2008

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Suing for Small Potatoes: Consumer Class Action Waivers in Arbitration Agreements Distinguished by the Ninth Circuit

Shroyer v. New Cingular Wireless Services, Inc.¹

I. INTRODUCTION

Over the last decade, arbitration agreements relating to credit cards, loans, cell phones and other electronic devices have increased in prevalence. Some companies are seeking to use class arbitration waivers to shield themselves from liability, both in court and in arbitration.² "While many courts have allowed companies to use [such] arbitration clauses . . . an increasing number are striking [down these] clauses as unconscionable."³ The federal circuit courts are divided on this issue, but the courts finding class arbitration waivers enforceable have often done so on the premise that the imbalances of the agreement are not so egregious as to be found unconscionable. The courts finding the agreements to be unenforceable often rely heavily on a policy of reasonableness and fairness.

In Shroyer, the Ninth Circuit laid a foundation for looking at consumer class action arbitration waivers with greater scrutiny, using a much narrower test. In doing so, it communicates a clear message to large corporations that arbitration agreements that include class action waivers for the purpose of cheating consumers out of small amounts of money will not be tolerated. This case note will address the significance of the Ninth Circuit's decision and the policy arguments supporting such an approach.

II. FACTS AND HOLDING

In 2004, Cingular Wireless LLC and AT&T Wireless Services, Inc. merged to form New Cingular Wireless Services, Inc. (Cingular).⁴ Kennith Shroyer, a former AT&T customer, noticed that his cellular phone service declined dramatically following the merger.⁵ When Shroyer and others complained to Cingular about the decline in service, the company requested they transfer their service plans and equipment from AT&T to Cingular.⁶ On January 2, 2005, Shroyer entered into a new contract with Cingular, assenting to the terms of the agreement

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1. 498 F.3d 976 (9th Cir. 2007).
3. Id. at 76.
4. Shroyer, 498 F.3d at 979.
5. Id.
6. Id.
over the phone with an electronic signature. The agreement included an arbitration clause and a class arbitration waiver. The waiver stated: "You and Cingular agree that you and Cingular may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." 9

On February 22, 2006, Shroyer filed a class action lawsuit against Cingular seeking damages, declaratory relief, and injunctive relief related to injuries suffered as a result of the merger and the actions of Cingular following the merger. 10 Shroyer alleged that Cingular told him it could provide former AT&T customers with a computer chip that would improve phone service quality, but in order to receive the chip, they would be required to extend their contracts by entering into service contracts with Cingular. 11 Further, Shroyer and the other class members alleged that they were told they would not be able to retain the more favorable rates of their previous AT&T contracts. 12 Once Shroyer filed suit, Cingular filed a motion to compel arbitration and stay further proceedings in the litigation. 13 The company argued that the arbitration clause was valid and enforceable because it was neither procedurally nor substantively unconscionable. 14 Alternatively, it argued that finding the clause unconscionable would frustrate the purpose of the Federal Arbitration Act, which expressly and impliedly preempted a finding of unconscionability. 15 The U.S. District Court for the Central District of California granted Cingular's motion to compel arbitration and dismissed the action without prejudice. 16 "Shroyer filed a timely notice of appeal" of the District Court's order compelling arbitration. 17

Applying state contract law, the U.S. Court of Appeals, Ninth Circuit found that when parties enter into a consumer contract of adhesion in which disputes typically involve small amounts of damages, and the consumer plaintiff alleges that the party with superior bargaining power intended to cheat consumers out of individually small sums, a class arbitration waiver is unconscionable and, therefore, unenforceable. 18 Furthermore, the Court of Appeals found that holding class

7. Id. Shroyer selected "yes" in response to the statement, "You agree to the terms as stated in the Wireless Service Agreement and the terms of service." Id.
8. Id. at 979-80. The arbitration clause included the following language: "Cingular and you . . . agree to arbitrate all disputes and claims . . . arising out of or relating to this Agreement, or to any prior oral or written agreement, for Equipment or services between Cingular and you." Id. at 980.
9. Id. (emphasis added).
10. Id. at 979. Shroyer pled seven causes of action in total: (1) unfair competition; (2) untrue and misleading advertising; (3) violations of the Consumers Legal Remedies Act; (4) breach of contract; (5) breach of the covenant of good faith and fair dealing; (6) fraud and deceit; and (7) unjust enrichment. Id.
11. Id.
12. Id.
13. Id. at 980.
14. Id.
15. Id. at 980-81.
16. Id. The district court entered Cingular's proposed Order Compelling Arbitration and Dismissing the Action Without Prejudice without making any changes or additions. Id.
17. Id. On appeal, Cingular argued that Shroyer had meaningful alternatives to entering into a contract with Cingular, therefore the contract was not unconscionable. Id. at 985. Additionally, it contended that the class arbitration waiver was not substantively unconscionable because the agreement provided that Cingular would pay the attorneys fees. Id. at 986.
18. Id. at 983.
arbitration waivers unconscionable did not frustrate the purposes of the Federal Arbitration Act.\textsuperscript{19}

III. LEGAL BACKGROUND

In 1925, Congress enacted the Federal Arbitration Act (FAA) to end judicial hostility toward arbitration and place agreements to arbitrate "upon the same footing as other contracts."\textsuperscript{20} The FAA states that an agreement in writing to submit to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{21} The FAA also required courts to enforce arbitration agreements as agreed to by the parties.\textsuperscript{22}

Beginning in the early 1980s, the Supreme Court took a position strongly favoring arbitration.\textsuperscript{23} As a result, standard form adhesion contracts including agreements to arbitrate have proliferated in the consumer credit, service, finance, banking, and employment industries.\textsuperscript{24} The Supreme Court provided, however, that generally applicable state contract defenses, such as unconscionability, were appropriate grounds for revoking an arbitration agreement.\textsuperscript{25} Generally, to be unconscionable and therefore unenforceable, an agreement must be both procedurally and substantively unconscionable.\textsuperscript{26} A contract is procedurally unenforceable if it is a contract of adhesion, a standardized instrument drafted by the party of superior bargaining strength and offered as a "take-it-or-leave-it" option to the weaker party.\textsuperscript{27} Substantive unconscionability focuses on the one-sidedness of the contract terms, favoring the stronger party.\textsuperscript{28}

Consumer plaintiffs have challenged class arbitration waivers with only some success. Five federal circuit courts have upheld class arbitration waivers on various grounds.\textsuperscript{29} Two circuit courts have ruled in favor of consumer plaintiffs, find-

\begin{itemize}
  \item \textsuperscript{19} Id. at 990.
  \item \textsuperscript{21} 9 U.S.C. § 2 (2006).
  \item \textsuperscript{22} 9 U.S.C. § 4 (2006).
  \item \textsuperscript{23} Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The FAA established a "liberal federal policy favoring arbitration agreements" that impelled lower courts to generously interpret arbitration agreements, liberally construe statutes to allow arbitration of rights created by those statutes, and deferentially review arbitration awards . . . ." Summers, supra note 20, at 685 (quoting Moses H. Cone, 460 U.S. at 24).
  \item \textsuperscript{24} Summers, supra note 20, at 685.
  \item \textsuperscript{26} Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981 (9th Cir. 2007).
  \item \textsuperscript{27} Id. at 982 (quoting Discover Bank v. Superior Bank, 113 P.3d 1100, 1108 (2005)).
  \item \textsuperscript{28} Id.
\end{itemize}
ing class arbitration waivers unenforceable due to unconscionability. The remaining four circuits have yet to address the subject in their highest courts, while the lower courts have demonstrated inconsistency in their rulings.

A. Courts Finding Consumer Class Action Waivers Enforceable

In Snowden v. Checkpoint Check Cashing,\(^\text{32}\) a borrower brought a class action against Checkpoint Cashing, a deferred deposit check cashing lender, asserting violations of the Truth in Lending Act and Racketeer Influenced and Corrupt Organizations Act.\(^\text{33}\) Checkpoint Cashing argued that the plaintiffs were barred from bringing a class action claim by the class action waiver they had signed in an arbitration agreement.\(^\text{34}\) In response, the plaintiffs argued that the agreement was unconscionable.\(^\text{35}\) The Fourth Circuit held that the class arbitration waiver was not unconscionable.\(^\text{36}\) While the court did not articulate a test for unconscionability, it impliedly balanced the provisions of the agreement and held that it was not unduly one-sided.\(^\text{37}\) The court implied that to hold otherwise would negate the purposes of the FAA.\(^\text{38}\) Finally, the Fourth Circuit rejected Snowden's argument that forcing consumers to arbitrate was against public policy.\(^\text{39}\)

In Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,\(^\text{40}\) a Fifth Circuit case, cell phone customers brought a class action against service providers alleging deceptive billing practices and asserting claims for breach of contract.\(^\text{41}\) The service providers filed motions to compel arbitration pursuant to the arbitration agreements and stay the proceedings,\(^\text{42}\) while the plaintiffs argued the arbitration clauses were unenforceable.\(^\text{43}\) The court stated that in order to be found unconscionable, the provisions "must possess features of both adhesionary formation and unduly harsh substance."\(^\text{44}\) The court ruled that while the cell phone contract was adhesionary, the arbitration clause did not "leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability."\(^\text{45}\) The Fifth Circuit couched its ruling within the context of the FAA, stating, "state courts are not permitted to employ those general doctrines in ways that subject arbitration claus-

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30. See Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).
31. Scanlon, supra note 29, at 43.
32. 290 F.3d 631 (4th Cir. 2002).
33. Id. at 633-34.
34. Id. at 634, 636.
35. Id. at 638.
36. Id.
37. See id. at 639 (finding Snowden's argument unfounded because attorney's fees were recoverable by a prevailing plaintiff).
38. Id.
39. Id. "Snowden has presented no authority or evidence establishing that the arbitral forum contemplated by the FAA and provided in the Arbitration Agreement is inconsistent with public policy relating to consumer protection." Id.
40. 379 F.3d 159 (5th Cir. 2004).
41. Id. at 162.
42. Id.
43. Id. at 166. Specifically, the plaintiffs argued that the bar on collective proceedings effectively immunized the defendants from low-value claims. Id. at 174.
44. Id. at 167.
45. Id. at 175.
es to special scrutiny." The court reasoned that although arbitration may limit certain litigation devices, such as class action suits, this limit adds to arbitration’s ability to offer efficient adjudication of claims.

B. Courts Finding Consumer Class Action Waiver Unenforceable

In Ting v. AT&T, consumers brought a class action against AT&T under the Unfair Practices Act. The court applied a standard unconscionability test, looking for both procedural unconscionability in the form of a contract of adhesion and substantive unconscionability in the one-sidedness of the terms. The Ninth Circuit found the terms of the arbitration agreement sufficiently one-sided to be unconscionable because AT&T would never bring a class action against its own customers. It concluded that a finding of unconscionability was not “inherently hostile” to arbitration, but fit within the FAA’s particular rule that contract defenses may be applied to invalidate arbitration agreements without violating § 2 of the FAA.

The First Circuit joined the Ninth Circuit in Kristian v. Comcast Corp., holding a class arbitration waiver between a cable television company and its customers unenforceable and allowing the plaintiffs to proceed with a class action based on antitrust law. Kristian distinguished itself from Ting, however, by finding that upholding such class arbitration waivers would undermine plaintiffs’ ability to vindicate their statutory rights, by limiting the plaintiffs’ ability to use class mechanisms, among other things. At the same time, it recognized that an unconscionability argument would lead to the same conclusion.

In 2005, the Supreme Court of California tackled the issue of whether class arbitration waivers were unenforceable on unconscionability grounds, laying the foundation for the Ninth Circuit’s approach in Shroyer. In Discover Bank v. Superior Court, the Supreme Court of California formulated a three-part test to

46. Id. at 167.
47. Id. at 174 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)).
48. 319 F.3d 1126 (9th Cir. 2003).
49. Id. at 1130.
50. Id. at 1148. In analyzing substantive unconscionability, the court examined whether the arbitration agreement demonstrated a “modicum of bilaterality,” looking beyond facial neutrality and assessing the actual effects of the challenged provisions. Id. at 1149 (quoting Armstrong v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 691 (Cal. 2000)).
51. Id. at 1150 (quoting Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002)) ("[I]t is difficult to envision the circumstances under which the provision might negatively impact [defendant] Discover [Card], because credit card companies typically do not sue their customers in class-action lawsuits.").
52. Id. at 1152.
53. 446 F.3d 25 (1st Cir. 2006).
54. Id. at 59.
55. See id. at 60, 64-65. Plaintiffs argued that the arbitration agreements did not allow them to vindicate their statutory rights because the agreements “(1) provide for limited discovery; (2) establish a shortened statute of limitations period; (3) bar recovery of treble damages; (4) prevent recovery of attorney’s fees; and (5) prohibit the use of class mechanisms.” Id. at 37.
56. Id. at 63 (“As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis. In fact, many of the Plaintiffs’ unconscionability arguments are merely reiterations of their vindication of statutory rights arguments.").
57. 113 P.3d 1100 (Cal. 2005).
determine the validity of a class arbitration waiver. A waiver of class arbitration is unconscionable when it (1) appears in a consumer contract of adhesion; (2) occurs in a setting in which disputes between contracting parties often involve small amounts of damages; and (3) 'is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . .”

Since the Discover Bank decision and development of the three-part test, California federal district courts have used the test to find arbitration agreements with class arbitration waivers both enforceable and unenforceable. In Provencher v. Dell, the federal district court enforced Dell's arbitration clause and class action waiver against a personal computer buyer who alleged that Dell had breached its extended warranty. The court found that the criteria in Discover Bank were not met, one reason being that the damages sought for breach of the extended warranty were significantly more than the “small amount” required by the Discover Bank test. In Janda v. T-Mobile, U.S.A., the court found the arbitration clause to be unconscionable because it fulfilled the Discover Bank test and was indistinguishable from the facts of Discover Bank.

IV. INSTANT DECISION

In the instant decision, Plaintiff Shroyer argued that the district court erred in finding the arbitration agreement he signed with New Cingular Wireless not unconscionable, emphasizing that the court had previously found class action preclusion clauses unconscionable and unenforceable. Shroyer did not specifically advocate the use of the Discover Bank test, but did cite Discover Bank and another California state court decision that applied the test. The Ninth Circuit Court chose to apply the three-part Discover Bank test and determined that the class arbitration waiver was both procedurally and substantively unconscionable.

Since Cingular did not offer customers an opportunity to negotiate the terms of the cell phone agreement but presented them with a take-it-or-leave-it contract, the court found it to be a contract of adhesion. Shroyer and other members of the class suffered damages in the hundreds of dollars at most, in amounts small

59. Discover Bank, 113 P.3d at 1110.
62. Id. at 1205-06.
63. Id. at 1201-02.
65. Id. at *6-*7.
66. Brief for Plaintiff-Appellant at 3-4, Shroyer v. New Cingular Wireless, 498 F.3d 976 (9th Cir. 2007) (No. 06-55964), 2006 WL 4040436.
68. Shroyer v. New Cingular Wireless, 498 F.3d 976, 981 (9th Cir. 2007).
69. Id. at 983-84.
enough to satisfy the second element of the Discover Bank test. Finally, Shroyer’s complaint clearly alleged that Cingular intended to “cheat large numbers of consumers out of individually small sums of money,” thereby satisfying the third element of the test. The court concluded that, because all three parts of the Discover Bank test were satisfied, Cingular’s class arbitration waiver was both procedurally and substantively unconscionable and therefore, unenforceable.

The court quickly struck down Cingular’s argument that there was no procedural unconscionability because Shroyer failed to demonstrate a lack of meaningful choices. It cited a recent appellate court decision, stating that “absent [extraordinary] circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability . . . .” Further, Cingular contended that the class action waiver was not substantively unconscionable because it did not wholly insulate Cingular from liability in that it provided for attorney’s fees.

The court stated, however, that “[t]here is no indication . . . that, in the case of small individual recovery, attorney’s fees are an adequate substitute for the class action or [class] arbitration mechanism[s].”

The court also found that the FAA did not preempt a holding of procedural and substantive unconscionability. The Act did not prevent federal or state courts from applying general state contract law principles. Furthermore, it did not appear to frustrate or undermine the original purpose of the FAA—to “reverse[e] hostility to arbitration and plac[e] arbitration agreements on the same footing as ordinary contracts . . . .” In fact, it can be seen to encourage the purposes of the FAA by requiring Cingular to permit its customers to bring class arbitration proceedings. Finally, because the court could find that “class arbitration [would be] simpler, cheaper, and faster for both the consumers and the defendant company,” permitting class arbitration would “further the FAA’s purpose of encouraging

70. Id. at 984. In Discover Bank, the plaintiff sought to recover a $29 fee charged for late payments and other finance charges. In Cohen, damages amounted to $1000, which the court found were small enough to satisfy the Discover Bank test. The monthly service fee that Cingular charged to Shroyer was $59.99 per month on his first account and $9.99 per month on his second account. Id.
71. Id.
72. Id.
73. Id. at 985. See also Brief for the Appellees at 11, Shroyer v. New Cingular Wireless, Inc., 498 F.3d 976 (9th Cir. 2007) (No. 06-55964), 2006 WL 4040437. Cingular argued that Shroyer was required to show evidence of surprise or oppression: either that “(i) he could not have obtained the good or service at issue from a competitor without agreeing to the challenged term; (ii) the subject of the contract involved a necessity of life; or (iii) the challenged term was imposed after the weaker party already had become dependent on the relationship.” Id. at 10.
74. Shroyer, 498 F.3d at 985 (quoting Gatton v. T-Mobile USA, Inc., 61 Cal. Rptr. 3d 344, 355-56 (Cal Ct. App. 2007)).
75. Brief for the Appellees, supra note 73, at 11. Cingular argued that it had ensured that individual arbitration provides a “realistic means of obtaining redress for small claims by agreeing to pay the full cost” of arbitration. Id.
76. Shroyer, 498 F.3d at 986 (quoting Discover Bank v. Super. Ct., 113 P.3d 1100, 1110 (Cal. 2005)).
77. Id. at 987.
78. Id.
79. Id. at 990.
80. Id. at 990-91.
alternative dispute resolution." The court reversed and remanded the case for further proceedings.  

V. COMMENT

By employing the Discover Bank test for unconscionability, the Shroyer court adopted a narrower test to apply specifically to consumer class arbitration waivers. More importantly, it added to traditional unconscionability analysis, used by other circuits in finding class arbitration waivers enforceable and unenforceable. The Shroyer decision raises several policy questions about the role courts should play in the treatment and use of arbitration agreements and their relationship with the Federal Arbitration Act.

A. The Ninth Circuit's New Approach

Prior to Shroyer, the Ninth Circuit approached unconscionability of class arbitration waivers much like the other circuit courts. In Ting v. AT&T, the court found a consumer class action waiver unenforceable because it was part of a contract of adhesion and lacked bilaterality. Shroyer articulated these traditional principles of procedural and substantive unconscionability, but it went a step further than Ting by requiring the Discover Bank test to specifically apply to consumer contracts of adhesion. The first element of the Discover Bank test is essentially identical to the traditional procedural unconscionability principle. While courts had expressed concerns in Ting, and other cases, that it was not economically feasible to pursue consumer claims on an individual basis because of their characteristically small amount of damages, Shroyer, using Discover Bank, made this concern the integral part of the second element. This element correlates substantially to an effects analysis of substantive unconscionability that many courts apply, but couches it in terms specifically addressing consumer contracts. The third element of the test injects traditional unconscionability analysis with a strong and much-needed consumer protection policy. While the California courts had already taken the lead in finding class action waivers in arbitration agreements unconscionable, in adopting the Discover Bank test, the Ninth Circuit sends an unmistakable message to large corporations that the enforceability of arbitration agreements will be closely examined.

81. Id.
82. Id. at 993.
83. See Ting v. AT&T, 319 F.3d 1126, 1148-52 (9th Cir. 2003).
84. 319 F.3d 1126 (9th Cir. 2003).
85. Id. at 1148-49.
86. Shroyer, 498 F.3d at 983-84.
87. E.g., Ting, 319 F.3d at 1148 ("A contract is procedurally unconscionable if it is a contract of adhesion . . . ."). See Shroyer, 498 F.3d at 983 ("[W]hether the agreement is a consumer contract of adhesion" drafted by a party that has superior bargaining power . . . .").
88. Shroyer, 498 F.3d at 983 ("[W]hether the agreement occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages . . . .").
89. See Ting, 319 F.3d at 1149.
90. Shroyer, 498 F.3d at 984.
91. Casper, supra note 60, at 1462.
The Ninth Circuit made it clear that the new test, however, would not supersede traditional unconscionability doctrine, but rather add to conventional analysis. Most significantly, it recognized that there will be instances when a class action waiver is unconscionable and the Discover Bank test is not satisfied.

B. Consumer Protection Policy in Action

The application of the narrow Discover Bank test to consumer class action waivers serves several important public policy goals. First, it gives individuals an opportunity to truly vindicate their rights. Class actions serve to inform potential plaintiffs who are unaware of the alleged illegal activities and would otherwise not commence any proceedings. Further, even consumers who are aware of problems with their contract may run into trouble attracting representation due to their small monetary claims, thereby deterring them from filing a claim at all. "Although a consumer can pursue arbitration without a lawyer, he or she would be at a [significant] disadvantage and might well lack basic information about how to initiate such a proceeding ...." A class action provides financial feasibility by combining small claims and surmounts the average consumer's lack of information regarding the filing of claims in general.

Critics argue that a large volume of class actions would be detrimental to the court system, but class actions are a vital part of the legal system. From an efficiency standpoint, class actions resolve a large number of individual disputes at one time, as opposed to using a case-by-case approach. This would benefit defendant companies also, provided that they do not engage in illegal activity, because it would be a quicker and cheaper method of establishing the validity of their conduct once and for all. If the company did indeed engage in illegal conduct, it follows that it would not want to allow a class action, which would be much more costly.

While courts that have invalidated consumer class action waivers are concerned with the plaintiffs' ability to seek recovery, it is by no means their sole concern. Perhaps even more importantly, these courts recognize that class actions serve to deter companies and creditors who might seek to take advantage of con-

92. See Shroyer, 498 F.3d at 982-83.
93. Id. at 983.
94. Jean R. Sternlight & Elizabeth J. Jenson, Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?, 67 LAW & COMTEMP. PROBS. 75, 89 (2004). It can be deduced that this one of the many reasons companies seek to prohibit class actions in the first place. E.g., Ting, 319 F.3d 1126.
95. Sternlight & Jenson, supra note 94, at 89-90. This is particularly true for "payday loan" class members who probably lack the financial means to hire an attorney for a small claim. Id. at 89-90 n.98.
96. Id. at 89-90 n.98.
97. Id. at 89-90.
98. See generally Sternlight & Jenson, supra note 94.
99. Id. at 92-93 n.108. It is hard to imagine a scenario where a consumer plaintiff alleges the defendant company intended to cheat consumers out of small amounts of money, and a class action would not be the best approach. If the plaintiffs' allegations are wrong, the company wins big. If the company loses, plaintiffs receive vindication of their rights.
100. Id. at 92-93 n.108.
C. Eliminating Vague Standards

As courts have increasingly found arbitration agreements to be unconscionable, criticism has surfaced that the courts misuse the unconscionability doctrine by focusing on reasonableness and fairness standards.\(^ {103} \) As a result, critics argue that these vague standards result in “treating arbitration agreements less favorably than other contracts,” contravening the Federal Arbitration Act.\(^ {104} \) Shroyer, in employing a decisively narrow test, effectively eliminates controversial vagueness. The Ninth Circuit’s use of a narrow three-part test effectively puts to rest discrepancies among lower courts in determining whether consumer class action waivers are unconscionable. It is important to note that the Ninth Circuit does not mandate that all consumer class action waivers may be found unconscionable by way of the Discover Bank test, but rather, it applies only to a narrow class of these consumer class action waivers.\(^ {105} \) The third element of the Discover Bank test allows courts to take a strong position in protecting consumer plaintiffs without interfering with the unconscionability analysis of class action waiver agreements related to employment contracts, which present an entirely different set of issues. It also does not apply to cases that involve significantly higher damages, nor those cases in which the plaintiff does not allege corporate intent to defraud consumers. The pool of cases to which the Discover Test applies is quite small.

It is less clear, however, whether the Shroyer court truly eliminated fairness and reasonable standards. Embedded within the Discover Bank test is an assumption that prohibiting class action litigation and arbitration is, at the very least unfair, due to the inherently small amounts of individual claims which provide a disincentive for individual plaintiffs to bring suit.\(^ {106} \) When addressing the issue of unconscionability, critics suggest the real question is whether the class action prohibition leads to a “gross disparity in the values exchanged” in the contract.\(^ {107} \) However, even the “gross disparity” approach plays on an idea of fairness by implying that relatively equal exchanges in value indicate the prohibition is not unconscionable. When it comes to unconscionability, it is likely impossible to avoid


\(^ {102} \) Sternlight & Jenson, supra note 94, at 81 (quoting Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 868 (Cal. Ct. App. 2002)).


\(^ {104} \) Id.

\(^ {105} \) Shroyer v. New Cingular Wireless, Inc., 498 F.3d 976, 983 (9th Cir. 2007) (see Discover Bank test elements).


\(^ {107} \) Burton, supra note 103, at 496 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c. (1981)).
issues of unfairness altogether: the common definition of unconscionable includes the description “shockingly unfair or unjust.” Whether the Discover Bank test is colored by fairness and reasonable standards is overshadowed by a greater need for consumer protection policy goals and tempered by its narrow application.

VI. CONCLUSION

The United States Circuit Courts and state courts have failed to create a unified body of law regarding consumer class action waivers and their validity. Several circuits, in applying traditional unconscionability principles, have found consumer class action waivers to be enforceable because they do not present significant differences in the value of the terms of the agreement. Other courts have rested findings of unconscionability on the inability of plaintiffs to effectively arbitrate their claims. Shroyer steps out on a limb by applying the Discover Bank test and employs a common sense policy of protection for consumer plaintiffs. While the United States Supreme Court has not yet ruled on the soundness of the Discover Bank Test, it is likely the Court will address this issue in the future, particularly if an increasing number of courts apply the Discover Bank test in finding consumer class action waivers unconscionable.109 Until the Supreme Court gives more guidance, the Ninth Circuit remains the strongest voice against consumer class action waivers in the court system.

JAIMEE CONLEY
