NO. 08-16080-CC

United States Court of Appeals
For the Eleventh Circuit

LOURDES CRUZ, PAUL FLAHERTY, JR., and CURTIS SMITH, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

CINGULAR WIRELESS, LLC, now known as AT&T MOBILITY LLC,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida, Ft. Myers Division, No. 2:07-cv-00714-JES-DNF, Hon. John E. Steele, United States District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and 29 and Eleventh Circuit Rules 28-1 and 29-2, set forth below is a list of the trial court judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party, to the best of my knowledge:

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AB Cellular Holding, LLC

Adorno & Yoss, LLP

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AT&T Mobility Corporation

AT&T Mobility LLC

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Dated: February 17, 2009

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STATEMENT OF THE ISSUES

The Chamber of Commerce of the United States of America (the "Chamber") adopts the Statement of the Issues as set forth in the Brief of Defendant-Appellee AT&T Mobility LLC f/k/a Cingular Wireless LLC ("ATTM").

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. The Chamber represents the interests of its members in important matters before the state and federal courts, legislatures, and executive branches. To that end, the Chamber files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. In particular, the Chamber has been involved in a wide variety of cases involving the interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Many Chamber members, constituent organizations, and affiliates include in their business contracts standard provisions that, in appropriate circumstances, require the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of

resolving disputes with consumers and other contracting parties and because arbitration minimizes the disruption and loss of good will that often results from litigation. Based on the Supreme Court's consistent endorsement of arbitration over the past several decades (most recently in February 2008), Chamber members have structured millions of contractual relationships around arbitration agreements.

The Chamber is deeply concerned that the state-law rule proposed by Appellants may cause its members to abandon arbitration in the vast area of ordinary consumer contracts. Individual arbitration of typical consumer disputes has proved efficient, effective, and satisfactory to both consumers and businesses alike. Injecting class procedures into contractual agreements to arbitrate will effectively eliminate the virtues of arbitration, while multiplying the stakes exponentially. The risk to businesses of class arbitration is simply too high, while the benefits of doing so are non-existent. The imposition of a class-arbitration requirement may result in the wholesale abandonment of arbitration in a huge swath of consumer-business transactions, driving up costs, and hence prices, accordingly. The Chamber thus has a strong interest in presenting its views on the pending petition to this Court.

All parties have consented to the filing of this *amicus curiae* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court held that ATTM's arbitration agreement was enforceable under state law, rejecting Appellants' contention that ATTM's arbitration provision is contrary to Florida public policy because it requires individual arbitration and precludes class arbitration. The district court concluded that Florida's Deceptive and Unfair Trade practices Act ("FDUTPA") does not confer a "non-waivable right" to class representation.

In their opening brief on appeal, Appellants continue to argue that ATTM's arbitration provision is contrary to Florida public policy, and ask this Court to certify the issue to the Florida Supreme Court on the basis that Florida law is unsettled. Rather than repeat the reasons that ATTM has given for rejection of Appellants' argument – including that Florida law is not unsettled because *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025 (Fla. 4th Dist. Ct. App.), *rev. denied*, 918 So. 2d 292 (Fla. 2005) rejected the precise argument that Appellants advance here – in this brief we make related but distinct points to demonstrate that the district court's decision below is correct regardless of the state of Florida law.

First, Appellants' argument directly conflicts with the FAA's express provisions and its purpose to protect individualized proceedings based on agreement. The FAA directs federal courts to compel arbitration "in the manner provided for" in the arbitration agreement. 9 U.S.C. § 4. Because class arbitration

was non-existent when the FAA was enacted, Congress necessarily understood "arbitration" to involve individualized proceedings when it used that term in the statute. The paradigmatic and exclusive form of arbitration existing when Congress decided to protect it cannot be rendered unacceptable *post hoc* by the development of new rules of court procedure well after the statute was enacted.

Second, a prohibition on class arbitration waivers would largely eliminate the many benefits of arbitration while increasing the risks to defendants of massive unreviewable judgments. As a practical matter, a ban on class arbitration waivers would disproportionately burden arbitration in violation of Section 2 of the FAA and would prompt businesses to abandon arbitration altogether. Such a rule would ultimately be harmful to consumers, who benefit greatly from individualized arbitration and derive little direct monetary benefit from class actions.

Finally, the FAA preempts state-law rules declaring arbitration agreements unenforceable on the ground that they do not permit class-wide relief.

ARGUMENT

The Chamber agrees with ATTM that there is no Florida public policy against agreements to arbitrate individually and that certification or reversal is inappropriate because a Florida appellate court already has rejected Appellants' "public policy" argument. Rather than belabor matters already well-articulated by ATTM, this brief explains how a prohibition of class arbitration waivers violates

the express provisions of the FAA and undermines the many benefits that arbitration affords businesses and consumers. Appellants' effort to elevate class actions to an untouchable stature is neither legally nor historically supportable; nor is it necessary for the vindication of consumers' rights.

I. THE FAA MANDATES ENFORCEMENT OF AGREEMENTS TO ARBITRATE INDIVIDUALLY.

The FAA's history and textual references to "arbitration" show that Congress plainly intended to protect parties' choice to resolve disputes on an individual basis. Appellants' argument – that an agreement to arbitrate as intended by Congress is nonetheless unenforceable based on a purported *subsequent* state-law policy favoring a later-developed class-action procedure – conflicts with the FAA's language and intent. Class actions were nonexistent when the FAA was enacted and thus not contemplated by the FAA. Thus, it cannot be the case that class actions are indispensable to arbitration agreements.

A. The FAA Protects Private Choice To Arbitrate Individually.

The FAA provides substantive federal protection to an agreement to "settle [a subsequent controversy] by arbitration." 9 U.S.C. § 2. Fundamental to the application of the FAA is an understanding of the word "arbitration." The FAA contains no express definition of arbitration, but contextual and historical insights are instructive as to what was meant by the term.

First, numerous provisions of the FAA establish that arbitration is a dispute resolution *procedure* created by *agreement*. Section 3 of the FAA provides for a stay of a suit in federal court until "arbitration has been had in accordance with the terms of the *agreement*." 9 U.S.C. § 3. Section 4 of the FAA is even more explicit, allowing a party to an arbitration agreement to petition a federal court "for an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. § 4 (emphasis added). The FAA thus recognizes the primacy of private choice of procedures and provides default rules only where such choice has not been exercised. *See, e.g.*, 9 U.S.C. § 5 (parties required to appoint arbitrator pursuant to method provided in the agreement, and use default method if not so provided). Congress intended that the procedures or "manner" of arbitration would be determined by agreement of the parties, not by external imposition.

Indeed, the legislative history of the FAA reflects a specific concern with state laws that allowed arbitration only if the parties agreed to particular state rules and failed to protect arbitration agreements containing procedures that varied from such rules. *Hearing on S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 8 (1923) (criticizing state laws allowing only "technical arbitration by which, if you agree to arbitrate under the method provided by the statute, you have an arbitration by statute * * * [which has] nothing to do with validating the contract to arbitrate").

Second, as a historical matter, "arbitration" as used in the FAA necessarily encompasses *individualized* arbitration, given that such arbitration was the *only type* that existed in 1925. Class arbitration was unheard of. "[T]he FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding—apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 57 (2007). An arbitration agreement thus cannot be deemed unenforceable or contrary to public policy based on its requirement that arbitration proceed exactly as the FAA contemplated – on an individual basis. Individualized arbitration is plainly acceptable and protected.[1]

Congress clearly viewed individualized arbitration as the paradigm of what it was protecting. Appellants' argument that such paradigm is inconsistent with public policy (as compared to alternative procedural devices not then in existence)

[1] That is not to say that the FAA would *not* protect a private choice to adopt class-arbitration procedures – the statute is all about choice, after all. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 454, 123 S. Ct. 2402, 2408 (2003) (remanding for arbitral determination of whether the *agreements* permit class arbitration in order to "enforc[e] the parties' arbitration agreements according to their terms"). Rather, it simply demonstrates that the FAA affirmatively *approved* of the only type of arbitration that existed at the time – individualized arbitration.

is a direct repudiation of Congress's judgment that individualized "arbitration" was worthy of protection.

B. The Modern Class Action Is Not So Fundamental That An Agreement Not To Use It Is Contrary To Public Policy.

The ability to obtain money damages in a class action is a relatively recent development, and the type of representative actions historically available in equity differed fundamentally from modern class actions. A procedure of such recent vintage cannot be so fundamental that its unavailability would render an arbitration agreement contrary to public policy.

The modern class action is "something out of the ordinary, an essentially new turn in legal events." Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977).[2] The Supreme Court's initial rules of practice for federal courts of equity,

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[2] Although legal historians once viewed the modern class action as a descendant of representative actions in seventeenth-century English chancery, research shows those representative actions to have been more like "archaic remnants of a medieval social and litigative structure" than forerunners of the modern class action. Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 136 (1987). "Seventeenth-century group litigation is not about the legal rights of aggregated individuals but about the residual incidents of status flowing from membership in agricultural communities poised at the edge of a market economy." *Id.* Notably, "none" of those group cases involved "actions for money damages." *Id.* at 135. Even today, damages are not available in representative actions in England except in limited circumstances. *See* Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT'L L. 249, 253 (2001).

promulgated in 1822, did not contain ***any*** provisions for class actions. *See* 20 U.S. (7 Wheat.) xvii-xxi (1822). Even the original version of Federal Rule of Civil Procedure 23, promulgated in 1937, did little to promote the use of class actions, in part because the circumstances in which absent parties would be bound by a class action ruling remained unclear. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 381 (1967).

"[M]odern class action practice emerged in the 1966 revision of Rule 23" (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833, 119 S. Ct. 2295, 2308 (1999), which gave federal court class actions their "current shape" (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 2245 (1997)). Revised Rule 23's "most adventuresome innovation" was its authorization of "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Id.* at 614.

Class actions in Florida state courts are an even more recent development. Enacted in its current form in 1980, Fla. R. Civ. P. 1.220 is modeled after revised federal Rule 23. Fla. R. Civ. P. 1.220 Advisory Committee's Note. The Florida Supreme Court "completely revised" Florida's class action rule in 1980 to "bring it in line with modern practice." *Id.*; *see also The Florida Bar*, 391 So. 2d 165, 168-170 (Fla. 1980).

For most of their histories, then, neither the American legal system in general, nor Florida's legal system in particular, provided for class-wide resolution of individual claims, and class actions for damages of the type so prevalent today took shape no more than 43 years ago. Such a recent innovation can hardly be deemed essential to dispute resolution.

To the contrary, it is well established that the right to bring a class action is "merely a procedural one * * * that may be waived." *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). "[P]arties are generally free to structure their arbitration agreements as they see fit," and may "specify by contract the rules under which that arbitration will be conducted." *Volt Info. Sciences v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1259 (1989). Just as parties to an arbitration agreement may "stipulate to whatever procedures they want" (*Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994)), they may agree to forgo procedures they ***don't*** want, such as jury trials[3] (a right with a far richer pedigree than the right to proceed on a class-

[3] *See, e.g., Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) ("[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.") (internal quotation marks omitted).

wide basis) and class actions. Numerous federal and state courts therefore have held that arbitration provisions that preclude class actions are enforceable.[4]

The opportunity for parties to determine procedures to resolve their disputes is in large part what distinguishes private arbitration from litigation. By agreeing to arbitrate, parties intentionally relinquish "the procedures and opportunity for review of the courtroom." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20,

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[4] *See, e.g.*, *Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373-78 (3d Cir. 2000); *Lloyd v. MBNA Am. Bank, N.A.*, 27 F. App'x 82, 84 (3d Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638-639 (4th Cir. 2002); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Pleasants v. Am. Express Co.*, 541 F.3d 853, 858 (8th Cir. 2008); *Jenkins v. First American Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-819 (11th Cir. 2001); *Adler v. Dell, Inc.*, 2008 WL 5351042, at *11 (E.D. Mich. Dec. 18, 2008) ("the decisions of the majority of Circuit Court of Appeals" hold that consumer agreements to arbitrate individually are enforceable); *In re Jamster Mktg. Litig.*, 2008 WL 4858506, at *4-*6 (S.D. Cal. Nov. 10, 2008) (agreements to arbitrate individually are enforceable under Illinois, Maryland, and Mississippi law); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) (class waivers "are a common feature of consumer arbitration agreements, and numerous courts have recognized that they are valid and fully enforceable"); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005) ("Numerous courts, both federal and state, have rigorously enforced no-class-action provisions in arbitration agreements and found them to be valid...."); *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448 (N.Y. App. Div. 2003) ("we are in accord with authorities holding that a contractual proscription against class actions ... is neither unconscionable nor violative of public policy"); *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698 (Tenn. Ct. App. 2006) ("the overwhelming majority view on this issue" is that agreements to arbitrate individually are enforceable).

31, 111 S. Ct. 1647, 1655 (1991). By the same token, agreements to resolve disputes through individual arbitration rather than class procedures cannot be deemed contrary to public policy. Indeed, the U.S. Supreme Court's holding in *Gilmer* — that a statute expressly authorizing claims on behalf of "other employees similarly situated" (29 U.S.C. § 216(b)) did not preclude agreements mandating "individual attempts at conciliation" — cannot be reconciled with any notion that such mandates are *per se* contrary to public policy. *Gilmer,* 500 U.S. at 32, 111 S. Ct. at 1655 (internal quotation marks omitted).

II. APPELLANTS' RULE THWARTS CONSUMER INTERESTS BETTER SERVED THROUGH INDIVIDUAL ARBITRATION.

A. Individual Arbitration Effectively Protects Consumer Rights.

Contrary to Appellants' and *amicus* AARP's view that requiring individual arbitration would be "exculpatory," the Supreme Court has stated that the FAA reflects Congress's determination that arbitration serves "the needs of consumers." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280, 115 S. Ct. 834, 842 (1995). Congress has explained that:

> it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.

Id. (quoting H.R. Rep. No. 97-542, at 13 (1982)). Congress has since reaffirmed that arbitration helps avoid the "delays, expense, uncertainties, loss of control, . . . and animosities that frequently accompany litigation," adding that "individuals . . . already find the legal system inaccessible, because of its complexity and expense." Y2K Act, Pub. L. No. 106-37, § 2(a)(3)(B)(iii), (iv), 113 Stat. 185, 186 (1999) (codified at 15 U.S.C. §§ 6601-17).

Arbitration benefits consumers by providing "a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280-281, 115 S. Ct. 842-843. Arbitration is less expensive because it resolves disputes more quickly: the average length of an AAA arbitration from filing to award is less than six months. *Id.* at 280 (citing AAA Amicus Brief); *see also* AAA, *Analysis of the AAA's Consumer Arbitration Caseload* (Jan.-Aug. 2007) (on average, desk arbitrations are resolved in four months, and in-person arbitrations are resolved in six months) available at http://www.adr.org/si.asp?id=5027. Class actions, by contrast, take years. Certification of a class requires notice to potential class members and inquiry into adequate representation, conflicts within the proposed class, commonality of factual and legal issues, manageability, and other due process issues. Arbitration expedites dispute resolution and reduces costs by eliminating or significantly

reducing pre-hearing motion practice and discovery and by severely limiting the bases for appeal.[5]

Consumers also benefit from arbitrators' greater flexibility than courts to provide relief on consumer claims. For example, AAA Commercial Arbitration Rule 45 permits an award of "any remedy or relief," including attorneys' fees and costs, whereas courts generally may not award exemplary damages for breach of contract or attorneys' fees without specific contractual or statutory authority. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602, 121 S. Ct. 1835, 1839 (2001) (discussing "American Rule" on attorneys' fees); *Barnes v. Gorman*, 536 U.S. 181, 187, 122 S. Ct. 2097, 2099 (2002) ("punitive damages . . . are generally not available for breach of contract").

Arbitration has, in practice, proven to be immensely "helpful to individuals." *Allied-Bruce*, 513 U.S. at 280, 115 S. Ct. at 842. For example, a study of

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[5] The costs of consumer arbitration have also been declining "as arbitration institutions compete to provide low-cost arbitration services." Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 755 (2001). The AAA caps a consumer's responsibility for arbitrator fees at $125 on claims of $10,000 or less, provides for fee waivers or deferrals in hardship cases, and makes arbitrators available to conduct hearings on a pro bono basis. *See* AAA, *Supplementary Procedures for the Resolution of Consumer-Related Disputes* (available at http://www.adr.org); AAA, *Administrative Fee Waivers and Pro Bono Arbitrators Services* (available at http://www.adr.org). Other arbitral institutions have similar provisions.

consumer-lending arbitrations filed between January 2000 and January 2004 revealed that 55% of arbitrations were resolved in the consumer's favor and that an additional 24% either produced a satisfactory settlement or were dismissed at the consumer's request. Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 2 (2004).[6] In general, "consumers are likely to fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1712 (2005).

Equally important, a large majority of consumers that submit their disputes to arbitration report that they are satisfied with the process. In one survey, more than two-thirds of consumers gave their arbitration experience a score of 4 or 5 on a scale of 1-5, with 5 being "very satisfied."[7] These findings contrast sharply with

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[6] Available at http://www.arb-forum.com/media/EY_2005.pdf.

[7] Ernst & Young, *supra*, at 2; *see also* Gary Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* 25 (Aug. 5, 1999) (90% of participants in securities arbitrations believed their cases were handled fairly), available at http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009528.pdf; Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1712 (2005) ("parties who participate in arbitration

(footnote continued on next page)

consumer perceptions of litigation. Only one in three Americans, for example, agrees that taking a case to court is affordable.[8] Arbitration is "widely seen" by participants "as faster (74%), simpler (63%), and cheaper (51%) than going to court."[9] A more recent survey revealed that arbitration has become the preferred way for consumers and businesses to resolve disputes.[10] Eighty-two percent of those surveyed would choose arbitration to settle a serious dispute with a company, while only 15% would choose litigation. *Id.*

Consumers benefit from individual arbitration not only by having their disputes resolved more expeditiously and cheaply than in litigation, but also as the recipients of lower prices. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594, 111 S. Ct. 1522, 1527 (1991) ("passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares

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proceedings are generally satisfied, both in terms of the fairness of the process and the equity of the outcome").

[8] *See* Frank A. Bennack, Jr., *A Report on the National Survey, in National Center For State Courts, How the Public Views the State Courts: A 1999 National Survey* 2, 22 (1999), available at http://www.flcourts.org/gen_public/family/diversity/bin/publicop_natl.pdf.

[9] Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster than Litigation* 5 (Apr. 2005), available at http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf.

[10] Public Opinion Strategies and Benenson Strategy Group, *Key Findings From A National Survey of Likely Voters* (2007) (surveying registered voters likely to vote

(footnote continued on next page)

reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"); *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) ("arbitration offers cost-saving benefits to telecommunications providers and 'these benefits are reflected in a lower cost of doing business that in competition are passed along to customers'") (citation omitted); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 6 J. AM. ARB. 251, 254-56 (2006) ("it is inconsistent with basic economics to question the existence of the price reduction" that results from the enforcement of consumer arbitration agreements). Furthermore, ***all*** consumers enjoy this benefit of arbitration, even if they never have any dispute with the company.

Arbitration is a particularly beneficial mechanism for resolving the small-scale disputes that routinely arise in the type of business relationship presented here. Many of the industries represented in the Chamber are characterized by millions of long-term contractual relationships between consumers and businesses for service provided and paid for on a periodic basis. The conflicts that arise from such relationships typically involve disagreements about minor charges. For that reason, providers in these industries spend enormous sums on customer-relations

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in the 2008 election), available at http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1092.

personnel who try to resolve consumer grievances. When those resources fail, arbitration gives consumers a quick and affordable means of presenting their grievances to neutral decision-makers. Were it not for arbitration, many customers in these circumstances would lack any meaningful recourse, because court filing fees alone often exceed the claimed damages. Especially where small claims are involved, therefore, arbitration operates to the consumer's advantage.

B. Appellants Incorrectly Presume That Class Procedures Better Serve Consumer Interests.

Underlying Appellants' and AARP's arguments is the misguided notion that class procedures more effectively protect consumers, particularly those with low-value claims. A class mechanism, they conclude, is necessary to encourage consumers to enforce their rights and deter corporations from violating those rights.

As an initial matter, Congress has found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 § 2(a)(3). Many class actions result in some form of settlement in which the individual claimant receives only a coupon from the company or a small

remunerative payment.[11] Individual members of large classes with low-value claims often get no meaningful recovery once litigation costs, attorneys' fees, and claims processing and distribution costs are taken into account. In such cases, there is little incentive for class members to file a claim, meaning that most individuals will receive no compensation at all. *See* 4 Newberg on Class Actions § 14:7 (4th ed. 2007).

When limited-value class claims are brought, the only people who benefit with certainty are the class ***attorneys***, not the members of the class. *See, e.g.*, Leslie, *supra*, at 993; Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff,* 60 L & CONTEMP. PROBS. 167, 168 (1997); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1138-1151 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1053-1054 (1996).

The limited value of many consumer claims is precisely what makes arbitration a sensible and desirable alternative to litigation for such claims. *See, e.g., Iberia Credit Bureau,* 379 F.3d at 174 (simplicity, informality, and expedition are the "characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims"). As explained above, consumer-initiated

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[11] Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. REV. 991 (2002).

arbitration has been tremendously successful, producing speedy and inexpensive resolution of a wide variety of consumer disputes.[12]

Also unavailing is Appellants' assumption that class-wide dispute resolution provides the only effective deterrent against corporate misconduct. Consumers can and do pursue their arbitral remedies on an individual basis and serve as a powerful deterrent against illegal practices. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 3359 (1985) ("[S]o long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). Just as important, Appellants' reasoning overlooks the fact that state and federal agencies designated to protect consumers "possess sufficient sanctioning power to provide a meaningful deterrent" to corporate misconduct. *Johnson*, 225 F.3d at 369; *see also Gilmer*, 500 U.S. at 32, 111 S. Ct. at 1655 (relying on EEOC's broad authority to protect consumers); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233, 107 S. Ct. 2332, 2341 (1987) (same

[12] Appellants' disparagement of individual arbitration as an effective means to vindicate limited-value claims ignores the numerous methods employed by ATTM's arbitration agreement to facilitate such claims. Appellants do not offer any argument or evidence that consumers themselves – as opposed to plaintiffs' *lawyers* – fare better under class proceedings than under individualized arbitration as provided by ATTM's agreement.

with respect to SEC); *Iberia*, 379 F.3d at 175 (same with respect to state attorney general).

C. Imposing Class Procedures On Unwilling Arbitral Parties Would Undermine The Purposes And Benefits Of Arbitration And Will Lead Companies To Abandon Arbitration Entirely.

Appellants' proposed rule would effectively destroy the utility of arbitration and rewrite millions of arbitration contracts without consent of the contracting parties. By its very nature, class dispute resolution is incompatible with the purpose, goals and benefits of arbitration. Class proceedings, which may sweep millions of potential claims into a single case, typically require extensive pre-trial motion practice and evidentiary hearings, entail extensive judicial management and review, cost millions of dollars to litigate, and take years to resolve. *See* Steven P. Marino & Renee D. Marino, *An Empirical Study of Recent Securities Class Action Settlements Involving Accountants, Attorneys or Underwriters*, 22 SECS. REG. L. J. 115, 127 (1994) (study of 299 class action securities settlements found that the average case took 3.9 years to settle with some lasting as long as ten years or more).

The detrimental impact of imposing class action procedures on arbitration would extend beyond cost and delays. The control that parties have over the shape of individual arbitral proceedings would be impossible in a class context. Parties now may agree on virtually every aspect of an arbitration, from the scope of

discovery to the admissibility of evidence to the nature of witness testimony to the site of the hearing. Class actions, by contrast, tend to be run by, and for the benefit of, the plaintiffs' attorneys.[13] Streamlined procedures traditionally associated with arbitration would not be tolerated in high stakes claims. Class-wide arbitration would also entail a significantly greater degree of judicial involvement than is normal in arbitration because absent class members must be protected. Such judicial involvement would multiply proceedings, generate attorneys' fees, and "impose[] costs on consumers." Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, J. DISP. RESOL. 89, 90 (2001).

Finally, in the individual context, arbitration's benefits easily outweigh its risk: that an arbitrator, subject to an exceedingly narrow standard of judicial review, will render an erroneous decision. But no economically rational business can afford to assume this risk in the class context, particularly without the attendant benefits in time and cost savings that arbitration provides. *See, e.g.*, Daniel Higginbotham, Note, *Buyer Beware: Why the Class Arbitration Waiver*

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[13] *See, e.g., Thorgood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) (describing the problem that class-action "lawyers are interested in their fees" rather than "relief for the class," but class members lack the motivation "to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests"); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 53 (2d Cir. 2000)

(footnote continued on next page)

Clause Presents a Gloomy Future for Consumers, 58 DUKE L.J. 103, 129-30 (2008). Faced with the choice of arbitrating aggregated claims with no opportunity for meaningful judicial review, or litigating those claims in a court with more robust appellate review, companies inevitably will choose litigation and abandon arbitration.[14]

The consequence of Appellants' proposed rule, therefore, is that businesses will stop including arbitration provisions in consumer contracts. That result benefits no one except class-action lawyers, and it harms consumers in two key respects. First, it limits consumers' access to a form of dispute resolution that Congress has determined, and experience has shown, to be cheaper, faster, and more consumer-friendly than conventional litigation. Second, it significantly increases firms' commercial litigation costs, and those cost increases will be passed on to consumers in the form of higher prices. The actual result of reversing the district court would not be fairer or more efficient arbitration — but rather more litigation and less arbitration. At bottom, it is arbitration itself, not lack of class procedures, that Appellants find contrary to public policy.

(in many class actions plaintiffs "are mere 'figureheads' and the real reason for bringing such actions is 'the quest for attorney's fees'") (citation omitted).

[14] For example, Comcast has abandoned arbitration in California, where class arbitration waivers have rendered certain arbitration agreements unenforceable under California law. *See* paragraph 13 of Comcast's subscriber agreement, available at http://www.comcast.net/terms/subscriber/.

III. THE FAA PREEMPTS STATE-LAW CHALLENGES TO ARBITRATION AGREEMENTS BASED ON CLASS WAIVERS.

As explained above, Appellants' approach will have a stifling effect on arbitration as a whole and, therefore, that approach is preempted by the FAA. *See Gay*, 511 F.3d at 395 (Pennsylvania rule that agreements requiring individual arbitration are unconscionable is preempted because it would "result in a significant narrowing of" and "interfere with the appropriate application of the FAA" and thereby violate "the intent of Congress"); *accord Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 364 (Tenn. Ct. App. 2001); *Blitz v. AT&T Wireless Servs., Inc.*, 2005 WL 6177327 (Mo. Cir. Ct. Nov. 28, 2005). Appellants' proposed rule is additionally preempted because it conflicts with the FAA's purposes of protecting private parties' right to agree to dispute resolution procedures that differ from litigation, and because it improperly relies on public policy as a ground to invalidate an arbitration agreement.

A. Appellants' Proposed State-Law Rule Conflicts With The FAA's Protection of Private Choice And Inappropriately Requires Arbitration To Emulate Litigation.

The FAA enables dispute resolution through procedures that deliberately vary from those applied in court. *See, e.g., Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) ("the FAA lets parties tailor ... many features of arbitration by contract, including ... procedure"); *Ultracashmere House, Ltd. v.*

Meyer, 664 F.2d 1176, 1180-81 (11th Cir. 1981) (purpose of FAA was "to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation") (overruled in part on other grounds as recognized in *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1469 n. 8 (11th Cir. 1997)); *Revere Copper and Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir. 1980) ("The goal of Congress in passing [the FAA] was to establish an alternative to the complications of litigation.").

The essential nature of arbitration, and the reason it is protected under the FAA, is precisely that it is a voluntary *alternative* to litigation, with the attendant procedures left to agreement, not state compulsion. *Volt*, 489 U.S. at 476, 109 S. Ct. at 1254. Rather than protecting a particular set of mandated arbitration procedures, Congress' "principal purpose" in enacting the FAA was to protect the alternative choices parties made when eschewing litigation and "ensuring that private arbitration agreements are enforced according to their terms." *Id.* at 478, 109 S. Ct. at 1255.

Appellants' requirement that arbitration procedures conform to litigation procedures supplants the federally protected private choices concerning alternative methods of dispute resolution. Similar efforts to impose the procedural trappings of litigation, many of which arguably have some public-policy justification, have been held preempted by the FAA because they discriminate against arbitration by

substituting state procedural choices for protected private choices in arbitration agreements.[15]

Indeed, class-action procedures are good examples of procedures that parties might rightly consider unduly burdensome and hence choose to reject in arbitration agreements. The FAA protects a federal interest in enforcing private choice regarding the best means for resolving private disputes. A state, of course, has ample tools of its own to enforce its laws and deter any low-value but widespread wrongdoing. Suits by the state Attorney General for public injunctive relief and restitution are but two examples. *Iberia Credit Bureau*, 379 F.3d at 175 (authority of Attorney General to sue on behalf of the State and seek restitution for consumers "tends to show that the arbitration clause does not leave the plaintiffs without remedies or" unconscionably "oppress" them). Given such other means of advancing state interests, sacrificing private choices for arbitration procedures for some perceived marginal gain in advancing those state interests directly conflicts with the FAA's core policy favoring private choice regarding arbitration.

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[15] *See, e.g.*, *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001) (FAA preempts application to arbitration clause of statute forbidding waiver of California venue notwithstanding law's further application to agreements to waive litigation because law governs only a sub-category of contracts and terms, not contracts generally); *OPE Intern. LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (same regarding Louisiana statute prohibiting venue waivers or restrictions); *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same regarding New Jersey judicial precedent on venue waivers or

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The FAA protects private choice on whether and how to arbitrate disputes such that the denial of broad choice of arbitration procedures is just as much a hostile act as is the denial of arbitration *in toto*. Freedom to make such choices is precisely the point of opting out of the litigation system and striking different balances between accuracy, efficiency, speed, and economy. *See Iberia Credit Bureau*, 379 F.3d at 176. Appellants' attempt to extend state control over litigation procedures into control over arbitration procedures directly conflicts with the very notion of private choice protected by the FAA.

B. State Public Policy Cannot Be Used To Invalidate Arbitration Agreements.

Appellants ask the Court to rule that an arbitration agreement may be voided by the simple expedient of making an *ad hoc* determination that one of its provisions is contrary to state public policy. The FAA cannot be so easily circumvented, however.

In enacting 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 which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 858 (1984). The Act's "basic purpose" is "to put arbitration provisions on 'the same footing' as a

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restrictions; precedent did not establish generally applicable contract defense).

contract's other terms." *Allied-Bruce*, 513 U.S. at 275, 115 S. Ct. at 840 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 2453 (1974)). Accordingly, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987) (quoting 9 U.S.C. § 2)). Unless that savings clause applies, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*." *Id.* at 492, 107 S. Ct. at 2527 n.9 (emphasis in original).

Section 2 of the FAA carves out a ***limited*** role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state-law grounds "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493, 107 S. Ct. at 2527 n.9 (emphasis in original). Accordingly, Section 2 gives the states "a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision." *Allied-Bruce*, 513 U.S. at 281, 115 S. Ct. at 843. However, "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry*, 482 U.S. at 493, 107 S. Ct. at 2527 n.9. "Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law

holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." *Id.*

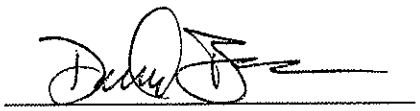
Appellants' arguments here exemplify the burgeoning strategy of seeking the invalidation of arbitration agreements based on state-law rules that are described under the rubric of general contract law, but in fact have been fashioned solely to deal with arbitration agreements. Specifically, the premise of the attack on the district court's decision is that contractual waivers of class actions are contrary to public policy. Yet Florida has no rule prohibiting such waivers. Appellants thus ask this Court to declare a new principle of public policy and then apply it in the same case to strike down an arbitration provision. That kind of *ad hoc* manipulation of public policy is inconsistent with the Supreme Court's admonition that state-law contract defenses may be used to void arbitration provisions only if they "***arose*** to govern issues concerning the validity, revocability, and enforceability of contracts ***generally***" (*Perry*, 482 U.S. at 493, 107 S. Ct. at 2527 n.9 (emphasis added)). Indeed, Congress's rationale for authorizing contract-law exceptions to the general rule that arbitration provisions are enforceable — that there can be no impermissible animosity toward arbitration when a court is merely applying an ***extant***, generally applicable contract-law defense — loses all force when, as here, the party seeking to avoid arbitration is trying to make up public policy as it goes along.

The approach embodied in Appellants' arguments would make the validity of arbitration agreements entirely a matter of *ad hoc* articulations of law, diluting the strong policies favoring enforcement of arbitration agreements. As the Supreme Court has made clear, however, no "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" can be used to preclude or limit agreed-upon arbitration. *Perry*, 482 U.S. at 493, 107 S. Ct. at 2527 n.9.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7) AND ELEVENTH CIRCUIT RULE 28-1

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7) and Eleventh Circuit Rule 28-1 for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2002 in Times New Roman 14-point font. The length of this brief is 6,995 words.

David L. Balser

Dated: February 17, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on February 17, 2009, I served one copy of the foregoing **Brief Of The Chamber Of Commerce Of The United States of America As *Amicus Curiae* In Support Of Defendant-Appellee** by First Class Mail, postage prepaid, on each of the following:

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