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To Be Announced: Silence from the United States Supreme Court and Disagreement among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration - Green Tree Fin. Corp. v. Bazzle

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NOTES

To Be Announced: Silence from the United States Supreme Court and Disagreement among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration

*Green Tree Fin. Corp. v. Bazzle*¹

I. INTRODUCTION

With growth in the area of arbitration agreements relating to employment, credit cards, loans, and other form agreements, the issue of class-wide arbitration has become an area of significant judicial activity.² However, increased judicial activity has not resulted in increased clarity; to the dismay of those parties seeking to pursue or avoid class-wide arbitration, the law on this issue has become unpredictable from jurisdiction to jurisdiction. The United States Supreme Court has expressed the importance of the class-action as a valuable device for vindicating plaintiffs' rights.³ Additionally, the Supreme Court has recognized arbitration as a valuable form of dispute resolution.⁴ In contrast, when the class-action and arbitration are found in the form of class-wide arbitration, the Supreme Court has been less than swift in establishing binding precedent for the lower courts to follow.⁵ Although the *Bazzle* decision was concerned primarily with whether silent agreements preclude class-wide arbitration, this casenote will address class-wide arbitration in general, and the manner in which the Supreme Court treated the issue in *Bazzle*.

1. 123 S. Ct. 2402 (2003).

2. 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, 26.

3. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). The Court summarized as follows:

[I]t may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise . . . [thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.

Id. at 338. See also *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974) ("Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

4. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

5. Most recently, the unwillingness of the court to decide the class-wide arbitration debate is evidenced by the majority opinion in *Bazzle*, and the denial of a request for certiorari in *Ting v. AT & T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003).

II. FACTS AND HOLDING

In 1995, Lynn and Burt Bazzle secured a home improvement loan from Green Tree Financial Corporation (Green Tree).⁶ The contract entered into by the parties included an arbitration clause that stated in relevant part: “[A]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us, with consent of you.”⁷ In separate transactions, Daniel Lackey and George and Florine Buggs entered into loan contracts and security agreements with Green Tree that contained arbitration clauses that were essentially identical to the Bazzles’ arbitration clause.⁸ Both sets of customers thereafter filed separate actions in South Carolina state courts, complaining that Green Tree had violated the attorney and insurance agent provision of the South Carolina Consumer Protection Code.⁹

In April 1997, the Bazzles filed a motion for class certification.¹⁰ Later,¹¹ Green Tree filed a motion to stay the court proceedings and compel arbitration.¹² The court granted the Bazzles’ motion for class certification, and issued an order compelling arbitration.¹³ An arbitrator administered the arbitration proceedings as a class. After finding Green Tree liable for violating the attorney and insurance preference requirements of the Consumer Protection Code, the arbitrator awarded the class \$10,935,000 in statutory damages, in addition to attorney’s fees.¹⁴ Green Tree filed a motion for reconsideration of the trial court’s order granting class certification.¹⁵ The trial court denied the motion, and Green Tree appealed to the South Carolina Court of Appeals claiming that class arbitration was legally impermissible.¹⁶

In a similar proceeding, Lackey and the Buggses sought class certification for their claim, and Green Tree moved to compel arbitration.¹⁷ The trial court denied Green Tree’s motion to compel arbitration, finding the arbitration agreement to be unenforceable.¹⁸ The South Carolina Court of Appeals reversed and remanded the

6. *Bazzle*, 123 S. Ct. at 2405.

7. *Id.*

8. *Id.* The Lackey and Buggses’ contracts substituted the word “you” with the word “Buyer[s]” in the italicized phrase. *Id.*

9. *Id.* Green Tree had apparently failed to provide the customers with a legally required form that would have informed them of their right to name their own lawyers and insurance agents. *Id.*

10. *Id.*

11. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 353 (S.C. 2002).

12. *Bazzle*, 123 S. Ct. at 2405.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Green Tree argued that the arbitrator failed to enforce the arbitration clause in accordance with its terms, in violation of the Federal Arbitration Act (FAA), when class-wide arbitration was imposed. *Id.* Green Tree based this argument on the reasoning employed by the Seventh Circuit in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1999). *Id.* Section 4 of the FAA requires arbitration to be in “accordance with the terms” of the agreement. 9 U.S.C. § 4 (2000). According to the Seventh Circuit, if the arbitration agreement in question is silent on the issue, authorizing class-wide arbitration would not be in accordance with the terms of the agreement. *Champ*, 55 F.3d at 269. See also *Gammara v. Thorp Consumer Disc. Co.*, 828 F. Supp. 673 (D. Minn. 1993).

17. *Bazzle*, 123 S. Ct. at 2405.

18. *Id.*

case, holding that the contract was not unconscionable.¹⁹ The parties then appointed the Honorable Thomas Ervin as arbitrator.²⁰ The arbitrator held a hearing to determine if class-wide arbitration was permissible under the contract's arbitration clause.²¹ At the hearing, Green Tree challenged the arbitrator's authority to order class arbitration under the FAA and the arbitration agreement at issue.²² The arbitrator issued an order permitting class-wide arbitration and ultimately ruled that Green Tree had violated the attorney and insurance agent preference requirements of the Consumer Protection Code. The arbitrator awarded the class \$9.2 million in damages, in addition to attorney's fees.²³ Green Tree thereafter appealed to the South Carolina Court of Appeals claiming, as in the *Bazzle* dispute, that class-wide arbitration was legally impermissible.²⁴

The South Carolina Supreme Court withdrew both of the cases from the court of appeals and assumed jurisdiction to hear the consolidated *Bazzle* and *Lackey* appeals.²⁵ The South Carolina Supreme Court held that the contracts were silent as to the issue of class arbitration and that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice."²⁶ The court upheld the *Bazzle* and *Lackey* awards concluding that, in light of the contractual silence with regard to class arbitration, the contracts authorized class arbitration, and that arbitration had properly taken that form.²⁷

The United States Supreme Court granted certiorari to consider whether the South Carolina Supreme Court decision was consistent with the Federal Arbitration Act.²⁸ However, rather than settling the issue of whether class certification is permissible when contracts do not expressly authorize class certification, the Supreme Court, in a plurality decision, vacated the judgment of the South Carolina Supreme Court and held that the question of contract interpretation in this case was for the arbitrator, not the judge, to decide.²⁹

19. *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998).

20. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 353 (S.C. 2002). Interestingly, the Honorable Thomas Ervin was chosen to arbitrate the *Bazzles'* dispute as well. *Id.* at 352.

21. *Id.*

22. *Id.* Although not expressed in the opinion, Green Tree's argument was likely based on the same reasoning as that set forth *supra* note 16.

23. *Bazzle*, 123 S. Ct. at 2406. After the arbitrator issued the order permitting class arbitration, Green Tree sought declaratory judgment from the federal district court seeking to enjoin the arbitrator from certifying the class. *Bazzle*, 569 S.E.2d at 353. The district court denied the injunction and dismissed for lack of subject matter jurisdiction. *Id.* at 354. Green Tree then filed a motion to stay the arbitration proceedings in state court. *Id.* The trial court denied the stay because it lacked jurisdiction to interfere with the arbitration and noted that it found class actions and arbitrations to be compatible. *Id.*

24. *Bazzle*, 123 S. Ct. at 2406.

25. *Id.*

26. *Bazzle*, 569 S.E.2d at 360. The South Carolina Supreme Court chose to base its argument on precedent from the California Court of Appeals in *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998), *cert denied*, 527 U.S. 1003 (1999), which held that allowing class-wide arbitration can further, rather than defeat, the FAA's goal of enforcing agreements to arbitrate and is therefore not preempted by Section 4 of the FAA. *Id.*

27. *Bazzle*, 123 S. Ct. at 2406.

28. *Id.*

29. *Id.* at 2407. The Supreme Court based its holding on language in the arbitration clauses which stated that the parties agreed to submit to the arbitrator "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract," and, therefore, the

III. LEGAL BACKGROUND

Section 4 of the Federal Arbitration Act (FAA) requires federal courts to enforce arbitration agreements as agreed by the parties.³⁰ However, problems such as the one presented in *Bazzle* arise when an arbitration agreement is silent as to class-wide arbitration. Unfortunately, the FAA does not mention class-wide arbitration, and the U.S. Supreme Court has failed to give any guidance on whether class-wide arbitration is permissible when an agreement is silent on the matter.³¹ In turn, state and federal courts have struggled, if not failed, to establish a cogent body of law from which one can glean a clear rule governing class-wide arbitration.³² This disjointed body of authority presents the possibility of confusion and frustration for multi-jurisdictional parties who frequently draft arbitration agreements, as one forum within the parties' reach may preclude class-wide arbitration while the other permits it.

The federal circuits have been consistent in prohibiting class-wide arbitration when an agreement is silent on the issue.³³ A seminal case from this line of authority is *Champ v. Siegel Trading Co.*,³⁴ wherein the Seventh Circuit followed the reasoning of several other circuits and held that Section 4 of the FAA forbids federal judges from ordering class-wide arbitration where the parties' arbitration agreement is silent on the issue.³⁵ The court's decision was based on federal appellate cases holding that trial courts cannot consolidate arbitral proceedings when

parties seem to have agreed that the issue of whether or not class arbitration is permissible in this case was to be decided by the arbitrator, not a judge. *Id.*

30. 9 U.S.C. § 4 (2000). State courts were not initially bound by the FAA, however, preemption was extended to state courts in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA is a substantive statute derived from the Commerce Clause, thereby establishing the supremacy of the FAA over arbitration agreements). The Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) held that the FAA is a body of substantive law that governs arbitration agreements relating to transactions involving interstate commerce. *Id.* The Court also held that the FAA is an appropriate exercise of the Congressional power under the Commerce Clause. *Id.* See Robert Hollis et al., Comment, *Is State Law Looking for Trouble? The Federal Arbitration Act Flexes Its Preemptive Muscle*, 2003 J. DISP. RESOL. 463, 467-70.

31. *Bazzle*, 569 S.E.2d at 356.

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

33. *Bazzle*, 569 S.E.2d at 356.

34. 55 F.3d 269 (7th Cir. 1995). *Champ* involved a consumer class action in which the plaintiff class alleged violations of several state laws, the Commodity Exchange Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO). *Id.* at 271. The district court ordered arbitration and refused to certify an arbitral class action, and the Seventh Circuit affirmed the district court decision. *Id.*

35. *Id.* See, e.g., *Gov't of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (holding that a "district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"). The court in *EEOC v. Waffle House, Inc.* stated that the purpose of the FAA is to "place arbitration agreements upon the same footing as other contracts." 534 U.S. 279, 289 (2002). See also *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Am. Centennial Ins. v. Nat'l Gas Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baessler v. Cont'l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984). But see, e.g., *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988) (holding that silence in an agreement does not prevent consolidation where the state arbitration law allows consolidation).

the parties' agreements do not allow consolidation.³⁶ The *Champ* court concluded that there is "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration," and therefore the FAA's goal to enforce parties' arbitration agreements as written should be given priority, even if inefficient.³⁷ The Seventh Circuit's approach has gained notable following recently, even by several state courts.³⁸

On the opposite end of the spectrum of decisions concerning class-wide arbitration are the cases setting forth the "California Approach,"³⁹ which allows a court to order class-wide arbitration even if the arbitration agreement is silent on the issue.⁴⁰ The most notable of the cases allowing class-wide arbitration is *Keating v. Superior Court*,⁴¹ wherein the California Supreme Court highlighted the importance of the class action stating that "the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."⁴² The California Supreme Court balanced "the potential inequities and inefficiencies"⁴³ that could result from class-wide arbitration, and held that the court had the power to order class-wide arbitration, and left the issue to the trial court to decide on a case-by-case basis.⁴⁴

In *Blue Cross v. Superior Court*,⁴⁵ a significant decision affirming the "California Approach," a California court of appeals went even further than the *Keating* court and held that the FAA does not preclude application of California's class-wide arbitration rules.⁴⁶ In reaching its decision the court stated that while the

36. *Champ*, 55 F.3d at 275.

37. *Id.*

38. *Bischoff v. DirecTV*, 180 F. Supp. 2d 1097 (C.D. Cal. 2002); *Dominium Austin Partners v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189 (S.D. Cal. 2001).

39. *Bazzele v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 356 (S.C. 2002).

40. See, e.g., *Sternlight*, *supra* note 32, at 68-69 (noting that most of the courts reaching this decision are California state courts).

41. 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

42. *Keating*, 645 P.2d at 1206. Significantly, the U.S. Supreme Court was faced with the opportunity to address the issue of class-wide arbitration on appeal in *Keating*, but rather reversed the decision on other grounds and avoided the class-wide arbitration issue. *Keating*, 465 U.S. at 1.

43. *Bazzele*, 569 S.E.2d at 357.

44. *Keating*, 645 P.2d at 1206. The court expressed several factors which should be considered in determining whether to allow class-wide arbitration including efficiency, equity, and prejudice to the drafting party which would likely result from class-wide arbitration. *Id.* at 1210. In a dissenting opinion, Justice Richardson stated that the complications resulting from continued judicial monitoring required by class-wide arbitration would be self-defeating to the initial purpose of the arbitration process. *Id.* at 1216.

45. 78 Cal. Rptr. 2d 779, 779 (1998).

46. *Id.* The California Statute which the California courts have used to authorize class-wide arbitration was based on the CAL. CIV. PROC. § 1281.3 (West 2003), which says that parties to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceedings with a third party; and (2) The disputes arise from the same transactions or series of related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Id.

FAA would preempt a state procedural rule if the two were in direct conflict, state procedure that furthers rather than defeats the FAA's goal of enforcing agreements to arbitrate is not preempted.⁴⁷ Determining that class-wide arbitration furthers the FAA's goals of enforcing arbitration agreements,⁴⁸ the court concluded that class-wide arbitration should be permissible when an agreement is silent on the issue.⁴⁹

IV. INSTANT DECISION

A. *The Principal Opinion*

In *Green Tree Financial Corp. v. Bazzle*,⁵⁰ the U.S. Supreme Court was faced with the decision of whether the South Carolina Supreme Court was correct in holding that class-wide arbitration may be ordered when an arbitration agreement is silent on the issue.⁵¹ However, the Supreme Court, in a plurality opinion, did anything but resolve the debate. Instead, Justice Breyer, joined by Justices Ginsberg, Scalia, and Souter, vacated and remanded the South Carolina decision and held that language in the arbitration agreement indicated that the parties had agreed to submit the issue of class-wide arbitration to an arbitrator, not a judge.⁵² Adding more drama to the debate, and signaling his agreement with the Rehnquist dissent,⁵³ Justice Stevens expressed that had he adhered to his preferred disposition of the case, there would have been no controlling judgment of the Court, and seeking to avoid that outcome he concurred in the judgment of the plurality.⁵⁴

The plurality treated the issue as one of contract interpretation with their analysis focusing on language in the contract which stated that “[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract” would be submitted to an arbitrator.⁵⁵ The plurality reasoned that a dispute about whether the contract forbids class-wide arbitration is a dispute “relating to this contract.”⁵⁶ Therefore, the Justices concluded that the parties must have intended to submit to an arbitrator, not a judge, the issue of class-wide arbitration.⁵⁷

The plurality went further and analyzed the exceptions in which a court may assume that parties intended courts, not arbitrators, to decide arbitration related matters.⁵⁸ The Court acknowledged that within the exceptions are issues such as

47. *Id.*

48. The *Blue Cross* court relied on *Rosenthal v. Great W. Fin. Sec. Corp.*, for the proposition that “a state procedure that serves to further, rather than defeat, full and uniform effectuation of the federal law’s objectives—to ensure that arbitration agreements are enforced according to their terms—is to be followed in California, rather than Section 4 of the FAA.” *Rosenthal*, 926 P.2d 1061 (1996).

49. *Blue Cross*, 78 Cal. Rptr. 2d at 779.

50. 123 S. Ct. 2402 (2003).

51. *Id.*

52. *Id.*

53. See *infra* Part IV.B.

54. 123 S. Ct. at 2408-09. Justice Stevens also dissented in part. *Id.*

55. *Id.* at 2407.

56. *Id.*

57. *Id.*

58. *Id.*

whether the parties have a valid arbitration agreement or whether a binding arbitration agreement applies to a certain type of controversy.⁵⁹

Concluding that the question of whether class-wide arbitration is permissible does not fit within the narrow exceptions, the majority reasoned that the question is not *whether* the parties agreed to arbitrate, but is a question of what *kind* of arbitration.⁶⁰ In turn, the Justices determined that the question at issue was a question of contract interpretation and arbitration procedure within the authority of the arbitrator.⁶¹ The Supreme Court vacated the judgment of the South Carolina Supreme Court and remanded the case for the arbitrator to decide the question of whether class-wide arbitration was permissible.⁶²

B. *The Rehnquist Dissent*⁶³

Chief Justice Rehnquist, joined by Justice O'Connor and Justice Kennedy disagreed with the plurality and concluded that he would have reversed the judgment of the South Carolina Supreme Court.⁶⁴ At the outset of the dissenting opinion, Justice Rehnquist acknowledged that the parties had entered into a contract with an arbitration clause that was governed by the FAA.⁶⁵ Justice Rehnquist stated that the decision of the South Carolina Supreme Court contravened the terms of the contract, and was therefore pre-empted by the FAA.⁶⁶

Early in the dissent, Justice Rehnquist clarified that the decision of “*what* to submit to the arbitrator is a matter of contractual agreement,” and contractual interpretation falls within the power of the court, not the arbitrator.⁶⁷ Justice Rehnquist, following the reasoning of the Supreme Court in *First Options of Chicago v. Kaplan*,⁶⁸ concluded that just as central to an agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted, and the *whom* is therefore a question for the court to decide.⁶⁹

59. *Id.* See *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *AT & T Tech. v. Communications Workers*, 475 U.S. 643 (1986); *John Wiley & Sons v. Livingston*, 373 U.S. 543 (1964).

60. *Bazzle*, 123 S. Ct. at 2407.

61. *Id.*

62. *Id.* at 2409.

63. It is important to distinguish between the dissenting opinions in this case, as Justice Thomas wrote a dissenting opinion as well. In Justice Thomas' dissent, he affirmed his belief that the FAA does not apply to proceedings in state courts, and therefore would have left the South Carolina Supreme Court decision undisturbed. *Id.* at 2411. As stated above, Justice Stevens also dissented in part. *Id.* at 2408.

64. *Id.* at 2411.

65. *Id.* at 2409.

66. *Id.*

67. *Id.*

68. 514 U.S. 938 (1995).

69. *Id.* Rehnquist based his reasoning on the following language from *First Options*:

Given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the “who should decide arbitrability” point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide.

Bazzle, 123 S. Ct. at 2409 (quoting *First Options*, 514 U.S. 938, 945 (1995)).

Central to Justice Rehnquist's dissent is that he considered the language in the contract to preclude class-wide arbitration.⁷⁰ Specifically, he argued that language from the contract stating that any disputes arising out of the contracts "shall be resolved by binding arbitration by one arbitrator selected by us with consent of you"⁷¹ wherein "us" was defined as "Green Tree" and "you" was defined as "Bazzle."⁷² According to the dissenting Justices, this language expressly required that each buyer agree to a particular arbitrator for disputes between Green Tree and the specific buyer named in each contract.⁷³

Justice Rehnquist acknowledged that the agreement at issue was technically silent as to class-wide arbitration, but noted that imposition of class-wide arbitration would contravene the terse language of the contract and therefore be pre-empted by the FAA.⁷⁴ Justice Rehnquist closed the dissenting opinion by stating that the decision of the South Carolina Supreme Court to allow class-wide arbitration had imposed a "regime that was contrary to the express agreement of the parties" and that he would therefore reverse the judgment.⁷⁵

V. COMMENT

In *Bazzle* the Supreme Court was faced with an opportunity to settle the ongoing debate concerning class-wide arbitration, but left the legal community with more questions than before. The most obvious question still left unanswered after *Bazzle* is whether class-wide arbitration should be permissible at all, and specifically whether it is permissible when an agreement is silent on the issue. Although the plurality in *Bazzle* decided the case without clarifying the matter,⁷⁶ Justice Rehnquist's dissenting opinion was somewhat revealing as to what may be the future of class-wide arbitration. The dissenting Justices, notably willing to decide the issue,⁷⁷ saw it unnecessary to go any further than the language of the arbitration agreement to resolve the case. Emphasizing that arbitration agreements are to

70. *Id.* at 2410. Unfortunately neither the majority nor the dissent addressed the issue of whether or not language in a contract explicitly precluding class-wide arbitration is permissible. However, Rehnquist's opinion suggests that such language would in fact be permissible. This issue has been addressed in detail in *Ting v. AT & T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003).

71. *Bazzle*, 123 S. Ct. at 2410.

72. In the agreement at issue in *Bazzle*, "you" was defined as "Bazzle," whereas in other agreements "you" would have been defined by the name of the particular person named in that specific contract. *Id.* at 2411.

73. *Id.* According to Rehnquist, this language made class-wide arbitration impermissible, as in class-wide arbitration the imposition of a single arbitrator for the entire class would directly conflict with the requirement that each specific buyer agree with Green Tree concerning an arbitrator for each specific contract. *Id.*

74. *Id.* The central purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms. *Mastrobuono v. Shearson Lehman Hutton*, 115 S. Ct. 1212 (1995). Any attempt to impose class-wide arbitration when an agreement precluded class-wide arbitration would directly conflict with the FAA, and therefore be pre-empted. *Bazzle*, 123 S. Ct. at 2410.

75. *Bazzle*, 123 S. Ct. at 2411.

76. See *supra* note 29 and accompanying text.

77. See *supra* notes 67, 69 and accompanying text.

be enforced according to their terms,⁷⁸ the dissenting Justices concluded that the terms of the agreement inherently precluded class-wide arbitration.⁷⁹

Although the dissenting Justices disagreed with the South Carolina Supreme Court decision and concluded that the agreement at issue, while technically silent, precluded class-wide arbitration, the Justices never addressed whether it would be permissible for an arbitration agreement to expressly preclude class-wide arbitration. The question evolved naturally from the language of the opinions, but neither the majority nor the dissenting Justices provided an answer as to whether this was a green light for parties to insert “no class-wide arbitration clauses” in agreements.

However, in light of the language of the opinions by Chief Justice Rehnquist and Justice Stevens,⁸⁰ it would appear that at least some of the Justices would allow such preclusive language. This very issue was decided in *Ting v. AT & T*,⁸¹ wherein the Ninth Circuit upheld a California district court decision holding that language expressly precluding class-wide arbitration rendered an agreement unconscionable.⁸² The facts of *Ting* provide an exemplary depiction of the consumer versus mega-corporation scenario that has been used by some commentators to demonstrate the need for class-wide arbitration.

In the summer of 2000, in response to the new mandatory de-tariffing requirements of the Federal Communications Commission (FCC),⁸³ AT & T began sending its customers a new Customer Service Agreement (CSA).⁸⁴ This CSA would establish a new contract between AT & T and the customer governing the

78. See *supra* note 16 and accompanying text.

79. *Bazze*, 123 S. Ct. at 2410.

80. *Id.* at 2408. Justice Stevens stated in relevant part:

The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible *if not prohibited* by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina.

Id. (emphasis added).

81. 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, No. 02-1251, 2003 WL 1988529 (S. Ct. Oct. 6, 2003).

82. *Ting v. AT & T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 53 (2003).

83. *Id.* At the time Congress enacted the Communications Act in 1934, AT & T was in control of virtually the entire telephone service industry. *Id.* The Communications Act was enacted to address the problems associated with corporations, such as AT & T, that enjoyed a monopoly over services. *Id.* In order to effectuate this purpose, the Act required carriers to file a list of tariffs or schedules showing all charges, among other information related to practices and regulations affecting the charges with the FCC. *Id.* The basic goal of the Act was to enable all purchasers of communications services to receive the same federally regulated rates. *Id.* Eventually courts developed the “filed rate doctrine” and any state-law claim seeking to enforce a contract which provided terms that differed from those of the filed rate would be pre-empted by federal law. *Id.* As technology advanced, and customers enjoyed a greater selection of telecommunication providers, arguments began to surface questioning the unnecessary costs to new entrants and collusive pricing that resulted from the “filed rate doctrine.” *Id.* After a long period of criticism and argument over the unfairness of the established tariff scheme, Congress enacted the Telecommunications Act of 1996 (Act). *Id.* The Act adopted the FCC’s de-tariffing rationale and sought to provide a “pro-competitive, deregulatory, national policy framework by opening all telecommunications markets to competition.” *Id.* Then, in October 1996, the FCC issued an order of mandatory de-tariffing, and thereby required all telecommunications carriers to establish contracts with consumers which governed the rates, terms, and conditions of long distance service. *Id.*

84. *Id.* at 1132.

rates, terms, and conditions of long distance service.⁸⁵ Within the CSA was a section stating that resolution of disputes would be conducted through binding arbitration and not by a judge or jury, or through a class action.⁸⁶ The CSA also prohibited the resolution of disputes in arbitration on a class-wide basis.⁸⁷ The court in *Ting* noted that absent the availability of class-wide arbitration it would be economically impossible for individual consumers to pursue claims against AT & T on an individual basis, and that many plaintiffs would therefore be unable to obtain relief.⁸⁸ The court dismissed the idea of applying federal preemption to the case and held that the agreement was a violation of California unconscionability law, and therefore unenforceable.⁸⁹

In concluding that the agreement was both procedurally and substantively unconscionable, the court quickly dismissed several important arguments that AT & T presented. On procedural grounds, the agreement was held unconscionable due to the “take-it or leave-it” manner in which the agreement was presented to the customers.⁹⁰ However, AT & T argued, and the court conceded, that customers *did* have other options aside from AT & T long distance.⁹¹ While it was true that two-thirds of California long-distance providers contained similar arbitration agreements in their CSAs, other providers, most notably Verizon, did not contain such provisions.⁹² The court reasoned that AT & T had dissuaded its customers from seeking “meaningful choices” by responding to customer complaints about the arbitration provisions by informing consumers that “all other major long-distance providers have included an arbitration provision in their services agreements.”⁹³

On substantive grounds, the court focused on the advantages of the class-action and concluded that a prohibition of the class-action would prevent consumers from vindicating their rights, most notably those in which the stakes are small.⁹⁴ The court went on to hold that the CSA was “effectively one-sided since it is hard to conceive of a class action suit that AT & T would file against its customers.”⁹⁵ These arguments employed by the lower court, and affirmed by the Ninth Circuit, are not entirely persuasive. The fact that “it is hard to conceive” of a class-action by AT & T against consumers, or that consumers will be less likely to pursue small claims, should not inevitably lead to a finding of unconscionability. The court dismissed the availability of small-claims court, the ability to obtain relief by petitioning the FCC, and individual arbitration as means for settling disputes which do not inherently carry with them the high cost of litigation.

In concluding that the CSA was unconscionable the court also engaged in mathematical analysis which was equally unpersuasive. The Legal Remedies Provisions of the CSA stated that consumers with claims under \$1,000, who were

85. *Id.*

86. *Id.* at 1133.

87. *Id.*

88. *Ting*, 182 F. Supp. 2d at 939.

89. *Id.*

90. *Id.* at 929.

91. *Id.*

92. *Id.* Verizon accounted for 8.8% of the market share for long-distance carriers. *Id.*

93. *Id.*

94. *Id.* at 930.

95. *Id.*

willing to have disputes resolved by document review, could pay a \$20 filing fee, with AT & T paying the remainder of the fees associated with arbitration.⁹⁶ Significantly, such a claim would also result in the American Arbitration Association's (AAA) Consumer Arbitration Rules being applied to each claim.⁹⁷ However, the court, in agreement with testimony by AT & T, pointed out that very few claims under \$1,000 were effectuated because more than ninety-nine percent of these claims were resolved by customer care representatives.⁹⁸ However, assuming *arguendo* that no claims under \$1,000 are ever brought, then who exactly are these "small-stake" consumers which will not be able to vindicate their rights? The court continues its analysis and appears to answer this question by introducing a hypothetical consumer with a \$100,000 claim.⁹⁹ According to the court's calculations, under the new CSA this consumer would pay approximately \$5,800 before arbitration even begins,¹⁰⁰ while a similar suit in court would cost her less than \$200 to file.¹⁰¹ The court concludes that having to advance such sums to carry out arbitration of claims will "deter many litigants."¹⁰² While not entirely dispositive of the court's argument, it is not difficult to envision a consumer with a \$100,000 claim that would be willing to forego \$5,800 to pursue the claim. More significant is that the court says nothing of the fact that filing a claim in court for under \$200, based on \$100,000 in claimed damages, would likely entail much more than \$5,800 in total expenses before the litigation terminates. This is especially true when considering the cost of hiring expensive legal counsel to oppose AT & T, a corporation with virtually unlimited resources to spend in litigation in comparison to an individual consumer. Neither does the court analyze the many benefits of pursuing such claims in the individual arbitration setting, which would likely be less costly than the total cost involved in the \$200 claim filed in court. The court also concludes that AT & T had "severely limited the damages a successful plaintiff may obtain and has prohibited . . . the use of class actions."¹⁰³ This conclusion begs the question of how many consumers in a class-action against AT & T will actually "obtain" the damages they have been awarded when the cost of litigating such claim is in many cases a pool of funds being paid to the representing attorneys. Recently, the Supreme Court was presented with the opportunity to decide the issue on appeal in *Ting*, but rather continued its silence with regard to class-wide arbitration and denied the request for certiorari.¹⁰⁴

Interestingly, prior to the *Ting* decision, both the Seventh Circuit and a New Jersey appellate court had upheld similar agreements which also expressly pre-

96. *Id.* at 933-34.

97. *Id.* at 934.

98. *Id.*

99. *Id.*

100. *Id.* The court's calculations were as follows:

If her claim sought \$100,000 and the arbitration was scheduled for four days, the initial filing fee would be \$1,250, there would be an extra service fee of \$750, and there could be an arbitrator's fee deposit of \$3,800. Thus, a class member's potential cost before arbitration begins would be \$5,800.

Id.

101. *Id.* This number is presumably based on the cost of filing a claim in a California court during this time period. *Id.*

102. *Id.*

103. *Id.* at 935.

104. *Ting, cert. denied*, 124 S. Ct 53 (2003).

cluded class-wide arbitration.¹⁰⁵ In fact, the Seventh Circuit case, as in *Ting*, involved a dispute between AT & T and a consumer regarding AT & T's CSA.¹⁰⁶ In *Boomer*, the dispute was centered on language in the CSA which was identical to the language of the CSA in *Ting*.¹⁰⁷ The plaintiff filed a class action against AT & T in violation of the CSA's prohibition of such claims, and AT & T then filed a motion to compel arbitration.¹⁰⁸ The district court denied AT & T's motion to compel arbitration and the plaintiff's motion for partial summary judgment, and AT & T appealed.¹⁰⁹ In contrast to the *Ting* case, wherein both the California district court and the Ninth Circuit focused on unconscionability, the Seventh Circuit analyzed the issue in terms of federal preemption.¹¹⁰ AT & T argued that a state law challenge to the validity of the arbitration clause in its CSA "violat[ed] Congress's objective in passing the Communications Act."¹¹¹ The Seventh Circuit agreed with AT & T and upheld the agreement.¹¹²

In support of its decision the court expressed three reasons why the state law challenge to the validity of the arbitration clause was preempted.¹¹³ First, the court concluded that allowing state challenges to the CSA would result in customers receiving different terms depending on their locality.¹¹⁴ This result would conflict with congressional intent that customers receive uniform terms in conditions of service, especially considering the number of national corporations that use a single CSA for all customers.¹¹⁵ This conclusion is particularly important to the facts of *Ting*, as *Ting* illustrates how absent federal preemption, the same CSA could lead to differing holdings (and therefore differing terms) from state to state. Second, allowing arbitration clauses, such as the one in the CSA sent by AT & T, allows corporations to offer lower rates.¹¹⁶ To invalidate agreements containing such clauses would permit discriminatory price structures.¹¹⁷ Third, the court

105. *Boomer v. AT & T*, 309 F.3d 404 (7th Cir. 2002). The agreement at issue in *Boomer* stated in relevant part:

No dispute may be joined with another lawsuit, or in an arbitration with a dispute of any other person, or resolved on a class-wide basis, the arbitrator may not award damages that are barred by this agreement and may not award punitive damages or attorney's fees unless such damages or fees are expressly authorized by a statute, you and AT & T both waive any claims for an award of damages that are excluded under this agreement.

Id. at 410. (emphasis added). See also *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001) (upholding an agreement which expressly prohibited plaintiffs from bringing a class action in the arbitration forum).

106. *Boomer*, 309 F.3d at 410. *Ting* did not explicitly identify the CSA at issue as identical to the one in *Boomer*, although the language was in fact identical. Given the facts expressed in both opinions concerning the CSAs, it is very likely that the CSA was the same in both cases. *Id.*

107. *Id.*

108. *Id.* at 408.

109. *Id.*

110. *Id.* at 417.

111. *Id.*

112. *Id.*

113. *Id.* at 418.

114. *Id.*

115. *Id.* See, e.g., *AT & T v. Centr. Office Tel., Inc.*, 524 U.S. 214 (1998) ("It is that antidiscriminatory policy which lies at the heart of the common-carrier section of the Communications Act.").

116. *Boomer*, 309 F.3d at 418.

117. *Id.* See, e.g., *Metro E. Ctr. for Conditioning and Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924 (7th Cir. 2002) (holding that arbitration offers cost saving benefits to telecommunication providers and that these benefits "reflected in a lower cost of doing business that in competition are

concluded that Section 201 of the Communications Act demonstrated Congress's intent that federal laws govern such long-distance service contracts.¹¹⁸ Considering the trend California has taken with respect to class-wide arbitration, it is no surprise that the Ninth Circuit decided to create a split in the circuits rather than follow preemption analysis employed by the Seventh Circuit decision in upholding such an agreement.

Commentators, unlike the Supreme Court, have been quite vocal on the issue. This is not surprising considering the future of class-wide arbitration involves significant implications for all parties who may potentially be involved in arbitration.¹¹⁹ Proponents of class-wide arbitration argue that the combination of the benefits of the class-action and arbitration presents a valuable tool in pursuing relief against wealthier parties, such as corporations or big businesses.¹²⁰ Proponents also argue that corporations have come to use mandatory arbitration clauses as weapons¹²¹ for precluding costly class-action litigation.¹²² Therefore, the elimination of class-wide arbitration would force plaintiffs to arbitrate claims individually, an alternative that arguably results in an advantage to the wealthier party, and a disadvantage to the individual consumer.¹²³

On the other hand, opponents of class-wide arbitration have dismissed the advantages of the process in light of the perceived disadvantages that grow from the

passed along to customers"). If arbitration clauses in some states are ruled unconscionable or illegal, whereas in other states they are upheld, the corporations will be faced with three options: 1) increase the rates of everyone, 2) only increase the rates of those living in litigation states (those that do not allow the arbitration clause), or 3) leave all rates the same. *Boomer*, 309 F.3d at 419.

118. *Boomer*, 309 F.3d at 419. The Seventh Circuit noted that the following language of Section 201(b) of the Communications Act demonstrates congressional intent that federal law determine the reasonableness of the terms and conditions of long-distance contracts, "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b) (2000). Section 202(a) states:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference of advantage to any particular person, *locality*, or to subject any particular person, class of persons, or *locality*, to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a) (emphasis added).

119. See *supra* Part I (noting the increasing number of form agreements relating to common consumer transactions that contain arbitration clauses).

120. See Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May/June 1998, at 24 [hereinafter Kaplinsky & Levin, *Excuse Me*]; Sternlight *supra* note 32, at 37-40; Andrea Lockridge, Note, *The Silent Treatment: Removing the Class Action from the Plaintiff's Toolbox Without Ever Saying a Word*, 2003 J. DISP. RESOL. 255, 267 (2003); Note, *Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 VA. L. REV. 787 (1981).

121. See Kaplinsky & Levin, *Excuse Me*, *supra* note 120, stating:

It is anticipated that virtually all major banks and lending institutions will implement consumer arbitration procedures within the next five years. Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place.

Id. at 28.

122. See Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 142 (1997); Kaplinsky & Levin, *Excuse Me*, *supra* note 120; Sternlight, *supra* note 32, at 1-7.

123. Sternlight, *supra* note 32, at 1-7; Lockridge, *supra* note 120, at 267.

importation of the class-action to the arbitration setting.¹²⁴ Some critics have suggested that the decidedly pro-class-wide arbitration stance that California has taken could potentially make the state “the class action capital of the country for small consumer claims subject to arbitration agreements.”¹²⁵

Some of the obvious advantages of the arbitration process over litigation include: the speed and affordability, the lower degree of hostility created by a less adversarial environment, and the simpler procedural and evidentiary rules.¹²⁶ However, based on the purported inefficiencies of class-wide arbitration, particularly the need for increased judicial activity, critics have argued that the process presents no benefit in comparison to litigation.¹²⁷

The *Keating* decision,¹²⁸ which may have been the first instance wherein a court considered class-wide arbitration,¹²⁹ and the decision which established the “California Approach,” summarized some of the logistical disadvantages of class-wide arbitration as follows:

Without doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration, ideally “a complete proceeding without resort to court facilities.” The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement. A good deal of care, and ingenuity, would be required to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay.¹³⁰

Therefore, when class-wide arbitration is chosen as the means to resolve many similar claims, the many benefits of the arbitration process are lost in favor of a procedural device which brings the burdens of litigation into the arbitral forum.¹³¹ It is somewhat ironic that the greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration is sometimes pursued by parties despite the fact that it lessens the distinction between the two processes.

124. See Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiff's Lawyers (But Undermine Federal Arbitration Act) by Refusing to Enforce “No-Class Action” Clauses in Consumer Arbitration Agreements*, 58 BUS. LAW. 1289 (2003) [hereinafter Kaplinsky & Levin, *Gold Rush*]; Sternlight, *supra* note 32, at 44-54.

125. Kaplinsky & Levin, *Gold Rush*, *supra* note 124.

126. *Id.* at 1297-98.

127. *Id.* See Stephen H. Kupperman & George C. Freeman III, *Achieving Justice in Arbitration: Selected Topics in Securities Arbitration: Rule 15C2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorney's Fees and Costs*, 65 TUL. L. REV. 1547, 1578 (1991); Sternlight, *supra* note 32.

128. *Keating v. Southland Corp.*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

129. Sternlight, *supra* note 32, at 38.

130. *Keating*, 645 P.2d at 1209 (citations omitted).

131. Kaplinsky & Levin, *Gold Rush*, *supra* note 124.

Aside from the logistical disadvantages of class-wide arbitration, there is also concern that businesses and larger parties may abandon arbitration as a means for settling disputes because class-wide arbitration presents the possibility of a single representative “championing” the cause of similarly situated potential plaintiffs.¹³² The defending parties may reason that the possibility of an unreviewable arbitral error is too great a risk in comparison to the cost of settling,¹³³ or going through the litigation process, which will at least be more punitive to the plaintiffs.¹³⁴

Other arguments against the process focus on the fact that there are numerous avenues other than class-wide arbitration by which a plaintiff can pursue relief.¹³⁵ By agreeing to forego class-wide arbitration a party has not signed away any rights to pursue relief individually, in fact the presumably advantageous individual arbitration setting is still available. Furthermore, the advantage of confidentiality associated with individual arbitration is weakened in the class setting, as extreme caution would be required to maintain the confidentiality of each individual claim, and at the same time satisfy the notice requirements of Federal Rule of Civil Procedure 23.

In addition, in many agreements the possibility of pursuing relief in small claims court would still be available,¹³⁶ as would any substantive rights and remedies against a party.¹³⁷ In 1998, the American Arbitration Association (AAA) established a Consumer Due Process Protocol.¹³⁸ This protocol establishes “clear benchmarks for conflict resolution processes involving consumers.”¹³⁹ Within the protocol are plain indications by the AAA that arbitration agreements should give consumers “notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and, a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.”¹⁴⁰ In addition to the above provision, the Protocol includes a range of provisions which seek to ensure the due process rights of parties to arbitration are secured.¹⁴¹

Given the apparent shortcomings of the class-wide arbitration process, and the fact that courts which have allowed class-wide arbitration do so with reserva-

132. *Id.* at 1299; Kupperman & Freeman, *supra* note 127.

133. Kaplinksy & Levin, *Gold Rush*, *supra* note 124. Authors Kaplinksy & Levin argue that class-wide arbitration presents the same risks as a class action litigation. *Id.* They cite numerous cases that reason that parties to class actions may abandon litigation in favor of settling a dispute when these risks arise. *Id.* See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (stating that “[c]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense”); *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (stating that “[c]lass certification places inordinate or hydraulic pressure on defendants to settle”); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (stating that “[c]lass certification may require defendants to ‘stake their companies on the outcome of a single jury trial’”).

134. Kaplinksy & Levin, *Gold Rush*, *supra* note 124, at 1299.

135. *Id.*

136. *Id.*

137. *Id.*

138. American Arbitration Association, Consumer Due Process Protocol (May 1998), available at <http://www.adr.org> (last visited Mar. 8, 2004).

139. *Id.*

140. *Id.*

141. *Id.*

tion,¹⁴² it is not unreasonable to question the relative merits of such a process. Although the possibility of leaving individual consumers without any avenue to pursue relief is not by any means a favored outcome, to employ a procedural device which negates the very advantages of arbitration as an alternative form of dispute resolution is equally unfavorable. In light of the alternatives available even in the absence of class-wide arbitration, such as small claims court or individual arbitration, it should not be said that plaintiffs would be left without alternatives, especially because these alternatives may not necessitate the hiring of costly legal counsel. Furthermore, even though on its face class-wide arbitration would appear to combine the intrinsic advantages of both arbitration and the class-action, the great disadvantages associated with the process, combined with the poor reasoning sometimes used to justify class-wide arbitration¹⁴³ simply point toward the need for legislative or judicial reform.

VI. CONCLUSION

Given the failure by both state courts and lower federal courts to create a unified body of law regarding class-wide arbitration, it is likely that the Supreme Court will at some point squarely decide the issue. However, until that time parties will be left to draft arbitration agreements keeping in mind the little guidance, and less than uniform opinions, that have been expressed by the lower courts. Assuming, as the South Carolina Supreme Court did, that a silent agreement does not preclude class-wide arbitration, it is not unlikely that more and more parties will begin drafting clauses to expressly preclude class-wide arbitration.¹⁴⁴ This alternative presents the problem of potential forum shopping by corporations who may be prohibited from using such an arbitration clause in one jurisdiction within its reach, while being permitted to do so in another jurisdiction within its reach.

Upon consideration of the dissent in *Bazzle*, it appears that at least a segment of the Supreme Court is sympathetic to the idea of allowing an arbitration clause to expressly preclude class-wide arbitration.¹⁴⁵ This language, considered along with the *Ting* line of decisions,¹⁴⁶ which have failed to establish a uniform body of law on this issue, makes the debate even more complex. *Bazzle* presented an ideal case in which the Supreme Court could have settled both whether class-arbitration is possible when an agreement is silent, and whether express language precluding class-wide arbitration is permissible. Unfortunately neither question was clearly answered in *Bazzle*, and the disagreement between the lower courts on these issues is sure to continue. In light of the Court's apparent unwillingness to settle the disagreements concerning class-wide arbitration, parties should consider looking

142. See, e.g., *Keating v. Southland Corp.*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (stating that "[c]lass-wide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives").

143. See, e.g., *Sternlight supra* note 32, at 84-89 (criticizing the analogy between consolidation and class arbitration). The South Carolina Supreme Court considered this analogy in reaching its conclusion that class-wide arbitration should not be precluded when an agreement is silent. See *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 358 (S.C. 2002).

144. See *Sternlight supra* note 32, at 6; *Hollis et al., supra* note 30, at 479.

145. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2408-11 (2003).

146. See *supra* notes 81-118 and accompanying text.

to Congress for resolution in this area of the law rather than hoping for the Supreme Court to decide the issue.

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