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# Curing Consumer Warranty Woes Through Regulated Arbitration

AMY J. SCHMITZ\*

*This Article proposes legislative procedural reforms accounting for the realities of consumer arbitration that have threatened and denied consumers' access to remedies for companies' violations of public, or statutory, warranty remedies under the Magnuson-Moss Warranty Act (MMWA). Furthermore, the Article proposes to clarify and expand the MMWA's current dispute resolution template in order to resolve judicial disagreement regarding the template's application and foster beneficial use of binding arbitration. Accordingly, this is not a call to ban all pre-dispute arbitration clauses in consumer contracts, but is instead an invitation for more politically palatable reforms that preserve both companies' savings and consumers' access to warranty remedies through arbitration. The time is ripe for legislative reforms that account for the importance of procedural justice and temper contractors' and courts' deference to consumer form contracts.*

Un-negotiated form arbitration provisions have become accepted reality in consumer contracts in the United States. Consumers can expect to find these form arbitration clauses in everything from McDonald's contest rules and medical services handbooks to computer purchase terms and pest control contracts.<sup>1</sup> Most, if not all, of the chief credit card companies now require arbitration in their form contracts.<sup>2</sup> At the same time, United States courts strictly enforce these form arbitration provisions under the Federal Arbitration Act (FAA) and states' adoptions of the Uniform Arbitration Act (UAA). They also generally follow the Supreme Court's charge in applying pro-arbitration jurisprudence and formalistic, efficiency-focused contract

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<sup>1</sup> Stephen K. Huber & E. Wendy Trachte-Huber, *Top Ten Developments in Arbitration in the 1990s*, in AM. ARBITRATION ASS'N, HANDBOOK ON COMMERCIAL ARBITRATION 15, 25–26 (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2006) [hereinafter HANDBOOK].

<sup>2</sup> Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1591 PLI/CORP. 35, 49 (2007) (including Citibank, Chase, AMEX, Discover, Bank of America, Capital One, Washington Mutual, MBNA, and GE Capital in its list of arbitration users); see Collected Cell Phone and Credit Card Arbitration Provisions, chart last updated on May 15, 2007 (on file with author) [hereinafter Collected Arbitration Provisions] (finding such prevalent use).

law.<sup>3</sup> Meanwhile, courts that depart from this charge earn reputations as outlier courts and risk running afoul of the FAA's preemption of state law that hinders arbitration.<sup>4</sup>

Contractual liberty is a pillar of classical contract law and related FAA jurisprudence. Moreover, arbitration can provide efficient and effective means for parties to resolve their disputes. Arbitration has become problematic, however, in consumer contexts due to contractors' and courts' deferential treatment of companies' adhesive arbitration provisions in consumer form contracts. This deference has allowed these companies to essentially privatize justice, even with respect to consumers' statutory rights.

At the same time, business attorneys report that "arbitration is losing its luster" among their corporate clients due to consumer distrust and litigation regarding enforcement of arbitration clauses.<sup>5</sup> Companies also lament arbitration's judicialization, or the infusion of trial-like procedures in arbitration proceedings.<sup>6</sup> Some businesses are also becoming skeptical of the due process arbitration proceedings offer.<sup>7</sup> The time is therefore ripe to address companies' and consumers' concerns in order to preserve both companies' efficient use of arbitration and consumers' vindication of statutory rights.

This Article is not the first to discuss these concerns and propose arbitration reforms.<sup>8</sup> Proposals for arbitration reforms have resonated with many scholars and policymakers who posit that pre-dispute arbitration provisions have hindered consumers' access to remedies, especially for

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<sup>3</sup> See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (finding that the "liberal federal policy favoring arbitration agreements" supported enforcement of an arbitration agreement that created risk of exorbitant arbitration costs and fees). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109–24 (2001) (enforcing arbitration agreements in employment contracts despite the FAA's exclusion for "workers engaged in . . . interstate commerce").

<sup>4</sup> See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 40–41 (2006); *Shepard v. Edward Mackay Enterprises, Inc.*, 148 Cal. App. 4th 1092 (2007) (finding the FAA preempted California law allowing homeowners to file litigation despite arbitration clauses in home purchase agreements).

<sup>5</sup> *Arbitration Aggravation*, BUSINESSWEEK, Apr. 30, 2007, at 38–39.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 39 ([Businesses] "are looking around and saying, 'Maybe the court system isn't so bad—at least you get due process at some point.'").

<sup>8</sup> See generally EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006) (leading arbitration scholars to critique and suggest reforms of the FAA).

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violations of their public or statutory rights.<sup>9</sup> Recently, on July 12, 2007, legislators again proposed bills in both the U.S. House and Senate to prohibit enforcement of all pre-dispute arbitration agreements in consumer, employment, and franchise contracts. The bills also went further to bar enforcement of these agreements with respect to "dispute[s] arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."<sup>10</sup>

Such broad bans on pre-dispute arbitration agreements, however, have not enjoyed legislative success.<sup>11</sup> Instead, Congress has largely ignored such proposals. It has adopted only a few targeted arbitration bills barring enforcement of arbitration requirements in active duty military members' consumer credit contracts and in motor vehicle franchise contracts.<sup>12</sup> Moreover, the limited empirical studies of arbitration outcomes available indicate that individuals may not benefit from a ban on arbitration agreements because arbitration often is faster and cheaper than litigation, and

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<sup>9</sup> See Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069 (1998) (recognizing the adhesive nature of consumer arbitration and proposing a Federal Consumer Arbitration Act designed to ensure consumers' consent to arbitration of statutory claims and access to fair proceedings); Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225 (1998) (suggesting legislative regulation of consumer, employment, and franchise arbitration).

<sup>10</sup> The Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th Cong. (2007) (primarily sponsored by Sen. Russ Feingold (D-WI) and Rep. Hank Johnson (D-GA), respectively.).

<sup>11</sup> See, e.g., H.R. 3651, 109th Cong. (2005) (Bill lingering in committee to amend the FAA to preclude arbitration of employment disputes unless the employee and employer agree to arbitrate after the dispute arises.); H.R. 2969, 109th Cong. (2005) (Another bill lost in committees to preclude enforcement of pre-dispute arbitration agreements in employment contracts.); H.R. 1994, 109th Cong. (2005) (Bill lost in committee addressing predatory mortgage lending practices, and including provisions barring enforcement of pre-dispute arbitration agreements in any consumer transactions.).

<sup>12</sup> National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a) (codified at 10 U.S.C. § 987 (2006)) (making arbitration clauses unlawful in consumer credit contracts with military servicemembers); Motor Vehicle Franchise Contract Arbitration Fairness Act § 11028, Pub. L. No. 107-273, 116 Stat. 1758 (enacted as 15 U.S.C. § 1226 (2002)) (limiting enforcement of agreements to arbitrate motor vehicle franchise disputes to post dispute, written contracts, and requiring written explanations for any arbitration awards).

may provide individuals with higher recovery rates than they would obtain in court.<sup>13</sup>

At the same time, some arbitration administering organizations and various advocacy groups have suggested due process fairness standards in disparate power contexts such as that in consumer arbitration. For example, the adhesive realities of consumer arbitration led the American Arbitration Association (AAA) to create a National Consumer Disputes Advisory Committee (Advisory Committee), which promulgated the 1998 Consumer Due Process Protocol (Protocol).<sup>14</sup> The Protocol suggests procedural fairness "shoulds" including clear notice of arbitration clauses and how to obtain information regarding the arbitration process, preservation of consumers' access to small claims court, and measures ensuring "reasonable cost to consumers" and "reasonably convenient" hearing locations.<sup>15</sup>

Some arbitration providers have encouraged or required companies that seek their services to adopt the Protocol or other procedural fairness standards, and some companies have complied.<sup>16</sup> However, other companies have continued to impose arbitration clauses with onerous provisions on consumers.<sup>17</sup> Harsh arbitration clauses appear in many common consumer contracts without consumers' notice or true consent, leading consumers to unknowingly waive access to judicial remedies for vindicating their statutory rights. This may allow companies that promulgate these arbitration clauses to avoid regulation and accountability. It also may deny the public access to information regarding issues affecting health, safety, and other important policies.

In light of these realities, I urged at a recent dispute resolution symposium that companies, consumers, and policymakers should join forces to craft procedural reforms that protect consumers' access to justice without

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<sup>13</sup> See Kirk D. Jensen, *Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L.Q. 631, 631-35 (2006) (gathering studies and surveys performed by various academics, companies, and institutions).

<sup>14</sup> National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, <http://www.adr.org/sp.asp?id=22019> (last visited Aug. 15, 2006) [hereinafter Protocol].

<sup>15</sup> *Id.*

<sup>16</sup> See American Arbitration Association, AAA Review of Consumer Clauses, <http://www.adr.org/si.asp?id=4453> (last visited Feb. 27, 2008) (stating AAA policy of refusing to administer arbitration proceedings pursuant to consumer clauses that do not comply with the Protocol).

<sup>17</sup> See *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389 (2001) (refusing to enforce an arbitration clause precluding consumers' access to small claims court on a defective product claim).

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sapping companies' cost-savings and other efficiency benefits of arbitration.<sup>18</sup> I argued that the "shoulds" of the 1998 Protocol be transformed into legislative "musts" that would survive FAA preemption.<sup>19</sup> This Article now further explores the importance of individuals' procedural justice assessments of arbitration's fairness, and seeks to address how demoralized consumers' unfairness assumptions may lead them to challenge or defy arbitration terms.<sup>20</sup> It also targets arbitration of consumers' warranty claims under the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act (MMWA) as a starting point for procedural reform of consumer arbitration because these claims often involve health and safety issues.<sup>21</sup> Furthermore, courts' disagreement regarding the interpretation and application of the MMWA's murky template for dispute resolution makes the Act's template a ripe laboratory for establishment of clear procedural protections.

Part I of this Article discusses the fairness concerns that plague arbitration of disputes arising out of companies' consumer form contracts, including questionable consent to form clauses and their use to curb consumers' rights. It also explores the importance of procedural fairness perceptions on parties' willingness to participate in arbitration and accept arbitration awards. Part II then sets forth the current MMWA text and administrative regulations governing "informal dispute resolution" under the Act, and courts' disagreement regarding the application of these regulations with respect to binding arbitration. Part III proposes how policymakers could resolve this disagreement and augment this template to establish mandatory minimum fairness rules for binding arbitration of MMWA claims. This Article concludes with suggestions for reforms that allow for beneficial use of consumer arbitration, but seek to preserve consumers' warranty remedies

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<sup>18</sup> Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L. J. 37, 37–55 (2007).

<sup>19</sup> Protocol, *supra* note 14.

<sup>20</sup> Scott Adams sums up unfairness assumptions as follows:

Dilbert: "I didn't read all of the shrink-wrap license agreement on my new software license until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion."

Dogbert: "Call your lawyer."

Dilbert: "Too late. He opened [the] software yesterday. Now he's Bill's laundry boy."

Scott Adams, Dilbert, United Feature Syndicate, Inc., Jan. 14, 1997.

<sup>21</sup> Magnuson-Moss Warranty–Federal Trade Commission Improvement Act (MMWA), Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–12 (2000)).

and quell the rising tide of litigation and skepticism toward consumer arbitration.

### I. PROCEDURAL INJUSTICE IN CONSUMER ARBITRATION

The FAA and contractual liberty generally support strict enforcement of arbitration agreements, and arbitration programs can generate cost-savings and other efficiency savings for disputants and courts.<sup>22</sup> This is especially true in international contexts where neutrality and enforcement concerns make arbitration particularly attractive.<sup>23</sup> Flexible arbitration procedures also may allow parties in a given industry to have their disputes resolved in accordance with industry norms,<sup>24</sup> and may merely impact statutory rights and remedies in the same way as forum selection clauses or settlement agreements.<sup>25</sup> Arbitration can nonetheless raise fairness concerns in consumer cases due to consumers' lack of bargaining power and illusory assent to form contracts.<sup>26</sup> Companies also may use arbitration clauses to

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<sup>22</sup> W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 70–71, 111–12 (2007) (emphasizing how arbitration can benefit consumers and highlighting the potential for consumers to aggregate their claims through class arbitration proceedings).

<sup>23</sup> See generally William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241 (2003) (discussing the unique qualities and character of international arbitration).

<sup>24</sup> See, e.g., Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–64, 292 (2006) (proposing overall cost savings of pre-dispute arbitration clauses for companies and consumers); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 212 (1998) (arguing that arbitration clauses benefit consumers and the purchasing public).

<sup>25</sup> William W. Park, *The 2002 Freshfields Lecture — Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L 279, 280–84 (2003) (also noting that the benefits of arbitration can be overrated and advancing the need of more precise procedural protocols).

<sup>26</sup> See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1382–86 (1996) (critiquing the courts' "drifting away from, or perhaps abandoning altogether, society's traditional notions of meaningful consent"); Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 29–33 (2002). But see Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741–54 (questioning claims that form arbitration provisions in consumer contracts as unfair); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429,

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curb consumers' statutory rights.<sup>27</sup> Indeed, consumer arbitration has been a matter of debate I will not now rehash.<sup>28</sup> Instead, this Article offers suggestions for procedural regulations of consumer arbitration aimed to address the confluence of formalistic FAA and contract enforcement with the culture of consumer contracting.<sup>29</sup>

### *A. Deference Toward Form Arbitration Clauses in Consumer Contracts*

It is time to reconsider the FAA's one-size-fits-all enforcement regime in order to ensure proper regulation of companies' use of arbitration, ease consumer demoralization, and preserve the legitimate and beneficial use of arbitration in consumer contexts. In prior presentations and articles, I have questioned the formulaic enforcement of arbitration provisions in consumer transactions.<sup>30</sup> I have borrowed from Ian Macneil's "relational contracts"<sup>31</sup> in proposing that courts should temper their formalistic enforcement of form

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435–51, 485–87 (2002) (explaining why electronic contracts are not adhesive and promote efficiency).

<sup>27</sup> See, e.g., Speidel, *supra* note 9, at 1084–92 (proposing legislative response to concerns regarding arbitration of consumers' statutory rights); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) (critiquing companies' inclusion of arbitration clauses in their contracts with consumers, employees, and "other little guys"); Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (critiquing arbitration of employment claims); Geraldine Szott Moohr, *Opting in or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087 (1999) (discussing unfairness of arbitration in traditionally non-merchant contexts); Stempel, *supra* note 26, at 1410–14 (critiquing industries' use of arbitration provisions in form contracts).

<sup>28</sup> Full discussion of all the concerns making legislation appropriate is beyond the scope of this Article.

<sup>29</sup> The time is ripe for establishment of clear procedural regulations of MMWA arbitration in order to address what Professor Speidel has described as the "consumerization of arbitration" that has allowed industries to deregulate themselves. Speidel, *supra* note 9, at 1071–74 (raising the astute question of whether the FAA's unitary model "has outlived its usefulness" in light of its expansion beyond traditional business relationships).

<sup>30</sup> See, e.g., Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 123–72 (2007).

<sup>31</sup> See Ian R. Macneil, Commentary, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 589–93 (1974) (critiquing "presentation" in classical law).



arbitration provisions companies impose in consumer contracts by considering the "extra communal contracting culture" in these transactions. This would require courts to consider how consumers' and companies' relations, understandings, and values with respect to dispute resolution often collide to the extent that these players lack personal connections and have diverging dispute resolution understandings and values.<sup>32</sup> It also asks the law to recognize that all contracting relationships are not the same.

The federal courts have read the FAA, however, to direct courts to enforce pre-dispute arbitration provisions in consumer form contracts with the same pro-arbitration one-size-fits-all regime they apply in all commercial contexts, thereby tipping dominos of deference to companies' advantage and arguably allowing them to effectually privatize justice.<sup>33</sup> I have previously described these dominos of deference: (a) companies promulgate form arbitration clauses to serve their needs to the disadvantage of consumers; (b) arbitration administering institutions create rules that may favor these companies as repeat clientele; (c) consumers treat these forms as "law" by failing to even attempt to negotiate them due to lack of awareness, resources, and bargaining power; and (d) courts condone these clauses with the preemptive force of the FAA and formalistic application of contract defenses.<sup>34</sup>

These dominos of deference allow manufacturers and other retailers to include form arbitration provisions in their consumer contracts that limit consumers' rights and remedies for any future claims they may have with respect to the transaction. For example, companies' provisions may preclude class or small claims relief, bar recovery of statutory damages or attorney fees, and require consumers to bear potentially high arbitration filing fees and costs. Consumers may nonetheless become subject to these provisions with little consideration of what they mean or how they may be problematic if disputes arise during contract performance.<sup>35</sup> At the same time, consumers who seek to resist such arbitration provisions generally lose the fight due to

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<sup>32</sup> See generally Schmitz, *supra* note 30.

<sup>33</sup> Schmitz, *supra* note 18.

<sup>34</sup> *Id.*

<sup>35</sup> See James C. Freund, *Calling All Deal Lawyers—Try Your Hand at Resolving Disputes*, 62 BUS. LAW. 37, 42–44 (2006) (describing "deal lawyers" experiences using boilerplate without consideration of conflict avoidance, and proposing that they use their problem-solving skills to help resolve disputes).

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lack of bargaining power and contract choices.<sup>36</sup> Courts then generally enforce arbitration terms per the FAA and contractual liberty directives.

Ideally, consumers would read and negotiate arbitration terms in their form contracts. This is not realistic, however, where consumers have no choice but to take a company's onerous arbitration terms or forgo the deal. Consumers who want cell phone service, for example, generally must accept burdensome arbitration terms in order to access that service. All nine of the biggest cell phone service providers' consumer form contracts I examined included such arbitration terms, while only two of these contracts stated arbitration as an "option."<sup>37</sup> Furthermore, one of the contracts that stated arbitration as an option precluded jury trial for any litigation, and all nine of the contracts barred consumers' access to class relief.<sup>38</sup>

Despite these contracting realities, however, courts have followed the Supreme Court's pro-arbitration jurisprudence in strictly enforcing these form arbitration provisions under the FAA.<sup>39</sup> Furthermore, the Court has read the FAA to preempt state law that hinders or discriminates against arbitration, and directs courts to order arbitration unless the arbitration agreement is unenforceable under a general contract defense such as fraud, mistake, or unconscionability.<sup>40</sup> Most courts then assume assent to form provisions and apply contract defenses narrowly, emphasizing efficiency without truly considering the consumer contracting culture.<sup>41</sup> In addition, the Court's holding in *Buckeye Check Cashing, Inc. v. Cardegna* reemphasized its directive that courts narrowly constrain their scrutiny of arbitration clauses to

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<sup>36</sup> See Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 101–18 (2006) (recognizing the dominance of drafters and form documents in consumer contracts).

<sup>37</sup> See Collected Arbitration Provisions, *supra* note 2.

<sup>38</sup> *Id.*

<sup>39</sup> See generally David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36–132 (questioning arbitration of employee and consumer claims pursuant to form agreements).

<sup>40</sup> See Speidel, *supra* note 9, at 1079–81 (explaining how FAA preemption and courts' narrow application of general contract defenses make it "difficult if not impossible" to avoid arbitration agreements).

<sup>41</sup> See Irma S. Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOY. L.A. L. REV. 137, 140–43 (2006) (discussing how courts' presumption of free bargaining allows dominant drafters to unilaterally change default rules).

only the enforceability of an arbitration agreement itself, and not contract defenses or other challenges that implicate the contract as a whole.<sup>42</sup>

Meanwhile, some commentators have tagged California courts that have used unconscionability and other contract defenses to police consumer arbitration as outlier courts that risk running afoul of FAA preemption by targeting arbitration clauses for special treatment.<sup>43</sup> These once proactive courts, however, seem to be joining with the majority in strictly enforcing arbitration. For example, the California Supreme Court recently condoned arbitration of a patient's medical malpractice claim against a chiropractor under an arbitration clause in the chiropractor's form contract that extended to future services although there had been a two-year lull in the patient's visits to the chiropractor from the time he signed that contract to when he received the allegedly negligent services.<sup>44</sup> The court did not consider that commentators and most bar ethics committees frown on use of prospective arbitration clauses to resolve legal malpractice claims.<sup>45</sup>

The FAA's unitary regime therefore converges with the consumer contracting culture and formalistic contract law to allow for privatized justice dictated by companies' form arbitration clauses. One may argue that such private justice regimes are efficient results of contractual liberty worthy of enforcement. In some communal industries, such as that in the cotton industry, research suggests that such private regimes can be quite beneficial.<sup>46</sup> The question is how far companies may go in imposing these regimes on consumers when important statutory warranty claims are at stake.

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<sup>42</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (holding the illegality defense at issue was for the arbitrator and not the court because the defense did not target the arbitration clause). See also Richard L. Barnes, *Buckeye, Bull's-Eye, or Moving Target: The FAA, Compulsory Arbitration, and Common-Law Contract*, 31 VT. L. REV. 141, 174–75, 184 (2006) (discussing the narrowing impact of *Buckeye*).

<sup>43</sup> Broome, *supra* note 4, at 40–41 (2006).

<sup>44</sup> *Reigelsperger v. Siller*, 150 P.3d 764, 765–68 (Cal. 2007) (denying, also, the claim that the contract did not give the proper notice of arbitration required by the California Medical Injury Compensation Reform Act of 1975, and not addressing the possible unconscionability of the arbitration clause).

<sup>45</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-425 (2002) (allowing for arbitration provisions in lawyer retainer agreements, but only with proper disclosures to ensure informed consent). See also Monica T. Nelson, *Discover Bank v. Superior Court: The Unconscionability of Classwide Arbitration Waivers in California*, 30 AM. J. TRIAL ADVOC. 649, 661–72 (2007) (discussing the many issues on class waivers in arbitration alone, and citing some recent cases enforcing these waivers in California).

<sup>46</sup> See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724–45,

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### *B. Consumers' Disempowerment and Loss of Statutory Rights*

Most opponents of consumer arbitration propose to bar enforcement of pre-dispute arbitration clauses in consumer cases.<sup>47</sup> Blanket bans on consumer arbitration, however, discount the benefits of arbitration and may backfire against consumers. Such preclusive proposals also have little practical effect due to their political demise.

This Article, therefore, diverges from these proposals by allowing for beneficial use of consumer arbitration. It instead suggests procedural regulation of consumer arbitration to address the importance of procedural justice and process impressions. Process matters, especially with respect to contracting and accessing remedies. This suggests that regulations should temper consumers' disadvantages in bargaining and dispute resolution processes, and recognize that consumers often lack meaningful contracting choice and information about their remedy rights.<sup>48</sup> Regulations also should recognize that consumers may lack access to legal counsel to help them in the bargaining process and to guide them through litigation or arbitration procedures necessary to obtain remedies.<sup>49</sup>

Consumers' frustrations with such process disadvantages have significant impact. This is because individuals generally focus on process in assessing "fairness." Social, psychological, and organizational research has long suggested that individuals generally focus on perceived fairness of process and procedures in assessing fairness.<sup>50</sup> Researchers have advanced a "fairness-heuristic" that individuals' judgments regarding the fairness of arbitration procedures greatly impact their impressions of arbitration and

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1785 (2001) (discussing cotton merchant community's creation of a private legal system (PLS) through which the community has succeeded in minimizing transaction, legal system, and collection costs).

<sup>47</sup> See Jean R. Sternlight, *In Defense of Mandatory Arbitration (if Imposed on the Company)*, 8 NEV. L.J. 82, 82-100 (2007) (discussing critics' calls to bar companies from imposing pre-dispute arbitration agreements on consumers and employees, and proposing to turn the consent question on its head by requiring companies to submit to binding arbitration at the sole option of the consumer).

<sup>48</sup> See Teri J. Dobbins, *The Hidden Costs of Contracting: Barriers to Justice in the Law of Contracts*, 7 J. L. SOC'Y 116, 116-18 (2005) (discussing how lower-income individuals are disadvantaged in bargaining and in seeking contract remedies).

<sup>49</sup> *Id.* at 127-35 (emphasizing how "[c]ontract remedies assume the ability to bring suit" but low-income people often lack that ability in both litigation and arbitration).

<sup>50</sup> See Deborah R. Hensler, *Judging Arbitration: The Findings of Procedural Justice Research*, in HANDBOOK, *supra* note 1, at 41-49 (discussing procedural justice research and highlighting how it suggests the importance of fair procedures in arbitration).

their decisions whether to accept arbitrators' awards.<sup>51</sup> For example, researchers who studied litigants in federal actions subject to court-ordered nonbinding arbitration found that individuals' fairness impressions of the arbitration procedures had a much greater impact on their decisions whether to accept an arbitrator's award than any subjective or objective measures of the award.<sup>52</sup> Litigants were likely to accept seemingly adverse awards if they viewed the process leading to the award as fair.

This flows from core social psychological approaches for dealing with authority contexts, and emphasizes the impact of fairness impressions in dispute resolution. "[P]eople use fairness judgments to summarize their experience with authorities and to guide their decisions and actions with respect to the authority."<sup>53</sup> Consumer and corporate litigants alike base positive and negative fairness assessments of arbitration on their impressions of the process. This suggests that individuals' assessments of arbitration will depend on whether they believe that the overall process is unbiased and allows them to fully present their cases in an open and dignified forum.<sup>54</sup> Furthermore, individuals without personal experience with arbitration base their perceptions of the process on others' stories and reports. Stories of arbitration's unfairness therefore foster consumer defiance of arbitration agreements and awards, and attendant litigation that compromises the touted efficiency of arbitration.

Indeed, consumer challenges of arbitration agreements and awards have been on the rise in the wake of consumers' and commentators' dissatisfaction with companies' use of arbitration clauses. Generalized consumer skepticism and negativity toward arbitration continues to grow despite some surveyed individuals' reported satisfaction with arbitration outcomes.<sup>55</sup> Consumers in focus groups I recently conducted in Denver, Colorado, reported that they felt demoralized and helpless against companies' form contracts and

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<sup>51</sup> E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224–28 (1993) (discussing study of litigants subject to court-ordered arbitration).

<sup>52</sup> *Id.* at 224, 228–48 (describing the study, setting forth hypotheses, and discussing findings strongly reinforcing the fairness heuristic).

<sup>53</sup> *Id.* at 246.

<sup>54</sup> *Id.* See also Hensler, *supra* note 50, at 48–49 (emphasizing implications of process perceptions on arbitration).

<sup>55</sup> Although there is great need for more research, some surveys suggest that arbitration may not be as "lawless" as some assume. See Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 204–15 (2006) (considering complaints of arbitration's "lawlessness," and evidence on both sides of the debate).

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arbitration clauses.<sup>56</sup> They indicated pessimism about companies' contracting practices and arbitration programs, and general distrust of merchant sellers.<sup>57</sup> They expected companies to impose unfair contract terms and viewed arbitration clauses as presumably anti-consumer.

Consumers in the discussions also explained that their helplessness has led them to assume that is a waste of time to read or retain any copies of form contracts because consumers lack power to effectuate changes in such forms. Consumers regularly threw out "bill stuffers" with terms companies added to consumer contracts, and often bypassed "terms and conditions" links in contracts they entered into over the Internet.<sup>58</sup> They reported great difficulties even contacting companies to question or negotiate form terms, especially when purchasing goods or services via the Internet.<sup>59</sup> They also recounted instances in which salespersons told them that form terms were not subject to any alteration, or that salespersons lacked power to change such terms.<sup>60</sup>

Of course, the lack of empirical evidence on consumer arbitration outcomes raises questions regarding the legitimacy of these negative perceptions. It is unclear that consumers' perceptions of arbitration reflect reality; there is at least some evidence that individuals fare quite well in arbitration.<sup>61</sup> However, consumers' current negativity toward arbitration stems from somewhere, and gels with a generalized demoralization. Moreover, this negativity toward arbitration clauses and form contracts matters regardless of whether it is warranted because trust that drives healthy markets is built on perceptions. Furthermore, this negativity suggests that consumer arbitration needs improvement, as well as a support system built on better consumer education regarding the attributes of arbitration.

At the same time, there is a need for more empirical data regarding the cognitive processes that underlie procedural fairness judgments and how individuals decide what procedures they perceive as fair.<sup>62</sup> "The question of

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<sup>56</sup> See Consumer Focus Group Notes, conducted by Amy J. Schmitz, Denver, Colorado (Nov. 18, 2006) (notes on file with author) [hereinafter Consumer Focus Group].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Weidemaier, *supra* note 22, at 84–89 (noting the limited empirical support for critiques of consumer and employment arbitration, as well as the benefits of arbitration for consumers).

<sup>62</sup> See Maureen L. Ambrose & Carol T. Kulik, *How Do I Know That's Fair?: A Categorization Approach to Fairness Judgments*, in THEORETICAL AND CULTURAL

how individuals evaluate procedures to form fairness judgments is fundamentally a cognitive question" that is central in proactively designing procedures that individuals will evaluate as fair.<sup>63</sup> Reasonable minds can disagree regarding procedural fairness, although there is evidence that individuals consistently value having a voice in decisionmaking and feeling decisionmakers have listened to their views.<sup>64</sup>

Individuals' values nonetheless differ based on their experiences and expectations.<sup>65</sup> Furthermore, they often incorporate their experiences with those of others in their status group in making judgments regarding the fairness of procedures.<sup>66</sup> This suggests that consumers' shared experiences and stories regarding arbitration procedures impact their overall impressions of arbitration and willingness to comply with arbitration agreements and awards. Reported perceptions matter, whether or not they are unfounded. Just as politicians must watch the polls, companies should be concerned with consumer morale and its impact on their bottom lines.

Accordingly, legislative solutions should focus on regulating procedures in arbitration and curbing arbitration clause terms, rather than barring enforcement of all pre-dispute arbitration agreements in consumer contracts. Individuals' focus on procedure in assessing "fairness" also suggests that procedural reform would be more effective in fostering fair and efficient arbitration than expanded review of arbitration awards. Expanded review of arbitration also may harm arbitration's efficacy and backfire against consumers by making them vulnerable to hassles and high costs of post-arbitration litigation.<sup>67</sup>

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PERSPECTIVES ON ORGANIZATIONAL JUSTICE 35, 37-43 (Stephen Gilliland et al. eds., 2001) (emphasizing importance and lack of data on cognitive questions impacting procedural justice).

<sup>63</sup> *Id.* at 37.

<sup>64</sup> *Id.* at 39-42 (noting differences in procedural values which are dependent on context and the persons involved).

<sup>65</sup> *Id.* at 40-43.

<sup>66</sup> *Id.* at 41-46 (discussing this normative basis for procedural justice judgments, and using cognitive categorization as a systematic way of addressing how individuals "make sense" of procedures).

<sup>67</sup> See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124-32 (2002) (discussing the meaning of finality under the FAA and highlighting its centrality to arbitration's functions). See also Dobbins, *supra* note 48, at 136-37 (noting that nonbinding arbitration may further disadvantage low-income people by raising litigation costs). The United Supreme Court recently confirmed the exclusivity of the FAA's limited review provisions. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. \_\_ (2008).

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I therefore invite procedural reforms that protect consumers' access to justice, and allow companies to reap efficiency benefits of arbitration while improving their reputations and goodwill.<sup>68</sup> I propose that the "shoulds" of the 1998 Protocol be transformed into legislative "musts" that would survive FAA preemption.<sup>69</sup> Policymakers could incorporate these as "musts" in the MMWA's dispute resolution template in order to protect these essentially public rights and use this template as a springboard for other procedural reforms that may garner political support. Providing clear arbitration rules in the MMWA also would ease the current litigation and uncertainty regarding the arbitrability of MMWA claims.

### II. THE MMWA'S AMBIGUOUS TEMPLATE FOR CONSUMER-FRIENDLY ADR

Realities of one-sided form provisions and their burden on consumers' access to statutory, or public, remedies make fairness standards especially important for protection of MMWA rights. The MMWA aims to enhance and ensure consumers' access to remedies for breach of warranty, but form arbitration provisions often unduly restrict and threaten that access. Consumers therefore complain that arbitration frustrates the Act's goals by allowing violators to avoid public disclosure and accountability, perpetuating contracting imbalances at the core of warranty abuses, and curbing "private attorney general" functions of consumer class actions.<sup>70</sup> They also assert that the MMWA's template for "informal" dispute resolution precludes binding arbitration of warranty claims.<sup>71</sup> Companies then also suffer the hassles and inefficiencies of continual litigation and judicial disagreement regarding

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<sup>68</sup> See Consumer Focus Group, *supra* note 56.

<sup>69</sup> Protocol, *supra* note 14.

<sup>70</sup> See *id.* See also Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173, 173–84, 246–47 (2003) (arguing that the text, legislative history, and purposes of the MMWA should drive courts to refuse to enforce binding arbitration of MMWA claims); Garrett S. Taylor, Note, *Read the Fine Print—Alabama Supreme Court Rules that Binding Arbitration Provisions in Written Warranties are Okay*, 2001 J. DISP. RESOL. 165, 172–76 (disagreeing with the Alabama Supreme Court's decision in *Southern Energy v. Ard*, 772 So. 2d 1131 (Ala. 2000), to overturn its one year-old decision and now hold MMWA claims arbitrable).

<sup>71</sup> MMWA, 15 U.S.C. § 2310 (2006) (providing for establishment and monitoring of dispute resolution procedures for consumers' warranty claims under the Act); 16 C.F.R. §§ 700.8, 703.1 (2000) (establishing disclosure and procedural requirements regarding notice, information, costs, neutrality, and review).



these claims and the enforcement of their arbitration clauses.<sup>72</sup> These considerations converge to make the MMWA an appropriate starting place for creation of clear procedural regulations of arbitration upon which consumers and companies can rely.

### A. *The Act's Text and Regulations Regarding Dispute Resolution*

Congress enacted the MMWA in 1975 to enhance notice and disclosure regarding consumer warranties, and improve consumers' access to remedies for breach of warranty claims.<sup>73</sup> The MMWA seeks to prevent deception, improve the adequacy of information provided to consumers, and promote competition in the marketing of consumer products.<sup>74</sup> To that end, the Act provides for a federal cause of action to enforce minimum standards for written warranties designated as "full" or "limited."<sup>75</sup> Although there is a split in authority, most courts also allow for federal claims based on Uniform Commercial Code (UCC) implied warranties even in the absence of a written warranty.<sup>76</sup>

The MMWA's provision for a federal action reinforces the Act's purpose of broadening remedies available for breach of express and implied warranties.<sup>77</sup> To that end, the Act allows consumers to seek legal and equitable relief in state or federal court. It also allows consumers who prevail on their warranty claims to collect costs and expenses, including attorney fees, incurred in connection with pursuit of the claims.<sup>78</sup> Furthermore, the Act provides for class relief, which fosters its public functions and often

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<sup>72</sup> See F. Paul Bland, Jr. et al., *Elected Arbitration Decisions Since September 2005*, 1590 PLI/CORP. 397, 403–25 (Mar.–May 2007) (emphasizing "an enormous explosion of litigation" involving challenges to arbitration clauses from 2005–07, and summarizing only "several dozen" due to the impossibility of covering the more than 500 published cases within this time period alone).

<sup>73</sup> MMWA, 15 U.S.C. §§ 2301–12.

<sup>74</sup> *Id.* § 2302(a). Mace E. Gunter, Note, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483, 1487–89 (2000) (discussing the purpose and history of the MMWA).

<sup>75</sup> MMWA, 15 U.S.C. § 2310(a)(3).

<sup>76</sup> See *McCurdy v. Texar, Inc.*, 575 So. 2d 299, 300 (Fla. Dist. Ct. App. 1991) (holding MMWA applied to allow for federal action under the Act for implied warranties). *But see* *McNamara v. Nomeco Bldg. Specialties, Inc.*, 26 F. Supp. 2d 1168, 1171–74 (D. Minn. 1998) (holding that the protections of the MMWA do not apply to implied warranties which are not attendant to any form of written warranty).

<sup>77</sup> MMWA, 15 U.S.C. § 2310(d).

<sup>78</sup> *Id.*

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provides the only feasible avenue for consumers to assert small-dollar claims.<sup>79</sup>

The Act also seeks to broaden consumers' access to remedies by encouraging warrantors to establish "informal dispute settlement procedures" that consumers may be required to pursue before commencing judicial action on warranty claims under the Act.<sup>80</sup> The Act states that it shall be Congress's "policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through dispute settlement mechanisms." It then charges the Federal Trade Commission (FTC) with prescribing and monitoring "minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty" covered by the Act. It also requires independent or government entities to participate in such procedures.<sup>81</sup>

The Act therefore specifies that a warrantor must incorporate an established dispute resolution procedure in its written warranty and ensure that the procedure meets the FTC's requirements. If the procedure complies, then an individual consumer may not bring a civil action under the Act until after the consumer "initially resorts" to the procedure. Class actions also may not proceed before initial resort to the informal procedure unless a court deems judicial action necessary to establish the named plaintiff's representative capacity for eventual litigation. The Act's text therefore suggests that such procedures must be nonbinding, but that any decision in these procedures may be admissible in post-procedure litigation.<sup>82</sup>

The FTC's regulations administering the Act then specify that any decisions of the warrantor or its designated dispute resolution provider may not be final or binding in any warranty dispute.<sup>83</sup> The regulations also specify minimum rules for warrantors' dispute resolution mechanisms that aim to ensure that consumers have notice and information regarding such mechanisms, and that the mechanisms are neutral, low cost, expeditious, and fair.<sup>84</sup> The regulations require that warrantors "clearly and conspicuously" disclose specified information on the face of a provided warranty, including information about the availability and required use of an informal dispute settlement mechanism and the name, address, and telephone number of the

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<sup>79</sup> *Id.* § 2310(d)–(e).

<sup>80</sup> MMWA, 15 U.S.C. § 2310(a).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 16 C.F.R. § 700.8 (2000) (stating that it is deceptive under the Act for a warrantor to state that such decisions are final).

<sup>84</sup> 16 C.F.R. §§ 700.8, 703.1.

mechanism consumers may use without charge.<sup>85</sup> The warrantor also must include in warranty materials further information describing the mechanism, applicable time limits, and what "types of information" consumers must present for resolution of disputes.<sup>86</sup> Furthermore, warrantors must take steps to "make consumers aware" of a mechanism when disputes arise.<sup>87</sup>

The FTC regulations also prescribe that warrantors must provide requested information to the mechanism, and act in "good faith" in deciding whether to abide by the mechanism's decision.<sup>88</sup> Warrantors also must ensure that the mechanism is staffed to provide "fair and expeditious" resolution of all disputes without charge for consumers. At the same time, the mechanism must be "sufficiently insulated" from the warrantor and mechanism staff must not have conflicting duties to the warrantor.<sup>89</sup> Furthermore, persons determining disputes under the mechanism must not be parties or potential parties to the dispute, or affiliated with a party, and must have "no direct involvement in the manufacture, distribution, sale or service of any product," which does not include ownership of an investment interest offered to the general public.<sup>90</sup>

Consumers also must have access to established written procedures for these dispute resolution mechanisms, which at least comply with specified items. Items include a mechanism's investigation of claims and allowance for parties to rebut information that contradicts their claims.<sup>91</sup> The mechanism also may hold a hearing if the parties agree after notification regarding their rights to bring witnesses or counsel, and must result in a "fair decision" that includes all appropriate remedies and specifies a reasonable time for performance.<sup>92</sup> Mechanisms must disclose such decisions to consumers with the reasons for the decisions.<sup>93</sup> Consumers dissatisfied with the decisions remain free to pursue their warranty claims in court, including small claims court.<sup>94</sup>

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<sup>85</sup> 16 C.F.R. § 703.2(b) (2000).

<sup>86</sup> 16 C.F.R. § 703.2(c).

<sup>87</sup> 16 C.F.R. § 703.2(d).

<sup>88</sup> 16 C.F.R. § 703.2(f)–(h) (also requiring the warrantor to "immediately notify" the mechanism of its decision).

<sup>89</sup> 16 C.F.R. § 703.3.

<sup>90</sup> 16 C.F.R. § 703.4 (but allowing for one-third of the dispute resolvers to have such involvement on a panel of three or more resolvers).

<sup>91</sup> 16 C.F.R. § 703.5 (2000).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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The MMWA regulations also require that consumers have access to records the mechanisms must maintain regarding warranty claims.<sup>95</sup> These records include information and evidence collected on the consumers' claims, as well as indices compiling information regarding the warrantors and products involved in claims, outcomes on claims, and warrantors' compliance with the mechanisms' decisions.<sup>96</sup> At the same time, the regulations further foster accountability and public disclosure by making statistical summaries of the indices publicly available, along with independent audit reports mechanisms must submit to the FTC on an annual basis.<sup>97</sup>

Although the MMWA's regime covers only optional and nonbinding dispute resolution, it nonetheless opens the door for Congress to reinvigorate that regime with more particularized procedural regulations of warrantors' binding arbitration programs. A proposal for such regulations may have more legislative muscle than current calls to bar all pre-dispute arbitration agreements, and could at least provide a starting point for consumer arbitration reforms.<sup>98</sup> Moreover, policymakers could then use this as a template for similar consumer arbitration reforms in Truth in Lending Act (TILA) and other statutory claims. The key is to invigorate the conversation and suggest reforms that both protect consumers' statutory rights and preserve the potential for beneficial use of consumer arbitration. Bills banning pre-dispute arbitration provisions in all consumer and employment contracts deny this potential, and fall by the political wayside.<sup>99</sup> This Article,

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<sup>95</sup> 16 C.F.R. § 703.6.

<sup>96</sup> *Id.*

<sup>97</sup> 16 C.F.R. §§ 703.7–703.8 (2000).

<sup>98</sup> Bills banning pre-dispute arbitration provisions in all consumer and employment contracts have not been successful. *See, e.g.*, H.R. 3651, 109th Cong. (2005) (lingering in committee of bill to amend the FAA to preclude arbitration of employment disputes unless the employee and employer agree to arbitrate after the dispute arises); H.R. 2969, 109th Cong. (2005) (Bill to preclude enforcement of pre-dispute arbitration agreements in employment contracts languishing in committees.); H.R. 1994, 109th Cong. (2005) (stalling bill addressing predatory mortgage lending practices, and including provisions barring enforcement of pre-dispute arbitration agreements in any consumer transactions for personal, family or household goods or services).

<sup>99</sup> *See, e.g.*, H.R. 3651, 109th Cong. (2005) (stalling bill to amend the FAA to preclude arbitration of employment disputes unless the employee and employer agree to arbitrate after the dispute arises); H.R. 2969, 109th Cong. (2005) (lingering of another bill to preclude enforcement of pre-dispute arbitration agreements in employment contracts); H.R. 1994, 109th Cong. (2005) (lingering bill in committee addressing predatory mortgage lending practices, and including provisions barring enforcement of pre-dispute arbitration agreements in consumer transactions for personal, family or household goods or services).

therefore, invites all involved to explore creation of procedural regulations within the current rubric of the MMWA.

### *B. Disagreement Regarding the Arbitrability of MMWA Claims*

As mentioned above, commentators have vigorously debated whether the MMWA's text and history preclude enforcement of pre-dispute contracts requiring arbitration of claims under the Act. Consumers generally base these challenges on grounds that arbitration clauses violate the MMWA or are unenforceable under contract defenses including unconscionability, lack of consideration, and fraud.<sup>100</sup> Consumers' success on these claims is nonetheless mixed and uncertain.<sup>101</sup> This is especially true in the wake of the Supreme Court's pro-arbitration jurisprudence and the resurgence of classical contract formalism.<sup>102</sup> Meanwhile, consumers generally cannot cling to state regulation of arbitration agreements due to the FAA's preemption of state law that treats arbitration agreements differently than other contracts or is otherwise hostile to arbitration.<sup>103</sup> In addition, the Court has narrowed the

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<sup>100</sup> See, e.g., *Walton v. Rose Mobile Homes L.L.C.*, 298 F.3d 470, 472 (5th Cir. 2002) (challenging consumer arbitration under MMWA); *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 963–65 (Ala. 2001) (challenging consumer arbitration on unconscionability grounds). The Alabama courts' struggle with arbitration, alone, exemplifies dissension regarding consumer arbitration. Terry Carter, *Arbitration Pendulum: Mandatory Arbitration Agreements, Once an Easy Pass, Come Under More Scrutiny*, ABA J., May 2003, at 14; Melissa Briggs Hutchens, Commentary, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599, 599–610 (2002) (noting political battles regarding consumer arbitration in Alabama).

<sup>101</sup> See *Koons Ford of Baltimore, Inc. v. Lobach*, 919 A.2d 722, 732–34 (Md. 2007) (chronicling the deep split among courts on the arbitrability of MMWA claims, with the majority and dissent citing cases supporting their opposite conclusions).

<sup>102</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that the text of the FAA forecloses the argument that § 1 excludes all employment contracts from the FAA); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472–73 (1989) (emphasizing that the FAA preempts state laws hostile to arbitration, and requiring that courts strictly enforce valid contracts to arbitrate); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (directing that under the FAA, a court must order arbitration to proceed once it finds a valid arbitration agreement under general state contract law).

<sup>103</sup> See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 483, 493 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (confirming the FAA's application in federal and state courts to all contracts within the vast preemptive power of the Commerce Clause).

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class of contractual challenges to arbitration that a court may determine as "gateway" arbitrability questions.<sup>104</sup>

### 1. *Courts' Holding MMWA Claims Arbitrable Under the FAA*

Arbitration of statutory claims highlights tensions between private lawmaking and public rights. This is especially true when corporate insiders use arbitration clauses to improperly impede consumers' vindication of public or statutory rights.<sup>105</sup> In addition, consumers have argued with some success that the MMWA bars binding arbitration of warranty claims by only allowing a warrantor to establish "an informal dispute settlement procedure" subject to FTC regulations that preclude warrantors from making a procedure final.<sup>106</sup>

The United States Supreme Court, however, has endorsed the arbitrability of statutory claims and has rarely found that a statute provides clear congressional direction to the contrary.<sup>107</sup> Although the Court has not

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<sup>104</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446–49 (2006) (holding that the claim for contract illegality was for the arbitrator to decide and not the court); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002) (emphasizing narrow scope of issues that must be determined by the court in holding that an arbitrator must determine whether a dispute is barred by the limit in the NASD's arbitration procedures). *But see* Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th Cong. (2007) (proposing an amendment to the FAA that appears to reverse this separability doctrine).

<sup>105</sup> See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5–22, 97–104 (2000) (discussing arbitration's effect on consumers' access to class relief and critiquing companies' use of arbitration to hinder consumers' vindication of statutory rights).

<sup>106</sup> 15 U.S.C. § 2310; see *supra* notes 78–95 and accompanying text (discussing MMWA and FTC provisions). See also *Browne v. Kline Tysons Imps., Inc.*, 190 F. Supp. 2d 827, 831 (E.D. Va. 2002) (holding MMWA precludes binding arbitration of warranty claims); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 962–65 (W.D. Va. 2000) (refusing to enforce arbitration of consumers' warranty claims under the MMWA due to the Act's intent to encourage alternative dispute settlement while not depriving any party of the right to vindicate warranty rights in court); *Borowiec v. Gateway 2000, Inc.*, 772 N.E.2d 256, 260–63 (Ill. App. Ct. 2002) (holding MMWA precludes binding arbitration of express warranty claims); *Parkerson v. Smith*, 817 So. 2d 529, 533–34 (Miss. 2002) (holding express warranty claims under the MMWA may not be subject to binding arbitration); see *Lamis, supra* note 70, at 240–41 ("The very essence of the statute was tied up with the legislative recognition that consumers were involuntarily subjected to the terms of a warranty.").

<sup>107</sup> See *Rodriguez De Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–81 (1989) (applying the FAA's "strong endorsement" of arbitration to encompass statutory claims). The Supreme Court has made clear that statutory rights are arbitrable, unless the

addressed the arbitrability of MMWA claims, it has upheld arbitration of consumer claims under TILA and employment claims under the Age Discrimination in Employment Act (ADEA).<sup>108</sup> The Court also rejected federal agency statements indicating Racketeer Influenced and Corrupt Organizations Act (RICO) and ADEA claims should not be subject to binding arbitration.<sup>109</sup>

The majority of courts have seen this as a signal that consumers who agree to broad arbitration provisions must arbitrate their MMWA claims.<sup>110</sup> These courts find that the MMWA's reference to informal dispute settlement procedures has no bearing on binding arbitration agreements under the FAA.<sup>111</sup> These courts opine that the Act's text is "ambiguous at most"

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statute forbids arbitration or arbitration will prevent a claimant from vindicating statutory rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding claims under the ADEA arbitrable). In deciding whether a statute forbids arbitration, a court must consider the statute's text, its legislative history, and whether arbitration clearly conflicts with the statute's purpose. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987).

<sup>108</sup> See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 88–92 (2000) (confirming parties' duty to arbitrate TILA claims under a financing contract despite unclear arbitration costs); *Gilmer*, 500 U.S. at 30–32 (rejecting claims that arbitration favors employers and is not subject to sufficient judicial review to ensure fundamental fairness). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding the FAA preempts contrary state law to require arbitration of state common law and statutory claims, including employment discrimination claims).

<sup>109</sup> See Katie Wiechens, Comment, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1460–65 (discussing the Supreme Court's rejection of SEC regulations which barred arbitration of claims under the Securities Exchange Act and EEOC indications that it deemed ADEA claims inarbitrable).

<sup>110</sup> *Koons Ford of Baltimore, Inc. v. Lobach*, 919 A.2d 722, 738 (Md. 2007) (Harrell, J., dissenting) (agreeing with "the vast majority" of courts that have decided that the MMWA permits binding arbitration of warranty claims). See *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002) (holding MMWA does not preclude binding arbitration under the FAA); *Walton v. Rose Mobile Homes L.L.C.*, 298 F.3d 470, 476–79 (5th Cir. 2002) (holding MMWA claims arbitrable); *Stacy David, Inc. v. Consuerga*, 845 So. 2d 303, 305 (Fla. Dist. Ct. App. 2003); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 492 (Tex. 2001); *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 79–81 (Ga. Ct. App. 2000) (holding MMWA claims are subject to binding arbitration agreements); *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1139 (Ala. 2000) (holding that the MMWA does not invalidate all arbitration clauses).

<sup>111</sup> See *Davis*, 305 F.3d at 1274–76 (stating that the MMWA's text does not directly address binding arbitration, and its regulation of informal dispute settlement procedures "does not mean that the Act precludes a court from enforcing a valid binding arbitration agreement").

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regarding binding arbitration because it only addresses "informal dispute settlement procedures."<sup>112</sup> They also find that FTC regulations barring binding arbitration of MMWA claims deserve no deference because they are unreasonable in light of the Supreme Court's pro-arbitration policy.<sup>113</sup> They likewise conclude that binding arbitration does not conflict with MMWA purposes,<sup>114</sup> and do not seem bothered by consumers' inability to challenge the operation of an allegedly unfair dispute settlement procedure under state law.<sup>115</sup>

Nonetheless, commentators and courts continue to disagree regarding the arbitrability of MMWA claims.<sup>116</sup> They also link these disagreements with fundamental battles regarding the consensual nature of form arbitration clauses in consumer contracts, and whether these clauses conform to notions of "fundamental fairness." These disagreements and battles then foster inefficiencies by fueling litigation and hindering companies from anticipating and sharing economic savings with consumers from their arbitration

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<sup>112</sup> *Id.* at 1275–76.

<sup>113</sup> *See id.* at 1279–80 (emphasizing unreasonableness of FTC regulations in light of FAA policy); *Walker v. DaimlerChrysler Corp.*, 856 N.E.2d 90, 94–99 (Ind. Ct. App. 2006) (concluding that the FTC's construction of the MMWA is unreasonable). *See also* Lamis, *supra* note 70, at 173–95, 214–44 (discussing and critiquing cases addressing arbitrability of MMWA claims); Wiechens, *supra* note 109, at 1466–78 (discussing courts' approaches to the FTC regulations).

<sup>114</sup> *See, e.g., Davis*, 305 F.3d at 1272–73 (emphasizing FAA pro-arbitration policy); Wiechens, *supra* note 109, at 1475–77 (noting that the Court endorsed arbitration of consumer protection claims in *Randolph*, 531 U.S. at 88–92).

<sup>115</sup> *See, e.g., Wolf v. Ford Motor Co.*, 829 F.2d 1277, 1279–80 (4th Cir. 1987) (holding MMWA preempted state fraud action challenging operation of dispute settlement procedure because the Act grants the FTC authority to ensure compliance with its minimum standards). The MMWA grants the FTC authority to investigate complaints regarding manufacturers' dispute settlement procedures, and allows the FTC to seek remedial action, including injunction proceedings, against a non-complying procedure. 15 U.S.C. §§ 2310(a)(4), 2310(c)(1) (2006).

<sup>116</sup> *See* Lamis, *supra* note 70, at 173–248; Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act v. The Magnuson-Moss Warranty Act. Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 4–34 (2001); Ryan Kauffman, Casenote, *Cunningham v. Fleetwood Homes of Georgia, Inc.: Will Consumers Be Required to Arbitrate Their Magnuson-Moss Claims?*, 19 T.M. COOLEY L. REV. 361, 361–86 (2002); Shelly Smith, Comment, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191 (2001); Wiechens, *supra* note 109, at 1459–86 (all discussing conflicting cases and arbitrability of MMWA claims).



programs.<sup>117</sup> Furthermore, even consumers who ostensibly "win" their challenges to the arbitrability of MMWA claims suffer needless delays and costs when they must pursue MMWA litigation and breach of contract arbitration on the same issues.<sup>118</sup> Courts also suffer when redundant litigation and consumer challenges of arbitration agreements clog their dockets.

## 2. Other Means for Attacking Arbitrability of MMWA Claims

The uncertain success of broad claims that MMWA rights are inarbitrable has spawned consumer attacks on arbitration agreements based on contract challenges and arguments that particular arbitration provisions violate or improperly curtail consumer rights.<sup>119</sup> Consumers argue that certain provisions are substantively unconscionable "because the arbitration clause imposes upon a plaintiff who is pursuing federal statutory claims the costs and expenses of the arbitration process."<sup>120</sup> These arguments have been unreliable at best, however, as courts struggle with consumers' narrow and creative arguments for why they should not have to arbitrate their MMWA rights even if such claims may be subject to arbitration generally.

In *Ex Parte Thicklin*, for example, a consumer sought to vacate an order compelling arbitration of her MMWA claims against a mobile home seller and manufacturer based on her argument that the warrantor violated the MMWA by not disclosing the arbitration agreement in the written warranty.<sup>121</sup> Not long before *Thicklin*, the Alabama Supreme Court had flip-flopped within a little over a year on the arbitrability of MMWA claims.<sup>122</sup>

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<sup>117</sup> See *Walton*, 298 F.3d at 478–79 (recognizing courts' disagreement regarding enforcement of binding arbitration of MMWA claims).

<sup>118</sup> See, e.g., *Ex parte Thicklin*, 824 So. 2d 723 (Ala. 2002), overruled by *Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997, 1005–07 (Ala. 2005) (allowing litigation of MMWA claims, but ordering arbitration of remaining claims under a sales agreement).

<sup>119</sup> See *Thicklin*, 824 So. 2d at 728–30 (arguing that the arbitration clause in this case was unenforceable under the MMWA because it was not disclosed in the written warranty and it precluded the consumers from vindicating their statutory rights by burdening them with costs of arbitration).

<sup>120</sup> *Id.* at 728.

<sup>121</sup> *Id.* at 726–29.

<sup>122</sup> *Id.* at 728–29 (changing its position since *Ard*, 772 So.2d 1131). See also Hutchens, *supra* note 100, at 599–603 (noting the myriad of political issues regarding arbitration in Alabama); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661–62 (1999) (discussing how Alabama Supreme Court judges' votes on arbitration issues coincide with whether they are supported by business and corporate interests).

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The *Thicklin* court, therefore, first clarified that MMWA claims are generally arbitrable. The court concluded, however, that the Act precluded arbitration of Thicklin's express warranty claims because the arbitration clause was in his purchase agreement but not in the manufacturer's separate written warranty, as required by the MMWA's consumer disclosure provisions.<sup>123</sup> That narrow avenue for challenging arbitration closed in 2005, however, when the Alabama Supreme Court overruled *Thicklin*'s holding that an arbitration agreement must be stated in a written warranty.<sup>124</sup>

The Federal Court of Appeals for the Eleventh Circuit also has struggled with enforcement of binding arbitration with respect to MMWA claims. Prior to 2002, the Eleventh Circuit had indicated in dicta that the MMWA precluded arbitration of *written*, but not *implied* or *oral express* warranty claims.<sup>125</sup> In 2002, however, the court held that the MMWA and FTC regulations only address informal dispute settlement mechanisms and do not preclude enforcement of binding arbitration agreements contained in written warranties.<sup>126</sup> Nonetheless, the court found that a "unique" contractual arrangement, in which the arbitration clause was in the retailer's contract but not the manufacturer's warranty, violated MMWA disclosure obligations by "failing to disclose in a single document all relevant terms of the warranty."<sup>127</sup>

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<sup>123</sup> *Thicklin*, 824 So. 2d at 728–30 (relying on *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611 (11th Cir. 2001)). *See also* *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746–48 (Ala. 2000) (holding that although an arbitration clause required compliance with AAA rules that called for binding arbitration, the clause should be construed to require nonbinding arbitration due to the contract's warranty requiring compliance with FTC regulations, which the court read to preclude binding arbitration of MMWA claims).

<sup>124</sup> *Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997, 1005–06 (Ala. 2005) (noting how no court had relied on the *Thicklin* narrow allowance for challenges to arbitration clauses not contained in the body of a written warranty).

<sup>125</sup> *See Richardson v. Palm Harbor Homes, Inc.* 254 F.3d 1321, 1325–27 (11th Cir. 2001) (holding any arguable preference for nonbinding arbitration under the MMWA only applies to *written* warranties but does not preclude binding arbitration of oral express warranty claims); *Cunningham v. Fleetwood Homes of Ga.*, 253 F.3d 611, 618–20 (11th Cir. 2001) (leaving uncertainty regarding whether implied warranty claims under the MMWA may be subject to binding arbitration).

<sup>126</sup> *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1272 (11th Cir. 2002) (holding that "the MMWA permits the enforcement of valid binding arbitration agreements within written warranties").

<sup>127</sup> *Cunningham*, 253 F.3d at 622–23 (concluding that the manufacturer could not compel arbitration against the consumer based on third-party beneficiary status under an arbitration clause in a retail agreement separate from the written warranty). That court

Consumers also argue that particular arbitration provisions are unconscionable or preclude their vindication of MMWA rights by improperly limiting or excluding remedies or procedures otherwise available to consumers under the Act.<sup>128</sup> They base such arguments on provisions in arbitration agreements that preclude class relief or recovery of statutory punitive and treble damages.<sup>129</sup> They also base these arguments on provisions that require them to bear their own arbitration fees and costs.<sup>130</sup> For example, consumers in *Green Tree Financial Corp. v. Randolph* challenged the arbitrability of their TILA claims arguing that "prohibitively high" arbitration costs would effectively preclude them from vindicating their statutory rights.<sup>131</sup> The Court rejected this argument, however, because the arbitration agreement's silence regarding costs did not establish that the consumers would in fact be required to pay prohibitively high costs.<sup>132</sup> The Court's opinion left courts, companies, and consumers wondering what one must show to prevail on such an argument.<sup>133</sup>

Accordingly, these particularized challenges again breed litigation and uncertainties. First, it is unclear whether courts will reject or accept consumers' attacks on arbitration provisions. Second, it is unclear how a court will proceed if it does hold MMWA claims inarbitrable. Consumers

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reiterated that it was not deciding whether MMWA claims *may* be subject to binding arbitration when properly disclosed in a written warranty. *Id.* at 623. Nonetheless, shortly after that court decided *Cunningham*, it concluded in *Richardson* that oral express warranty claims under the MMWA claims may be subject to binding arbitration. *Richardson*, 254 F.3d at 1328.

<sup>128</sup> See *Randolph*, 531 U.S. at 89–91 (denying consumer's challenge of arbitration based on potentially high arbitration costs but acknowledging that consumer may be able to show high arbitration costs would make her "unable to vindicate her statutory rights in arbitration").

<sup>129</sup> See *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1033 (11th Cir. 2003) (holding that an arbitrator must decide mortgagors' argument that an arbitration provision precluding mortgagors from recovering statutory punitive and treble damages violated TILA and RESPA).

<sup>130</sup> See *Randolph*, 531 U.S. at 82 (discussing consumer arguments that an arbitration agreement improperly curbed TILA rights because it was ambiguous regarding who must pay arbitration costs).

<sup>131</sup> This argument is often asserted in tandem with an unconscionability attack. *Id.* at 89–92.

<sup>132</sup> *Id.* at 89–91 (creating a "wait-and-see" approach).

<sup>133</sup> See also *Thicklin*, 824 So. 2d at 730 (dismissing consumer's claim that the arbitration clause in her sales and financing contract was unenforceable because it imposed costs and expenses that would preclude her from pursuing MMWA statutory claims).

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who succeed on arguments that their MMWA claims are inarbitrable often must arbitrate contract and tort claims prior to proceeding with their MMWA litigation.<sup>134</sup> A court also may compel arbitration of implied and oral warranty claims, but allow consumers to litigate *written* warranty claims.<sup>135</sup> In addition, courts may order consumers to arbitrate warranty claims against some, but not all, of the parties who may bear responsibility for the claims.<sup>136</sup> For example, a court may compel consumers to arbitrate claims against a retailer, but not MMWA claims against the manufacturer.<sup>137</sup> This uncertain enforcement and allowance for parallel litigation and arbitration results in inefficiencies for all disputants and the courts.

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<sup>134</sup> *Browne v. Kline Tysons Imps., Inc.*, 190 F. Supp. 2d 827, 828–33 (E.D. Va. 2002) (allowing litigation of MMWA claims, but ordering arbitration of TILA and state statutory and common law claims arising out of a car sale).

<sup>135</sup> See *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1323–26 (11th Cir. 2001) (noting that consumers had been compelled to arbitrate implied warranty claims against the retailer, and that the MMWA arguably would only preclude binding arbitration of written warranty claims—although the same court later upheld the enforceability of arbitration agreements contained within written warranties); *Cunningham v. Fleetwood Homes of Ga.*, 253 F.3d 611, 612–13, 623–24 (11th Cir. 2001) (requiring consumers to arbitrate their fraud, mental anguish, negligence, breach of contract, breach of implied warranty, and violation of the Alabama Extended Manufacturer's Liability Doctrine claims, but holding they were not required to arbitrate their written and express warranty claims against the manufacturer).

<sup>136</sup> Some courts use third-party beneficiary and estoppel principles to compel consumers to arbitrate claims against both signatories and non-signatories to contracts containing arbitration clauses. See *Ex parte Gates*, 675 So. 2d 371, 374–75 (Ala. 1996) (enforcing arbitration against a consumer on behalf of non-signatory manufacturer based on broad arbitration clause). But see *Ex parte Jones*, 686 So. 2d 1166, 1166–68 (Ala. 1996) (withdrawing prior opinion, and holding there was no agreement to arbitrate between consumers and the non-signatory to the arbitration agreement); *Ex parte Martin*, 703 So. 2d 883, 886–88 (Ala. 1996) (holding arbitration clause in loan agreement between buyers and sellers did not apply to manufacturer). See also David F. Sawrie, Note, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 VAND. L. REV. 721, 727–58 (1998) (discussing application of estoppel in enforcing arbitration agreements and the Alabama courts' struggle with these estoppel issues).

<sup>137</sup> In *Cunningham*, the court accepted the manufacturer's third-party beneficiary status under the retailer-consumer agreement, and compelled the consumers to arbitrate all their non-express-warranty claims against both the retailer and manufacturer. *Cunningham*, 253 F.3d at 613–14, 624.

### III. PROCEDURAL REFORMS THAT CONFRONT MMWA CONFUSION AND CONSUMER CONTRACTING REALITIES WITHOUT CURBING COMPANY SAVINGS

I first presented a rough sketch of some procedural reform ideas for consumer arbitration at the January 2007 "Rethinking the Federal Arbitration Act" symposium in hopes of reviving debate regarding establishment of reforms that would generate political interest.<sup>138</sup> Based on discussions at the symposium, along with deeper research, reflection, and feedback, this Article now goes further to offer a "top ten" for more concrete and targeted procedural reforms of MMWA arbitration. The hope is to establish sufficiently clear MMWA legislative guidelines that are balanced to protect consumers while capitalizing on arbitration's potential for fairly resolving consumer claims. Furthermore, the proposal targets MMWA arbitration because it raises important consumer protection concerns and the time is ripe to calm the inefficiencies of the current uncertainties regarding the arbitrability of MMWA claims. This also may provide procedural regulations of MMWA arbitration with the necessary political support to come to fruition and provide a template for further procedural regulation of consumer arbitration with respect to other statutory rights.

#### *A. Necessity of Mandatory Minimums for MMWA Arbitration*

Ideally, consumers would have the time, resources, and power to take charge of their contracts and insist on terms that serve their interests. At the least, they would negotiate changes to form arbitration provisions that ensure their access to reasonable procedures for resolution of claims that may arise during contract performance. In reality, however, consumers often lack the tools or power to accomplish such contract changes.<sup>139</sup> Although consumers need not bother with suggesting changes when companies offer reasonable arbitration terms, they may suffer later when they must abide by companies' onerous arbitration provisions that ignore the Protocol's and other due

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<sup>138</sup> See Schmitz, *supra* note 18. Again, the notion of legislative fairness standards is not new. A proposal for such standards was introduced in Congress in 2000, but sparked little debate or action. See Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000). Reenergized suggestions for reforms, however, may enjoy more success, especially in light of the unprecedented expansion of consumer arbitration provisions and growing skepticism of consumer arbitration over the past seven years.

<sup>139</sup> See Schmitz, *supra* note 30, at 123–72 (describing the consumer contracting culture).

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process "shoulds."<sup>140</sup> In addition, consumers have little power to "shop" for reasonable arbitration terms where they lack true "choice" because nearly all companies within an industry offer essentially the same terms.<sup>141</sup> This is true, for example, with respect to cell phone services.<sup>142</sup>

At the same time, states can do little to regulate arbitration because the FAA preempts states' attempts to single-out arbitration for special treatment or otherwise inhibit enforcement of arbitration agreements according to their terms. Some arbitration providers have promulgated due process protocols and consumer rules aimed to hinder companies' overreaching, such as the AAA has done by aiding in creation of the Protocol and promulgating its consumer rules.<sup>143</sup> Furthermore, the AAA states that for consumer claims under \$75,000, the AAA "reserves the right" to refuse to administer a contract clause that "substantially and materially deviates" from the Protocol.<sup>144</sup> The AAA consumer rules, however, do not apply to residential construction cases or cases over \$75,000,<sup>145</sup> and the AAA will administer the case if a court orders it to proceed despite Protocol violations.<sup>146</sup>

Even if an arbitration institution refuses to administer an arbitration proceeding pursuant to a provision that defies its policies, a court may

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<sup>140</sup> See Protocol, *supra* note 14 (discussing cases and cell phone contracts exemplifying onerous arbitration terms that preclude small claims or class relief, requiring consumers to bear potentially high arbitration costs, and squelch access to statutory damages).

<sup>141</sup> See Speidel, *supra* note 9, at 1084–87 (discussing how an "individual . . . must fend for herself in a contracting process where information is sparse and choice is limited to 'take-it-or-leave-it'").

<sup>142</sup> See Collected Arbitration Provisions, *supra* note 2 (discussing cell phone contracts' arbitration provisions).

<sup>143</sup> See Protocol, *supra* note 14 (discussing the Protocol and the AAA's consumer rules). The AAA is not alone in promulgating such due process standards and rules for consumer disputes. See JAMS, JAMS Policy on Consumer Arbitration Pursuant to Pre-Dispute Clauses—Minimum Standards of Procedural Fairness, [http://www.jamsadr.com/arbitration/consumer\\_min\\_std.asp](http://www.jamsadr.com/arbitration/consumer_min_std.asp) (last visited May 3, 2007) [hereinafter JAMS Fairness Standards]. See also Weidemaier, *supra* note 22, at 87–94 (proposing how provider rules may temper effects of companies' onerous arbitration provisions by insisting that companies abide by their due process protocols or rules).

<sup>144</sup> American Arbitration Association, Statement of Ethical Principles for the American Arbitration Association, <http://www.adr.org/sp.asp?id=22036> (last visited May 3, 2007).

<sup>145</sup> *Id.*

<sup>146</sup> See E-mail from Jennifer Jester Coffman, AAA Senior Vice President, New York, to Amy J. Schmitz, Associate Professor of Law, University of Colorado (May 3, 2007) (on file with author).

override such policy or order the parties to arbitrate before another arbitrator according to the contract's terms under the FAA.<sup>147</sup> In *Gipson v. Cross Country Bank*, the court trumped JAMS' prior refusal to enforce a class action waiver, and insistence on allowing consumers to proceed in class arbitration on their Fair Credit Billing Act claims.<sup>148</sup> The court held that a court may decide the enforceability of a class action waiver as a gateway issue, and the arbitrator exceeded his authority by ordering class arbitration in defiance of the waiver at issue.<sup>149</sup> It thus enjoined the consumers from pursuing class relief.<sup>150</sup> JAMS subsequently retracted its policy refusing to honor class action waivers.<sup>151</sup>

Some courts have looked to an institution's due process standards in assessing the enforceability of arbitration provisions.<sup>152</sup> In *Comb v. PayPal*, for example, the court looked to the Protocol in finding an arbitration provision in PayPal's electronic consumer contracts unconscionable. This is because the provision precluded any class relief, barred access to small claims court, mandated arbitration in PayPal's home state of California, and prescribed application of the AAA's commercial rules, which subjected consumers to high travel costs and an equal share of fees in excess of \$5,000.<sup>153</sup>

It nonetheless appears that many courts disregard or ignore the Protocol or other due process standards in assessing enforceability of arbitration

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<sup>147</sup> 9 U.S.C. § 2 (2000). Some courts have presumed that they would have to order arbitration to proceed according to the contract's terms, even if the terms offend a provider's due process standards. See *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1176–77 (N.D. Cal. 2002) (assuming the contract's provision for the AAA commercial rules would prevent imposition of the consumer rules' cost caps).

<sup>148</sup> *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1281–89 (M.D. Ala. 2005).

<sup>149</sup> *Id.* at 1283–86 (distinguishing express class action waivers from arbitration clauses that are silent with respect to class relief).

<sup>150</sup> *Id.* at 1288–89.

<sup>151</sup> Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1591 PLI/CORP. 35, 64 (2007); JAMS, JAMS Class Action Procedures, Rules 2–3, [http://www.jamsadr.com/images/PDF/JAMS\\_Class\\_Action\\_Procedures.pdf](http://www.jamsadr.com/images/PDF/JAMS_Class_Action_Procedures.pdf) (last visited Feb. 21, 2008) (requiring an arbitrator to determine whether an arbitration clause allows for class arbitration as a threshold matter, and subjecting that determination to immediate court review).

<sup>152</sup> See *Comb*, 218 F. Supp. 2d at 1176–78 (holding the contract's provision for application of the AAA commercial rules unconscionable because it defied the consumer rules' cap on the consumers' potentially high fees and costs).

<sup>153</sup> *Id.* at 1172–73, 1175–77.

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provisions. Albeit unscientific, a May 2, 2007, online search using the broad inquiry "due process protocol" and no date or other restrictions in Westlaw's ALLCASES database combining all federal and state cases retrieved only thirty-one cases referencing the consumer or employment protocols.<sup>154</sup> Furthermore, only fifteen of these were consumer cases, two of them were no longer good law, and the courts in all but one rejected or paid little attention to arguments based on violation or compliance with the Protocol.<sup>155</sup> Instead, it seems that discussion of the Protocol and due process standards has been most prevalent among law journal and review commentators.<sup>156</sup>

It also is unclear how strenuously or consistently arbitral institutions can or will promulgate or impose their consumer rules or due process standards on companies they hope to attract as repeat clientele.<sup>157</sup> They must compete in a fairly saturated provider market, and may suffer competitive disadvantages if they insist on compliance with consumer fairness standards.<sup>158</sup> Some also question whether providers take available steps to adequately protect consumers' rights to class and consolidated actions,

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<sup>154</sup> Westlaw Search Results for "due process protocol" in ALLCASES database (May 2, 2007) (on file with author) (showing many of the courts said very little regarding the Protocol and merely mentioned consumers' argument that an arbitration provision should be unenforceable due to its defiance of the Protocol).

<sup>155</sup> *Id.* Case Chart compiling and analyzing the cases referencing the Protocol (May 20, 2007) (on file with author).

<sup>156</sup> In contrast to the search in the ALLCASES database, the same search on Westlaw in its JLR database—which includes all journals and law reviews—retrieved 473 documents. Westlaw Search Results for "due process protocol" in JLR database (May 2, 2007) (on file with author).

<sup>157</sup> See Weidemaier, *supra* note 22, at 107–11 (noting the lack of data on providers' actual enforcement of their standards).

<sup>158</sup> For example, there have been allegations that the National Arbitration Forum (NAF) is predisposed to favor lenders that require its consumer clients to arbitrate all claims with the NAF under NAF rules. Paul Bland, National Arbitration Forum's Wall of Secrecy Crumbling, [http://pubcit.typepad.com/clpblog/2006/10/national\\_arbitr.html](http://pubcit.typepad.com/clpblog/2006/10/national_arbitr.html) (last visited Jan. 14, 2007) (also describing affidavits and other evidence in *McQuillan v. Check 'N Go* (an unpublished case in North Carolina) indicating that NAF targeted its advertisements and solicitations to lenders and blocking arbitrators from serving if they ruled against corporate parties). See also Brief of the National Ass'n of Consumer Advocates as Amicus Curiae in Support of Respondents, *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (arguing that NAF's rules and practices are unfavorable for consumers, and attaching NAF marketing letters to lenders stating NAF can "minimize lawsuits" and "the threat of lender liability jury verdicts"); Weidemaier, *supra* note 22, at 108–11 (noting that providers may impose due process rules on companies to protect their reputations and other external constraints).



adequate discovery, and rule production.<sup>159</sup> In addition, companies remain free to avoid providers' constraints by requiring ad hoc arbitration.

At the same time, consumers have limited and uncertain success in challenging the arbitrability of MMWA claims on the basis of the Act's text, regulations, or purpose.<sup>160</sup> Courts in Alabama alone have confused companies and consumers with their flip-flop on these challenges.<sup>161</sup> In addition, consumers struggle with hurdles and uncertainties in attacking form arbitration provisions under general contract theories.<sup>162</sup> Some courts are overly formulaic and stingy in their applications of contract defenses to invalidate arbitration provisions, while others provide contracting parties with no real guidance for when they will grant such relief.<sup>163</sup>

This leads consumers and companies to mourn the uncertainties of arbitration agreement enforcement.<sup>164</sup> Consumers question their arbitration rights, while companies lose faith that they can rely on any cost savings from

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<sup>159</sup> See Weidemaier, *supra* note 22, at 90–112 (critiquing limits on class relief in arbitration and how providers could better protect consumers). See also *Garcia v. Wayne Homes, L.L.C.*, 2002 WL 628619, at 17 (Ohio Ct. App. 2002) (finding plaintiff's claim against AAA for misrepresenting their compliance with the Protocol was premature because the AAA had not yet administered the arbitration at issue).

<sup>160</sup> See *supra* Part II.A (discussing disagreement regarding the arbitrability of MMWA claims).

<sup>161</sup> See *Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997, 1005–07 (Ala. 2005) (discussing the litany of cases in the Alabama state and federal courts addressing enforcement of arbitration in MMWA cases, highlighting the disagreements and nuances of the courts' decisions in these cases, and ultimately overruling the *Thicklin* narrow allowance for challenges to arbitration clauses using the MMWA).

<sup>162</sup> See Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 326–44 (2005) (noting consumers' limited and uncertain success challenging arguably "unfair" arbitration clauses); James F. Hogg, *Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses in Michigan, Minnesota, and Washington*, 2006 MICH. ST. L. REV. 1011, 1011–13, 1040–44 (comparing applications of unconscionability and unfair surprise in three states and concluding that widely variable application of these defenses leaves consumers vulnerable to unfair contract terms).

<sup>163</sup> Hogg, *supra* note 162, at 1025–44 (exploring three states' widely variable law). See also *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201–05 (C.D. Cal. 2006) (finding class action waiver under an arbitration clause in a consumer's computer sales contract was not unconscionable under the particular facts, and therefore stopping the consumer's attempt to lead a class action asserting statutory and other claims).

<sup>164</sup> See *Provencher*, 409 F. Supp. 2d at 1201–05; Kaplinsky, *supra* note 2, at 43–44 (including litigation and uncertainties regarding enforcement as chief drawback of arbitration).

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their arbitration programs. Furthermore, the parties and courts lose time and resources in litigation regarding arbitration enforcement.<sup>165</sup> Clear minimum rules are therefore necessary to foster efficiency by providing contracting guidance and limiting costly and uncertain judicial challenges.<sup>166</sup>

Such procedural regulations also are preferable to banning all pre-dispute arbitration agreements in consumer contracts. Companies adopt arbitration programs citing speed, savings of legal fees and costs, lower risks of jury damage determinations, curtailed discovery, and limited appeal.<sup>167</sup> The growth of consumer arbitration over the past decade also suggests that companies must benefit from their arbitration programs. In addition, evidence indicates that individuals may fare quite well in arbitration and may mourn companies' elimination of arbitration programs due to overly restrictive arbitration regulations.<sup>168</sup> In a 2005 Harris Poll conducted for the U.S. Chamber Institute for Legal Reform of adults who had participated in arbitration, many respondents indicated that they found arbitration faster (70%), simpler (63%), and cheaper (51%) than litigation, and roughly two-thirds said they would use arbitration again.<sup>169</sup>

Nonetheless, some question the propriety of companies' use of arbitration to avoid juries and class actions, and whether companies pass any savings

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<sup>165</sup> See Bland, Jr. et al., *supra* note 72, at 403–04 (noting the "enormous explosion of litigation" regarding arbitration enforcement, with over 500 new judicial opinions published in the two years preceding the Spring 2007 article).

<sup>166</sup> See Giuseppe B. Abbamonte, *The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach*, 12 COLUM J. EUR. L. 695, 696–99, 710–12 (2006) (explaining how uniform legislative directives can help harmonize law, improve consumer confidence in the market, and promote efficiency). See also Speidel, *supra* note 9, at 1086–94 (proposing an amendment to the FAA aimed to improve arbitration for individuals by protecting their rights to informed and voluntary agreement, fair process and procedures, and adequate judicial review).

<sup>167</sup> Kaplinsky, *supra* note 151, at 43–44 (listing advantages and drawbacks of arbitration from financial institutions' perspective).

<sup>168</sup> See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–64, 292 (2006) (arguing that pre-dispute arbitration clauses benefit companies and consumers); Jensen, *supra* note 13, at 631–35 (gathering studies indicating that individuals enjoy higher recovery rates in arbitration than litigation, and often report satisfaction with the arbitration process).

<sup>169</sup> Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster than Litigation—Conducted for the U.S. Chamber Inst. for Legal Reform* (Apr. 2005), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf> (indicating that among those who lost, 40% still said they were moderately to highly satisfied with the fairness of the process).

from their programs on to consumers through lower prices or better quality goods or services.<sup>170</sup> My review of eleven major credit card companies' contracts, for example, indicated that consumers do not necessarily enjoy lower interest rates, or APRs, if they accept arbitration clauses.<sup>171</sup> In addition, companies insist on *pre-dispute* arbitration clauses because consumers are unlikely to agree to arbitration after disputes arise due to adversarial postures and growing distrust of arbitration. Again, fairness perceptions and assumptions matter, even if they are not based on personal experience with arbitration.<sup>172</sup>

Companies also may welcome fairness regulations they could follow to ensure enforcement of their arbitration programs. Some companies voluntarily comply with due process standards, and some commercial attorneys urge their clients to adopt fair arbitration terms.<sup>173</sup> Companies and consumers may embrace procedural rules that balance fairness and efficiency without judicializing the process with court-like procedures.<sup>174</sup> This Article therefore invites promulgations of such procedural arbitration regulations,<sup>175</sup>

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<sup>170</sup> See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 686–93 (1996) (critiquing free market justifications for arbitration of consumer claims and concluding that "failing to regulate the market with respect to arbitration clauses is likely to lead to an inefficient result that benefits those who impose form arbitration agreements").

<sup>171</sup> See Collected Arbitration Provisions, *supra* note 2.

<sup>172</sup> See *supra* notes 48–55 and accompanying text (discussing consumer perceptions and importance of procedural justice assumptions).

<sup>173</sup> Kaplinsky, *supra* note 151, at 51–52 ("My message to clients: Draft a fair clause!"). See also Collected Arbitration Provisions, *supra* note 2 (Out of the eleven credit card contracts gathered, three did not include arbitration clauses and two allowed the consumer to opt out of arbitration.).

<sup>174</sup> See William W. Park, *Procedural Evolution in Business Arbitration: Three Studies in Change*, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE, at 44–64 (Oxford Univ. Press 2006) (discussing fairness versus efficiency of precise procedural rules); Park, *supra* note 25, at 297–300 (discussing costs and benefits of procedural protocols in hopes of stimulating "deeper dialogue on fine tuning the balance between *ex ante* and *ex post* rule-making" to arrive "at an optimal counterpoise between rules and discretion").

<sup>175</sup> Again, reform energy would be better directed to improving arbitration procedures and protocols than to pushing for a ban on pre-dispute arbitration agreements in consumer contracts in the current "pro-arbitration" environment. See Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 453–54, 481–83 (emphasizing why energies should be used to reform the arbitration process in mandatory arbitration agreements with respect to the consumer context of nursing home contracts).

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and uses the MMWA's template for establishment of arbitration regulations instead of cluttering the FAA with procedural provisions.

### *B. Balanced Arbitration Regulations Within the MMWA's Rubric*

The time is ripe to clarify the MMWA's dispute resolution template and create clear regulations that cover binding arbitration.<sup>176</sup> The MMWA urges creation of dispute resolution programs that enhance consumer warranty information and remedies, and empowers the FTC to establish "minimum requirements" for such programs.<sup>177</sup> The FTC's regulations then require that consumers have adequate notice and information about companies' programs, free access to such programs, and speedy, neutral determinations. They also mandate that dispute resolution programs be equipped to provide consumers with adequate access to evidence such as prior claim information, as well as assurance of relief based on accepted awards.<sup>178</sup> Similarly, the Protocol and other providers' consumer arbitration due process standards also call for notice, neutrality, reasonable cost, adequate claim presentation, and speed. These regulations and standards therefore provide a useful starting point for creation of more particularized mandatory minimums for MMWA binding arbitration.<sup>179</sup> The following "top ten" suggestions build from this starting point.

#### *1. Notice*

A central purpose of the MMWA is to provide consumers with notice and information regarding their warranty rights and remedies. In this spirit, it also requires that companies "clearly and conspicuously" disclose their informal dispute resolution programs in their written warranties.<sup>180</sup>

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<sup>176</sup> See Charles W. Mooney, Jr., *The Consumer Compromise in Revised U.C.C. Article 9: The Shame of it All*, 68 OHIO ST. L.J. 215, 221–26 (2007) (emphasizing importance of including consumer groups and varied voices in creation of uniform legislation).

<sup>177</sup> See *supra* notes 78–95 and accompanying text (discussing the MMWA and FTC provisions).

<sup>178</sup> See *supra* notes 81–95 and accompanying text (setting forth FTC regulations). See also FTC, A Businessperson's Guide to Federal Warranty Law, <http://www.ftc.gov/bcp/online/pubs/buspubs/warranty.shtm> (last visited Feb. 15, 2008).

<sup>179</sup> See Protocol, *supra* note 14. See also Schmitz, *supra* note 162, at 345–71 (suggesting guidelines for arbitration of consumers' mobile home warranty claims).

<sup>180</sup> See *supra* note 83 and accompanying text (noting FTC notice provisions).

Furthermore, the FTC's regulations require warrantors to describe their programs and provide access to the programs' written rules and procedures.<sup>181</sup> The Protocol similarly calls companies to give consumers clear notice and disclose "full and accurate information" about their dispute resolution provisions, along with resources for "effective participation in ADR."<sup>182</sup>

FAA arbitration law, however, does not require heightened notice of arbitration clauses. Instead, the law calls on courts to assess consent to arbitration clauses as they would any contract terms. Accordingly, many companies bury arbitration clauses in long form contracts, often using unnoticeable or small typeface. Furthermore, even when they state an arbitration requirement in large or bold print, they rarely set forth additional information or resources respecting their arbitration programs. In my review of arbitration clauses in companies' and consumers' cell phone service and credit card contracts, for example, I found that most of these companies slip their clauses in "bill stuffers" or terms accessible via website links and "pop-ups."<sup>183</sup>

The MMWA should now be clarified to require companies to provide consumers with clear and conspicuous notice and information regarding their binding arbitration programs, as they currently must do for "informal" programs.<sup>184</sup> The FTC regulations should then give meaning to the Act's proviso by listing what information companies must include in their arbitration agreements in order to comply with the Act. They should aim to adequately alert consumers about a required arbitration process and arm consumers with resources for understanding and navigating the applicable rules and procedures. They also should foster efficiency by establishing a template for simple and understandable arbitration notice provisions that companies could use and rely on to comply with the MMWA.

To that end, the regulations should require that arbitration provisions notify consumers regarding the binding nature of a process, waiver of access to jury trial, any time limits for filing claims, who will administer the

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<sup>181</sup> See *supra* note 84 and accompanying text (describing FTC regulations).

<sup>182</sup> See Protocol, *supra* note 14, at Principle 2. See also JAMS Fairness Standards, *supra* note 143, at Rule 2 (requiring clear notice of "existence, terms, conditions and implications" of pre-dispute arbitration clauses).

<sup>183</sup> See Collected Arbitration Provisions, *supra* note 2.

<sup>184</sup> This would also resolve courts' disagreement regarding the propriety of requiring clear notice of arbitration terms. See *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (breaking from the majority of courts and holding employee could not be compelled to arbitrate her Title VII claims unless she *expressly* waived her access to statutory remedies in court).

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program and what written rules will govern the process. Such notice also must direct consumers to where they can obtain copies of these rules and list addresses, phone numbers, and websites to contact for further information and assistance.<sup>185</sup> This should include contact information for the chosen process provider, and for the state bar association or other arbitration resources.

This would help legitimize consumers' consent to form arbitration provisions and quell consumers' distrust of the unknown. It may ease consumer skepticism to educate them about arbitration procedures and how they can use arbitration to their benefit. Currently, consumers report little to no understanding regarding arbitration and assume the unfairness of arbitration clauses as foreign concepts companies must slip into their contracts to consumers' disadvantage.<sup>186</sup> In addition, educating consumers about arbitration may enhance the rationality and efficiency of consumers' contracting decisions.<sup>187</sup> Moreover, even if consumers do not take advantage of listed resources, it may ease their distrust to see that a company has complied with FTC regulations and is providing information for consumers to contact if disputes develop. A companies' provision of simplified FTC-approved lists of required information could also foster efficiency by reducing consumers' need to analyze and research contract terms and companies' uncertainty that their arbitration agreements comply with FTC standards.

The ABA also has emphasized notice and disclosure rules as essential to ensure informed consent to arbitration clauses in uneven bargaining contexts. In its 2002 ethics opinion regarding lawyers' use of arbitration provisions, it required lawyers to "explain" impacts of arbitration provisions to clients, taking into account the sophistication of a client in order to ensure the client's "informed decision."<sup>188</sup> This includes explanation of possible disadvantages

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<sup>185</sup> See Department of Housing and Urban Development (HUD), *Manufactured Housing Dispute Resolution Program; Final Rule*, 24 CFR 3280, 3282, 3288 (May 14, 2007) (emphasizing informing consumers about HUD's dispute resolution program as a "key component" and requiring retailers to notify consumers of their rights to use the program and of the procedures required for doing so).

<sup>186</sup> Consumer Focus Group, *supra* note 56.

<sup>187</sup> See Richard A. Epstein & Oren Bar-Gill, *Consumer Contracts: Behavioral Economics vs. Neoclassical Economics*, <http://lsr.nellco.org/nyu/lewp/papers/91> (2007) (emphasizing how consumer "learning matters" and must involve interplay of education and information sharing among individuals).

<sup>188</sup> See ABA Formal Op. 02-425, *supra* note 45 (providing rules regarding arbitration clauses in retainer contracts).

for the client, such as waiver of jury trial rights and access to discovery.<sup>189</sup> Educating individuals about their contract rights is an important first step in improving their access to justice.<sup>190</sup>

Education, however, should not lead to contractual clutter. Companies and consumers would shun long laundry lists of information in form contracts. This overcomplicates contracts, and dilutes any effective notice of arbitration by leading consumers to gloss over arbitration terms without reading or understanding their significance. It may even heighten consumers' suspicions of arbitration programs, while decreasing companies' savings from form contracting.<sup>191</sup> A minimal list covering the basics and contacts for assistance should sufficiently arm consumers with useful and necessary information without hiding the "trees" in the "forest" of confusing contract language. Required notice should direct consumers to a dedicated FTC webpage, and perhaps a print source as well, where they can review the list of FTC requirements and contact further resources regarding arbitration and MMWA arbitration regulations.

## 2. Neutrality

The MMWA and its regulations also emphasize that neutral providers must administer companies' dispute resolution programs and be "sufficiently insulated" from the companies that engage them. FTC regulations further direct that these providers must have no "conflicting duties" or "direct involvement" with warrantors.<sup>192</sup> These regulations therefore coincide with the FAA's arbitrator neutrality provision and courts' interpretation of this proviso to require that arbitrators avoid direct connections with disputants and disclose factors that give a reasonable impression of bias.<sup>193</sup> Accordingly, FAA law already requires this baseline degree of neutrality in MMWA, and all other, binding arbitration proceedings.

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<sup>189</sup> *Id.*

<sup>190</sup> See Dobbins, *supra* note 48, at 145 (emphasizing importance of educating the public on contract rights and remedies).

<sup>191</sup> See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (7th Cir. 1997) (noting the impracticality of requiring companies to recite all their terms on the phone and stating that "approve-or-return" provisions such as that in *Hill* make consumers better off "as a group").

<sup>192</sup> See *supra* notes 78–95 and accompanying text (discussing MMWA and FTC regulations).

<sup>193</sup> See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (emphasizing the narrowness of bias under FAA § 10).

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MMWA arbitration regulations should go beyond this baseline, however, due to the heightened risk of arbitrator bias toward manufacturers who are much more likely to be repeat-clients than individual consumers. The regulations therefore should borrow from the Protocol in requiring that consumers have an "equal voice" in arbitrator selection, and from JAMS in ensuring consumers' participation in the selection process.<sup>194</sup> This should curb companies' unilateral selection of arbitrators, and help ease arguable repeat-player bias companies gain by controlling the process.

The regulations also should look to the Protocol in specifying that arbitrators comply with fairly strict arbitrator disclosure rules.<sup>195</sup> Currently, courts read the FAA to have little force in requiring disclosure. They reserve the "draconian" remedy of vacatur for cases involving an arbitrator's "significant compromising relationship" with a party.<sup>196</sup> However, disclosure rules have little force if there are not sufficient penalties or ramifications for violating them.

FTC regulations could therefore empower courts to vacate an award in warranty cases if an arbitrator blatantly breaches disclosure requirements. California, for example, requires arbitrators to comply with ethical standards on par with those established for its judicial arbitration program, and specifies that an arbitration award may be vacated if an arbitrator fails to make required disclosures.<sup>197</sup> California's vacatur provisions may go too far in contexts where expert arbitrators often have ties with disputants. They may be warranted in MMWA cases, however, because consumers in those cases generally do not share organic relational ties with arbitrators to temper manufacturers' repeat-player advantages.

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<sup>194</sup> Protocol, *supra* note 14, at Principle 3; JAMS Fairness Standards, *supra* note 143, at Rule 4. *See also* Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000) (emphasizing that parties should have a right to "a competent, neutral arbitrator," and an "equal voice" in arbitrator selection); American Arbitration Association, Consumer-Related Disputes Supplementary Procedures, Rule C-4 (effective Sept. 15, 2005), <http://www.adr.org/sp.asp?id=22014> [hereinafter AAA Consumer Rules] (requiring impartial persons).

<sup>195</sup> Protocol, *supra* note 14, at Principle 3.

<sup>196</sup> *Positive Software Solutions Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 282–83 (5th Cir. 2007) (refusing to vacate an award based solely on nondisclosure).

<sup>197</sup> CAL. CIV. PROC. CODE § 1286.2(a)(6) (West 2006) (grounds for vacating arbitration award). *See id.* § 1281.91 (grounds for arbitrator disqualification).



### 3. Reasonable Costs

Another chief purpose of the MMWA is to broaden warranty remedies and ensure consumers' access to these remedies. To that end, the Act requires that warrantors provide their informal dispute resolution programs free of charge to consumers. It also allows prevailing consumers to recover their attorney fees.<sup>198</sup> It recognizes that warranty rights and remedies are meaningless if it is not financially feasible for consumers to pursue them. Current MMWA regulations for informal programs therefore suggest that burdensome costs and fees should not hinder consumers' pursuit of MMWA remedies. Policymakers should therefore clarify and expand the MMWA to protect consumers from financially burdensome binding arbitration procedures.

Such regulations are necessary because companies may not police their own form contracts. Instead, they may decline to err on the side of generosity in covering or capping consumer costs in their arbitration programs. Many companies fail to comply with the Protocol in ensuring that consumers' arbitration costs remain "reasonable,"<sup>199</sup> while consumers continually complain that high arbitration filing costs stymie their access to statutory remedies.<sup>200</sup>

Consumers have found little relief from high arbitration costs in the courts in the wake of *Green Tree Financial Services, Inc. v. Randolph*.<sup>201</sup> This is because *Randolph* set hefty and unclear hurdles for consumers to prove inability to pay high costs and placed consumers in a financial game of "chicken" by adopting a "wait-and-see" approach that essentially leaves consumers to complete arbitration procedures they may not be able to afford—banking on hopes that arbitrators will ease cost burdens in their

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<sup>198</sup> See *supra* notes 78–95 and accompanying text (discussing MMWA and FTC regulations).

<sup>199</sup> See Protocol, *supra* note 14, at Principle 6 (defining reasonable costs vaguely with reference to various contextual factors).

<sup>200</sup> See *supra* notes 128–31 and accompanying text (discussing prevalence of cost-based challenges to consumer arbitration).

<sup>201</sup> *Randolph*, 531 U.S. at 80–91 (finding consumers failed to meet the high burden of proving they would in fact be responsible for prohibitively high arbitration filing fees). See also *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561 (8th Cir. 2006) (finding that an employee would not intervene in a Title VII EEOC action on his behalf due to an arbitration clause in her employment contract and that she failed to prove that her arbitration costs would preclude her from vindicating her statutory rights).

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awards.<sup>202</sup> The Supreme Court's *Randolph* opinion also has fostered litigation and judicial dissention by leaving unanswered questions regarding what proof is sufficient to satisfy the burden of proving unreasonable costs. This, in turn, has left companies wondering whether a court will void or sever their arbitration clauses.<sup>203</sup>

Accordingly, MMWA arbitration reforms should ease litigation and protect consumers' access to statutory warranty remedies by establishing clear cost caps and limits. Reforms should borrow from workable cost schedules, such as those that the AAA Consumer Rules use for consumer claims for under \$75,000.<sup>204</sup> Policymakers also may consider the simplicity of blanket regulations, such as JAMS' requirement that companies bear all costs when they initiate arbitration and its absolute \$250 cap on consumers' arbitration fees for filing claims against a company.<sup>205</sup>

MMWA regulations need not, however, impose blanket caps or shift costs to companies for all consumers in all cases. This falsely assumes the label "consumer" connotes financial need. It also may encourage frivolous filings by erasing all proof of income requirements. Furthermore, arbitration regulations should not overly limit arbitrators' discretion or underestimate arbitrators' ability to apply set graduated income/cost schedules. Instead, regulations should balance consumer and company interests by requiring consumers to show that they meet stated income schedules for fee reductions or waivers.<sup>206</sup>

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<sup>202</sup> *Id.* AAA Commercial Arbitration Rules and Mediation Procedures, Rule 43 (effective Sept. 1, 2007), <http://www.adr.org/sp.asp?id=22440> (allowing arbitrator to "assess" and "apportion the fees, expenses, and compensation" related to such award as the arbitrator determines is appropriate, and to award attorneys' fees if authorized by the parties' agreement or other law); *Id.* at Rule 49 (allowing AAA to defer or reduce fees upon showing of hardship); *Id.* at Rule 50 (requiring parties to bear expenses equally unless they agree otherwise or the arbitrator assesses expenses in the award).

<sup>203</sup> See Bland, Jr. et al., *supra* note 72, at 403–25 (highlighting the litigation explosion regarding the enforcement of arbitration clauses from 2005–07). This litigation fosters more uncertainties and inefficiencies because it hinders companies' reliance on cost savings from their arbitration programs, which companies arguably share with consumers through lower prices and better quality.

<sup>204</sup> See AAA Consumer Rules, *supra* note 194 (providing a fee schedule based on claim amount, and capping fees at \$250 for telephonic hearings and \$750 per day of in person hearings for claims not exceeding \$75,000; also allowing parties to bring claims to small claims court).

<sup>205</sup> See JAMS Fairness Standards, *supra* note 143, at Rule 7 (vaguely defining reasonable costs with reference to various contextual factors).

<sup>206</sup> California requires consumers requesting waivers to declare under oath their income and number of persons in their households, but does not allow arbitration

Nonetheless, MMWA reforms should include clear fee and cost waivers for indigent consumers. They therefore could borrow from California in requiring arbitration providers to waive arbitration fees for consumers who establish that they are "indigent," having a gross monthly income that is less than 300 percent of the federal poverty guidelines.<sup>207</sup> The reforms also could incorporate California's mandate that arbitration providers give consumers written notice of the right to a fee cap or waiver.<sup>208</sup>

These elements culminate in a two-pronged approach. First, regulations should require automatic caps on consumers' arbitration fees and costs in accordance with a graduated schedule based on income and claim amount. Second, regulations also should mandate that fees be waived for consumers regardless of claim amount who prove they are indigent per published federal guidelines. Arbitrators or administrators could then review documentary proof of claim amount and income, and determine consumers' arbitration costs per claim/income/cost schedules at the outset of arbitration proceedings, subject to variation in special circumstances.

This would help ease the risks and uncertainties of the current "wait-and-see" approach by providing parties at the outset with cost information they need to make decisions regarding how to best pursue or defend warranty claims. It also would help quell the burdens and inefficiencies of litigation regarding arbitration costs. This, in turn, should allow companies to better rely on their arbitration clauses and costs savings from their arbitration programs.

#### 4. *Adequate Discovery and Presentation of Claims*

Again, the MMWA seeks to enhance and protect consumers' access to warranty remedies. Some commentators have therefore argued that binding arbitration is inappropriate for consumer statutory claims in part due to lack of adequate discovery.<sup>209</sup> Many also have emphasized that access to information and evidence is especially important in warranty cases because

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providers to require additional evidence of indigence. CAL. CIV. PROC. CODE § 1284.3(b)(3) (West 2006). Perhaps it would better prevent fraud to require consumers to present additional proof when their statements lack credibility due to other evidence.

<sup>207</sup> *Id.* § 1284.3(b)(1).

<sup>208</sup> *Id.* § 1284.3(b)(2).

<sup>209</sup> See Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 318 (1995) (arguing that arbitration denies consumers statutory protections due to limited discovery, lack of class action procedures, and absence of written opinions).

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health and safety are often at stake. Furthermore, the salient evidence in these cases generally is in the companies' custody, and often is the type of information that should be available to the larger consuming public.<sup>210</sup>

The FTC regulations for informal dispute resolution currently require that arbitration providers investigate claims, organize claim evidence, and provide the parties with opportunity to submit materials and rebut arguments against them.<sup>211</sup> In addition, the Protocol emphasizes consumers' rights to a "fundamentally fair process," and warns that parties should never be denied these rights "due to an inability to obtain information material to a dispute."<sup>212</sup> It also requires that arbitration agreements establish "procedures for arbitrator-supervised exchange of information," but cautions that such procedures should be mindful of the efficiency of arbitration.<sup>213</sup> The JAMS Fairness Rules similarly require that arbitration provisions "allow for the discovery or exchange" of relevant information.<sup>214</sup>

MMWA arbitration reforms should protect consumers' access to evidence they need to investigate their claims, and to adequate hearing procedures to present their cases. Policymakers must nonetheless be cautious in adopting discovery and evidentiary rules in consumer arbitration.<sup>215</sup> They must balance individual consumers' benefits from such rules with risks of increased prices and interest rates resulting from judicialized procedures.<sup>216</sup> They also should give healthy regard for the importance of protecting consumers' statutory warranty rights.

Accordingly, MMWA reforms should require procedures for minimum mandatory document exchange. Consumers must have access to companies' reports and correspondence they need to prove warranty claims. The reforms should nonetheless give arbitrators discretion to set relevancy limits on this

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<sup>210</sup> See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 KAN. L. REV. 1211, 1229–32 (2006) (discussing the role of civil courts in alerting consumers about health and safety concerns, and using the flammable fabric cases as an example).

<sup>211</sup> See *supra* notes 81–95 and accompanying text (discussing FTC regulations).

<sup>212</sup> Protocol, *supra* note 14, at Principle 13.

<sup>213</sup> *Id.*

<sup>214</sup> JAMS Fairness Standards, *supra* note 143, at Rule 9.

<sup>215</sup> *C.f.*, Sternlight, *supra* note 27, at 683–84 (warning of dangers of corporations' use of arbitration to prevent consumers from getting needed discovery); see also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 93 (discussing drawbacks of judicialized arbitration).

<sup>216</sup> See Ware, *supra* note 215, at 89–90 (noting how judicialization of proceedings often results in increased business costs that are passed on to the populace through higher prices).

exchange and guard against abusive or onerous discovery. Reforms could then borrow from construction arbitration practices by requiring disputants to jointly compile limited "document source books" that include the documents they deem most relevant, which would be presumptively admissible subject to valid privilege or privacy objections.<sup>217</sup>

Arbitrators could resolve these objections and other discovery disputes through telephonic or summary processes. The reforms should borrow from the Protocol in specifying that arbitrators decide these issues with heightened sensitivity to consumers' privacy and confidentiality concerns.<sup>218</sup> Reforms also should authorize arbitrators to order sanctions against parties that do not engage in fair exchange of documents, or otherwise "hide" relevant information. Arbitrators also could have the clear authority to order necessary depositions, thereby relieving the uncertainties that currently exist under the FAA's vague provision of power to order witnesses to attend proceedings and bring documents to the hearing.<sup>219</sup>

These procedures should not overcomplicate the process. Under current arbitration practice, parties often lack the wherewithal to adequately present their cases without attorney representation. Consumers intimidated or unfamiliar with arbitration processes also are particularly vulnerable to pitfalls of complicated procedures. This is why JAMS Fairness Rules warn that companies' arbitration procedures must not discourage the use of counsel.<sup>220</sup> Accordingly, parties should retain the right to use counsel in arbitration, but should not feel compelled to do so by the complications of the process. Again, policymakers will have the challenging task of balancing fairness and efficiency in crafting these rules, but allowance for arbitrator discretion and flexibility to address case contexts should ease some burdens of this task.

##### *5. Fair Use of Telephonic or On-Line Dispute Resolution with Retained Right to In-Person Hearings at Reasonable Locations*

Presentation protections and cost limits should account for expanded use of expedited, telephonic, electronic/on-line, or "desk" arbitration options that allow parties to tell the arbitrator about their cases in truncated proceedings

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<sup>217</sup> This is based on my experience arbitrating construction disputes.

<sup>218</sup> Protocol, *supra* note 14, at Principle 12.

<sup>219</sup> 9 U.S.C. § 7 (2000).

<sup>220</sup> JAMS Fairness Standards, *supra* note 143, at Rule 6.

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or through remote communications.<sup>221</sup> These options often benefit all involved by minimizing travel, easing scheduling hassles, and reducing overall dispute resolution costs. This can also mean more timely awards, and access to remedies based on those awards.

Exciting and promising developments are being made with respect to on-line dispute resolution (ODR). The AAA, for example, has initiated several ODR developments, including Rapid Alternative Dispute Resolution (R/ADR) designed to allow parties to complete their mediations or arbitrations through mostly on-line processes within two weeks.<sup>222</sup> Institutions such as the AAA also have been expanding various means for on-line case filing, management, and communications among the parties and the providers.<sup>223</sup>

Nonetheless, on-line and telephonic processes have drawbacks and limitations. Consumers should retain rights to in-person hearings when they will suffer technological disadvantages in on-line or telephonic proceedings. In-person contact also may promote amicable settlements and healing benefits.<sup>224</sup> Dispute resolution theory highlights how personal interaction can lead to healing and amicable settlement. In addition, the consumers in the focus groups I conducted indicated that they often prefer to discuss complaints and claims directly with a manager or other company representative than through letters or e-mails because they feel they will get a more satisfying resolution through such personal dealings.<sup>225</sup>

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<sup>221</sup> See Protocol, *supra* note 14, at Principle 69 (calling providers to develop programs "which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of the goods or services provided, and the ability of the Consumer to pay").

<sup>222</sup> Debi Miller-Moore, *ODR at the AAA: Online Dispute Resolution in Practice*, 38 U. TOL. L. REV. 395, 400–01 (2006) (noting R/ADR's connection with The National Research Exchange, and highlighting the expanding opportunities for ODR in domestic and international disputes).

<sup>223</sup> *Id.* at 395–401 (giving an overview of AAA Webfile, as well as the AAA's Electronic Case Folder, Neutral's ECenter, and R/ADR). See also AAA Consumer Rules, *supra* note 194.

<sup>224</sup> See Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1420 (1997) (discussing psychological benefits of in-person mediation); Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 470–71 (2002) (explaining that a consumer may not have technological tools, on-line computer time, or sufficient computer skills to participate in cyber mediation or arbitration).

<sup>225</sup> Consumer Focus Group, *supra* note 56.

Procedural regulations should therefore give consumers the option of in-person hearings at convenient locations. The JAMS Fairness Rules specify that consumers must retain the right to in-person hearings in their "hometown area."<sup>226</sup> The Protocol also echoes these location concerns by requiring that hearings be "at a location which is reasonably convenient to both parties."<sup>227</sup> Large companies with travel resources and multiple offices should not be able to insist on requiring that consumers bear the burden of traveling to arbitrate in the company's home location.<sup>228</sup>

Reforms should therefore allow for the parties to agree to ODR or other "desk" procedures, but should give consumers the option of requesting in-person hearings at a reasonable location in their home state. The arbitrator should have authority to require consumers to show reasons for requesting in-person hearings in small claim cases and to set the location in the absence of parties' agreement. Such reforms should nonetheless be subject to review and revision based on the ever emerging ODR developments.

### 6. *Preservation of Remedies*

The MMWA provides for statutory remedies aimed to protect important public policies that deserve special protection despite remedy limitations that regularly appear in companies' consumer arbitration provisions. The Act allows consumers to obtain legal and equitable relief and to collect legal costs and attorney fees on prevailing warranty claims. It also allows for class relief to protect the Act's public functions. The FTC regulations then specify that consumers must retain their rights to seek these remedies in court although they must comply with companies' qualifying dispute resolution procedures.<sup>229</sup> They also require that awards provided through these procedures must be "fair" in allowing for all appropriate remedies.<sup>230</sup>

MMWA regulations applicable to binding arbitration should likewise guard consumers' access to statutory damages and collection of attorney fees that promote MMWA policies.<sup>231</sup> This coincides with the FTC's regulations

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<sup>226</sup> JAMS Fairness Standards, *supra* note 143, at Rule 5.

<sup>227</sup> Protocol, *supra* note 14, at Principle 7.

<sup>228</sup> See *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1176–78 (N.D. Cal. 2002) (imposing a company's location in its home state of California).

<sup>229</sup> See *supra* notes 78–95 and accompanying text (discussing the MMWA and FTC provisions).

<sup>230</sup> *Id.*

<sup>231</sup> See, e.g., *Cieslewicz v. Mut. Cas. Ins. Co.*, 267 N.W.2d 595, 599–601 (Wis. 1978) (explaining that punitive damages aim to punish or deter bad conduct).

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for informal dispute resolution and the Protocol's proviso that arbitrators retain power "to grant whatever relief would be available in court under law or in equity."<sup>232</sup> It also gains support from JAMS Fairness Rule 3, which requires that remedies applicable in court remain available to consumers under form arbitration provisions, unless the provisions give the consumer the right to seek inarbitrable remedies in court.<sup>233</sup>

Mandatory regulations protecting this access should therefore override form contract limitations on remedies. Contractual freedom generally supports remedy and fee collection limits in business and other commercial contexts. It is nonetheless important to protect consumers' recovery of attorney fees for prevailing MMWA claims in order to ensure their access to counsel, especially in light of current concerns regarding attorneys' incentives to decline consumer cases involving small claims subject to arbitration. In addition, preclusions of attorney fee recovery should not dissuade consumers from serving their functions as "private attorneys general" in pursuing MMWA claims where public officials lack resources to spearhead these actions.

### *7. Allowance for Class Relief, Consolidation, or Joinder*

Limits on class and consolidated relief through arbitration clauses also raise particular concerns with respect to consumers' ability to vindicate their MMWA rights and serve their private attorney general functions under the Act. These concerns have made the validity of class relief waivers a key issue of debate and disagreement among courts and commentators.<sup>234</sup> Some have concluded that such waivers should be unenforceable due to their impact on MMWA's policies and consumers' ability to vindicate their warranty rights.<sup>235</sup> They emphasize that the MMWA allows for class relief, and that consumer claimants often can only feasibly assert these small dollar claims as a class. In addition, class actions allow consumers to act as private

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<sup>232</sup> Protocol, *supra* note 14, at Principle 14.

<sup>233</sup> JAMS Fairness Standards, *supra* note 143, at Rule 5.

<sup>234</sup> See Kaplinsky, *supra* note 151, at 61–65 (highlighting the disagreement among courts regarding the enforceability of class waivers).

<sup>235</sup> Class arbitration is controversial and uncertain, and full debate is beyond the scope of this Article. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5–22, 97–104 (2000) (discussing arbitration's effect on consumers' access to class relief and proposing that companies should not be permitted to hinder consumers' vindication of statutory rights through class relief waivers).



attorneys general in raising awareness regarding companies' questionable practices and aiding the FTC's and other public officials' enforcement of consumer protections.<sup>236</sup>

These attorney general functions of class actions have become especially important in protecting consumer warranties due to the FTC's and other public officials' scant enforcement actions. The overworked FTC is currently administering forty-six statutes, which means it simply does not have the resources to thoroughly investigate all possible MMWA violations and spearhead enforcement actions.<sup>237</sup> In addition, states' attorneys general have not consistently enforced consumer protections for a variety of reasons, including lack of resources, political support, and consumer impetus.<sup>238</sup> At the same time, city attorney offices rarely, if ever, pursue consumer protection enforcement actions.<sup>239</sup> Consumer class actions have therefore

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<sup>236</sup> See Schmitz, *supra* note 210, at 1235–37 (discussing how consumer class actions raise public awareness regarding issues of policy concerns).

<sup>237</sup> See FTC, Statutes Enforced or Administered by the Commission, <http://www.ftc.gov/ogc/stats.shtm> (last visited Feb. 15, 2008). In addition, a search of all federal or state court cases from January 1, 2000 to July 25, 2007 in the ALLCASES database on Westlaw with the query "'MMWA' OR 'Magnusson Moss' OR 'Magnusson-Moss' OR 'Magnuson Moss' OR 'Magnuson-Moss'" revealed 857 cases total, but no cases in which the "FTC" or "Federal Trade Commission" was a party to the action. See Westlaw search, July 25, 2007 (records on file with author). Furthermore, "Reno," "Ashcroft," "Gonzales," or "Attorney General" did not appear in any of these cases, and the only case that listed the United States as a party did not appear to be a MMWA enforcement action. See *id.* A narrowed search using "'attorney general' OR 'private attorney general'" revealed 55 cases, but only five of these indicated state attorneys general who intervened in some way or filed briefs. See *id.*

<sup>238</sup> See Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 611–14 (2006) (reporting study of disparate enforcement of consumer protections by usually elected state attorney generals due to economics and politics). See also E-mail from Paul Chessin, Assistant Colorado Attorney General, to Jeremy Durham, Research Assistant to Associate Professor Amy Schmitz (July 27, 2007) (on file with author) (explaining how Colorado does not have a state analogue to the MMWA, leaving most warranties to the UCC and limited provisions of the Colorado Consumer Protection Act, and that "it does not appear the Attorney General has received any consumer complaints under these provisions").

<sup>239</sup> See, e.g., E-mail from Liza C. Sillis, Chief Deputy District Attorney, Denver District Attorney's Office, 2d Judicial District, State of Colorado, to Jeremy Durham, Research Assistant to Associate Professor Amy J. Schmitz (July 10, 2007) (on file with author).

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become a key tool in raising awareness regarding warranty issues and enforcing statutory policies.<sup>240</sup>

Arbitration providers are also sensitive to the importance of class relief. Some arbitration providers have created class arbitration rules and have welcomed companies to allow consumers and employees to assert their claims in such proceedings. The AAA announced that it will administer class arbitration under its Supplementary Rules for Class Arbitrations if the parties' agreement provides that disputes shall be resolved by arbitration in accordance with any of the AAA's rules, and the agreement expressly allows or is silent regarding class relief, consolidation, or joinder of claims.<sup>241</sup> JAMS also has instituted Class Action Procedures that allow an arbitrator to administer class arbitration in appropriate cases according to JAMS' class procedures if the arbitrator determines that the arbitration clause permits class arbitration or a court orders it.<sup>242</sup>

These procedures have little impact, however, in the wake of companies' preclusions of class proceedings in their consumer arbitration clauses. Trade journals tout corporate benefits of class relief waivers, and companies eagerly embrace these waivers as means for limiting liability and public disclosure of warranty violations.<sup>243</sup> As noted above, all nine of the cell phone companies' consumer form contracts I reviewed included express preclusions of access to class relief in their arbitration clauses.<sup>244</sup> Furthermore, many of these waivers were clear and careful in seeking to ward off class proceedings of any kind. Verizon's clause, for example, stated in bold and all capital letters, "**THIS AGREEMENT DOESN'T PERMIT CLASS ARBITRATIONS EVEN IF [the arbitration provider] PROCEDURES OR RULE WOULD.**" It also states in all capital letters that the arbitration clause does not apply if a court refuses to enforce the preclusion of class arbitration.<sup>245</sup> This suggests that companies particularly

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<sup>240</sup> Congress acknowledged this with its adoption of the Class Action Fairness Act of 2005. Class Action Fairness Act of 2005, 28 U.S.C.A. § 1453 (West 2008).

<sup>241</sup> American Arbitration Association, AAA Policy on Class Arbitrations (July 14, 2005), <http://www.adr.org/sp.asp?id=25967>; AAA, *Supplemental Rules for Class Arbitrations* (effective Oct. 8, 2003), <http://www.adr.org/sp.asp?ID=21936>.

<sup>242</sup> JAMS CLASS ACTION PROCEDURES, *supra* note 151, at Rules 2–3 (requiring an arbitrator to determine whether an arbitration clause allows for class arbitration as a threshold matter, and subjecting that determination to immediate court review).

<sup>243</sup> *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1274–76 (D. Ariz. 2007) (explaining the genesis of class-action prohibitions through arbitration clauses and their negative impacts on consumer warranty claims).

<sup>244</sup> Collected Arbitration Provisions, *supra* note 2.

<sup>245</sup> *Id.*

value the use of arbitration clauses to bar consumer class proceedings, and may even prefer litigation over any class arbitration.<sup>246</sup>

It is generally for the arbitrators to interpret arbitration clauses to determine their allowance for class proceedings, and some arbitrators and courts have found class action waivers unenforceable.<sup>247</sup> However, explicit waivers may be too clear for an interpretation allowing class proceedings and many courts have enforced class waivers per the FAA and strict contract law. This enforcement then trumps arbitration providers' class procedures, and may override a provider's refusal to administer an arbitration proceeding pursuant to a provision that bars class relief.<sup>248</sup> For example, JAMS had announced a policy refusing to enforce class action waivers in consumer cases, but retracted that policy in the wake of a court's holding that an arbitrator exceeded his authority by ordering class arbitration in defiance of a contractual class waiver.<sup>249</sup>

This raises concerns that companies would simply abandon arbitration programs if they cannot use them to preclude class actions. Furthermore, some have argued that class actions impose coercive settlements or plaintiffs' attorneys otherwise abuse use of class procedures.<sup>250</sup> Accordingly, any allowance for class arbitrations under new MMWA arbitration standards

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<sup>246</sup> *Id.* (All nine companies expressly precluding class relief, three are careful to also expressly bar use of providers' or other applicable rules allowing for class arbitration procedures, and five void the arbitration provision if the preclusion is deemed unenforceable.).

<sup>247</sup> See *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2402–10 (2003) (eluding the question of whether Green Tree can contractually preclude class relief through its arbitration clauses in its consumer contracts by holding that arbitrators must first interpret the contracts to determine whether they do preclude class relief); *Cooper*, 503 F. Supp. 2d at 1281–85 (D. Ariz. 2007) (highlighting dissention among courts regarding the enforceability of class relief waivers in arbitration clauses and the policy issues these waivers raise). See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (further narrowing the scope of issues for the court).

<sup>248</sup> See 9 U.S.C. § 2 (2000); *Comb v. PayPal Inc.*, 218 F. Supp. 2d 1165, 1176–77 (N.D. Cal. 2002) (Court assumed it would have to honor the arbitration provision regardless of AAA fairness policies.).

<sup>249</sup> See *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1281–89 (M.D. Ala. 2005) (distinguishing express class action waivers from arbitration clauses that are silent with respect to class relief); Kaplinsky, *supra* note 151, at 64 (2007) (noting JAMS' retraction of its policy after *Gipson*).

<sup>250</sup> See Bruce L. Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1381 (2000) (proposing that class action in the real world "is an instrument of abuse and corruption").

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should contain measures to prevent such abuse of class procedures. Consumers should therefore continue to bear the burden of establishing that they qualify for class treatment under strictures similar to those in the Rules of Civil Procedure.<sup>251</sup> Furthermore, although use of ODR/desk procedures and caps on consumers' arbitration fees may ease consumers' burdens of asserting claims in individual arbitrations, these measures do not displace need for class relief in MMWA cases, especially when it appears a company is using class waivers to cheat consumers or hide warranty claims.<sup>252</sup>

At the least, MMWA arbitration rules should allow for liberal joinder aimed to help streamline proceedings and contain costs. It wastes time, money, and headaches for parties similarly subject to arbitration clauses involving claims arising out of the same contracts or occurrences to each resolve their claims in separate arbitrations. Furthermore, joining arbitrations involving the same issues would help eliminate inconsistent rulings and resulting preclusion problems.<sup>253</sup> In addition, joinder rules should override companies' attempts to preclude any consolidation as means for dodging responsibility by blaming others in the manufacturing and sale chain for product defects and other warranty violations.<sup>254</sup> Again, these are suggestions for policymakers to consider and debate.

### *8. Timely Decisions and Compliance with Awards*

It is important that arbitration procedures include time limits aimed to prevent unnecessary delays that may harass claimants and frustrate efficiency benefits of arbitration. This is especially true in MMWA cases where companies may strategically delay the process to avoid taking responsibility for correcting warranty violations or paying damages and fines. They also may use delays to create extra hassles and expenses for consumer claimants that often drive them to drop their claims. Furthermore, time limits foster arbitration's speed and efficiency, which is considered one of the key benefits of arbitration.

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<sup>251</sup> See, e.g., *Cooper*, 503 F. Supp. 2d at 1292–93 (ordering arbitration with the unenforceable class action waiver severed from the arbitration clause and directing that the arbitrator must determine whether the claimant met the class action criteria).

<sup>252</sup> *Id.* (holding the particular class action waiver in an arbitration clause unconscionable and against public policy under a case-by-case analysis due to its likely impact on consumers' statutory rights).

<sup>253</sup> See *id.*

<sup>254</sup> See Schmitz, *supra* note 162, at 360–61 (proposing liberal joinder in mobile home warranty cases).

At the same time, the MMWA aims to expand and ensure consumers' access to remedies for warranty violations. Accordingly FTC regulations currently require that warrantors' MMWA dispute resolution mechanisms inform all parties of their decisions within forty days of receiving notice of a dispute. They also require that decisions specify a reasonable time for performance, and make public information regarding warrantors' compliance with these decisions.<sup>255</sup> The Protocol similarly urges that arbitration proceedings take place "within a reasonable time," and that providers specify a "reasonable time period for each step" in the process. It also urges providers to establish rules that allow for default procedures if a party with notice of proceedings fails to participate.<sup>256</sup>

The Better Business Bureau's (BBB) dispute resolution rules also include time limits. The BBB's program for resolution of business-customer disputes provides that arbitrators in the program will usually render decisions within ten days after the hearing is closed, and that the BBB will make every effort to resolve complaints within sixty days.<sup>257</sup> The BBB's Informal Dispute Settlement (IDS) Rules for its nonbinding process consumers may use to resolve disputes with businesses also state the same time parameters.<sup>258</sup> Furthermore, the BBB rules for binding arbitration call for these same time constraints, and require the parties to submit requests for clarification or correction of a decision within ten days of receiving it.<sup>259</sup> They also require that the parties comply with awards within ordered time limits, and state that

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<sup>255</sup> See *supra* notes 78–95 and accompanying text (discussing the MMWA and FTC regulations).

<sup>256</sup> Protocol, *supra* note 14, at Principle 8. The Protocol further provides that awards should be final and binding. *Id.* at Principle 15(a).

<sup>257</sup> BBB Rules of Conditionally Binding Arbitration, Rules 25 & 27, <http://www.dr.bbb.org> (follow "Dispute Resolution, The Commonsense Alternative" hyperlink; then follow "Conditionally Binding" hyperlink) (last visited Feb. 15, 2008).

<sup>258</sup> See BBB Rules for Informal Dispute Settlement, Rules 24 & 26, <http://www.dr.bbb.org> (follow "Dispute Resolution, The Commonsense Alternative" hyperlink; then follow "IDS Rules" hyperlink) (last visited Feb. 15, 2008). See also BBB Dispute Resolution: The Commonsense Alternative, Informal Dispute Settlement, <http://www.dr.bbb.org> (follow "Dispute Resolution, The Commonsense Alternative" hyperlink) (last visited Jan. 31, 2008) (describing the IDS process for resolution of consumers' disputes with companies).

<sup>259</sup> See BBB Moving and Storage Rules of Arbitration (Binding), <http://www.dr.bbb.org> (follow "Dispute Resolution, The Commonsense Alternative" hyperlink; then follow "Binding" hyperlink) (last visited Feb. 15, 2008) (stating the time limits in rules 25, 27, and 28).

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the BBB will contact the parties two weeks after the time set to confirm that the parties have complied.<sup>260</sup>

At the same time, small claims court rules also usually set time limits on procedures, and require that courts hold hearings and render awards or judgments within fairly short time limits.<sup>261</sup> In addition, some states' small claims rules aim to ensure timely compliance with judgments by allowing courts to increase judgments if parties fail to pay within a specified time such as thirty days.<sup>262</sup> Similarly, some states' arbitration rules set time limits for when arbitrators must hold hearings and render awards.<sup>263</sup>

MMWA arbitration regulations should also set clear timelines for when providers must hold any required hearings and render decisions, subject to modification pursuant to special circumstances or the parties' agreement. Again, speed and efficiency are considered one of the key benefits of arbitration and are worthy of protection. Judgments reached after years of litigation amount to pyrrhic victories.

Furthermore, MMWA regulations should require warrantors to comply with or pay any awards within time limits such as thirty days, and allow arbitrators to assess penalties for failure to do so. The National Association of Securities Dealers (NASD), for example, has sought to reduce brokers' nonpayment of arbitration awards since the United States General Accountability Office (GAO) issued several reports regarding rampant nonpayment rates.<sup>264</sup> Along with instituting other notice and enforcement measures, the NASD amended its code of procedures to streamline default proceedings against defunct brokers and to bar delinquent brokers from enforcing contracts requiring NASD arbitration.<sup>265</sup> In addition, both the

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<sup>260</sup> *Id.*

<sup>261</sup> See COLO. R. CIV. PROC. 502(c) & 358 (2003) (requiring trial date within thirty days from notice of claim and that the court immediately render judgment at the close of trial); ARIZ. REV. STAT. ANN. §§ 22-515 & 22-520 (2003) (requiring hearing date within sixty days of the filing of the answer and judgment within ten days of the close of trial); CAL. CIV. PROC. CODE § 116.330(a) (West 2007) (requiring hearing within seventy days from the date it is ordered).

<sup>262</sup> See, e.g., WASH. REV. CODE ANN. § 12.40.105 (West 2007) (allowing for increased judgment if not paid within thirty days from when it was rendered).

<sup>263</sup> See, e.g., ARIZ. REV. STAT. ANN. §§ 74(b) & 75(a) (2003) (requiring arbitrator to set hearing date for between 60 and 120 days from appointment and to render an award within ten days after close of the hearing).

<sup>264</sup> See Per Jebsen, *How to Fix Unpaid Arbitration Awards*, 26 PACE L. REV. 183, 190-92 (2005).

<sup>265</sup> *Id.* at 191-92. See also Order Approving Proposed Rule Change by NASD, Inc. Relating to Amendments to Rule 10301 of the Code of Arbitration Procedure to Prohibit

NASD and New York Stock Exchange (NYSE) require that awards be paid within thirty days from award notice, and require awards to bear interest from the date of the award if they are not paid within that time.<sup>266</sup> MMWA arbitrations should similarly strive to ensure prompt compliance with awards. Warranty remedies have little value if consumers are unable or must unduly struggle to obtain them.

### 9. Public Disclosure of Awards

Many companies value arbitration for its privacy, and generally arbitration proceedings should remain private and confidential.<sup>267</sup> However, secrecy has its drawbacks.<sup>268</sup> Public disclosure of MMWA awards and reasons for awards is particularly important in order to help develop law and raise awareness with respect to these public claims.<sup>269</sup> Public decisions alert consumers about product safety and questionable company practices, and may prompt further investigations and policy initiatives.<sup>270</sup> MMWA regulations therefore should include disclosure rules aimed to foster these functions and preclude companies from using arbitration's privacy to escape

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Terminated, Suspended, Barred, or Otherwise Defunct Firms from Enforcing Predispute Arbitration Agreements in the NASD Arbitration Forum, Exchange Act Release No. 34-44158, 66 Fed. Reg. 19,267 (Apr. 6, 2001).

<sup>266</sup> NASD CUSTOMER DISPUTES ARB. PRO. CODE § 12904(i) (2007), available at [http://finra.complinet.com/finra/display/display.html?rbid=1189&element\\_id=1159000927](http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000927); NASD INDUSTRY DISPUTES ARB. PRO. CODE § 13904(i) (2007), available at [http://finra.complinet.com/finra/display/display.html?rbid=1189&element\\_id=1159000927](http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000927); NYSE ARB. RULE 627(g), available at [http://wallstreet.cch.com/nysetools/Exchangeviewer.asp?SelectedNode=chp\\_1\\_9&manual=nyse/nyse\\_rules/nyse-rules/](http://wallstreet.cch.com/nysetools/Exchangeviewer.asp?SelectedNode=chp_1_9&manual=nyse/nyse_rules/nyse-rules/) (last visited Feb. 15, 2008).

<sup>267</sup> See Schmitz, *supra* note 210, at 1212–18 (discussing benefits of privacy in arbitration).

<sup>268</sup> *Id.* at 1228–34 (highlighting drawbacks of secrecy in arbitration, especially when statutory claims are at stake).

<sup>269</sup> See Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087, 1093–97 (2000) (discussing how public adjudication, in contrast to private arbitration, aids legal development and creates public values through recorded opinions).

<sup>270</sup> See Christopher Placitella & Justin Klein, *The Civil Justice System Bridges the Great Divide in Consumer Protection*, 43 DUQ. L. REV. 219, 223–35 (2005) (emphasizing uneven power structure in pharmaceutical cases and the need for civil litigation to protect consumer interests).

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liability or otherwise hide warranty violations.<sup>271</sup>

Regulations requiring public disclosure of MMWA awards also may help quell companies' repeat-player advantages. Some charge that arbitrators favor repeat-player companies such as manufacturers in order to compete in the growing provider market and garner continued business.<sup>272</sup> Public awards, however, may counteract incentives to favor these players by exposing any favoritism and inspiring balanced awards. Furthermore, manufacturers may use private awards and confidentiality clauses to eliminate MMWA claims from the public system and essentially privatize justice with respect to these warranty claims.<sup>273</sup> Such secrecy also may prevent consumers from uncovering evidence of prior warranty violations that could aid their own cases.<sup>274</sup>

The importance of public disclosure with respect to MMWA claims likely led to the FTC's current regulations requiring that warrantors' dispute resolution mechanisms disclose reasoned decisions to consumers, provide access to other records such as indices of information about warrantors and products involved in filed claims, and make known any awards on those claims. As described above, these mechanisms also must publish and submit to the FTC summaries of these indices and independent audit reports of their compliance with MMWA regulations.<sup>275</sup>

The Protocol and JAMS Fairness Policy show this same concern for public disclosure regarding consumer claims.<sup>276</sup> The Protocol urges arbitrators to "facilitate" and comply with requests to "provide a brief written explanation" of awards without jeopardizing the privacy and confidentiality parties expect in arbitration.<sup>277</sup> The JAMS Fairness Procedures state that

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<sup>271</sup> See Schmitz, *supra* note 210, at 1230–34 (discussing dangers of privacy in arbitration).

<sup>272</sup> See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 219 (2004) (noting repeat players' use of privacy and confidentiality in arbitration to their disproportionate advantage); Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 535–40, 546–48 (2005).

<sup>273</sup> Moses, *supra* note 272, at 535–40, 546–48.

<sup>274</sup> See *Ting v. AT&T*, 319 F.3d 1126, 1133, 1149–52 (9th Cir. 2003) (warning how AT&T could use arbitration's private awards and confidentiality clauses in its arbitration agreements to preclude consumers from proving their claims).

<sup>275</sup> See *supra* notes 78–95 and accompanying text (discussing the MMWA and FTC regulations).

<sup>276</sup> See Protocol, *supra* note 14, at Principles 12 & 15 (addressing secrecy and awards); JAMS Fairness Standards, *supra* note 143, at Rule 10 (requiring reasoned award).

<sup>277</sup> Protocol, *supra* note 14, Principles 12 & 15.



awards should include "a concise written statement of the essential findings and conclusions on which the award is based."<sup>278</sup>

Accordingly, MMWA regulations for binding consumer arbitration should, at a minimum, require publication of basic reports regarding warranty decisions. These regulations could borrow from California arbitration procedures by requiring that reports state the identity of parties and arbitrators, provider fees, hearings and disposition dates, description of claims, and statement of results.<sup>279</sup> Similarly, Maine recently adopted a new arbitration law after much compromise that requires providers such as the AAA to report names of the parties, arbitrators and prevailing parties, along with amounts of claims and fee allocations in arbitrations they administer.<sup>280</sup>

MMWA reports should therefore include this basic information. Upon request, these reports also should go further to include concise written explanations for arbitration awards, as the NASD has proposed for its arbitrations.<sup>281</sup> However, these publication requirements should not be too onerous or create unnecessary expenses. They also must not be so burdensome or technical that they drive away qualified arbitrators, especially those that are non-lawyers with other relevant expertise.

Accordingly, a party requesting an explanation should alert the arbitrator of the request at least twenty days before any hearing, and perhaps pay a small fee for the arbitrator's additional time in preparing the explanation. For example, the NASD's proposal for such requests allows for arbitrators to earn an extra \$200 for writing reasoned opinions.<sup>282</sup> Furthermore, arbitrators should not be required to include detailed legal authorities or intricate damages calculations in their explanations. This would likely drive away

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<sup>278</sup> JAMS Fairness Standards, *supra* note 143, at Rule 10.

<sup>279</sup> CAL. CIV. PROC. CODE § 1281.96 (2005) (requiring at least quarterly publication of consumer arbitration reports including similar basic information).

<sup>280</sup> 10 ME. REV. STAT. ANN. § 1169 (2007). The reporting requirement was all that was left from an original bill proposing to bar enforcement of pre-dispute arbitration contracts in consumer, employment, and insurance disputes. David LeFevre, *Ohio Considers Mandatory Arbitration of Medical Malpractice*, DISP. RESOL. MAG., Summer 2007, at 38 (noting how the adopted law "fell far short" of the sweeping proposals but hoped to foster oversight with less risk if FAA preemption).

<sup>281</sup> Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto, to Provide Written Explanations in Arbitration Awards Upon the Request of Customers, or of Associated Persons in Industry Controversies, 70 Fed. Reg. 41,065 (July 15, 2005) (expanding current NASD award publication rules by proposing amendments allowing parties to require that these awards include reasoned opinions).

<sup>282</sup> *Id.*

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non-lawyer arbitrators, hinder timeliness of awards, and overcomplicate published reports.

Regulations also must aim to contain costs for gathering and making these awards public. Use of the Internet would further that aim. Arbitrators could be required to upload reports on a central searchable database on the FTC's website for MMWA arbitration decisions.<sup>283</sup> The public could then access the reports and search the database using search terms such as party name and claim type. In addition, regulations should require arbitrators or arbitration administrators to provide printed reports to the parties in a case free of cost. Such printed reports could also be available to other interested parties for a nominal printing fee, or for free to those without Internet access.<sup>284</sup>

It is true that these basic arbitration reports and publication requirements will not create legal precedent per se and may not further the development of MMWA law to the extent that reasoned and publicly reported judicial opinions do. However, they would provide parties with more feedback than common bare awards that state little more than a dollar amount or dismissal. Furthermore, such reports would provide more public information and signaling benefits than purely private awards or settlement agreements.<sup>285</sup> Evidence suggests that publication of arbitration awards has persuasive effect on future awards, and that arbitrators competing for business may have incentive to publish quality reports and explanations to signal their knowledge and competence.<sup>286</sup>

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<sup>283</sup> See, e.g., CAL. CIV. PROC. CODE § 1281.96 (2005) (requiring arbitration administrators to provide reports for free over the Internet); Press Release, Nat'l Ass'n of Sec. Dealers, NASD Dispute Resolution to Provide Arbitration Awards Online (May 10, 2001), <http://finra.org/PressRoom/NewsReleases/2001NewsReleases/P010078> (discussing how NASD worked with the Securities Arbitration Commentator to publish awards online).

<sup>284</sup> See CAL. CIV. PROC. CODE § 1281.96(b) (2005) (allowing small fees for printing reports for the public); AAA Employment Awards Database, <http://www.adr.org/employmentawards> (last visited Feb. 15, 2008) (providing access to redacted awards from AAA employment arbitrations filed after January 1, 1999 for a yearly fee of \$100, but allowing access to a sample award for free).

<sup>285</sup> This is especially true in light of the tiny percentage of cases that become subjects of judicial opinions. See Boyd N. Boland, *Most Cases Settle: The "Vanishing Trial" from the Perspective of a Settlement Judge*, TRIAL TALK, Jun./Jul. 2005, at 15–17 (noting that less than 2% of cases go to trial and that this hinders clarification of legal standards).

<sup>286</sup> Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 213–14 (2006) (concluding that the research available indicates that arbitration is less "lawless" than some fear).

The regulations also could improve transparency and public responsibility in consumer arbitration by clarifying that the FTC's current claim indices and audit requirements apply to both binding and informal arbitration. Companies and arbitration administrators would then have to publish these indices of claims and award information with respect to their binding arbitration programs. They also would have to submit summaries of these indices and independent audit reports of their arbitration programs to the FTC on an annual or quarterly basis. The FTC could then publish these summaries and audit reports on their website, or in another designated print media venue. Taken together, these report and audit regulations should foster company accountability and public awareness with respect to consumer warranty issues.

#### 10. *Access to Small Claims Court*

MMWA guidelines also should protect consumers' access to small claims court for asserting claims seeking damages under a specified amount, such as \$5,000 or \$7,500. The FTC guidelines currently preclude informal dispute resolution programs from replacing small claims and other court access, but, again, most courts have found this inapplicable to binding arbitration under the FAA.<sup>287</sup> The Protocol, however, asks companies to ensure in their binding arbitration clauses that consumers retain their rights to bring complaints to small claims court.<sup>288</sup>

Such small claims carve-outs from binding arbitration clauses can provide an important consumer protection, especially for consumers who lack financial and legal resources.<sup>289</sup> This is because seeking remedies through small claims court is usually less costly and time consuming than regular litigation or arbitration. Filing fees may be as low as \$10 or \$15, and parties do not pay for the judges' time as they generally must do in arbitration.<sup>290</sup> Consumers also may save money in small claims court to the

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<sup>287</sup> See *supra* notes 81–95 and accompanying text (discussing FTC guidelines and their enforcement).

<sup>288</sup> Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000) (section 17(c)(11) of proposed rules requiring that parties have the right to opt out of arbitration for small claims).

<sup>289</sup> See Dobbins, *supra* note 48, at 139–41 (noting importance of small claims court access for low-income people).

<sup>290</sup> See, e.g., TEX. GOV'T CODE ANN. §§ 28.003–28.004 (2004) (stating \$10 filing fee for all cases up to \$5,000, but charging additional fees if jury trial is requested); ARIZ. REV. STAT. ANN. §§ 22-501–22-524 (2007) (charging \$16 filing fee for all cases); N.Y. CITY CIV. CT. ACT § 1803(a) (2004) (assessing \$15 filing fee for claims up to \$1,000).

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extent they can avoid hiring attorneys.<sup>291</sup> Furthermore, some state rules allow for free or very low cost mediation or arbitration upon agreement of the parties.<sup>292</sup>

Requiring small claims court access is nonetheless problematic due to the wide variation in jurisdictional rules. States each enact their own small claims provisions, and counties and cities within each state may then further designate their own rules. Jurisdictions' rules for maximum claim amounts can range from \$2,500 to \$10,000, and their filing fees can run from \$10 to \$75 or more depending on the jurisdiction.<sup>293</sup> Furthermore, jurisdictions vary regarding their allowance for jury trials, legal representation, recovery of costs, and appeals. For example, Colorado allows claims up to \$7,500, precludes attorney presence except corporate general counsels, allows the prevailing party to collect costs, and requires mediation in some cases.<sup>294</sup> In contrast, its neighbor Arizona limits claims to \$2,500 maximum, has no provision about costs, allows for attorneys upon party agreement, and precludes any rights to a jury trial or appeal.<sup>295</sup>

There also may be concern that companies would shun such regulations as unwarranted intrusions on their contractual liberty that may hinder the cost savings they hoped to gain through their arbitration programs. In reality, however, such regulations would only affect small dollar claims that qualify for court submission. They would therefore target companies' questionable use of arbitration clauses to dissuade consumers from bringing small claims due to high arbitration filing costs. Moreover, many companies already accept such carve-outs for small claims in their consumer arbitration provisions.<sup>296</sup> They may even welcome these carve-outs because small claims court rules limit recovery amounts, and often preclude jury trial, appeal, and class relief.

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<sup>291</sup> See, e.g., CAL. CODE CIV. PROC. § 116.530 (2007) (precluding presence of attorneys in small claims court); ARIZ. REV. STAT. ANN. § 22-5-12(c) (2007) (allowing attorneys only if all parties agree to it).

<sup>292</sup> See COLO. R. CIV. PROC. 501-21 (requiring mediation in some cases); N.Y. UNIFORM DIST. CT. ACT § 180-2 (1989) (allowing for a free arbitrator in some cases).

<sup>293</sup> Compare ARIZ. REV. STAT. ANN. § 22-50-3(a) (2003) (\$2,500 maximum) with ILL. SUP. CT. R. 281 (2005) (\$10,000 maximum). Compare TEX. GOV'T CODE ANN. § 28.004 (2004) (\$25 claimant filing fee) with CAL. CIV. PROC. CODE § 116.230 (2007) (fees ranging from \$30-75 depending on claim amount).

<sup>294</sup> COLO. R. CIV. PROC. 515, 520

<sup>295</sup> ARIZ. REV. STAT. ANN. §§ 22-503(a), 512(c), 518, & 519 (2003).

<sup>296</sup> Many if not most of the cell phone and credit card consumer contracts I reviewed allowed consumers to bring qualifying claims to small claims court. See Collected Arbitration Provisions, *supra* note 2.

MMWA regulations therefore should preserve consumers' option to bring disputes to small claims court in qualifying cases. It does not appear that such regulation would push companies away from beneficial use of arbitration. In addition, MMWA arbitration regulations could ease concerns regarding jurisdictional differences by specifying that the small claims option must be available only for claims under a commonly designated amount such as \$5,000 or \$7,500. Furthermore, jurisdictions' rules already minimize forum shopping by limiting who may file claims in their courts. Jurisdictional differences also can be beneficial to the extent that they foster healthy federalism and states' freedom to adopt rules that serve their particular interests and populations.

#### IV. CONCLUSION

This Article does not seek to tackle all consumer arbitration or prescribe generally applicable revisions of the FAA. Instead, it proposes minimum fairness regulations for binding consumer arbitration of MMWA claims under non-negotiable form contracts. It suggests clarification and expansion of the current MMWA dispute resolution template in order to resolve judicial disagreement regarding this template and protect statutory warranty rights that affect not only individual consumer claimants, but also the greater consuming public. Furthermore, this Article's suggested procedural regulations for inclusion in the MMWA's existing rubric may be more politically palatable than the failed blanket proposals to bar pre-dispute arbitration clauses in all consumer and employment agreements.<sup>297</sup> The suggested procedural regulations also may gain support from various constituencies because they seek to balance fairness and efficiency in protecting consumer warranties while clarifying the enforcement of companies' form contracts.

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<sup>297</sup> It may be time for Congress to consider such proposals as the Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 111th Cong., primarily sponsored by Sen. Russ Feingold (D-WI) and Rep. Hank Johnson (D-GA). However, similar proposals to date have lingered or been lost in committees. *See supra* notes 10–11 and accompanying text (discussing these proposals).