time_is_money_opportunity_cost_can_help_you_figure_out_how_much_your_time.html ("How much is an hour of your time worth? It's worth whatever wage you would get if you spent that hour working.")

78. See Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 114.

79. Resnik, *supra* note 43, at 100.

80. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting).

81. PUB. CITIZEN, THE ARBITRATION DEBATE TRAP: HOW OPPONENTS OF CORPORATE ACCOUNTABILITY DISTORT THE DEBATE ON ARBITRATION 4 n.6 (July 2008) [hereinafter PUB. CITIZEN, DEBATE TRAP], [http://www.citizen.org/documents/ArbitrationDebateTrap\(Final\).pdf](http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf) (emphasis removed).

deter most attorneys from taking the case.⁸² As Professor Sternlight notes, “Virtually no case is enough of a ‘sure thing’ to warrant taking it on a mere chance of being reimbursed for one’s time.”⁸³

Arbitration clauses have forced attorneys to turn away consumers whose claims they otherwise would have taken. A survey of consumer attorneys found that 84 percent had been forced to reject a consumer with a meritorious claim due to an arbitration clause.⁸⁴ In addition, consumer attorneys noted that recoveries in 91 percent of their past class actions would no longer be possible today because those companies now have arbitration clauses.⁸⁵ Despite the obvious merit of these consumer claims (given that they resulted in a monetary recovery), consumer attorneys indicated a clear unwillingness to pursue the same claims today on an individual basis in arbitration.⁸⁶ Thus, consumers bound by arbitration clauses are very unlikely to find an attorney willing to act on their behalf.

b. Consumers Are Unlikely to be Successful Without an Attorney

While some pro-arbitration advocates have claimed that consumers are better off proceeding pro se (without representation of counsel) in arbitration,⁸⁷ the fact remains that most consumers require the assistance of an attorney to bring a legal claim. Consumers can usually resolve procedurally easy claims—such as a breach of warranty claim involving a product that broke soon after purchase—by calling a company’s customer service department.⁸⁸ Thus, the types of claims that consumers actually seek to litigate tend to be more procedurally complex. A procedurally difficult claim might require the consumer to know the intricacies of a particular law (such as knowing the required elements of an “unfair” business practices claim under California’s Unfair Competition Law) or might require the consumer to prove difficult causation issues (such as showing that the consumer got sick from a particular food, as opposed to a stomach virus or other cause).⁸⁹ As Professor Sternlight notes:

Unlike the [procedurally easy] claims . . . where the consumer can essentially tell her story and hope to prevail, [procedurally difficult] claims will often require a claimant or her representative to amass, understand and organize complicated facts; to conduct legal research;

82. Glover, *supra* note 5, at 1184 n.227.

83. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 109 n.115.

84. NACA, *supra* note 68, at 5.

85. *Id.*

86. *Id.*

87. See, e.g., Hans A. von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, HERITAGE FOUND. (July 17, 2013), <http://www.heritage.org/research/reports/2013/07/the-unfair-attack-on-arbitration-harming-consumers-by-eliminating-a-proven-dispute-resolution-system>.

88. See Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 114.

89. See *id.*

to offer expert testimony; or to write complex legal arguments. . . . [E]xcept in very unusual circumstances it is highly unlikely that a consumer could present a [procedurally difficult] claim on her own, unrepresented by an attorney.⁹⁰

Moreover, consumers still fare much better with an attorney even for procedurally easy claims. In fact, studies have found that for claims of below average complexity, attorneys were still nine times more successful than pro se litigants.⁹¹ Pro se litigants often cannot achieve favorable outcomes due to a lack of: education, English language fluency, knowledge of legalese, or understanding of the legal process.⁹² In addition, pitting a pro se litigant against a high-powered corporate defense attorney creates a perceived power asymmetry, which results in pro se litigants bowing to pressure to settle their claims for paltry sums of money.⁹³ Thus, regardless of how complex their legal claim, consumers are unlikely to successfully navigate the legal process without an attorney.

3. *Consumers Are Unlikely to Realize That They Have a Potential Legal Claim*

Consumers also do not pursue individual arbitrations because they are often not even aware that they have been wronged, or if they are aware, they do not realize that they have a potential legal claim. As Professor Sternlight explains, when “the consumer does not realize she has potentially been injured” or when “the consumer does not realize that an injury she has suffered may be legally cognizable,” “it becomes . . . impossible for consumers to present their claims individually.”⁹⁴ For example, while a few savvy consumers might realize that their computers lacked the promised gigabyte storage capacity, this fact would likely go unnoticed by most consumers.⁹⁵ In a class action, these latter consumers would recover as unnamed class members, but if forced to arbitrate individually, these consumers would never recover for the company’s ill-gotten gains.

Moreover, even if consumers are aware that they have been wronged, the consumers may not know they have a legally cognizable claim. For example, consumers might be very upset that banks were charging them excessive overdraft fees, but most consumers would not know the specific laws under

90. *Id.*

91. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 *FORDHAM URB. L.J.* 381, 402 (2010).

92. See ADMIN. OFF. OF CTS., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS (Jan. 2007), at 1–2 – 1–8, available at http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf.

93. See Resnik, *supra* note 43, at 84 (pro se litigants perceive a power asymmetry); Sternlight, *Lawyerless*, *supra* note 91, at 403–04 (this power asymmetry results in lower settlements for pro se litigants).

94. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 108.

95. See *id.* at 111.

which they might be entitled to a recovery.⁹⁶ This lack of legal knowledge would explain why millions of consumers complained about Wachovia and Wells Fargo's overdraft fees, but only *one* ever filed an arbitration proceeding.⁹⁷

Thus, consumers are not currently likely to vindicate their rights in arbitration because: (1) it is not worth consumers' time and money to pursue small-value claims individually; (2) for small-value claims, consumers cannot locate a willing attorney to help them present procedurally difficult claims and to correct power imbalances between themselves and corporate counsel; and (3) consumers are often unaware that they have been harmed or that they have a legally cognizable claim. As long as consumers will not file any claims, a company could "pickpocket \$10 at a time from millions of consumers" and get away with it.⁹⁸ The next Parts therefore explore methods that consumers, attorneys, and states can employ to thwart the corporate strategy of using arbitration agreements to deter the collective vindication of consumers' rights.

III.

METHODS THAT WOULD ALLOW CONSUMERS TO PROFITABLY PURSUE THEIR CLAIMS IN ARBITRATION

This Section proposes two potential solutions that would enable consumers to pursue their claims in arbitration more effectively. First, consumers could achieve strength in numbers by aggregating their claims through the principle of assignment, which allows the transfer of rights from one party (the assignor) to another party (the assignee). Second, states could pass legislation providing an enhanced remedy for small-value consumer claims, thereby providing sufficient damages to consumers to make pursuing their claims on an individual basis worthwhile.

A. Consolidation of Claims Through Assignment

Consolidation of claims has the potential to overcome one of the primary problems with individual arbitration—that small-value claims are not worthwhile to pursue on their own.⁹⁹ If an attorney could consolidate enough claims and pursue them collectively in arbitration, the efficiencies of this approach would resemble those of class action litigation. An attorney could consolidate a number of consumer claims by assigning the claims to a single party, such as a lead consumer-plaintiff or a corporation set up specifically to accept the assigned claims. The assignee could then pursue all of the claims together in one arbitration proceeding. Because many arbitration clauses only

96. *See id.*

97. *See id.* at 100 n.76.

98. *See* Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 705 (2012).

99. *See supra* Part II.B.1–2.

prohibit the joinder of parties—not the joinder of claims—such an assignment strategy may offer an innovative end-run around a corporate defendant’s class action waiver.

1. *Methods for Claim Consolidation*

An attorney seeking to consolidate consumer claims through assignment must adhere to the following procedure. First, the attorney must secure assignments from consumers via contract, while providing that any recovered funds will be redistributed to the consumer-assignors. Second, the attorney must file each claim separately in arbitration and then request a hearing to determine whether the claims should be consolidated.¹⁰⁰ There is some authority suggesting that an attorney could file for consolidation of arbitration proceedings in state court in jurisdictions that have enacted the Revised Uniform Arbitration Act (RUAA).¹⁰¹ However, federal case law that has developed since the drafting of the RUAA has established that courts must defer procedural issues—like consolidation—to the arbitrators, so most courts are likely to hold that consolidation provisions modeled upon RUAA are preempted by the FAA.¹⁰² Third, the attorney must argue that the consumers’ arbitration agreement permits the consolidation of claims because the procedures that govern arbitration are a matter of contract.¹⁰³ The success of the argument that the contract permits consolidation will depend on the language of the arbitration clause, as outlined below.

100. See Richard Jeydel, *Consolidation, Joinder, and Class Actions: What Arbitrators and Courts May and May Not Do*, DISP. RESOL. J., Nov. 2002–Jan. 2003, at 24, 25.

101. See REVISED UNIF. ARBITRATION ACT § 1-569.10 (2000) (providing that parties can petition a court to consolidate separate arbitration proceedings); *Legislative Fact Sheet: Arbitration Act (2000)*, UNIF. LAW COMM’N (last visited Mar. 9, 2015), [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000)) (seventeen states and the District of Columbia have enacted the Revised Uniform Arbitration Act); see, e.g., *Lyndoe v. D.R. Horton, Inc.*, 287 P.3d 357, 363 (N.M. Ct. App. 2012) (allowing a state court to consolidate arbitration proceedings under New Mexico’s RUAA statute).

102. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010) (“[P]rocedural questions . . . are presumptively not for the judge, but for an arbitrator, to decide.” (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)) (internal quotation marks omitted)); Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: The Power of Arbitrators*, 35 *FORDHAM URB. L.J.* 83, 88 (2008) (“[T]he consolidation issue has now been resolved in favor of preserving that power for arbitrators. Indeed, the First, Third, Fourth, Seventh, and Ninth Circuits . . . have held that this issue is properly left for arbitrators to decide.” (citing *Certain Underwriters at Lloyd’s London v. Westchester Fire Ins.*, 489 F.3d 580, 585–86 (3d Cir. 2007))); see also, e.g., *Dockser v. Schwartzberg*, 433 F.3d 421, 427 (4th Cir. 2006); *Certain Underwriters at Lloyd’s v. Cravens Dargan & Co.*, 197 F. App’x 645, 647 (9th Cir. 2006); *Emp’rs Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 576–77 (7th Cir. 2006); *Shaw’s Supermarkets, Inc. v. United Food & Commercial Workers Union, Local 791*, 321 F.3d 251, 254 (1st Cir. 2003). *But see Lyndoe*, 287 P.3d at 363 (holding that the FAA does not prevent a court from ordering consolidation of separate arbitration proceedings).

103. See *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (holding that issues surrounding arbitration are a “matter of contract”).

Where the arbitration clause is silent as to whether claims may be consolidated, an attorney may be able to convince an arbitrator to exercise his or her significant discretion over procedural issues to grant consolidation. The Supreme Court has noted that when an arbitration clause is silent as to a procedural issue, an arbitrator is empowered to adopt any procedure that is reasonable under the circumstances.¹⁰⁴ In fact, many arbitration clauses *are* silent on whether consolidation is permitted.¹⁰⁵ An attorney could use the factors from the RUAA as persuasive authority to argue that consolidation should be permitted when: (1) claims arise “from the same transaction or series of related transactions,” (2) there are common questions of law or fact that might result in “conflicting decisions in the separate arbitration proceedings,” and (3) the hardship to the plaintiff from the failure to consolidate is greater than the prejudice to the defendant from consolidation.¹⁰⁶ Thus, if the contract is silent as to consolidation, an attorney will often have a strong case that consolidation should be permitted.

In contrast, if the arbitration clause contains broad anticonsolidation language, an arbitrator is unlikely to allow the consolidation of claims. PayPal and Microsoft’s arbitration agreements, for example, contain broad anticonsolidation provisions. PayPal’s arbitration clause provides, “The arbitrator may not . . . preside over any form of a consolidated . . . proceeding.”¹⁰⁷ Microsoft’s arbitration clause states, “No arbitration or proceeding will be combined with another without the prior written consent of all parties to all affected arbitrations or proceedings.”¹⁰⁸ Given this sweeping anticonsolidation language, an arbitrator is unlikely to construe the agreement as allowing the consolidation of claims.

However, narrower anticonsolidation language in some arbitration agreements can be construed as allowing the joinder of claims, just not the joinder of parties. For example, Netflix’s arbitration clause states that “the arbitrator may not consolidate more than one person’s claims with your claims,” and AT&T’s arbitration clause states simply that “the arbitrator may not consolidate more than one person’s claims.”¹⁰⁹ Both of these provisions prohibit the consolidation of multiple *parties* into one proceeding but do not prohibit the consolidation of claims all belonging to only one party. Therefore,

104. See *Stolt-Nielsen*, 559 U.S. at 685. However, an arbitrator cannot adopt a procedure that alters the fundamental nature of arbitration, unless the parties have expressly agreed to this procedure. *Id.*

105. Jonathan R. Waldron, *Resolving a Split: May Courts Order Consolidation of Arbitration Proceedings Absent Express Agreement by the Parties?*, 1 J. DISP. RESOL. 177 (2005) (“Parties to arbitration agreements rarely include language that addresses whether related arbitration claims may be consolidated.”).

106. See REVISED UNIF. ARBITRATION ACT § 1-569.10.

107. PayPal, *PayPal User Agreement*, § 14.3 (Nov. 18, 2014), <http://archive.is/0203P>.

108. Microsoft, *Microsoft Services Agreement*, § 10.4 (Aug. 27, 2012), <http://archive.is/17FWL>.

109. AT&T, *GoPhone Terms of Service* (last visited Nov. 16, 2013), <http://archive.is/Vou8n>; Netflix, *Netflix Terms of Use*, § 15.6, <http://archive.is/O1tbP> (last visited Nov. 17, 2013).

a single assignee who owned multiple consumer claims could consolidate all of his or her claims under such an agreement.¹¹⁰ As a result, an attorney could successfully argue for consolidation under contracts like those of Netflix and AT&T, which contain narrower anticonsolidation language than the contracts of Paypal and Microsoft.¹¹¹

Therefore, under many types of arbitration clauses, an attorney could successfully consolidate multiple consumer claims by employing a strategy of assigning claims to one lead consumer-plaintiff or to a specially created corporation. A consolidated arbitration proceeding would offer many of the same efficiency benefits as class action litigation.

2. *Potential Obstacles to an Assignment Strategy*

There are three potential obstacles to an assignment strategy, but none are insurmountable. The first potential obstacle to an assignment strategy is that corporate defendants might incorporate anti-assignment provisions into their consumer contracts to prevent consumers from assigning their claims to others. As a general rule, courts will uphold anti-assignment provisions in contracts.¹¹² However, an anti-assignment provision needs to be mutual—applying to both the corporate defendant and the consumer—to avoid being stricken as unconscionable.¹¹³ But many corporations rely on their ability to assign claims to subsidiaries, insurers, and collection agencies, and therefore they cannot feasibly adopt anti-assignment provisions. Thus, anti-assignment provisions are unlikely to pose a major barrier to the strategy of consolidating consumer claims by assigning them to a single party.

The second problem facing an assignment strategy is that certain statutes limit who may bring suit. For example, California's Unfair Competition Law (UCL) contains a requirement that "[a]ctions for relief pursuant to this chapter shall be prosecuted *exclusively* . . . by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."¹¹⁴ Because the statute expressly limits who may bring suit, the Supreme Court of California has held that an assignee who has not suffered injury in fact may not

110. See *Robert Lamb Hart Planners & Architects v. Evergreen, Ltd.*, 787 F. Supp. 753, 756, 759 (S.D. Ohio 1992) (holding that assignee is treated the same under a nonconsolidation clause as the assignor would be treated).

111. See AT&T, *GoPhone Terms of Service*, *supra* note 109; Netflix, *Netflix Terms of Use*, *supra* note 109; Paypal, *PayPal User Agreement*, *supra* note 107; Microsoft, *Microsoft Services Agreement*, *supra* note 108.

112. 29 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 74:22 (4th ed. 2003) ("Contract provisions prohibiting the assignment of rights under the contract will ordinarily be upheld, depending on the particular facts and circumstances.").

113. Courts generally consider the nonmutual waiver of legal rights to be unconscionable. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 693–94 (Cal. 2000) (finding lack of mutuality in an arbitration clause, which required only the employee to arbitrate disputes, was unconscionable).

114. CAL. BUS. & PROF. CODE § 17204 (West 2009) (emphasis added).

bring a cause of action under the UCL.¹¹⁵ Thus, if an attorney were to assign consumer claims to a specially designated corporation, the assignee corporation would not have standing to sue under the UCL because it would not itself have suffered injury in fact. However, an attorney could avoid this problem by instead selecting an assignee who *had* suffered injury in fact, such as a consumer, to act as the lead plaintiff. In addition, California's UCL is rather unique in specifically limiting who may bring suit. Typically, an assignee can acquire standing from the injury suffered by the assignor.¹¹⁶ Thus, standing is only a problem in rare circumstances.

The third potential problem with an assignment strategy is that the cost to an attorney of locating affected consumers and convincing them to assign their claims might prove prohibitive. An attorney in private practice who wanted to avoid losing money would not be willing to pursue an assignment strategy if the cost of acquiring a consumer claim exceeded the potential payoff from that claim. For example, if an attorney took consumer claims on a contingency fee of 30 percent and each claim was worth ten dollars, the attorney would not be willing to pay more than three dollars to acquire any given claim. This small amount of money would limit how much advertising and outreach an attorney could do.

However, social media might decrease the cost of locating affected consumers. For example, a website called "Consumers Count" has attempted to use social media techniques to provide a cost-effective means of aggregating consumer claims.¹¹⁷ While that particular site has yet to become successful,¹¹⁸ the concept of employing social media to cost effectively connect consumers has potential. Consumers could sign up online to participate in mass arbitration against specific companies and could also alert friends who might have bought the affected product or service. A well-designed social media site could become popular very quickly. For example, the political site MoveOn.org,

115. *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 209 P.3d 937, 943 (Cal. 2009) (holding that the purpose of Proposition 64, which amended the UCL to add a standing requirement, "would be nullified if a person claiming actual injury from some unfair business practice were allowed to assign that claim to one who has suffered no injury").

116. *See Sprint Commc'ns Co., v. APCC Servs., Inc.*, 554 U.S. 269, 286 (2008) ("[T]he assignee of a claim has standing to assert the injury in fact suffered by the assignor." (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000))).

117. *See How It Works*, CONSUMERSCOUNT.ORG, <http://consumerscount.org/how-it-works> (last visited Mar. 9, 2015).

118. The site's founders designed Consumers Count "to turn arbitration into an unexpected nightmare for corporations by inundating companies with mass individual arbitrations that will be so burdensome that companies will disavow arbitration." Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion?*, 8 J. BUS. & TECH. L. 345, 347 n.11 (2013) (internal quotation marks omitted). However, none of the causes on the organization's website are close to reaching the "critical mass" that the organization has deemed necessary to inundate a company with individual arbitrations. *See Browse All Causes*, CONSUMERSCOUNT.ORG, <http://consumerscount.org/complaint/browse.aspx> (last visited Mar. 9, 2015).

which allows users to create online petitions, became wildly successful nearly overnight by tapping into social media.¹¹⁹ Consumers have even used MoveOn.org to force companies to change their policies. For example, a petition with fifty thousand signatures forced Facebook to change some of its advertising practices, which intruded on consumer privacy.¹²⁰ The potential, therefore, exists to create a successful social media platform that could help consumers vindicate their legal rights.

Thus, while attorneys may encounter potential problems in pursuing a strategy of assigning consumer claims to a single assignee and attempting to consolidate those claims into one arbitration proceeding, none of these problems are insurmountable. While assignment is not a perfect strategy, it remains a viable option for attorneys who want to pursue consumer claims on a collective basis. Proceeding on multiple claims at the same time through a single assignee would exert settlement leverage by exposing a company to more liability, result in cost sharing by dividing the cost of arbitration among multiple claims for relief, and decrease the attorney time spent in comparison to pursuing the claims individually. Consequently, consumer advocates should give serious consideration to this assignment strategy.

*B. An Enhanced Consumer Remedies Statute Could Incentivize
Consumers to File Individual Arbitrations*

States could also provide enhanced remedies for consumers with small-value claims to encourage both consumers and their attorneys to pursue claims individually in arbitration. Currently, one of the primary reasons that consumers do not file individual arbitration claims is that their damages are too small to make pursuing such claims worthwhile. As California Supreme Court Justice Goodwin Liu suggested in *Sonic-Calabasas v. Moreno*, state legislatures could solve this problem by passing an enhanced consumer remedies statute modeled after the remedies provided for consumers in AT&T Mobility's arbitration agreement.¹²¹ AT&T Mobility's arbitration agreement provides as follows:

AT&T will pay all AAA filing, administration, and arbitrator fees for any arbitration [unless] the arbitrator finds that either the substance of your claim or the relief sought . . . is frivolous.

If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T's last written settlement offer made before an arbitrator was selected, then AT&T will:

119. See *A Short History*, MOVEON.ORG, <http://front.moveon.org/about/#.VP3EdrPF83S> (last visited Mar. 9, 2015).

120. Michael Liedtke, *Facebook Revamps New Advertising System*, HUFFINGTON POST (Nov. 30, 2007, 6:38 AM), <http://www.huffingtonpost.com/huff-wires/20071130/facebook-about-face/>.

121. See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 205–06 (Cal. 2013).

- pay you the amount of the award or \$10,000 (“the alternative payment”), whichever is greater; and
- pay your attorney, if any, twice the amount of attorneys’ fees, and reimburse any expenses (including expert witness fees and costs) that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration (“the attorney premium”).

If AT&T did not make a written offer to settle the dispute before an arbitrator was selected, you and your attorney will be entitled to receive the alternative payment and the attorney premium, respectively, if the arbitrator awards you any relief on the merits.¹²²

As the Supreme Court noted in *AT&T Mobility v. Concepcion*, this arbitration provision provides “a substantial inducement for the consumer to pursue the claim in arbitration if a dispute [is] not resolved informally” because it offers to pay all of a consumer’s costs and attorney’s fees, as well as a bounty of \$10,000 if AT&T refuses to settle.¹²³ Because it offers substantial incentives for a consumer to bring claims individually in arbitration, AT&T’s arbitration clause serves as a good model for an enhanced consumer remedies statute. However, due to some flaws in AT&T’s arbitration policy, few consumers ever file claims against AT&T.¹²⁴ Before AT&T’s arbitration provision would make for effective legislation, it would need to undergo a few alterations to avoid FAA preemption issues, to address the flaws in AT&T’s policy that continue to prevent consumers from vindicating their rights, and to curtail the potential for abuse of the enhanced remedies.

First, to avoid FAA preemption, state legislators should draft any enhanced remedies statute to be facially neutral. As the Supreme Court has noted, state laws that are “applicable *only* to arbitration provisions” are invalid because they facially discriminate against arbitration.¹²⁵ Thus, a consumer remedies statute instead must provide that any individual consumer pursuing a claim under the relevant consumer protection statute—regardless of whether in arbitration, small claims court, or superior court—can qualify for the enhanced remedy.

However, an enhanced consumer remedy statute could still run afoul of the FAA (under *Concepcion*), despite being facially neutral, if it had a disproportionate impact on arbitration by interfering with the “fundamental attributes” of arbitration.¹²⁶ Yet, the Supreme Court’s enthusiastic approval of AT&T’s arbitration clause as facilitating the arbitration process would make it difficult for the Court to find that the clause, now enacted as a statute, interferes

122. AT&T, *GoPhone Terms of Service*, *supra* note 109.

123. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (internal quotation marks omitted) (citing favorably the district court’s findings).

124. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 100.

125. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

126. *Concepcion*, 131 S. Ct. at 1748.

with the fundamental character of arbitration.¹²⁷ For example, the Supreme Court of California has noted that enactment of the AT&T Mobility arbitration provision as an unwaivable statutory remedy would not be at odds with the Supreme Court's decision in *Concepcion* because the enhanced remedy would not interfere with any of the essential attributes of arbitration, such as its informality or expediency.¹²⁸ Thus, the FAA would not preempt an enhanced consumer remedies statute, as long as it was facially neutral.

Second, to allow attorneys to adequately assess a consumer's chances of recovering an enhanced remedy *before* agreeing to prosecute the consumer's claims, an enhanced remedies statute must alter the time frame in which a company can issue its final settlement offer. AT&T's agreement allows the company to offer a written settlement any time before an arbitrator is selected.¹²⁹ Under AAA rules, the parties select an arbitrator immediately prior to the holding of a preliminary hearing, which generally occurs two months after the consumer files the initial claim.¹³⁰ This timeline poses a problem, however, because consumers generally require an attorney's assistance to file a claim but are not yet certain at the filing stage whether they are entitled to the enhanced remedies. AT&T can deny a consumer the enhanced remedies up to two months *after* the consumer files a claim simply by offering to settle for the full amount.¹³¹ Therefore, an attorney would not be willing to take the case at the filing stage because AT&T could eliminate his or her entitlement to attorney's fees, as part of the enhanced remedy, by offering to settle on the eve of the preliminary hearing.¹³²

To avoid this problem, state legislatures should draft enhanced consumer remedies statutes such that they require a potential defendant to issue its last written settlement offer *prior* to the filing of an arbitration claim. Such statutes could achieve this objective by providing that a consumer can issue a written settlement demand to a company at any time and the company must respond in writing within thirty days with either an acceptance of the consumer's offer, a

127. *See id.* at 1744, 1753.

128. *See* *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 206 (Cal. 2013) (“Suppose that . . . a state legislature seeking to protect small-dollar claimants were to enact a generally applicable, unwaivable statute similar to the provision [in *Concepcion*], requiring a defendant to pay a penalty plus attorney fees if a plaintiff with a low-value claim obtains an award through litigation or arbitration greater than the defendant's last settlement offer. Nothing in *Concepcion* suggests that such a statute—which . . . does not interfere with fundamental attributes of arbitration—would be preempted by the FAA.”).

129. *See* AT&T, *GoPhone Terms of Service*, *supra* note 109.

130. AM. ARBITRATION ASS'N., AAA ARBITRATION ROADMAP 3 (2007).

131. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 647 n.108 (2012) (arguing that a consumer will never receive the “bounty” under the AT&T agreement because “AT&T can make its final offer on the eve of arbitration”).

132. *See id.*

rejection of the consumer's offer, or with a counteroffer for settlement.¹³³ A failure to respond within thirty days would constitute a rejection of the consumer's settlement demand.

As under the AT&T arbitration clause, the consumer would be entitled to the enhanced remedy if: (1) the company rejected the consumer's demand, and the consumer later received any award greater than zero, or (2) the company offered to settle, but the consumer later received an award that was larger than the company's settlement offer. This statute would be similar to AT&T's arbitration clause but would instead make the company's last settlement offer due before—rather than after—a consumer filed suit. By altering the time frame for settlement offers, the statute would allow an attorney to know before filing suit whether the consumer is likely to qualify for the enhanced remedy. For example, if a company rejected a consumer's settlement demand, an attorney could be certain that the consumer would be entitled to the enhanced remedy as long as the consumer prevailed in arbitration. Therefore, attorneys need the adjusted time frame to have a level of predictability when assessing whether to take a consumer's claim.

Third, an enhanced consumer remedies statute would need to be limited to small-value claims. The statute is only meant to ensure that consumers with small-value claims have an incentive to pursue them individually, so that corporations cannot defraud a large number of consumers of small amounts of money and escape reprisal.¹³⁴ For this reason, consumers who have large individual claims or are pursuing aggregated claims in class action litigation should not qualify for the enhanced remedy. In fact, the enhanced remedy could be particularly problematic in the context of class action litigation because a defendant's liability would be astronomical if the enhanced remedy were assessed once for each member of the class. Therefore, the statute should only apply to claims below a certain dollar threshold.

Fourth, an enhanced remedies statute should provide for a larger fixed recovery (greater than \$10,000) rather than double attorney's fees, because the determination of attorney's fees can be difficult. Attorneys often fail to receive full compensation through attorney's fee awards because courts employ the unpredictable lodestar measurement, which allows the adjudicator to award fees based on how much time he or she thinks that the attorney should have reasonably spent on the case, rather than based on how much time the attorney

133. I chose a thirty-day time frame because the AT&T agreement gives AT&T thirty days to resolve the consumer's dispute informally before a claim can be filed, so this time frame appears to provide companies sufficient time to decide on a settlement offer. *See* AT&T, *GoPhone Terms of Service*, *supra* note 109 ("If AT&T and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or AT&T may commence an arbitration proceeding."). This thirty-day term therefore represents AT&T's judgment that it can process and evaluate the merits of a consumer's claim within thirty days.

134. *See* *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 206 (Cal. 2013) (noting that the goal of enacting AT&T's arbitration clause as a statute would be to ensure that consumers can pursue small-value claims).

actually spent.¹³⁵ In the consumer context, judges or arbitrators might punish an attorney for spending a larger number of hours on a consumer claim that has relatively small actual damages (such as thirty dollars) by awarding lower fees.¹³⁶ The adjudicator might not view the pursuit of small-value claims as a worthwhile expenditure of an attorney's time.¹³⁷ Additionally, an adjudicator might find double attorney's fees to be excessive and use his or her discretion to credit the attorney with fewer hours of work.¹³⁸ In contrast, if the enhanced remedy statute did not include attorney's fees, but consisted only of a larger fixed monetary award to the consumer, the attorney could secure his or her entire fee through a contingency arrangement, obviating the need to petition the adjudicator for a determination of reasonable fees.

The lack of reviewability of most fee awards further compounds the aforementioned problems. While an adjudicator's refusal to award a guaranteed fixed recovery (of say \$10,000) would likely be overturned on appeal as a blatant disregard of the enhanced remedies statute, a paltry award of attorney's fees could not be similarly challenged because the standard of review is so deferential.¹³⁹ Thus, double attorney's fees fall short as a generous remedy if a judge or arbitrator has vast discretion to adjust downwards the number of hours that an attorney has worked.¹⁴⁰ Therefore, attorneys would likely find stronger incentives to enforce consumer rights in a regime with higher fixed recovery amounts (more than \$10,000), which the attorney could share through contingency fees, rather than in a regime of guaranteed attorney's fees. The fixed remedy proposed herein is based on empirical data, which demonstrates that the average attorney requires a claim of \$50,000 to take a case.¹⁴¹ Thus, an enhanced consumer remedies statute should seek to provide at least this amount.

In light of the foregoing, a model enhanced consumer remedy statute should provide as follows:

135. Joseph F. Cleveland, Jr. & Alex Harrell, *Is Texas Becoming the Lodestar State?: A Practitioner's Guide to Recovering Attorneys' Fees Under the Lodestar Method*, 75 TEX. B.J. 700, 701 (2012) (explaining the lodestar measurement of attorney's fees).

136. See Gilles & Friedman, *supra* note 131, at 646–47 (“[I]t is almost impossible to imagine a court awarding \$25,000 (or anything remotely close) as a ‘reasonable fee’ for [a claim] of \$30.22.”).

137. See *id.*

138. See *id.*

139. See, e.g., *Ermine v. City of Spokane*, 23 P.3d 492, 494–95 (Wash. 2001) (en banc) (reviewing a judge's award of attorney's fees for abuse of discretion, a highly deferential standard); see also 9 U.S.C. § 11 (2012) (an arbitral award may be challenged only if a mistake in calculating damages is “evident” from the face of the award).

140. See 9 U.S.C. § 11 (the number of hours an attorney should be credited with working will usually not be apparent only from the face of the award, so it is nonreviewable); *Ermine*, 23 P.3d at 494–95 (decisions on attorney's fees are reviewed only for abuse of discretion).

141. See PUB. CITIZEN, DEBATE TRAP, *supra* note 81, at 4 n.16 (finding in a survey of labor lawyers, attorneys responded that they would need, on average, a claim of \$50,000 to agree to take the case).

An individual with a total consumer claim¹⁴² of less than \$50,000 against a company may issue a written¹⁴³ settlement demand to any agent of the company authorized to deal with consumers. The consumer must specify the basis for the claim and the amount of money for which the consumer would be willing to settle. If a consumer issues a settlement demand, the company must respond within thirty days in writing with an acceptance of the consumer's settlement demand, a rejection of the consumer's settlement demand, or a counteroffer for settlement. A company's failure to respond within thirty days will constitute a rejection of the consumer's settlement demand. After receiving the company's reply or if thirty days have elapsed with no reply, a consumer may file his or her claim in the appropriate forum. If the company has rejected the consumer's settlement demand and the consumer receives any recovery in the appropriate forum, the consumer is entitled to either: (a) the awarded recovery or (b) \$50,000 plus costs. If the company has issued a counteroffer for settlement and the consumer receives an award in the appropriate forum in excess of the company's counteroffer, the consumer is entitled to either: (a) the awarded recovery or (b) \$50,000 plus costs.

This statute addresses the above concerns about FAA preemption, attorneys' incentives, and avoidance of abuse: it is facially neutral to arbitration, requires a company to offer a settlement *before* a consumer must file suit, restricts its application to small-value claims, and offers a higher fixed award (\$50,000) than the AT&T Mobility agreement. By offering consumers a higher fixed recovery and allowing attorneys to evaluate the availability of enhanced remedies prior to filing a claim, the proposed statute would aid consumers in bringing individual arbitration claims, particularly by aiding consumers in securing the assistance of counsel.

Without these additional incentives, the statute would not be very effective considering that even under AT&T's allegedly pro-consumer arbitration clause, relatively few consumers ever filed claims. Affidavits in *Concepcion* reveal that “[f]ewer than 200 of AT&T's millions of customers brought claims in individual arbitration against the company for any reason.”¹⁴⁴ While this is slightly better than the zero customers who brought arbitration claims against Wachovia during a similar time period,¹⁴⁵ this low number demonstrates that even AT&T's relatively “consumer-friendly” arbitration clause does not go far enough.

142. Each state could define which of its consumer protection laws constituted a “consumer claim.”

143. For purposes of this section, “written” shall include typed electronic communication.

144. Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 100 (alteration in original) (quoting Brief of Marygrace Coneff, et al. as Amici Curiae Supporting Petitioners at 9, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3973886).

145. *Id.* at 100 n.76.

In addition to increasing recoveries by consumers, this proposed enhanced consumer remedies statute would also incentivize companies to institute online systems that would make it easier for consumers to file claims. Anecdotal evidence indicates that when consumers have access to easily navigable online systems for filing complaints, they are far more likely to do so.¹⁴⁶ For example, each year, consumers file sixty million consumer disputes against various online merchants through eBay and PayPal's online systems.¹⁴⁷ PayPal and eBay have substantial incentive to offer simple dispute resolution systems because consumers would not trust their sites if they offered no recourse against fraudulent merchants. An enhanced consumer remedies statute would similarly incentivize large companies to set up simple dispute-resolution systems because failure to do so might result in substantial liability if significant numbers of consumer settlement demands fell through the cracks.¹⁴⁸ Thus, by creating significant incentives for companies to settle claims expediently, an enhanced consumer remedies statute could secure recovery for large numbers of consumers without the need to even resort to arbitration.

IV.

STRATEGIES THAT WOULD ALLOW CONSUMERS TO ESCAPE BINDING ARBITRATION IN ADHESION CONTRACTS

There are two strategies consumers could pursue to escape binding arbitration provisions. First, consumers could join together in a "union" to demand that companies remove binding arbitration provisions from their contracts. Second, consumers could employ software programs to cross out or "knock out" a company's arbitration clause by leveraging the "battle of the forms" doctrine from contract law. Both strategies would allow consumers to escape binding arbitration provisions and instead pursue class action litigation in the event that they suffered a wrong.

A. Forming a "Union" to Negotiate Contract Terms on Consumers' Behalf

Consumers could gain the necessary power to escape binding arbitration agreements by forming a "union" to negotiate contract terms on their behalf in the same manner that a labor union negotiates on behalf of its members.¹⁴⁹ Consumers could demand certain contract terms by leveraging the threat of boycotting the company's products or services. If the consumers' union gained enough members willing to boycott, it could gain substantial leverage.

146. *See id.* at 101.

147. *Id.*

148. To the extent that handling consumer claims may be too onerous for small merchants, state legislatures could limit the application of enhanced consumer remedies statutes to large companies by enacting a minimum-earnings threshold before a company becomes subject to the statute.

149. There is a group called "Consumers Union," which publishes Consumer Reports and advocates on behalf of consumers, but it does not negotiate contract terms like a union does.

Consumers have a great deal of power to dictate terms to companies by threatening to boycott the company's products. Professor Gary Minda notes that "boycotts requesting consumers to withhold their patronage can be just as coercive as traditional labor and business boycotts, and in some contexts they may be even more coercive."¹⁵⁰ Consumer boycotts can inflict serious financial harm on a company. One study found that on average, consumer boycotts decreased companies' share price by 3.5 percent, and companies lost an average of \$150 million in revenue during the first two months of consumer boycotts.¹⁵¹ Consumer boycotts therefore serve as a very powerful tool to force companies to change policies. Consumer boycotts have succeeded in the past, for example, in forcing Nike to stop employing sweatshop labor¹⁵² and in stopping Nestle from allowing deforestation in its palm oil supply chain.¹⁵³ Thus, consumers can effect changes in corporate practices when they band together.

Admittedly, consumer boycotts are not a foolproof strategy and many are unsuccessful. Data reveal that only about a quarter of consumer boycotts are successful.¹⁵⁴ For example, a recent boycott of Chick-fil-A for donating money to antigay political groups was unsuccessful in convincing the company to change its stance on its political contributions.¹⁵⁵ In addition, only certain types of products are amenable to consumer boycotts. Daniel Diermeier, a professor at the Kellogg School of Management at Northwestern University, explains that for a consumer boycott to succeed, the "cost of participation must be low," which means consumers must be able to avoid the boycotted product without too much trouble.¹⁵⁶ "[R]etailers and oil companies make good boycott targets" because it is easy for consumers to buy from a competitor.¹⁵⁷ A consumer boycott will not be as successful for more durable goods that are not replaced very often, such as cars or cell phones, because switching costs are higher.

Nonetheless, a consumers' union has a few tactics at its disposal to boost its chances of successfully convincing companies to back away from binding arbitration clauses in their adhesion contracts. First, a consumers' union should

150. Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807, 922 (1993).

151. Stephen W. Pruitt & Monroe Friedman, *Determining the Effectiveness of Consumer Boycotts: A Stock Price Analysis of Their Impact on Corporate Targets*, 9 J. CONSUMER POL'Y 375, 381 (1986).

152. See Simon Birch, *How Activism Forced Nike to Change Its Ethical Game*, GUARDIAN (July 6, 2012, 11:04 AM), <http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike>.

153. *Successful Boycotts*, ETHICAL CONSUMER, <http://www.ethicalconsumer.org/boycotts/successfulboycotts.aspx> (last visited Mar. 9, 2015).

154. Pruitt & Friedman, *supra* note 151, at 375.

155. Mackenzie Weinger, *Mike Huckabee: Chick-fil-A Hasn't Changed*, POLITICO (updated Sept. 21, 2012, 7:01 PM), <http://www.politico.com/news/stories/0912/81543.html>.

156. Daniel Diermeier, *When Do Company Boycotts Work?*, HARV. BUS. REV. (Aug. 6, 2012), <http://blogs.hbr.org/2012/08/when-do-company-boycotts-work/>.

157. *Id.*

utilize social and traditional media to spread its message.¹⁵⁸ Second, it should convey clearly defined goals to consumers and stress the importance of securing a few essential contract provisions that are important to consumers, such as a guarantee that consumers can pursue their claims in court or a guarantee that a company will keep consumers' information private and will not sell it to others.¹⁵⁹ Third, a consumers' union must frame its message with powerful rhetoric.¹⁶⁰ Because arbitration provisions by themselves usually do not spark consumer outrage, a consumers' union should focus instead on examples of wrongful conduct by companies that cannot be remedied due to class action waivers. For example, rather than merely noting that AT&T Mobility requires consumers to waive their right to class action litigation, a consumers' union should emphasize that AT&T cheated consumers out of their money by charging them sales tax on what the company advertised as "free" cell phones and then prevented consumers from suing through the use of binding arbitration.¹⁶¹ The latter would constitute a far more powerful message. Lastly, a consumers' union could partner with labor unions that also want binding arbitration clauses removed from certain companies' employment contracts. A combined boycott could prove even more powerful than individual action.

Even if a consumers' union failed to convince many companies to change their arbitration policies, it could still exert political pressure to change arbitration laws. Labor unions wield enormous political influence, particularly on the state level, and a consumers' union could do so as well.¹⁶² A consumers' union could, for example, pressure Congress to pass the Arbitration Fairness Act—a proposal to restore the original purpose of the FAA by prohibiting arbitration clauses in adhesive employment and consumer contracts.¹⁶³ Thus, efforts to organize voluntary associations of consumers to fight arbitration clauses could prove fruitful on many different levels and could elevate consumer issues to the national spotlight.

158. Tiberius Brastaviceanu, *Viral Labeling*, MULTITUDE PROJECT (Dec. 10, 2011), <https://sites.google.com/site/multitude2008/Home/activism/organize-efficient-boycott-campaigns>.

159. See Joshua A.T. Fairfield, "Do-Not-Track" as Contract, 14 VAND. J. ENT. & TECH. L. 545, 549–50 (2012) (arguing that consumers care about companies tracking them online and selling their data).

160. Brastaviceanu, *supra* note 158.

161. See AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

162. See, e.g., *The Image and Influence of California's Organized Labor*, CAL. REP. (Oct. 25–27, 2013), <http://audio.californiareport.org/archive/R201310251630/a> ("In many ways organized labor is the most powerful political force here in deeply Democratic California.")

163. See H. R. 1844, 113th Cong. § 2(1) (2013) (proposing legislation that would make arbitration clauses unenforceable as to consumer, employment, civil rights, and antitrust claims, and finding that "[t]he Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power").

B. Application of Software Programs to Engage in a Battle of the Forms

Under the “battle of the forms” doctrine in contract law, consumers could knock out an arbitration provision in an online contract by proposing a contradictory term. The battle of the forms in the Uniform Commercial Code (UCC) provides that if two parties never agree to each other’s contract terms but transact business anyway, the resulting contract consists only of those terms on which the parties do agree, and all contradictory terms knock each other out.¹⁶⁴ The UCC then provides default terms, called “gap filler provisions,” to replace the knocked-out terms.¹⁶⁵ Because the UCC default rule is that parties can sue in court, if a company proposes to arbitrate future disputes and a consumer proposes a “no arbitration” alternative, the two conflicting proposals would knock each other out and be replaced by the “no arbitration” default rule under the UCC.¹⁶⁶ Consumers could thus use the battle of the forms doctrine to counteract arbitration provisions in online contracts, including clickwrap and browsewrap agreements, as outlined below.

1. Clickwrap Agreements

Consumers could utilize software that crosses out arbitration provisions in clickwrap agreements and provides notice of this deletion to companies in order to escape such provisions. A clickwrap agreement is a contract that requires a consumer to accept its terms by clicking an “I Accept” button before purchasing a company’s products or using its services. Software programs could allow a consumer to cross out an arbitration clause before “signing” a clickwrap agreement, just as a consumer could do on a paper form. This action would “knock out” the arbitration clause under the UCC’s battle of the forms as long as the company still chooses to do business with the consumer.¹⁶⁷ A consumer could thereby escape arbitration.

Some software already exists that would enable consumers to reject clickwrap terms. The browser plug-in TOSAmend allows a consumer to cross out language from an online agreement and transmit that information to the company’s servers when the consumer clicks the “I Accept” button.¹⁶⁸ A

164. See Francis J. Mootz III, *After the Battle of the Forms: Commercial Contracting in the Electronic Age*, 4 I/S: J.L. & POL’Y FOR INFO. SOC’Y 271, 275–76 (2008) (explaining the knockout rule); see also U.C.C. § 2-207(3) (2012) (the battle of the forms). “All American jurisdictions have adopted the U.C.C. . . .” Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1105 (2002).

165. See U.C.C. § 2-207(3).

166. See James J. White, *Default Rules in Sales and the Myth of Contracting Out*, 48 LOY. L. REV. 53, 84 (2002) (noting that the UCC does not contain a gap-filler arbitration rule, so the default term would allow the parties to sue in court).

167. See U.C.C. § 2-207(3).

168. See *TOSAmend: The Easy Way To Modify Web Service TOS Online Contracts*, OWOCKL.COM, <http://owocki.com/tosamend-the-easy-way-to-modify-web-service-terms-of-service-online-contracts/>. TOSAmend was at one time available for free online, although the links now appear to be dead. See <http://www.tosamend.com/> (last visited Mar. 9, 2015).

consumer who downloads TOSAmend could thus cross out arbitration terms before accepting any online agreement. If it is too much work for a consumer to actively find and excise arbitration terms, a similar browser plug-in could theoretically be written to operate more passively and automatically cross out the arbitration provision in every online agreement. For example, a browser plug-in could search for the word “arbitration” in any online contract and cross out the entire paragraph containing the word. Alternatively, a browser plug-in could simply transmit the message, “I reject all arbitration terms and class action waivers,” whenever a consumer clicks the “I Accept” button.¹⁶⁹

Pursuant to the UCC, if a company received notice that a consumer rejected its arbitration clause yet shipped a product to the consumer anyway, the company’s “conduct” would be construed as recognizing the existence of a contract—on terms dictated by the UCC’s battle of the forms provision.¹⁷⁰ The resulting contract would be construed not to contain an arbitration provision because the consumer’s proposal not to arbitrate would knock out the company’s arbitration provision.¹⁷¹

An actual person at the company would not need to receive the consumer’s terms for the company to be bound by them because Section 14 of the Uniform Electronic Transactions Act allows “electronic agents” to enter into an agreement without the direct supervision of a human.¹⁷² Professors Zev Eigen and Florencia Marotta-Wurgler note that a consumer could use a program like TOSAmend to avoid a company’s contract terms by sending back the following message to a company’s computer server: “By clicking this box, I reject the proposed terms and conditions, and counter-offer that the transaction be governed by the applicable default rules and consumer protection laws.”¹⁷³ This counterproposal for different contract terms could engage the UCC’s battle of the forms provision, even if a real person never saw the message.¹⁷⁴ Thus, if a consumer sent alternate contract terms to a

169. See Zev J. Eigen & Florencia Marotta-Wurgler, *What if Consumers Could Change the Terms of Online Contracts?*, OWOCKI.COM (Nov. 29, 2011), at 2–3, http://owocki.com/wp-content/uploads/2011/11/Eigen_Marotta_Wurgler_TOSAmend.pdf (proposing similar language).

170. U.C.C. § 2-207(3). The resulting contract would also contain UCC default rules (or “gap filler” terms). See *id.* However, because the UCC does not contain a gap-filler arbitration rule, the default term would allow the parties to sue in court. See White, *supra* note 166, at 84.

171. Yana Welinder, *A Face Tells More Than a Thousand Posts: Developing Face Recognition Privacy in Social Networks*, 26 HARV. J.L. & TECH. 165, 230 (2012).

172. UNIF. ELEC. TRANSACTIONS ACT § 14(1) (1999) (“A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents’ actions or the resulting terms and agreements.”). The Act has been enacted in forty-seven states and the District of Columbia. *Uniform Electronic Transactions Act*, NAT’L CONF. STATE LEGIS., <http://www.ncsl.org/research/telecommunications-and-information-technology/uniform-electronic-transactions-acts.aspx> (last visited Mar. 9, 2015); see, e.g., CAL. CIV. CODE § 1633.14(a) (West 2000).

173. Eigen & Marotta-Wurgler, *supra* note 169, at 2.

174. See *id.* The authors argue that to be enforceable, a consumer might also need to send the company an email to put it on notice of the consumer’s terms, although they suggest that inquiry

company's server using TOSAmend or another program, the company could be bound by these terms if it shipped a product to the consumer, as long as the company's computer system received notice of the consumer's terms.

Courts will likely approve the practice of crossing out arbitration clauses in clickwrap agreements. Courts have generally agreed that if a consumer crosses out an arbitration clause and the company does business with the consumer anyway, the arbitration clause does not become part of the agreement.¹⁷⁵ Even if a company's clickwrap agreement provided that consumers could not alter the terms of the contract, courts rarely give effect to such boilerplate language because it constitutes an obvious attempt to circumvent the UCC battle of the forms provision.¹⁷⁶ Consumers could therefore reclaim their right to sue in court by employing computer programs that would routinely excise arbitration agreements in clickwrap agreements.

2. *Browsewrap Agreements*

Like with clickwrap agreements, consumers could apply a similar tactic to engage in a battle of the forms when faced with browsewrap agreements, but using a different type of software. A browsewrap agreement appears somewhere on a company's website and states that a consumer accepts the terms of the agreement by using the website or by buying the company's products. For example, Amazon's browsewrap agreement provides, "By using Amazon Services, you agree to these conditions."¹⁷⁷ Browsewrap agreements are more passive than clickwrap agreements and do not require explicit assent.

Consumers should be wary of browsewrap agreements even though the enforceability of such agreements is sometimes questionable. Courts generally hold that a browsewrap agreement is not enforceable if a consumer never receives notice of its existence.¹⁷⁸ For example, courts have refused to enforce

notice might also apply, such that a company could not simply bury its head in the sand if it knew consumers were routinely sending it alternative terms. *See id.* at 2–3.

175. *See, e.g.,* Gen. Steel Corp. v. Collins, 196 S.W.3d 18, 21 (Ky. Ct. App. 2006) ("Where the terms of the offer and acceptance are clearly at odds, they cancel out one another, and neither becomes a part of the contract. Under [the UCC battle of the forms provision], the effect of [the plaintiff's] obliteration of the arbitration clause was to eliminate it from the parties' agreement.").

176. *See, e.g., id.* at 22 (holding that a no-modifications clause cannot preclude a battle of the forms); Corestar Int'l Pte. Ltd. v. LPB Commc'ns, Inc., 513 F. Supp. 2d 107, 118 (D.N.J. 2007) (holding that a clause prohibiting modifications unless approved by the seller could not preclude a battle of the forms); Lockheed Elecs. Co. v. Keronix, Inc., 170 Cal. Rptr. 591, 595–96 (Cal. Dist. Ct. App. 1981) (rejecting a seller's attempt to circumvent a battle of the forms through a provision stating that it accepted the deal only if all its own terms were accepted).

177. Amazon, *Conditions of Use* (Dec. 5, 2012), <http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088>.

178. *See* Major v. McCallister, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) (noting that courts generally will not enforce browsewrap agreements unless the site's users receive "actual or constructive knowledge of [the] site's terms and conditions prior to using the site" (quoting Sw. Airlines Co. v. BoardFirst, L.L.C., No. 3:06-CV-0891-B, 2007 WL 4823761, at *5 (N.D. Tex. Sept. 12, 2007))).

browsewrap conditions against consumers if a website merely provides a hyperlink at the bottom of the page that says “Terms of Use,” because the hyperlink does not afford the consumer sufficient notice of the existence of contract terms.¹⁷⁹

However, courts have upheld browsewrap agreements as binding as long as a company provides minimal notice. For example, a company can create an enforceable browsewrap agreement by sending consumers a letter alerting them to the existence of the agreement.¹⁸⁰ Additionally, courts have indicated that if the company states somewhere “outside of the Conditions of Use” on the company’s website that the browsewrap agreement is “binding on all users,” it may be enforceable.¹⁸¹ For example, one commentator noted that Southwest Airline’s browsewrap agreement is likely enforceable because it provides notice to consumers on the bottom of its webpage by stating, “Use of the Southwest websites and our Company Information constitutes acceptance of our Terms and Conditions.”¹⁸² Thus, although courts are more likely to enforce clickwrap agreements than browsewrap agreements, consumers should still be wary of browsewrap agreements because a consumer can unwittingly accept such an agreement without ever noticing its existence.

Consumers could combat browsewrap agreements by sending terms of their own to a company’s server using a computer program, thereby engaging a battle of the forms. According to Professor Joshua Fairfield, a browser plug-in could allow consumers to set up a “standardized, simple, machine-readable” flag that could be sent to a company’s server and that could communicate the message, “If you [choose] to deal with me, you should know that I reserve all rights and remedies, and specifically reject any arbitration clause.”¹⁸³ In turn, a corporation could configure its computer servers to ignore web traffic that contains certain flags. As Professor Fairfield explains, “Corporations can set their web servers to respond to the flag and [either] respect the consumer’s preference, or choose not do business with her, as the corporation chooses.”¹⁸⁴ If the company’s web server failed to reject the consumer’s page visit despite the consumer’s demand for alternative contract terms, this passive acceptance would result in a battle of the forms. Under the Uniform Electronic

179. See, e.g., *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012) (refusing to enforce the browsewrap agreement because “the website never directs a user to the Terms of Use”).

180. See, e.g., *Vernon v. Qwest Commc’ns Int’l, Inc.*, 857 F. Supp. 2d 1135, 1150–51 (D. Colo. 2012), *aff’d*, 925 F. Supp. 2d 1185 (D. Colo. 2013).

181. See, e.g., *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 793 (N.D. Ill. 2011) (stating that the browsewrap agreement provided insufficient notice because the website did not say anywhere “outside of the Conditions of Use themselves” that there was a browsewrap agreement that bound users of the site).

182. See Sam S. Han, *Predicting the Enforceability of Browse-Wrap Agreements in Ohio* (Jan. 2010), at 39–40, <http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=samster>; see also SOUTHWEST.COM, <https://www.southwest.com/> (last visited Mar. 9, 2015).

183. Fairfield, *supra* note 159, at 581, 585.

184. *Id.* at 585.

Transactions Act, a web server's receipt of a consumer's contract provisions is sufficient to engage a battle of the forms, regardless of whether a real person ever sees the consumer's terms.¹⁸⁵ Thus, if a consumer sets up her web browser to convey a proposal to a company's server that the parties *not* arbitrate future disputes, the consumer's "no arbitration" provision would knock out the company's contradictory arbitration terms in the company's browsewrap agreement.¹⁸⁶ A consumer could thereby avoid being bound by an arbitration provision in a browsewrap agreement.

As outlined above, the use of automated contract terms is not an entirely new approach. Companies that want to exclude robots and scrapers (such as the indexing crawlers used by Google)¹⁸⁷ from accessing their servers can post a file called "robots.txt" on their servers.¹⁸⁸ The robots.txt file automatically communicates to other computers accessing the site that crawling is a prohibited use of the website.¹⁸⁹ Courts have held that the use of the robots.txt file creates an enforceable legal right against companies that use crawlers in violation of a website's terms of use.¹⁹⁰ Thus, as with the robots.txt file, courts would be likely to enforce a consumer's electronically transmitted contract terms, even if they were in a format that only a computer could read. As long as courts were willing to enforce machine-readable contract terms, consumers could use software programs that operated similarly to robots.txt to avoid arbitration clauses in browsewrap agreements.¹⁹¹

V.

STRATEGIES THAT WOULD SHIFT ENFORCEMENT TO THE GOVERNMENT

A. Introduction

The demise of class action litigation created an enforcement gap in consumer protection law. Class action litigation has been severely curtailed not

185. See *id.* at 581–82, 585 (noting that machines can make contracts without direct human intervention and arguing that courts should enforce consumers' terms even if they are only machine-readable).

186. Welinder, *supra* note 171, at 230.

187. Robots, crawlers, and scrapers are programs that access certain websites at frequent intervals to automatically retrieve and record specific types of data from the site. See *Crawling & Indexing*, GOOGLE.COM, <http://www.google.com/insidesearch/howsearchworks/crawling-indexing.html> (last visited Mar. 9, 2015). Google's indexing crawler ("Googlebot") automatically crawls the web looking for hyperlinks so it can record information about the site that will later appear in a Google search. *Id.*

188. Fairfield, *supra* note 159, at 582.

189. See *id.*

190. *Id.*; see, e.g., eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1070 (N.D. Cal. 2000) (holding that the defendant had electronically trespassed by using an automated crawler on eBay's website because eBay employed a robots.txt file to notify automated crawlers that it did not consent to being crawled).

191. See Fairfield, *supra* note 159, at 581 ("If courts were to enforce such a contractual term, the non-trivial concerns raised by *Concepcion* would simply cease to exist.").

only by *Concepcion* and class action waivers, but also by heightened federal requirements for class certification—such as requiring that the class be “ascertainable”—and by the Class Action Fairness Act (CAFA), which ensures that most class actions end up in federal court.¹⁹² Because class action litigation has been the primary method for enforcing consumers’ rights, an enforcement gap now exists. This gap can only be filled through government intervention.¹⁹³

However, government enforcement by itself cannot be a panacea for the enforcement gap because government resources are scarce, and state attorneys general are notoriously overburdened. As Professor Myriam Gilles and Attorney Gary Friedman explain, “[B]udgetary constraints are only getting worse in the current economic climate[,] [s]o it is unrealistic to expect state [attorneys general] to step into the breach [left by declining class action litigation] with their own resources.”¹⁹⁴ It is therefore necessary that state attorneys general partner with private counsel to augment the state’s enforcement resources. Enacting qui tam legislation could foster such public-private partnerships while avoiding the pitfalls of arbitration. Because qui tam lawsuits are brought on behalf of the government, they cannot be subject to binding arbitration because the government, as a non-party to the agreement, is not bound by a consumer’s agreement to arbitrate.

*B. States Could Adopt a Qui Tam Statute to Help Enforce Their
Consumer Protection Laws*

States could adopt qui tam legislation, which has been used in the false claims and insurance contexts, to enforce their consumer protection laws. A qui tam statute creates a public-private partnership whereby private parties can assist the attorney general in enforcing the laws of the state. A state’s attorney general benefits by being able to draw upon the resources of private counsel. In turn, private counsel benefit by sharing in any potential recovery with the government and by avoiding the pitfalls of class action litigation, specifically arbitration, certification, and CAFA. This joint enforcement regime swells government coffers, while ensuring that the state’s consumer protection laws still serve their deterrent function in a post-*Concepcion* world, where little to no private enforcement will happen due to the unavailability of the class action device.

The quintessential example of a qui tam statute is the federal False Claims Act (FCA).¹⁹⁵ The FCA was originally created to leverage private resources to help fight fraud perpetrated on the government by U.S. military contractors.¹⁹⁶

192. Gilles & Friedman, *supra* note 131, at 658–60.

193. *Id.* at 660.

194. *Id.* at 669.

195. 31 U.S.C. § 3729 (2012).

196. See Thomas L. Harris, *Alternate Remedies & the False Claims Act: Protecting Qui Tam Relators in Light of Government Intervention and Criminal Prosecution Decisions*, 94 CORNELL L. REV. 1293, 1298–1300 (2009) (arguing that if the government feels relator’s counsel is competent, it

The FCA allows a private party (called a “relator”) to file suit on behalf of the government against any person who has knowingly submitted a “false or fraudulent claim for payment” to the U.S. government.¹⁹⁷ Once a relator has filed suit under the FCA, the government can elect to take over the case.¹⁹⁸ If the government prosecutes the case and prevails, the FCA grants the relator a share of the recovery for bringing the claim to the government’s attention.¹⁹⁹ On the other hand, if the government already has notice of the fraud—either because the fraud has been publicly disclosed (such as in a newspaper) or because another relator had already brought the fraud to the government’s attention—then the relator’s claim must be dismissed.²⁰⁰ Therefore, one of the relator’s key functions is to bring potential legal claims to the government’s attention.

Qui tam statutes also allow the government to draw upon the resources available to private law firms. For example, when the government elects to pursue an FCA claim, the relator’s counsel often serve as co-counsel to the government—taking depositions, reviewing discovery documents, or securing expert testimony.²⁰¹ For these efforts, the FCA allows the relator’s counsel to recover reasonable attorney’s fees and costs.²⁰² By partnering with relator’s counsel, the government can benefit from the resources that private counsel bring to bear, including money, manpower, and expertise.²⁰³ Thus, relators assist the government not only by initiating litigation, but also by providing litigation resources and support.²⁰⁴

Based on the FCA, one might believe that qui tam actions can only be used to recover government funds, but states have also enacted qui tam statutes that only cover wrongs committed against *private parties*. States typically justify such statutes on the basis that deterring such harm is in the public interest. For example, Illinois and California have passed qui tam statutes that allow private parties to bring suit in the name of the state in order to punish fraud against private insurers.²⁰⁵ The California legislature gave a number of public interest justifications for passing its qui tam statute. First, numerous state officials, including the insurance commissioner, are already tasked with

has permitted them to serve a role akin to co-counsel); *see, e.g., Wall Street Journal: HCA Seems Worried About Remaining Liability for Medicare Fraud*, PHILLIPS & COHEN LLP (Feb. 27, 2002), <http://www.phillipsandcohen.com/2002/Wall-Street-Journal-HCA-seems-worried-about-remaining-liability-for-Medicare-fraud.shtml> (six private law firms assisted the government in litigating an FCA claim against Healthcare Associates).

197. 31 U.S.C. §§ 3729(a)(1)(A), 3730(b)(1).

198. 31 U.S.C. § 3730(b)(2).

199. 31 U.S.C. § 3730(d)(1).

200. 31 U.S.C. § 3730(b)(5), (e)(4).

201. Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS., Autumn 1997, at 167, 196–97.

202. 31 U.S.C. § 3730(d)(1).

203. Fisch, *supra* note 201, at 196–97.

204. *Id.* at 195.

205. *See* CAL. INS. CODE § 1871.7(e)(1) (West 2011); 740 ILL. COMP. STAT. 92/15(a) (2002).

rooting out insurance fraud, and a qui tam statute would provide them with additional assistance.²⁰⁶ Second, insurance fraud harms the public because it raises insurance premiums, decreases confidence and faith in the insurance system, and harms competition by unjustly enriching insurers that engage in fraudulent activity at the expense of insurers that play by the rules.²⁰⁷

The same public policy justifications underlying state insurance qui tam statutes could also be used to justify the passage of a qui tam statute to prosecute fraud against consumers. In California, for example, the Attorney General (like the insurance commissioner in the insurance context) is charged with enforcing the State's consumer protection laws.²⁰⁸ In fulfilling this duty, the Attorney General could benefit from the assistance of private relator's counsel.²⁰⁹ In addition, fraud perpetrated upon consumers causes harm in a similar manner as does fraud perpetrated upon insurers. Fraud perpetrated upon consumers harms the public because it decreases overall confidence in the marketplace, increases the cost of transacting (by placing a heavy burden upon consumers to painstakingly scrutinize every transaction), and harms competition by unjustly enriching companies that engage in consumer fraud at the expense of companies that play by the rules.²¹⁰ These strong public policy justifications therefore justify a qui tam statute in the consumer context.

A consumer qui tam statute, modeled on the FCA, the California Insurance Code, and other consumer protection laws, might provide as follows:

(a) Liability.

Any person engaged in a fraudulent, unfair, or abusive business practice²¹¹ shall be liable for three times the amount obtained by these wrongful acts.²¹²

(b) Suits by the Attorney General.

A civil action may be brought under this section by the Attorney General. Any monies recovered shall be paid half to the Attorney General and half to a fund to compensate consumers harmed by fraudulent, unfair, or abusive practices.²¹³

206. See CAL INS. CODE § 1871(a).

207. See CAL INS. CODE § 1871(c)–(h).

208. See CAL. BUS. & PROF. CODE § 17204 (West 2009).

209. Cf. CAL. INS. CODE § 1871(a).

210. Cf. CAL. INS. CODE § 1871(c)–(h).

211. Consumer protection statutes typically protect against unfair, deceptive, and abusive acts. See, e.g., Rebecca Schonberg, *Introducing "Abusive": A New and Improved Standard for Consumer Protection*, 100 CALIF. L. REV. 1401, 1404 (2012) (noting that Congress granted the CFPB the authority to prevent "unfair, deceptive, or abusive act[s] or practice[s] under federal law in connection with any transaction with a consumer for a consumer financial product or service.") (quoting 12 U.S.C. § 5531(a), (b) (2006 & Supp. V 2011)).

212. Cf. CAL. INS. CODE § 1871.7(b) (a person engaged in insurance fraud under this section is liable for three times the amount of fraudulent insurance claims submitted).

213. Cf. CAL. INS. CODE § 1871.7(g)(1)(A)(iv) ("[Monies] shall be paid to the General Fund of the state and, upon appropriation by the Legislature, shall be apportioned . . . for enhanced fraud investigation and prevention efforts").

(c) Suits by Private Persons (“Relators”).

A person may bring a civil action under this section on behalf of the State, and the action shall be brought in the name of the State. The complaint shall be filed under seal, and a copy of the complaint shall be served on the Attorney General.

(1) Time to Intervene.

Within sixty days, the Attorney General shall notify the court whether the government intervenes or declines to intervene in the action. The Attorney General, upon a showing of good cause, may petition the court for a reasonable extension. The court may grant reasonable extensions not to exceed 365 days from the date of filing.

(2) Responsibilities of the Parties.

- A. If the Attorney General intervenes in the action, he or she shall have primary responsibility for prosecuting the action. The relator may continue as a party to the litigation and may assist the Attorney General in prosecuting the action.
- B. If the Attorney General elects not to intervene in the action, the relator may prosecute the action in the name of the government.

(3) Award to Qui Tam Plaintiff.

- A. If the Attorney General intervenes in the action, the relator shall be entitled to a minimum of 15 percent and a maximum of 25 percent of the proceeds of the action or settlement, plus reasonable attorney’s fees and expenses.
- B. If the Attorney General elects not to intervene in the action, the relator shall be entitled to a minimum of 25 percent and a maximum of 30 percent of the proceeds of the action or settlement, plus reasonable attorney’s fees and expenses.
- C. All remaining funds shall be paid half to the Attorney General and half to a fund to compensate consumers that are harmed by fraudulent, unfair, or abusive practices.

(4) Certain Actions Barred.

The court shall dismiss an action or claim under this Section if it contains substantially the same allegations as are disclosed in—

- A. a criminal, administrative, or other civil hearing;
- B. a legislative or administrative report; or
- C. a major news source—
- D. unless,
 - i. the government opposes the dismissal of the

relator's claim or action, or

- ii. the relator possesses knowledge that is independent of and materially adds to the information that is publicly disclosed.

(5) Frivolous Suits.

- A. Upon a showing of good cause by the Attorney General, the court shall dismiss the relator's action or claim.
- B. If the court determines that a cause of action is frivolous, the court shall award the defendant reasonable attorney's fees and costs.²¹⁴

This model qui tam statute has five essential components. First, it allows anyone with original information to bring suit, including whistleblowers. Second, it provides sufficient liability to incentivize both private parties and the Attorney General to bring suit, while still ensuring a sufficient recovery to compensate consumers. Third, it enables relators to sue on their own if the Attorney General lacks the resources to take the case or otherwise declines to pursue it. Fourth, the statute establishes safeguards against frivolous suits. And fifth, the statute is carefully worded to avoid being subject to arbitration clauses signed by consumers. These provisions and their application to the consumer protection context are explained below.

1. The Proposed Qui Tam Statute Allows Anyone with Original Information to Bring Suit, Including Whistleblowers from Within a Company

A qui tam statute has the unique advantage of incentivizing employees of a company who object to the company's treatment of consumers to bring suit on behalf of the state. Many employees object to their employer's practices but have no statutory remedy that would allow them to bring suit. For example, Worlds Savings employee Paul Bishop complained to the bank's executives that the company was issuing mortgage loans to consumers who had no ability to repay the loans. He also alleged that brokers were forging consumers' information so that consumers could qualify for loans they could not afford.²¹⁵ Bishop indicated that he knew the company was "breaking the law"²¹⁶ and that he was willing to sue the company as a "whistleblow[er],"²¹⁷ but no statute empowered him to do so. Had such a statute existed, it might have prevented the ensuing financial debacle when the mortgage bubble burst in 2008, resulting in World Savings losing \$11 billion and becoming the subject of a

214. Cf. 31 U.S.C. § 3730(h)(2) (2012); CAL. INS. CODE § 1871.7(g)(1)(A)(ii).

215. *World of Trouble*, CBS NEWS (Feb. 13, 2009), <http://www.cbsnews.com/news/world-of-trouble/>.

216. *Id.*

217. *See Update: Paul Bishop Loses Arbitration Hearing*, CBS NEWS (June 3, 2010), <http://www.cbsnews.com/news/update-paul-bishop-loses-arbitration-hearing/> (indicating a willingness both to bring suit and to whistleblow, Bishop sued the company in arbitration for terminating him for blowing the whistle to executives about the company's unlawful mortgage practices).

federal investigation due to its unlawful lending practices.²¹⁸ Bishop's experience demonstrates that the ability of company insiders to bring whistleblower (qui tam) lawsuits is critically important because consumers are often not even aware that they have been wronged until it is too late and the damage cannot be undone.²¹⁹

2. *The Qui Tam Statute Provides for Sufficient Liability to Incentivize Suits, Compensate Consumers, and Deter Wrongful Conduct by Companies*

This model statute, in line with the FCA and California Insurance Code, provides for treble damages to create sufficient incentives for both relators and the government to bring suit, while still recovering enough funds to provide some form of compensation to consumers. Without the prospect of obtaining sufficiently large damages, private counsel will not have the incentive to bring suit. In a normal class action, private counsel (under most contingency fee arrangements) can recover up to 30 percent of damages. Under the qui tam statute, private counsel (under the same contingency fee arrangement) could at most recover 30 percent of the relator's share of the recovery. If the relator were only entitled to 25 percent of the government's recovery, the relator's attorney would be limited to 30 percent of that 25 percent, which is 7.5 percent of the total recovery. Earning 7.5 percent as relator's counsel appears paltry in comparison to earning 30 percent as class counsel.

Because under a qui tam statute, plaintiff's attorneys would receive less than a third of what they could earn under a class action, damages would need to be trebled to adequately compensate private counsel. Otherwise, plaintiff's counsel might assist the government only minimally in the litigation process or decline altogether to bring claims to the government's attention. In addition, because the Attorney General receives half of the recovery after the relator takes his or her share, treble damages are also necessary to ensure that the recovery is sufficiently large to make it worth the Attorney General's time to pursue the claim.

Furthermore, treble damages are necessary to deter defendants from defrauding consumers. The statute cannot serve its deterrent function unless the defendant must at least disgorge all of its wrongfully obtained funds; otherwise, a defendant might still profit from its fraud. However, most cases settle for approximately half of the defendant's total damages exposure.²²⁰ If a defendant receives the typical offer to settle for half its total liability, a statute that

218. See *World of Trouble*, CBS NEWS, *supra* note 215; Dean Foust, *Wachovia: Golden West Wasn't Golden*, BLOOMBERG (June 3, 2008), <http://www.businessweek.com/stories/2008-06-03/wachovia-golden-west-wasnt-golden>.

219. See Sternlight, *Procedurally Difficult Claims*, *supra* note 6, at 108.

220. See BRIAN C. ELMER & ALAN W.H. GOURLEY, CROWELL & MORING, *FCA SETTLEMENTS: A PRACTICAL GUIDE FOR DEFENSE COUNSEL* 5, http://www.crowell.com/documents/DOCASSOCFKTYPE_PRESENTATIONS_440.pdf (last visited Mar. 9, 2015).

provides for only actual damages will result in insufficient deterrence because the defendant can still retain half its ill-gotten gains. Adopting double or treble damages can achieve a greater deterrent function, as exemplified by the success of the FCA's treble damages provision. Studies have found that for each dollar of fraudulently obtained funds the government recovers under the FCA, the Act deters another twenty-nine dollars' worth of fraud by other companies.²²¹ Treble damages are therefore necessary to ensure an optimal level of deterrence.

While treble damages may seem large, they are not unique to the qui tam context. The United States has long employed treble damages in the antitrust context to deter unfair business practices.²²² In addition, treble damages have been used in the consumer protection context in the international arena. For example, China recently adopted treble damages in amendments to its consumer protection laws.²²³ The necessity of treble damages is therefore well recognized as a deterrent against fraud and unfair business practices.

3. *The Qui Tam Statute Allows a Relator to Prosecute the Suit Alone if the Attorney General Declines to Intervene*

Another benefit of the qui tam statute is that it allows relators to prosecute an action on their own if the Attorney General is unwilling or unable to take the case. This enables the government to recover funds without expending litigation resources. For example, in enacting the FCA, Congress believed that the relator would act as a "check that the [g]overnment does not neglect evidence, cause undu[e] delay, or drop the . . . case without legitimate reason."²²⁴ In the FCA context, the relator offers an important alternative avenue of recovery if the Attorney General does not or cannot take the case. In the context of a consumer qui tam statute, if the Attorney General refused to prosecute a meritorious claim—either because he or she misjudged the strength of the evidence or because the Attorney General lacked sufficient resources to do so—the relator could still ensure a recovery both for the government and for consumers. If the relator proceeds alone under the statute, she would be entitled to 30 percent of the recovery at most, which would allow the government to retain at least 70 percent of the winnings without expending any litigation

221. See WILLIAM L. STRINGER, TAXPAYERS AGAINST FRAUD, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT 32, 33–35 (Sept. 1996) (FCA deterred at least \$35.6 billion of fraud between 1986 and 1996); *Fraud Statistics 1986–2008*, TAXPAYERS AGAINST FRAUD, <http://www.taf.org/FCA-stats-DoJ-2008.pdf> (last visited Mar. 9, 2015) (demonstrating that the FCA recovered \$1.215 billion between 1986 and 1996).

222. See 15 U.S.C. § 15(a) (1990).

223. Adam Jourdan, *China Overhauls Consumer Protection Laws*, REUTERS (Oct. 25, 2013, 2:26 AM), <http://www.reuters.com/article/2013/10/25/us-china-consumer-law-idUSBRE99005E20131025> ("The amendments to the 1993 law include increasing compensation for consumers Compensation rose from equaling the amount of damages to three times the amount.")

224. S. REP. NO. 99-345, at 26 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5291.

resources of its own.²²⁵ Under the proposed statute, the government and consumers would thereby benefit when private actors enforced the law in the government's stead.

4. *Safeguards Protect Defendants Against Frivolous Litigation*

Because the qui tam statute exposes defendants to considerable potential liability and allows anyone to bring suit, the qui tam statute would need to provide safeguards to prevent frivolous lawsuits. The proposed statute provides three such safeguards.

First, the statute bars actions based on public disclosures of information, which prevents the type of "parasitic" or "shakedown" lawsuits to which defendants often object. For example, "shakedown lawsuits" based on public disclosures were the primary reason that California voters passed Proposition 64, which significantly curtailed California's private attorney general (PAGA) statute under its consumer protection laws by introducing a strict standing requirement.²²⁶ Thus, by barring suits based on public and widely available information, the proposed qui tam statute surmounts these criticisms. The statute's "public disclosure bar" would, for example, prevent a relator from filing a lawsuit by copying facts from a complaint in another lawsuit, a government report, or a report in the news media. By requiring that the relator possess some original information that "materially adds" to any information that has already been disclosed, a qui tam statute would ensure that only consumers with actual complaints or whistleblowers from within a company could file suit.

Second, the qui tam statute provides a safeguard by granting the Attorney General the discretion to dismiss the suit upon a showing of good cause. In the case of frivolous suits, "the responsible [Attorney General] [can] act[] as a . . . bulwark against unmeritorious cases."²²⁷ For example, in California, the Attorney General wanted to curtail the perceived abuses of the PAGA statute prior to the enactment of Proposition 64, but lacked the power to do so. The Attorney General's only recourse was ultimately to bring a lawsuit against the law firms that were accused of engaging in "shakedown lawsuits," on the theory that they were engaged in an unlawful business practice.²²⁸ However, if those same firms had filed their suits under the proposed qui tam statute, the

225. See 31 U.S.C. § 3730(d)(2) (2012).

226. See Steven Greenhut, *How California's Consumer Laws Legalize Extortion California Trial Lawyers Target Small Business with Frivolous Lawsuits*, *The Freeman*, FOUND. FOR ECON. EDUC. (May 1, 2003), <http://fee.org/freeman/detail/how-californias-consumer-laws-legalize-extortion#axzz2izi4USLx> (providing a framework for situations in which law firms, for example, would file PAGA suits when a restaurant was downgraded from an A to B as soon as this information was publicly disclosed).

227. Gilles & Friedman, *supra* note 131, at 671.

228. *Attorney General Sues Law Firm for Alleged 'Shakedown'*, SACRAMENTO BUS. J. (Feb. 26, 2003, 3:43 PM), <http://www.bizjournals.com/sacramento/stories/2003/02/24/daily29.html?page=all>.

Attorney General could have dealt with such firms more expeditiously by simply instructing the court to dismiss all of their claims. No complex lawsuit would have been required.

Third, the model qui tam statute provides that a court must award attorney's fees to defendants if it deems the plaintiff's case frivolous, which allows defendants to fight shakedown artists without wasting their own resources. These three safeguards discourage lawyers from filing frivolous litigation under the qui tam statute.²²⁹

5. *A Qui Tam Statute Would Not Be Subject to Arbitration Agreements*

The key benefit of a state qui tam statute is that it bypasses any arbitration agreement in a consumer contract. The relator brings the suit on behalf of the government, not on his or her own behalf, and the government cannot be bound by a consumer arbitration agreement to which it was never a party. In the FCA context, a number of courts have held that "qui tam claims [are] non-arbitrable, because (1) they [are] outside the scope of [the] employment contract, and (2) as a relator, the plaintiff [stands] as a private representative of the United States government."²³⁰

In addition, the Supreme Court has held that an arbitration clause does not bind the government even if the government is bringing suit to benefit someone who *is* bound by an arbitration agreement.²³¹ In *EEOC v. Waffle House*, the Court held that in an EEOC enforcement action, the government is not bound by arbitration agreements signed by individuals on whose behalf it is bringing suit.²³² Law review commentators have also concluded that suits by the government are "impervious to the increasingly restrictive rules governing class [actions]."²³³

However, a qui tam statute needs to be carefully drafted so that it does not sound like a PAGA statute, because PAGA suits might be subject to binding arbitration. PAGA suits fall somewhere in between a class action and a qui tam action. In California, for example, the state's PAGA labor code statute allows any "aggrieved employee" to bring a lawsuit for labor code violations not only on behalf of the state, but also on behalf of "other current or former employees."²³⁴ Seventy-five percent of any recovery under California's PAGA statute goes to the state and the remaining 25 percent is split among the

229. Big business might still oppose a consumer qui tam statute despite these safeguards, but in states that have a ballot-initiative process, opposition from big business might not be as influential with voters as it is with state legislatures.

230. See *Orcutt v. Kettering Radiologists, Inc.*, 199 F. Supp. 2d 746, 755 (S.D. Ohio 2002) (emphasis removed) (citing New York case law and reaching a similar result).

231. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 298 (2002).

232. *Id.*

233. Gilles & Friedman, *supra* note 131, at 665.

234. See CAL. LAB. CODE § 2699(a) (West 2004).

aggrieved employees.²³⁵ PAGA suits resemble qui tam actions because the plaintiff sues on behalf of the state, but they also resemble a class action because the plaintiff sues on behalf of a class of aggrieved employees and can achieve a recovery on their behalf. PAGA suits, however, differ from qui tam actions because the government cannot intervene in the suit and cannot exercise control over the litigation.²³⁶ And PAGA suits differ from class actions because, although the plaintiff represents other “aggrieved employees,” the plaintiff need not meet class certification requirements to bring a PAGA suit.²³⁷

While the California Supreme Court has held that the FAA does not preempt the state’s PAGA statute, it is not clear how the U.S. Supreme Court or other federal courts would rule on this issue. The California Supreme Court held that because a PAGA suit brought on the state’s behalf is a “type of qui tam action,” it is not subject to binding arbitration because the state was never a party to the employer’s arbitration agreement.²³⁸ However, the court below construed a PAGA suit as being closer to a class action than a pure qui tam action because the plaintiff represents other similarly situated individuals, and as a result, it held that *Concepcion* was the controlling precedent.²³⁹ It is anyone’s guess how the U.S. Supreme Court would rule on PAGA statutes. Nevertheless, Professor Janet Cooper Alexander of Stanford Law School argues that a qui tam statute is “more likely” to avoid FAA preemption than a PAGA statute because courts might consider PAGA suits to be too similar to class actions, which are subject to binding arbitration under *Concepcion*.²⁴⁰

To avoid being construed as too similar to a class action, a model qui tam statute should provide that suits are brought solely “on behalf of the State,” as opposed to the wording of California’s PAGA statute, for example, which states that suits are brought on behalf of the state and “other aggrieved employees.”²⁴¹ In addition, “the statute c[an] award a share of the penalties to the group affected by the misconduct but should make it clear that the award is not compensation for individual claims and is awarded to the group as a whole.”²⁴² The model qui tam statute outlined above would achieve this purpose by authorizing the state to distribute recovered funds to *any* consumers harmed by deceptive, unfair, or abusive practices—not necessarily the specific consumers harmed by the practice that was the source of the recovery. The

235. See CAL. LAB. CODE § 2699(i).

236. See generally CAL. LAB. CODE § 2699 (providing no mechanism for the state to intervene in the action).

237. See *Arias v. Superior Court*, 209 P.3d 923, 930 (Cal. 2009).

238. See *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 148 (Cal. 2014) (emphasis removed).

239. See *id.* at 133–34.

240. Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1235 (2013).

241. See CAL. LAB. CODE § 2699(a); *Iskanian*, 327 P.3d at 133 (the attorney-plaintiff sues on behalf of the state in a PAGA suit).

242. Alexander, *supra* note 240, at 1236.

government has discretion to decide how to disburse the funds. Therefore, the statute outlined above is likely to be construed as authorizing only a qui tam action, not class-wide relief, and would thus be less likely to run afoul of the FAA than a PAGA statute.

A qui tam statute could thus solve many of the problems inherent in class actions while effectively combining the enforcement resources of the public and private sector. A qui tam statute ensures that binding arbitration clauses cannot frustrate the enforcement of a state's consumer protection laws. In addition, a qui tam statute bypasses class certification requirements and CAFA's removal jurisdiction.²⁴³ Lastly, a qui tam statute strikes the perfect balance between public and private enforcement of consumer protection laws by creating a "more flexible regulatory process in which [one is] not forced to choose between the relative advantages of public and private enforcement, or between the pursuit of compensation and deterrence."²⁴⁴

CONCLUSION

Over the last two decades, the U.S. Supreme Court has made it increasingly difficult for consumers to pursue class action litigation. In contrast, other countries have been moving in the entirely opposite direction. The European Commission in June 2014 adopted an official recommendation that all EU member states should, within two years, adopt measures for "collective redress."²⁴⁵ European countries thus have found that class actions are an important way to help individuals vindicate their rights. In an age where *Concepcion* renders class action waivers nearly invulnerable to attack, consumers need methods to assist them in vindicating their rights.

While consumers and practitioners can make efforts to ameliorate the problem, ultimately the best solutions must come at the level of state legislative reform. For example, consumers can take individual action by crossing out arbitration agreements and using the "battle of the forms" to remove such clauses from all adhesion contracts or by banding together in "unions" to demand the removal of arbitration terms from consumer contracts. These approaches, however, put a great deal of onus on consumers to be aware of the terms in their contracts and to anticipate the potential need for litigation. If too few consumers are sufficiently motivated to combat arbitration clauses, these particular solutions will fail.

Law firms, likewise, can attempt to find ways to effectuate collective (and therefore more cost-effective) arbitration, such as through the assignment of claims. However, such an approach places a heavy burden on law firms to organize consumers. Moreover, companies can quickly respond to this clever

243. Gilles & Friedman, *supra* note 131, at 666.

244. Fisch, *supra* note 201, at 202.

245. *EU Takes Steps Towards a European Class Action*, SIDLEY AUSTIN (June 12, 2013), <http://www.sidley.com/EU-Takes-Steps-towards-a-European-Class-Action-06-12-2013/>.

method of consolidation by specifically barring this tactic in an amendment to their arbitration clauses.

The two most promising solutions to the problems posed by class action waivers involve legislative reforms: an enhanced consumer remedies statute and a consumer qui tam statute. An enhanced consumer remedies statute would make it viable for consumers to pursue their claims on an individual basis by providing them a sufficient recovery to enable them to retain counsel. However, such a statute would still not protect consumers who are unaware that they have been wronged or who do not realize they have a cognizable legal claim. Thus, an enhanced remedies statute may prove an insufficient deterrent against fraudulent, unfair, or abusive practices leveraged against consumers.

In contrast, a qui tam statute would avoid all of these problems by allowing the collective enforcement of consumer rights through a partnership between public and private actors. A qui tam statute presents the ideal situation for states. It would provide funds for the state Attorney General's office, allow the state to take full advantage of the resources of private counsel, and ensure the continued enforcement of the state's consumer protection laws. At the same time, it would provide significant safeguards against frivolous suits. With the consumer class action on its deathbed, a new legal process must arise from the ashes to take its place.

