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Little Fish in a Big Sea: Should Consumer Protection Statutes Override Class Arbitration Waivers, A

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A Little Fish in a Big Sea: Should Consumer Protection Statutes Override Class Arbitration Waivers?

Kristian v. Comcast Corp.[1]

I. INTRODUCTION

As arbitration agreements have become increasingly commonplace in dealings between large companies and their subscribers, courts have taken a strong interest in protecting consumer rights. As part of this protection, courts have to apply federal statutes, protecting the right to treble damages and recovery of attorney's fees in the context of mass arbitration agreements. The difficulty comes in attempting to allow companies to exercise their freedom of contract while protecting consumers with little bargaining power. Although other courts have largely favored arbitration, and upheld its applicability, a clash remains between consumer protection statutes and the waiver of those statutory rights for arbitration purposes.

II. FACTS AND HOLDING

Martha Kristian and James D. Masterson brought a claim against Comcast Corporation under the Clayton Antitrust Act[2] in the U.S. District Court for the District of Massachusetts.[3] Jack Rogers and Paul Pinella also brought a claim against Comcast Corporation in Massachusetts state court under the Massachusetts Antitrust Act.[4] Because the Rogers/Pinella claim involved federal issues of arbitrability, Comcast removed this claim to the U.S. District Court for the District of Massachusetts.[5]

The four plaintiffs subscribed to Comcast's cable services in the Boston area.[6] They alleged that Comcast entered into "swapping agreements"[7] with other cable service providers in 1999 and 2001 to keep its hold on markets and territories.[8] The plaintiffs sought to certify as a class all Boston-area Comcast subscribers since December 1999, the date of the swapping agreement, because Comcast's actions affected all subscribers.[9]

1. 446 F.3d 25 (1st Cir. 2006).
2. 15 U.S.C. §§ 15, 26 (2000).
3. *Kristian*, 446 F.3d at 30-31.
4. MASS. GEN. LAWS ch. 93, § 6 (1978); *Kristian*, 446 F.3d at 30.
5. *Kristian*, 446 F.3d at 30.
6. *Id.* at 30.
7. In a swapping agreement, companies consolidate their holds on markets by agreeing to swap or exchange cable television assets in violation of federal antitrust laws. *Id.*; *see also id.* at 30, n.1.
8. *Kristian*, 446 F.3d at 30.
9. *Id.*

When the plaintiffs first subscribed to Comcast's cable services,[10] their service agreements did not contain an arbitration provision.[11] In November 2001, Comcast included a copy of its 2001 Policies and Practices document as a billing stuffer with customers' monthly bills.[12] This billing stuffer added an arbitration provision to their agreement.[13] Comcast further revised the arbitration provision in 2002, but left the provision unchanged in 2003.[14]

Comcast argued that the customer complaints should be arbitrated because the 2002/2003 Policies and Practices document[15] contained an arbitration agreement.[16] Even though the customers were challenging Comcast's 1999 swapping agreement, Comcast claimed the arbitration clause had a retroactive effect and should apply to this dispute.[17] The customers argued that since the claim arose before the policy change, the agreement to arbitrate was not binding.[18] Additionally, the customers argued that the arbitration agreement prevented them from exercising their statutory rights under federal antitrust law, violated public policy, and was unconscionable under state law.[19]

The district court ruled similarly on both the federal and state antitrust claims.[20] The court found that the 2002/2003 arbitration did not have a retroactive effect, and refused to rule on the other arguments.[21] Comcast filed an interlocutory appeal, and the First Circuit stayed both cases pending appeal and consolidated them.[22]

The First Circuit Court of Appeals reversed the district court's decision.[23] The court found that the language had a retroactive effect and that Comcast had given adequate notice to the subscribers. Because the arbitration agreement contained a provision for severance, arbitration could proceed even if certain portions were removed.[24] Reversing the district court's decision that the arbitration agreement did not have a retroactive effect, the First Circuit found that when an arbitration agreement conflicts with statutes designed to further public policies, provisions denying a customer the vindication of her statutory rights cannot be enforced.[25]

10. Plaintiffs originally subscribed through Comcast's predecessor companies in 1987, 1991, 1994, and 1999. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. The court referred to the "2002/2003 Policies and Practices" because the arbitration agreement did not change after 2002. *Id.* at 30.
16. *Id.* at 31.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 29.
24. *Id.*
25. *Id.*

III. LEGAL BACKGROUND

A. Retroactivity

In general, certain contractual language can indicate a retroactive effect.[26] Language requiring arbitration for "any controversy between us arising out of your business"[27] or "any controversy arising out of or relating to any of my accounts"[28] has been applied retroactively in multiple jurisdictions.[29] The First Circuit, however, refused to find retroactivity in *Choice Sec. Sys., Inc. v. AT&T Corp.*[30] Despite language requiring arbitration for "all disputes . . . arising out of or relating to the products furnished pursuant to this Agreement," the court refused to extend arbitration because the clause was a "run-of-the-mill integration clause."[31]

The Supreme Court has held that "as a matter of federal law, any doubts concerning the scope of arbitrable agreements should be resolved in favor of arbitration."[32] The First Circuit has held, somewhat differently, that arbitration "does not totally displace ordinary rules of contractual interpretation."[33] In *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer,*[34] the court stated that the presumption in favor of arbitration applies only to questions of scope, not necessarily to questions on the merits of the case.[35] To further clarify its position, the court established a test to determine the scope of arbitration applicability.[36] The court stated that where a federal policy favoring arbitration conflicts with state contract law, and there is a question of scope, the federal arbitration policy trumps the state contract law.[37] This decision follows Supreme Court precedent, which favors arbitration for any doubts concerning the scope of arbitrable issues.[38]

B. Arbitrability

In the First Circuit, there is a presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights.[39] The Supreme Court has held that a statute is satisfied when a litigant can effectively vindicate her statutory

26. *See, e.g.*, Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1028 (11th Cir. 1982); Beneficial Nat'l Bank, U.S.A. v. Payton, 214 F. Supp. 2d 679, 689 (S.D. Miss. 2001); Whistler v. H.J. Meyers & Co., 948 F. Supp. 798, 802 (N.D. Ill. 1996).

27. *Belke*, 693 F.3d at 1028.

28. *Whistler*, 948 F. Supp. at 802.

29. *See, e.g., Belke*, 693 F.2d at 1028; *Beneficial Nat'l Bank*, 214 F. Supp. 2d at 689; *Whistler*, 948 F. Supp. at 802; Boulet v. Bangor Sec., 324 F. Supp. 2d 120, 125 n.4 (D. Me. 2004).

30. 141 F.3d 1149 (1st Cir. 1998).

31. *Id.*

32. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

33. 226 F.3d 15 (1st Cir. 2000).

34. *Id.*

35. *Id.*

36. *Id.* at 25.

37. *Id.*

38. *Moses H. Cone*, 460 U.S. at 24-25.

39. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 170 F.3d 1, 14 (1st Cir. 1999).

rights in arbitration.[40] If a litigant is unable to vindicate her statutory rights, however, arbitration may be denied altogether.

Three Supreme Court decisions form guidelines for determining whether a claim should be decided by an arbitrator or a court. The first case established categories in which courts should rule instead of an arbitrator. In *Howsam v. Dean Witter Reynolds, Inc.*,[41] the National Association of Securities Dealers (NASD) placed a six-year statute of limitation on claims decided by an arbitrator.[42] Since Dean Witter's claim had exceeded the statute of limitations, the Court had to decide whether a court or arbitrator should declare the issue "ineligible for arbitration."[43] The Court described two categories in which courts rather than arbitrators should resolve disputes: (1) disputes "about whether the parties are bound by a given arbitration clause,"[44] and (2) disagreements "about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."[45] Since NASD's statute of limitations rule did not fall into either of these categories, the Court held that the arbitrator should decide whether the issue was ineligible for arbitration.[46]

The second case, *PacifiCare Health Sys., Inc. v. Book,*[47] examined the recovery of punitive damages.[48] A group of physicians brought a number of claims against health care management organizations, and the HMO sought to compel arbitration.[49] The physicians opposed arbitration because the RICO statute, under which the claims were brought, allowed for punitive damages, and the arbitration agreement did not allow for punitive damages.[50] The HMOs claimed that because the contractual language contained specific preclusions, no issue of arbitrability existed, and an arbitrator should resolve the dispute.[51] The agreement specifically precluded the recovery of punitive damages, but was unclear on the recovery of treble damages.[52] The Court ultimately applied *Howsam* and compelled arbitration, finding that there was too much legal ambiguity to conclude a question of arbitrability existed.[53]

The third case, *Green Tree Fin. Corp. v. Bazzle,*[54] concerned the applicability of class arbitration.[55] In *Bazzle*, a number of homeowners alleged consumer protection violations against a commercial lender in South Carolina.[56] The arbitration clauses were silent on the issue of permitting class arbitration.[57] The commercial

40. Mitsubishi Motors Corp. v. Soder Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).
41. 537 U.S. 79 (2002).
42. *Id.* at 81.
43. *Id.* at 82.
44. *Id.* at 84.
45. *Id.*
46. *Id.* at 85-86.
47. 538 U.S. 401 (2003).
48. *Id.* at 405.
49. *Id.* at 402-03.
50. *Id.* at 403.
51. *Id.*
52. *Id.* at 405-07.
53. *Id.*
54. 539 U.S. 444 (2003).
55. *Id.* at 447.
56. *Id.* at 447-48.
57. *Id.* at 447.

lender argued that since the agreement did not explicitly allow for class arbitration, it was not allowed.[58] The Supreme Court determined that the ambiguous language created "a disputed issue of contract interpretation."[59] The *Howsam* exception assumes that parties intended courts, not arbitrators, to decide certain disputes.[60] This exception did not apply in *Bazzle*, however, because the contract did not expressly allow or prohibit arbitration.[61] Additionally, because *Bazzle* did not concern a state statute or judicial procedures, the Court found that an arbitrator could determine whether class arbitration was allowed.[62]

The First Circuit further defined the *Howsam* holding in *Marie v. Allied Home Mortgage Corp.*[63] In *Marie*, the arbitration agreement itself limited the amount of time a consumer had to initiate a claim against the mortgage company.[64] This differed from *Howsam*, where the statute of limitations was found in the arbitrator's governing rules, not the arbitration agreement itself.[65] Still, the court decided that this type of decision was "presumed to be for the arbitrator" and the arbitrator's expertise would allow him to properly interpret the arbitration agreement.[66]

C. Vindication of Statutory Rights

In Massachusetts, a statutory right or remedy may be waived "when the waiver would not frustrate the public policies of the statute."[67] In *Canal Elec. Co. v. Westinghouse Elec. Corp.*, the Massachusetts Supreme Judicial Court examined whether certain statutory rights in the state's antitrust laws could be waived by contractual agreement.[68] The court distinguished property rights of individuals from protection of the general public.[69] Because *Canal* involved property rights, the waiver was upheld.[70] Additionally, the Court stated that Massachusetts' statutory requirement for treble damages is waiveable when the public interest is not harmed.[71] The court was careful to note that its decision "would not effectuate a consumer's waiver of rights," leaving that issue undecided in Massachusetts.[72]

The leading Supreme Court case on awarding attorney's fees in arbitration is *Green Tree Fin. Corp.-Ala. v. Randolph*.[73] In *Randolph*, a mobile home purchaser

58. *Id.* at 450.
59. *Id.*
60. *Id.* at 452.
61. *Id.* at 452-53.
62. *Id.*
63. 402 F.3d 1 (1st Cir. 2005).
64. *Id.* at 11. The arbitration agreement limited the customer's time to 60 days. *Id.*
65. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 81-82 (2002); *Marie*, 402 F.3d at 11.
66. *Marie*, 402 F.3d at 11. For an in-depth discussion of *Marie*, see David LeFevre, *Whose Finding Is it Anyway?: The Division of Labor between Courts and Arbitrators with Respect to Waiver*, 2006 J. DISP. RESOL. 305.
67. Canal Elec. Co. v. Westinghouse Elec. Corp., 548 N.E.2d 182 (Mass. 1990).
68. *Id.* at 183.
69. *Id.* at 187.
70. *Id.*
71. *Id.*
72. *Id.*
73. 531 U.S. 79 (2000).

brought claims under the federal Truth in Lending Act against her lender.[74] The arbitration agreement between Randolph and his lender was silent on the issue of costs and fees.[75] If Randolph had to bear the cost, she argued, it would not be financially viable to pursue the claim.[76] The Court held that a party, seeking to invalidate an arbitration agreement on the basis of cost, bears the burden of showing the likelihood of incurring such costs.[77] Additionally, the Court found that the arbitration agreement's mere silence "alone is plainly insufficient to render it unenforceable."[78]

The U.S. Supreme Court has held in *Bazzle* that an arbitration agreement may expressly limit class arbitration.[79] The decision also states that any ambiguous terms should be interpreted by the arbitrator under state contract law.[80] Multiple jurisdictions have followed this precedent in ruling on class arbitration waivers. In the Eleventh Circuit case of *Jenkins v. First Am. Cash Advance of Ga., LLC*,[81] the court ruled that class arbitration can be waived.[82] Following *Bazzle*, the court held that whether a contract was adhesive and unconscionable was an issue for the arbitrator, not for the court.[83] North Dakota also allows class arbitration in adhesion contracts. In *Strand v. U.S. Bank Nat'l Ass'n ND*,[84] the North Dakota Supreme Court held that class arbitration could be waived so long as none of the consumer's substantive rights and remedies were limited.[85] In all cases upholding class arbitration bans, the determining factor has been whether an individual party could achieve a desired remedy, regardless of convenience.[86]

IV. INSTANT DECISION

In *Kristian v. Comcast Corp.*, the First Circuit examined the retroactivity of an arbitration agreement, along with the agreement's waiver of federal and state statutory rights. The court reversed the District Court's decision on retroactivity, finding that the arbitration language did not prohibit retroactive application. Next, the court determined that issues about statutory rights were properly decided by a court, not an arbitrator. The First Circuit ruled that treble damages, attorney's fees, and class arbitration could not be waived because it would prevent the vindication of statutory rights.

The First Circuit found that the arbitration agreement's language, which did not explicitly prohibit retroactive application, applied to the claims arising in 1999 and 2001.[87] Following Supreme Court precedent, it reasoned that any doubt about

74. *Id.* at 82.
75. *Id.*
76. *Id.* at 90.
77. *Id.* at 92.
78. *Id.*
79. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453-54 (2003).
80. *Id.*
81. 400 F.3d 868 (11th Cir. 2005).
82. *Id.* at 878.
83. *Id.* at 877.
84. 693 N.W.2d 918 (N.D. 2005).
85. *Id.* at 926.
86. Linda M. Laslet, Keith Maurer & H. Wesley Sunu, *Recent Developments in Alternative Dispute Resolution*, 41 TORT TRIAL & INS. PRAC. L.J. 123, 141 (2006).
87. Kristian v. Comcast Corp., 446 F.3d 25, 35-36 (1st Cir. 2006).

arbitrability should be decided in favor of arbitration.[88] Because the state contract law conflicted with federal arbitration policy, federal preference for arbitration trumped the state law claim.[89] The court also found that customers received proper notice of the arbitration provisions as required by federal law.[90] While Comcast did not emphasize the arbitration agreement changes, such attention was not required under federal law.[91] The court stated that while Comcast could have complied more clearly with the federal notice requirements by listing the effective date of the notice, Comcast fulfilled all federal requirements.[92]

The First Circuit held that some issues were best decided by an arbitrator, while other issues could be best handled by a court. The court found that the arbitrator could best decide questions of discovery and limitations.[93] Any dispute over discovery would be procedural in nature, leaving it well within the arbitrator's jurisdiction.[94] Also, applying *Howsam*, the court determined that allegations of waiver or delay were squarely in the purview of the arbitrator, because the claims did not concern the scope of arbitrability.[95] On the other hand, the court stated that arbitration provisions in conflict with statutory law designed to vindicate rights may be decided in a court.[96]

The court also decided that prohibitions against treble damages were invalid.[97] The First Circuit reasoned that no Supreme Court decision had allowed waiver of treble damages in consumer cases.[98] Citing the *Mitsubishi* decision, the instant court stated that a waiver of treble damages for federal antitrust violations would be invalid on public policy grounds.[99] Additionally, the court found that the prohibitions against attorney's fees and costs were invalid.[100] Because the high cost of litigation could prevent a customer from bringing a claim, the court viewed the act of forcing the consumer to pay as essentially barring the consumer's claim.[101] Finally, the court invalidated the prohibition against class actions.[102] Because the invalid provisions were severable from the arbitration agreement, however, the court allowed the arbitration to proceed.[103]

88. *Id.* at 35.
89. *Id.*
90. *Id.* at 36-37.
91. *Id.* at 36.
92. *Id.* 47 C.F.R. § 76.1603(b) (2001) (requires customers to be provided with written notice of any changes in rates, programming services or channel positions a minimum of 30 days before the date of change).
93. *Id.* at 43.
94. *Id.*
95. *Id.* at 44.
96. *Id.* at 47.
97. *Id.* at 48.
98. *Id.* at 48-49.
99. *Id.* at 49.
100. *Id.* at 52.
101. *Id.* at 52-53.
102. *Id.* at 59.
103. *Id.* at 62.

V. COMMENT

The decision in *Kristian* makes major changes to arbitration agreements in the First Circuit. The language in the Comcast arbitration agreement expressly prohibited a subscriber from receiving treble damages and attorney's fees, and also waived class arbitration.[104] The court held that because state and federal law allowed for recovery of treble damages and attorney's fees, the waiver was invalid.[105] Additionally, the court held that class arbitration could not be prohibited.[106] In examining all three waiver provisions within the Policies and Practices document, the court applied the tests for effective vindication of statutory rights.

A. Waiver of Treble Damages and Attorney's Fees

In examining waiver of treble damages and attorney's fees, the court relied heavily on Supreme Court precedent. The Supreme Court had previously stated that allowing treble damages and the recovery of attorney's fees furthers a public interest.[107] Additionally, treble damages in antitrust actions are a federal statutory right.[108] The First Circuit's denial of waiver is well placed, given the respective bargaining positions of Comcast and each individual subscriber. In a mass-arbitration context, a single subscriber cannot be expected to bargain with Comcast over this waiver, creating a "take-it-or-leave-it" scenario. Allowing this waiver to stand would go against *Canal* and *Randolph*'s requirement that each party be allowed to fully vindicate statutory rights.

Likewise, the federal antitrust statute allows for the recovery of a reasonable attorney's fee.[109] The court again appropriately refused to waive this recovery right. Applying *Randolph*, a single subscriber would incur costs likely exceeding the recovery for an antitrust violation. Preventing recovery of attorney's fees would interfere with a subscriber's vindication of his statutory rights. Comcast had agreed to finance the cost of the arbitration, but the subscriber would still have to pay his own attorney's fees.

B. Waiver of Class Arbitration

For class arbitration, however, the court stands on shakier ground. The arbitration agreement expressly prohibits class arbitration.[110] As noted by the court, the agreement did not forbid class actions, only class arbitrations.[111] If the First Circuit chose to not enforce the arbitration agreement, the claim could proceed on a class action basis. However, the court decided that, under federal precedent, the

104. *Id.* at 29-30.
105. *Id.*
106. *Id.*
107. *See* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).
108. 15 U.S.C. § 15(a) (1982).
109. *Id.*
110. *Kristian*, 446 F.3d at 29-30.
111. *Id.* at 54.

requirement to arbitrate must be enforced because the contract language was unambiguous, and each invalid provision was severable.

Several circuits have addressed class arbitration waivers, reaching varying results.[112] Cases in the Third and Fourth Circuits provide precedent in Comcast's favor.[113] The court cites the Third Circuit decision, *Johnson v. West Suburban Bank*,[114] for authority. *Johnson* involved a Truth in Lending Act (TILA) claim. The Third Circuit relied on a Supreme Court case, *Gilmer v. Johnson/Interstate Lane Corp.*,[115] where the Court said that so long as a party can vindicate its statutory rights, arbitration can proceed.[116] The *Johnson* court extended *Gilmer* to the TILA, identifying three factors to help determine the validity of a class arbitration bar. The *Kristian* court adopted these three factors, applying them to the antitrust context.

For its first factor, *Johnson* states that the recovery amount is not necessarily increased in a class forum.[117] The *Kristian* court determined that without a class action, customers will not sue at all in antitrust cases.[118] It reasoned that each customer's costs will potentially outweigh the amount recovered in the claim. The court misinterprets the heart of *Johnson*'s argument. The Third Circuit intended this statement to simply mean that a plaintiff would not see a larger recovery in class arbitration than in solo arbitration.[119] Presumably, the damage amount per customer would remain constant regardless of the number of plaintiffs. Applying *Johnson* to *Kristian*, all cable subscribers could recover the same amount by suing individually as they could as a class. This differs with the First Circuit's conclusion that plaintiffs will not sue by themselves.

For its second factor, *Johnson* states that if the recovery of attorney's fees and costs is permitted, then each party can be adequately represented outside of a class forum.[120] The instant court rejects this factor by introducing the idea of "opportunity costs," or the external costs of filing a lawsuit against Comcast.[121] Because each plaintiff would have to personally assert a case against Comcast, the "opportunity costs" would be significantly larger in class arbitration. The *Johnson* court did not factor in "opportunity costs," presumably because they exist in all types of litigation.[122] *Kristian* and her fellow subscribers in this lawsuit would bear "opportunity costs" far greater than those subscribers not involved in the litigation, yet all may be entitled to the same recovery, as all were similarly harmed. The *Johnson* requirement for the recovery of attorney's fees and costs avoids one of

112. Johnson v. W. Suburban Bank, 225 F.3d 366 (3d Cir. 2000); Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Jenkins v. First Am. Cash Advance of Ga., 400 F.3d 868 (11th Cir. 2005); Livingston v. Associated Fin., Inc., 339 F.3d 53 (7th Cir. 2003).

113. *Johnson*, 225 F.3d at 374; *Snowden*, 290 F.3d at 638.

114. 225 F.3d 366.

115. 500 U.S. 20 (1991).

116. *Id.* at 28.

117. *Johnson*, 225 F.3d at 374.

118. Kristian v. Comcast Corp., 446 F.3d 25, 58 (1st Cir. 2006).

119. The *Kristian* court stated that due to the cost of providing expert witnesses, no customers would bring a claim for a small value. *Id.* However, the first *Johnson* factor speaks only to the sums available for recovery, without discussion of attorney's fees, expert witness retention fees, or other costs. *Johnson*, 225 F.3d at 374.

120. *Johnson*, 225 F.3d at 374-75.

121. *Kristian*, 446 F.3d at 58-59.

122. *Johnson*, 225 F.3d at 374-75.

the First Circuit's major fears: that a subscriber will be left with hundreds of thousands of dollars in attorney's and expert's fees after a case involving multiple subscribers.

For its third factor, *Johnson* states that class arbitration can be barred if administrative enforcement can remedy the problem.[123] In applying the last factor, the *Kristian* court noted that if Comcast's class arbitration was barred, administrative enforcement could still occur.[124] The *Johnson* court was satisfied that the TILA could be enforced through an administrative process. Because Comcast falls under FCC regulations,[125] it seems likely that the administrative process could help reduce the number of swapping agreements entered into by all telecommunications companies. Therefore, the court's conclusion that no enforcement will happen if class arbitration is barred is questionable.

It is important to distinguish the court's refusal to uphold the waiver of treble damages and attorney's fees from its decision on class arbitration. Treble damages and attorney's fees provisions can be found in the federal antitrust statute. The court does not cite a single federal statute that prohibits the waiver of class arbitration. It cites Fed. R. Civ. P. 23, which provides for class actions, but notes that this is not a ban on class arbitration, although the rule "effectively forecloses the use of any class-based mechanism."[126] Still, the court does not say that class actions cannot be waived under federal law.

C. *Policy Rationales behind Barring Class Arbitration in Mass Consumer Transactions*

Four policy rationales exist for allowing class arbitration waiver to stand. First, class arbitration could result in consumers paying higher costs in the future. Arbitration was initially designed to be a low-cost, efficient way of evaluating and deciding claims.[127] Grouping claims together will increase the size of the arbitration along with costs and time. Second, even assuming that Comcast holds superior bargaining power in requiring a class arbitration waiver, the subscribers were consenting parties to the cable subscription contract. Courts have long recognized that one-sided adhesion contracts are binding on both parties.[128] The subscribers have voluntarily agreed to Comcast's terms, regardless of whether or not they could bargain with Comcast to change the terms.

Third, in class action claims in a judicial forum, Fed. R. Civ. P. 23 provides requirements for notification to class members of the pending lawsuit. Under the Federal Arbitration Act, however, no rules exist to specify exactly how each potential class member is notified of the potential arbitration.[129] Because a defining factor of arbitration is confidentiality, a conflict exists between keeping confiden-

123. *Id.* at 375.
124. *Kristian*, 446 F.3d at 57.
125. *Id.* at 36.
126. *Id.* at 54.
127. Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1711 (2005).
128. *Id.* at 1713.
129. *Id.* at 1716-17.

tiality between the subscriber and the cable company and notifying potential class members of the claim. Fourth, Congress has recognized the Federal Arbitration Act as a valid and respectable alternative to litigation.[130] As more and more companies begin waiving class arbitration, consumer advocacy groups may force Congress to take a position on the issue. A possible amendment to the Federal Arbitration Act could explicitly allow or prohibit waiver of class arbitration once and for all.

Examining *Kristian* and other class arbitration waiver cases, there is a trend towards banning class arbitration waivers.[131] Hopefully, courts can create consistency to help both corporation and individual consumers understand their rights in the future. Additionally, this trend will likely reduce the overall amount of arbitration.[132] This appears to contradict with the judiciary's favoritism towards arbitration, but the decrease will result from the consolidation of all arbitrations into one large class arbitration.

VI. CONCLUSION

The *Kristian* holding increases consumer rights in the First Circuit. Barring recovery of treble damages and attorney's fees despite statutory authority to the contrary is not a new concept, and courts continue to prevent the waiver of class arbitration in consumer cases. The court appears to have severely limited the application of class arbitration waivers in future cases. Plaintiffs would need to seek large damage amounts to meet the First Circuit's economics requirements. If this decision is applied in other circuits, it could indicate a strong disfavor towards waiving class arbitration, while maintaining favor for arbitration in general.

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130. *Id.* at 1718.

131. Jonathan Rizzardi, Recent Developments, *Discover Bank v. Superior Court of L.A.*, 21 OHIO ST. J. ON DISP. RESOL. 1093, 1098 (2006).

132. *Id.*