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Rules for a New Game: Finding a Workable Solution for Applying Class Actions to the Arbitration Process

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Rules for a New Game: Finding a Workable Solution for Applying Class Actions to the Arbitration Process

Dunkelman v. Cincinnati Bengals, Inc.[1]

I. INTRODUCTION

The increased use of arbitration clauses in form contracts has raised concerns about whether mandatory arbitration will prevent consumers from seeking redress for relatively small claims via class action litigation.[2] One recent study has shown that an average person living in Los Angeles agrees to arbitrate a dispute arising out of approximately one-third of all of his or her purchases.[3] With the rising use of arbitration, it does not make sense to allow companies to preclude consumers from class action litigation by requiring individual arbitration.

In 2003, the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, indicated that class-wide arbitration was permissible.[4] As a result the number of cases of class-wide arbitration is likely to increase.[5] Because of the few courts that have actually employed class-wide arbitration it has not been definitively settled as to how the hybrid procedure should be conducted. One school of thought emphasizes the class members' due process rights, while another argues that maintaining the integrity of the arbitration process should be a priority. This casenote analyzes the two separate theories and attempts to devise a workable solution for which class-wide arbitration may proceed. The instant case arises out of a dispute between the Cincinnati Bengals and a class of season ticket holders for club level luxury seats, and presents an example of a situation where class-wide arbitration could be most appropriate.[6]

II. FACTS AND HOLDING

Plaintiff-appellants Jay Dunkelman, Edward Walton, and Robert and Betty Brown (fans) held season tickets to the National Football League's Cincinnati Bengals (Bengals) games, but after several years of poor performance by the Bengals,[7] the disillusioned fans lost interest in the Bengals and stopped buying season

1. 821 N.E.2d 198 (Ohio Ct. App. 2004).

2. Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 740 (2004).

3. *Id.*

4. *See id.*

5. Hans Smit, *Arbitration & Judicial Decision: Class Actions in Arbitration*, 14 AM. REV. INT'L ARB. 175, 176 (2003).

6. *Dunkelman*, 821 N.E.2d at 198.

7. The Bengals' record from 1998-2003 was 27-69, a winning percentage of only 28%. Cincinnati Bengals Website, http://www.bengals.com/team/yearlystats.asp (last visited Sept. 19, 2005).

tickets.[8] The defendant-appellee Bengals refused to allow the fans to end their season ticket ownership and tried to make them continue to pay for their tickets.[9] The fans then sued the Bengals in an effort to get out of their season ticket contracts.[10]

When the Bengals built the new Paul Brown Stadium in Hamilton County,[11] they devised a seat license system to pay the construction costs of the new stadium.[12] This new system required fans to first buy a seat license in order for them to purchase season tickets to the Bengals games.[13] The seat license was known as a Charter Ownership Agreement (COA) and after the fan had purchased a COA for one hundred and fifty dollars per seat, the fan was then eligible to buy season tickets.[14] The COA was mailed in a brochure[15] to solicit buyers for the seat licenses and included a section entitled "Charter Ownership Rules and Regulations" which set out specific terms explaining the parties' obligations.[16] Included in the rules and regulations was an obligation to pay a deposit of twenty-five percent of the initial annual lease price, which was refundable at the end of the lease term.[17] Also, if the fan did not pay for their season ticket during the lease term, the one hundred and fifty dollar COA fee was lost and the fan forfeited the rights to buy any future season tickets for those seats.[18] The only consequence stated in the COA brochure for failing to buy season tickets was to forfeit one's right to their COA and lose any deposit made.[19]

After the COA had been signed and returned to the Bengals, the fan received a Club Seats License Agreement (CLSA) which specified the seat location and lease term.[20] The CLSA also contained some additional "rules and regulations" which were not mentioned in the original COA.[21] These additional provisions included an arbitration clause, as well as default and acceleration clauses which stated that the fan would have to pay for all non-purchased season tickets for the

8. *Dunkelman*, 821 N.E.2d at 199.
9. *Id.*
10. *Id.*
11. Paul Brown Stadium was built by Hamilton County, Ohio. Metropolitan Sports Facilities Commission Metrodome: Next Generation of Sports Facilities, *available at* http://www.msfc.com/nextgen_football_paulbrown.cfm (last visited Sept. 19, 2005). It was funded by both public and private financing, with most of the funding coming from an increase in sales tax to pay the bonds for the new stadium and about fifty million from the Bengals. *Id.* The stadium is managed on behalf of Hamilton County by the Bengals. *Id.* The Bengals played their inaugural game in the stadium on September 10, 2000. Paul Brown Staduim, *available at* http://football.ballparks.com/NFL/CincinnatiBengals/newindex.htm (last visited Sept. 19, 2005).
12. *Dunkelman*, 821 N.E.2d at 200.
13. *Id.*
14. *Id.*
15. The brochure was jointly created by Tri-State Sports, a company hired to help with season ticket sales, and Hamilton County. *Id.* The brochure contained a color-coded diagram of Paul Brown Stadium for the fans to decide where they wanted to purchase their seats. *Id.* The brochure also contained a payment schedule for the upcoming seasons. *Id.* The payment schedule also explained the terms of six, eight, or ten year leases. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

duration of the lease if the fan defaulted on the season ticket contract.[22] Unlike the COA, which required a signature and was to be returned, the CLSA did not require the fan to sign and return the document.[23]

The primary issue for determination is whether the COA or CLSA terms control the relationship between the parties. The Bengals contend that the CLSA terms which include the arbitration provision and the default and acceleration clause are the controlling rules and the COA brochure was just that, merely a brochure.[24] The Bengals further argue that the fans are bound to arbitration as a result of a settlement agreement[25] reached between general admission season ticket holders and the Bengals.[26] In response, the fans argue the COA rules control the relationship because they signed the COA agreeing to the rules and regulations contained in the brochure.[27] The fans also assert that the settlement reached between general admission season ticket holders and the Bengals does not apply to their status as club level season ticket holders.[28]

At the Court of Common Pleas in Hamilton County, the fans alleged negligent misrepresentation and fraud,[29] and violations of the Ohio Consumer Sales Practices Act,[30] seeking to enjoin the Bengals from collecting money and harassing them about payments.[31] The trial court did not rule on the merits or the preliminary injunction, instead granting a stay of judicial proceedings pending arbitration between the parties.[32] The trial court found the arbitration clause between the parties enforceable.[33]

The Court of Appeals of Ohio, First District, reversed the decision of the trial court and remanded the case, giving instructions to the trial court to lift the stay pending arbitration and to rule on the preliminary injunction motion.[34] The court of appeals held that the distinction between club level season ticket holders and general admission season ticket holders was sufficient to separate the groups for the purposes of a class action as the two groups had signed "entirely different" agreements with the Bengals.[35] The court also held the arbitration clause was invalid where an agreement had already been reached between the contracting parties in the COA; finding the fans did not assert and had no expectation of additional terms being included in the CLSA.[36]

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22. *Id.*
23. *Id.* at 200-01.
24. *Id.*
25. This settlement arose out of a similar case, *Reedy v. Cincinnati Bengals, Inc.*, in which general admissions season ticket holders argued that they were not bound by a similar arbitration agreement. 758 N.E.2d 678 (Ohio Ct. App. 2001).
26. *Dunkelman*, 821 N.E.2d at 202.
27. *Id.* at 200.
28. *Id.* at 202.
29. *Id.* at 199.
30. OHIO REV. CODE ANN. § 1345.02 (2005).
31. *Dunkelman*, 821 N.E.2d at 201.
32. *Id.* at 202.
33. *Id.* at 199.
34. *Id.* at 205.
35. *Id.* at 202.
36. *Id.* at 204.

III. LEGAL BACKGROUND

A. *Class Arbitration: How Much Involvement Should the Courts Have in the Arbitration Process?*

The rationale behind class actions is to improve the efficiency of the judicial system by creating means to consolidate claims arising out of a common nucleus of facts into one action.[37] Class actions provide an opportunity for parties to litigate relatively small claims, allocate judicial resources efficiently, and prevent inconsistent results arising out of the same set of facts.[38] Arbitration has also been used as a means of increasing the efficiency of the judicial system where parties have agreed to resolve their disputes before a private arbitrator.[39] The benefits of arbitration are speedy resolution, low cost, and the preservation of goodwill between the disputants.[40] The advantages of combining the class action mechanism of procedure with the arbitration process are the same as those which make class actions advantageous to individual litigation: "to promote efficiency and consistency while providing an expeditious and less costly mechanism for resolving disputes."[41] The primary concern with class-wide arbitration is the difficulty of incorporating all the procedural requirements of Rule 23[42] of the Federal Rules of Civil Procedure into arbitration without too much judicial involvement.[43]

Rule 23 concerning class actions sets out several procedural rules with which courts must adhere in order to litigate a class action.[44] Rule 23(a) has four prerequisites which must be met before a class action can be sustained: 1) the class must be large enough that joinder of all members is impracticable, 2) the questions of law or fact are common to the entire class, 3) the claims or defenses of the parties are typical to the claims or defenses of the entire class, and 4) the representative parties will fairly and adequately protect the interests of the class.[45] If these prerequisites are met the court then decides whether to certify a class action.[46] Once a class has been certified, the court must make sure that all members of the class are notified of the nature of the class action, the definition of the class, the claims or defenses, give them the choice to exclude themselves from the class, and explain the binding effect of a class judgment.[47] The court also has the responsibility to approve any settlement or voluntary dismissal in order to protect any absent class members.[48] It is uncertain to what extent these rules, which must be fol-

37. Note, *Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 VA. L. REV. 787, 787 (1981).
38. *Id.* at 788.
39. *Id.* at 792-93.
40. *Id.* at 793-94.
41. *Id.* at 798.
42. FED. R. CIV. P. 23.
43. Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 53 (2000).
44. *See id.*
45. FED. R. CIV. P. 23(a).
46. FED. R. CIV. P. 23(c)(1)(A).
47. FED. R. CIV. P. 23(c)(2)(B).
48. FED. R. CIV. P. 23(e)(1)(A).

lowed by the court in formal litigation of class actions, should be handled by a court in a class-wide arbitration setting.[49]

The Federal Arbitration Act (FAA) does not address the issue of class-wide arbitration.[50] In the absence of an explicit rule in the FAA, the Supreme Court has not yet ruled affirmatively as to whether class-wide arbitration is permissible under the FAA.[51] The Supreme Court did address class-wide arbitration in *Greentree Financial Corp. v. Bazzle*, but only reached the issue of whether it was the decision of the court or the arbitrator to determine whether the agreement between the parties allowed class-wide arbitration.[52] The plurality treated the issue as one of contract interpretation and avoided answering whether class-wide arbitration is permissible when an arbitration agreement is silent on the issue.[53] The federal courts have routinely held that when arbitration agreements are silent on the issue of class-wide arbitration, it is not allowed.[54] However, the FAA's non-treatment of class-wide arbitration has provided an invitation for state courts to create their own policies regarding class arbitration.[55]

B. State Court Treatment of Class-Arbitration: Judicial Involvement to Preserve the Integrity of the Class Action

The first court to order class-wide arbitration was a California Court of Appeals in *Keating v. Superior Court*.[56] The court in *Keating* determined, after weighing the advantages and disadvantages of class arbitration, that "there is no insurmountable obstacle to conducting an arbitration on a class-wide basis."[57] Another case allowing class-wide arbitration to proceed is *Dickler v. Shearson Lehman Hutton, Inc.*,[58] a Pennsylvania state court case. The *Dickler* court also found strong policy arguments in favor of allowing class-wide arbitration to proceed.[59] In a case such as *Dickler*, where each class member can only seek a relatively small amount of relief, the costs for each individual claimant to individually arbitrate their claims would far outweigh the advantages to arbitrating the dis-

49. *See* Sternlight, *supra* note 43, at 43-44.

50. Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 264.

51. *Id.*

52. 539 U.S. 444, 447 (2003).

53. Bunch, *supra* note 50, at 266.

54. *See id.* at 264. The Seventh Circuit agreed with several other courts addressing similar questions by holding that the FAA does not authorize courts to order class-wide arbitration when an arbitration contract does not specifically address the issue. Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995).

55. The most notable state decisions on class-wide arbitration have come from California in a line of cases recognizing the legality of class-wide arbitration. *See* Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998); Keating v. Superior Court, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980) *rev'd on other grounds.*

56. *Keating*, 167 Cal. Rptr. at 492.

57. *Id.*

58. 596 A.2d 860 (Pa. Super. 1991).

59. *See id.* at 864. *See also* Leason v. Merrill Lynch, Inc., No. 6914, 1984 Del. Ch. LEXIS 587 (Del. Ch. Aug. 23, 1984) (demonstrating the difficulty that arises when an individual does not have a claim large enough to make it economically feasible to bring an individual lawsuit, but is bound to arbitration and thus cannot bring a class action lawsuit).

pute.[60] The economic disincentive to individually arbitrate each claim would effectively allow the offending party to continue their harmful and improper practices.[61] The *Keating* and *Dickler* courts have provided a few guidelines for other courts to follow when allocating the responsibility of the courts in a class-wide arbitration proceeding.

The *Keating* court determined that anytime class-wide arbitration was ordered by the court "a greater degree of judicial involvement than is normally associated with arbitration" would be necessary.[62] The court carefully considered the difficulties that combining a class action lawsuit with an arbitration proceeding would bring.[63] Among the concerns they considered was the "unnecessary interference by the courts in and undue delay of the arbitration process."[64] In addition, the courts would have to oversee the named plaintiffs to ensure that they were providing adequate representation for absent class members.[65] As the Supreme Court of California stated in an appeal of *Keating v. Superior Court*,

> 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.[66]

In *Lewis v. Prudential-Bache Sec. Inc.*, another California case, the court followed the *Keating* decision, ordering the lower court to certify the plaintiff's class and provide proper notice when ordering arbitration to proceed.[67]

The court in *Dickler* likewise determined that in order to apply class-wide arbitration, the trial court will have to be involved in some procedural issues such as class certification.[68] The *Dickler* court noted that in order to proceed with class-wide arbitration it would be necessary for the court to certify the class, ensure that notice to class members is properly given, and review any proposed settlement to make sure absent class members have been adequately represented.[69] The court also discussed the additional complexities that would accompany certifying class arbitrations.[70] Because of the uniqueness of the arbitration process, the courts

60. *Dickler*, 596 A.2d at 864.
61. *Id.*
62. *Keating*, 167 Cal. Rptr. at 490.
63. *See id.*
64. *Id.* at 490. Interference by the courts could be caused by the court attempting to oversee the procedural processes mandated by FRCP 23 such as certification, notice of class members, approval of settlement or dismissal of a class action, and appointing class counsel. *Id.* This type of court supervision of the arbitration process could also result in delays which would undermine the speedy and efficient nature of arbitration. *Id.*
65. *Id.*
66. *Keating*, 645 P.2d at 1209.
67. 225 Cal. Rptr. 69 (Cal. Ct. App. 1986).
68. Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. Ct. 1991).
69. *Id.*
70. *Id.* These additional complexities include whether the particular forum is appropriate for the entire class and whether a stricter standard for class certification should be applied in class arbitration. *Id.*

may have to use a stricter standard for class certification.[71] The rigid schedule for judicial supervision set forth by these courts is not the only way to approach class-wide arbitration. Some commentators argue that too much judicial interference would reduce the effectiveness of the arbitration process.[72]

C. Preserving the Nature of Arbitration: Less Judicial Involvement in Class-Arbitration

The decisions of the few courts who have allowed class-wide arbitration to proceed have been careful to point out what roles the courts will have to play in the class arbitration process.[73] However, some commentators have suggested ways for class-wide arbitration to proceed with as little judicial interference as possible. One suggestion is that arbitrators, and not the courts, should make the initial decision of class certification.[74] Advantages of the arbitrator making the class certification decision would be to avoid court delays and allow for greater procedural flexibility.[75] Critics of this view argue that arbitrators do not have the necessary expertise or experience to make the class certification decision.[76] In contrast, it is quite possible that the arbitrator's expertise in manageability in the arbitral setting could make him more competent to deal with class certification.[77]

This method would mean that after the case goes to the arbitrator the courts would not become involved again until after the arbitration award has been issued.[78] After the award has been rendered by the arbitrator it would be subject to postarbitration judicial review.[79] Just like ordinary arbitration proceedings, the standard of review would make it very difficult to overturn an arbitrator's decision on the merits.[80] Even if the class certification granted by the arbitrator were found to be erroneous, the merits of the decision would not have to be overturned and the decision would still stand for the named class members.[81]

The requirement in Rule 23(c) that courts provide appropriate notice would not be extremely difficult to overcome.[82] Notice, which is normally overseen by a judge in normal class action litigation, could just as easily be directed by an arbitrator.[83] All that is necessary of the arbitrator is to determine the best form of notice which would inform class members of the impending action.[84] The notice should include information about the controversy as well as tell class members

71. *Id.*
72. *See* Daniel R. Waltcher, Note, *Classwide Arbitration and 10B-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon*, 74 CORNELL L. REV. 380, 400-01 (1989).
73. *Keating* and *Dickler* both mention how the court will have to be involved in such areas such as class certification, notice, and review of any settlement. *See* Keating v. Superior Court, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980); *Dickler*, 596 A.2d 860.
74. Note, *supra* note 37, at 806.
75. *Id.*
76. Sternlight, *supra* note 43, at 51.
77. Note, *supra* note 37, at 806.
78. *Id.* at 806-07.
79. *Id.* at 807-08.
80. *Id.* at 808.
81. *Id.*
82. *See id.* at 799.
83. *See id.* at 813.
84. *Id.*

that they can opt out of the arbitration, challenge the arbitrator's decision, challenge the adequacy of representation, or even intervene if the representation is held to be inadequate.[85]

The possibility of intervention could create disagreements between multiple representatives; however, this does not present a reason not to proceed with class-wide arbitration.[86] In the case where a class member is not happy with the initial representative, she may want to become a representative.[87] Too many representatives could complicate the arbitration proceedings, and the court would be justified to not certify the class and let each member arbitrate individually.[88] The same type of result could just as easily be a problem in normal class-action litigation.

One proposed framework for class-wide arbitration would have the entire arbitration process free of court interference after the court made the initial decision on whether the arbitration clause should be enforced.[89] Then the courts could review the arbitrator's rulings on issues such as class certification, notice, and a review of the award.[90] Another proposal suggests that the court certify the class, and then the courts would not interfere until after the arbitration award has been issued.[91]

Following the Supreme Court decision in *Bazzle*, the American Arbitration Association (AAA) developed a set of rules and procedures for class-wide arbitration.[92] The supplementary rules drafted by the AAA are very similar to the class action rules in FRCP Rule 23.[93] Rule Two of the Supplementary Rules states that the arbitrator shall determine if the parties' contracts allow for class arbitration, after the arbitrator's decision a 30 day stay of proceedings is granted to allow any parties to challenge the arbitrator's decision in court.[94] Next, the arbitrator is to make a class certification determination using factors reflecting FRCP Rule 23(a), except that each class member must have entered an arbitration clause similar to "that signed by the class representative(s) and each of the other class members."[95] Following the class certification by the arbitrator, proceedings will again be stayed pending judicial review of the decision if any parties wish to challenge.[96] Once the class arbitration is set to proceed the arbitrator should direct the "best notice practicable in the circumstances . . . to all class members who can be identified through the reasonable efforts."[97] The rest of the arbitration process is to proceed without interference from the courts.[98] Any settlement or voluntary dismissal

85. *Id.*
86. Waltcher, *supra* note 72, at 404.
87. *Id.*
88. *Id.*
89. Note, *supra* note 37, at 812.
90. *Id.* at 812-13.
91. Waltcher, *supra* note 72, at 404.
92. American Arbitration Association, Policy on Class Arbitrations (July 14, 2005), *available at* http://www.adr.org/sp.asp?id=25967 [hereinafter AAA Policy].
93. American Arbitration Association, Supplementary Rules for Class Arbitrations, *available at* http://www.adr.org/sp.asp?id=21936 (last visited Sept. 20, 2005) [hereinafter AAA Rules].
94. *Id.* at Rule 2.
95. Fed. R. Civ. P. 23(a); AAA Rules, *supra* note 93, at Rule 4.
96. AAA Rules, *supra* note 93, at Rule 5(d).
97. *Id.* at Rule 6(a).
98. *See* AAA Rules, *supra* note 93.

must be determined to be fair by the arbitrator,[99] and the final award must be in a writing signed by the arbitrator(s).[100] This written award must state the reason for the award on the merits and define the members of the class who are bound by the award with specificity.[101] Regardless of how the courts approach the procedural issues of class arbitration, the position taken by the *Keating* court in California that there is no "insurmountable obstacle" to conducting class-wide arbitration reflects the idea that the benefits of class-wide arbitration outweigh any problems.[102]

IV. INSTANT DECISION

In the instant case, the Court of Appeals of the First District of Ohio was faced with the decision of whether arbitration could be imposed on a class of football fans who had purchased club level season tickets.[103] The court used a de novo standard of review because the main issue of the case involved questions of law.[104] The court made decisions on three issues: 1) whether the fans were part of a class previously bound by arbitration, 2) whether the arbitration clause included in the CLSA was valid, and 3) whether the trial court should have ruled on the preliminary injunction before issuing a stay of judicial proceedings pending arbitration.[105]

The court first addressed the Bengals' argument that the fans were bound by an arbitration clause in a settlement agreement[106] arising out of the 2000 case *Reedy v. Cincinnati Bengals, Inc.*[107] The instant court agreed with the fans argument that the COA signed by the fans in this case was "entirely different" from the general admission COA in *Reedy*.[108] The court distinguished between the club level season ticket holders and the general admission season ticket holders primarily on the basis that the adhesion contracts[109] included in the COA's were entirely different.[110] Therefore, the fans in the instant case could not be included in the class settlement negotiated by the class bound by the *Reedy* settlement.[111] After determining the instant class did not share a sufficient "common nucleus" with the

99. *Id.* at Rule 8(a).
100. *Id.* at Rule 10.
101. *Id.* at Rule 7.
102. *See* Keating v. Superior Court, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd in part sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).
103. Dunkelman v. Cincinnati Bengals, Inc., 821 N.E.2d 198, 199-200 (Ohio Ct. App. 2004).
104. *Id.* at 201-02.
105. *Id.* at 202, 204.
106. *Id.* at 202.
107. Reedy v. Cincinnati Bengals, Inc., 758 N.E.2d 678 (Ohio Ct. App. 2001). *Reedy*, which is very similar to the instant case on its facts, was decided four years ago and ruled that the class of general admission ticket holders was bound by arbitration. *Id.* at 686.
108. *Dunkelman*, 821 N.E.2d at 202.
109. An adhesion contract is a standard form contract that is prepared by a party in a position of power to be signed by a weaker party with less bargaining power, usually a consumer. BLACK'S LAW DICTIONARY 318-19 (7th ed. 1999).
110. *Dunkelman*, 821 N.E.2d at 202.
111. *Id.*

class in *Reedy* to be bound to arbitration, the court then determined whether the fans had agreed to submit to arbitration under the CLSA.[112]

The court found that the trial court erred in staying judicial proceedings pending arbitration.[113] The court acknowledged the public policy in Ohio was in favor of resolving disputes through arbitration.[114] However, the court also noted that arbitration is a matter of contract.[115] When it is clear that the parties have not agreed to arbitrate their dispute, then arbitration is not proper and the court is justified to order judicial proceedings.[116] In this case, the court found that the facts in the instant case were nearly identical to that of the *Reedy* case decided four years prior.[117] The Bengals further argued that the fans' payment made after they received the CLSA signified their assent to the terms of the CLSA.[118] However, the court followed the decision in *Reedy* which held that the initial rules and regulations, which came with the COA, formed the complete contract.[119] Therefore, the CLSA sent out by the Bengals was not binding on the fans.[120] Like the *Reedy* court, the *Dunkelman* court held that as a matter of contract law the Bengals had not offered any consideration to impose new terms on the fans.[121]

The final issue is whether the trial court erred in failing to grant the fans' motion for a preliminary injunction prior to ordering the parties to arbitrate their dispute.[122] The court determined that "[w]hen a trial court is faced with a motion to stay pending arbitration and a motion for a preliminary injunction, the motion for a preliminary injunction should be heard first."[123] Because the court had already decided there was no valid arbitration agreement, the court did not rule on the preliminary injunction issue, only noting what their decision would have been if it had been necessary.[124]

On the first issue, whether the fans were part of a class previously bound by arbitration, the court ruled against the Bengals in their argument that the fans should be bound to arbitration by the *Reedy* settlement because the adhesion contracts on the COAs signed by the two groups of fans were "entirely different" agreements.[125] On the second question of whether the arbitration clause included in the CLSA was valid, the court found that the entire contract between the Bengals and the fans was contained in the COA, and the additional terms in the CLSA were not binding because they were not accompanied byconsideration.[126] On the third question of whether a trial court should have ruled on the preliminary injunction before issuing a stay of judicial proceedings, the court acknowledged that the motion for a preliminary injunction should have been heard by the court before

112. *Id.*
113. *Id.* at 204.
114. *Id.* at 203.
115. *Id.*
116. *Id.* at 202.
117. *Id.* at 202-03.
118. *Id.* at 203-04.
119. *Id.* at 204.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* (citing Yudin v. Knight Indus. Corp., 672 N.E.2d 265, 266 (1996)).
124. *Id.* at 204-05.
125. *Id.* at 202.
126. *Id.* at 203-04.

issuing a stay of judicial proceedings pending arbitration.[127] Even though the court found the fans were not bound to arbitration, the superior bargaining power of the Bengals forcing an adhesion contract on the fans demonstrates why a procedure for class-wide arbitration should be constructed to be implemented in situations such as this.

V. COMMENT

A. Why a Class-Wide Arbitration Procedure is Necessary

The instant case, like both *Dickler* and *Keating*, arose out of a dispute over form contracts. Form contracts often provide a way for a party in a stronger bargaining position to force unfavorable terms on the weaker party. In *Dunkelman*, the plaintiffs found themselves in a situation where the most efficient and favorable method of seeking redress would be in a class action proceeding.[128] However, if the parties were held to an arbitration clause in a form contract, they would be unable to proceed as a class, enjoying the efficiency and cost benefits of a class action; instead, they would have to proceed individually. This unfortunate result in jurisdictions which have not yet allowed class arbitration to proceed, denies the opportunity for many innocent consumers to seek redress where they have suffered minimal damages.[129]

The Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, has made it clear that class actions may be entertained in arbitration.[130] This is a big step towards fairly resolving consumer disputes with large companies arising out of form contracts. Class-wide arbitration is a legal mechanism which can prove most effective, particularly when one considers the lack of alternatives which exist to consumers who are trapped into individual arbitration clauses found in adhesion contracts.[131] One major question remains to be resolved before class-wide arbitration is to be integrated into state and federal courts.[132] This unresolved issue is whether class-wide arbitration should proceed under a rigid schedule of judicial supervision or if arbitrators should be given a certain degree of independence to oversee the proceedings similar to a normal arbitration. The adoption of a procedural framework which retains the characteristics of arbitration while recognizing due process concerns inherent in class actions would make it more likely that courts would approve use of class-wide arbitration.

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127. *Id.* at 204-05.

128. *Dunkelman*, 821 N.E.2d at 199.

129. The California case of *Szetela v. Discover Bank* provides another example of a case where not allowing class arbitration resulted in a manifest injustice. 118 Cal. Rptr.2d 862 (Cal. Ct. App. 2002). In that case, a no class action arbitration clause forced the parties to individually arbitrate each of their claims. *Id.* at 865. Because each claim was only worth about twenty-nine dollars, this effectively prevented most parties from seeking redress from Discover. *Id.* at 865. As a result, the court found the clause unconscionable. *Id.* at 864.

130. Smit, *supra* note 5, at 176; 539 U.S. 444 (2003).

131. The court in *Keating v. Superior Court* offers a quote reflecting this idea: "Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but to its alternatives." 645 P.2d 1192, 1209 (Cal. 1982).

132. Before *Bazzle*, only Pennsylvania and California state courts allowed for class arbitration and no federal courts had allowed it. Wilson, *supra* note 2, at 775.

B. Due Process Concerns

The courts and commentators who prefer strict judicial supervision cite their concern for the due process of absent class members.[133] The due process rights of absent class members are certainly an important consideration that must be taken into account when devising a method to apply class-wide arbitration. The first question to ask in ensuring compliance with the due process rights of absent class members is: "What level of due process is required in class-wide arbitration?" Once the level of due process is established, the second question becomes: "What procedures are required in class-wide arbitration to meet this level of due process?"

In answer to the first question, some believe that by agreeing to have a dispute settled by arbitration, parties have agreed to waive their rights to due process of law.[134] Arbitration should not be considered to be a waiver of due process. Although arbitration, by its nature, fails to provide a guarantee of the same rights found in the court system, that does not mean one waives all rights to due process by agreeing to arbitration. Constitutional rights of citizens must be taken very seriously and cannot be waived by virtue of a citizen signing an adhesion contract which happens to contain an arbitration clause.[135] Even where due process was not found to be applicable in a class-wide arbitration setting, a standard of fairness has been applied to arbitration proceedings by the courts.[136] This means that at a minimum, the arbitrator is required to at least adhere to a fairness standard, which presumably would comport with the due process rights found in the Constitution.[137]

Because it has been established that the due process rights of absent class members must be respected, the second question is how to conduct class-wide arbitration without violating those rights. At one end of the spectrum are the courts which have already applied class-wide arbitration.[138] They would have the court supervise the entire class arbitration process including, determination of whether arbitration is appropriate, selection of an arbitrator, class certification, notice, discovery, settlement/dismissal, award, and adequacy of representation.[139] While this would certainly guarantee the due process rights of absent class members, it is an impracticable method. Although the California and Pennsylvania courts which have applied class-wide arbitration have involved the courts extensively, there is a better way that would satisfy both the due process concerns of absent class members while still preserving the independent nature of arbitration.

133. Sternlight, *supra* note 43, at 52.
134. *Id.* at 116.
135. *See id.* at 116-17.
136. Note, *supra* note 37, at 800-03 (citing Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979); Bell Aerospace Co. v. Local 516, UAW, 500 F.2d 921, 923 (2d Cir. 1974)).
137. *Id.*
138. California and Pennsylvania are the only states whose courts have ordered class-wide arbitration. Wilson, *supra* note 2, at 775.
139. C. Evan Stewart, *Are Class Actions Appropriate in Arbitrations?*, N.Y.L.J., June 13, 1991 at 6.

C. Proposed Framework of Conducting Class-Wide Arbitration

The best way to conduct class-wide arbitration is to allow for an appeal of the arbitrator's class certification prior to arbitration, let the arbitration proceed uninterrupted, and then allow class members to challenge for inadequate representation after the arbitrator's final award. This would provide for protection of the due process rights of absent class members while still promoting a speedy, efficient and independent arbitration. This process would include some features to protect the due process of class members and also some which would allow arbitration to take place independent of excessive court interference. This model closely follows the approach suggested by the American Arbitration Association (AAA), and advocates an alternative process to that followed by the Pennsylvania and California courts which have previously implemented class-wide arbitration.

To ensure due process to absent class members at the class certification stage, an opportunity must be made for class members who do not agree with the class determination to appeal the arbitrator's decision. The Supplementary Rules for Class Arbitrations drafted by the AAA provide for a 30-day period during which class members can challenge the arbitrator's interpretation of the arbitration clause or class determination.[140] Once the class has been certified and judicial proceedings are complete, the arbitration would begin unimpeded by judicial interference until after a final decision has been rendered.

During this stage of the arbitration process interlocutory appeals would not be allowed. This would streamline the process and prevent the kind of drawn out and complicated litigation that arbitration seeks to avoid. This approach would be preferable to that taken by the courts in California for two reasons. First, it preserves the advantages of the arbitration process such as speed, efficiency, cost, and finality. Second, it prevents class-wide arbitration from becoming overly burdened by judicial interference.

However, some additional procedures during the arbitration would be necessary to ensure the protection of absent class members. First, the arbitrator should be required to provide a written award.[141] A written award would not only help a court to review the award given by the arbitrator, it would allow the parties to understand the grounds of the arbitrator's decision. Second, a written record of the arbitration hearings should be kept for a court to review if an absent class member argues inadequate representation.[142] This would maintain the speedy and efficient characteristics of the arbitration process without compromising the rights of class members.

At the end of the arbitration, if an absent class member believed they were inadequately represented, they could challenge the arbitrator's judgment against them to a court. In most circumstances, the arbitrator would be equally qualified to determine adequacy of counsel as a judge,[143] but providing for an appeal would guarantee that no class member would be treated unfairly. Similarly, the court

140. AAA Rules, *supra* note 93, at Rules 3, 5.

141. A written decision, although not normally required in the arbitration setting, would state the reasons for the arbitrator's decision. The AAA Supplementary Rules for Class Arbitration includes this as a requirement. AAA Rules, *supra* note 93, at Rule 10.

142. Note, *supra* note 37, at 813.

143. *See* Waltcher, *supra* note 72, at 403-05.

would also be able to review any settlements or voluntary dismissals made by the parties in the course of arbitration. This would comply with FRCP 23(e) without interfering with the arbitration process because a settlement or dismissal would indicate the end of the arbitration anyway. Although arbitrators are likely to be just as competent as judges, the fact that they are not bound by Article III of the Constitution implies that they should not be expected to uphold the rights and guarantees of the Constitution.[144]

Under this method the arbitrator would keep a record of the proceedings and provide a written award so the courts would not have to observe the entire arbitration to determine adequacy of counsel. It would be unnecessary for the court to oversee the entire arbitration process to ensure adequate representation when they could hear the evidence and make a decision based on the testimony of participants, facts in the record, and other evidence used to decide this kind of matter. This method is better than those previously used by courts in California and Pennsylvania because it provides a mechanism to protect absent class members from inadequate representation without burdening the court and compromising the nature of arbitration.

The final award given by the arbitrator should have the same effect as in a normal arbitration. Because all the parties in a class-wide arbitration received notice of the proceeding and had an opportunity to opt out of the class, they are aware of the binding nature of an arbitration award. Therefore it is unnecessary to provide them with a lower standard of review than is ordinarily applied to overturning an arbitrator's award. One commentator, however, suggests a framework that would allow parties to seek court review of the arbitrator's decision on the merits.[145] This procedure would not promote the advantages of class-wide arbitration. The result would be to undermine the arbitration process and effectively result in the court deciding the actual dispute.

Establishing a procedure for class-wide arbitration which involves extensive interference by the judiciary would defeat all of the benefits of arbitration. However, the due process issues raised in the class action context requires more than the ordinary degree of protection found in arbitrations. Class-wide arbitration can be advantageous to both parties if a few compromises are made to allow the process to flow smoothly. Consumers bound by arbitration can still bring class actions, eliminating the ability of a stronger party to take away their right to seek redress for small claims by forcing individual arbitration.[146] The benefits to the stronger party enforcing the arbitration clause are still the efficiency, speed, and low cost of arbitrations relative to judicial litigation.

Applying a framework like the one suggested here would retain the integrity of both arbitration and class actions. Allowing the actual arbitration proceeding to continue uninterrupted would promote the advantages that accompany arbitration.

144. *See* Sternlight, *supra* note 43, at 53.

145. Note, *supra* note 37, at 813.

146. In the wake of *Bazzle* many commentators are exploring the consequences of "No-Class-Action Arbitration Clauses" (NCAACs) and whether they are enforceable. *See* Wilson, *supra* note 2, at 741 (finding a split in state court decisions as to whether NCAACs are unconscionable and unenforceable). Commentators have also studied whether arbitration agreements that are silent on the issue of class arbitration should bar class arbitration. *See* Sternlight, *supra* note 43, at 83-90 (arguing that courts should not interpret silent agreements as barring class arbitration.)

At the same time, opportunities to appeal at the beginning and end of the proceedings provide absent class members to appeal a denial of their rights to the court. Although some of the advantages to arbitration must be compromised in order to find a workable solution, the end result can be summarized by Judge Feinberg in *Keating*, "[w]e have concluded that there is no insurmountable obstacle to conducting an arbitration on a class-wide basis."[147]

VI. CONCLUSION

Despite the difficulties involved with finding a way to balance the due process interests of class members and the independent nature of arbitration, there is no reason why a compromise cannot be reached that would satisfy the primary concerns of both sides to the issue. Class-wide arbitration is an idea whose time has come. Although what procedures should be applied to resolve disputes may be a little unclear at the moment, if courts will adopt a method that recognizes the importance of due process concerns while minimizing departure from a traditional arbitration setting, this is an issue that can be overcome. Due to the need for a way to apply the class action device to situations where consumers are bound by arbitration, this question should be addressed by all courts so that class-wide arbitration can be applied fairly and uniformly.

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147. Keating v. Superior Court, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980).