COMMENT

DAVID VERSUS TWO GOLIATHS: WHY THE WISCONSIN STATE LEGISLATURE NEEDS TO UPDATE THE WISCONSIN CONSUMER ACT BY PLACING RESTRICTIONS ON MANDATORY ARBITRATION

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Mandatory arbitration agreements have been on the rise in the past thirty years, specifically in consumer contracts. From computers to vacation rentals, it is becoming increasingly likely that a consumer will encounter one of these agreements. What was once viewed with contempt in the United States has now become the norm. Despite this increase, consumers are often unaware of the presence of mandatory arbitration agreements in their contracts and are uninformed about their habitually negative implications.

Despite this rise in mandatory arbitration, as well as the potential disadvantages for consumers, Wisconsin consumer laws remain unchanged. In fact, the Wisconsin Consumer Act, which governs most consumer transactions in Wisconsin, is silent on mandatory arbitration. As such, the Consumer Act is currently failing to fulfill its stated purpose of both modernizing the law surrounding consumer transactions and protecting consumers from unfair business practices.

The realities of today's marketplace require that the Wisconsin Legislature act swiftly, reinvigorating the once effective and influential Consumer Act. To ensure that the purpose of the Consumer Act is again achieved, this Comment argues that the legislature needs to codify a standard of unconscionability, placing both procedural and substantive restrictions on mandatory arbitration agreements. In doing so, the legislature will ensure that consumers are knowingly and voluntarily waiving their rights, establish a fair and neutral arbitration process, and encourage efficiency and uniformity in the court system. These new restrictions will also help to eradicate unscrupulous business practices from Wisconsin, while providing legitimate companies with certainty as to what may be placed in their arbitration agreements. Finally, by codifying unconscionability through these restrictions, the legislature will be aligning Wisconsin law with federal policy and case law.

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INTRODUCTION

Cell phones. Medical procedures. Credit cards. Software.[1] Today, contracts are attached to the purchase of almost every single product and service.[2] For most consumers, entering into these types of agreements has become a matter of course. Generally, when they sign on the dotted line, they do so hoping that the other side will hold to its obligations. In the event it does not, they often inappropriately assume that the courts are available to ensure that their rights are enforced. However, in a startling number of instances, aggrieved consumers find the courts inaccessible, realizing that "justice [has become] open to everyone in the same way as the Ritz Hotel."[3]

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1. Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 18 (2003) [hereinafter *Substitute for the Jury Trial*] (explaining that these are the types of consumer contracts that often contain mandatory arbitration agreements).

2. *Id.*

3. Bonnie Y. Sawusch, *Letter from the Chair*, LITIG. NEWSL. 2 (Spring 2010) (quoting Judge Sturgess), http://www.michbar.org/litigation/pdfs/spring_2010.pdf.

This unexpected result arises from the proliferation of mandatory arbitration agreements.[4] Today, businesses place mandatory arbitration clauses in over 70 percent of their consumer contracts.[5] What judges once treated with disdain[6] has now become its own industry.[7] In fact, one commentator believes "[i]t is not a hyperbole to state that civil justice or adjudication in the United States . . . is achieved primarily through arbitration."[8]

The increase of arbitration in the United States began in 1925 with Congress's enactment of the Federal Arbitration Act (FAA),[9] which "'declared a national policy favoring arbitration.'"[10] Recent Supreme Court decisions have not only upheld the policies enacted by the FAA, but also expanded the statute's scope.[11] In 2011, the Supreme Court again increased the FAA's control when it held that "[r]equiring the availability of class-wide arbitration . . . create[ed] a scheme inconsistent with the FAA."[12]

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4. *Substitute for the Jury Trial*, *supra* note 1, at 18; *see also* Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2350–51 (2012).

5. Carter Dougherty, *Consumers May See New Limits on Mandatory Arbitration*, BLOOMBERG BUSINESSWEEK, May 21, 2012, *available at* http://www.businessweek.com/news/2012-05-21/consumers-may-see-new-limits-on-mandatory-arbitration (stating that a report by the Pew Charitable Trust found that 71 percent of checking accounts at the ten largest U.S. banks include arbitration clauses); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 717 (2012) [hereinafter *Tsunami*].

6. 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, 73–74 [hereinafter *Enforcing Small Print to Protect Big Business*].

7. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1311 (2009) [hereinafter *Mandatory Arbitration and Fairness*] (stating that arbitration has become a "service sold by arbitration vendors").

8. Thomas E. Carbonneau, *The Revolution in Law through Arbitration*, 56 CLEV. ST. L. REV. 233, 236 (2008).

9. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (1947).

10. JON O. SHIMABUKURO, AM. LAW DIV., THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2 (2002) (quoting *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

11. *Id.* at 3–7; *see Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (a plurality concluding that failing to outline the costs of arbitration does not render the contract void); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding that the term involving commerce should be interpreted broadly and that the FAA applies to all contracts that involve commerce); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA preempts state law).

12. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). Both class-wide litigation and arbitration have the potential to result in higher damages for consumers and higher payouts for the plaintiffs' attorney. Therefore, by removing class actions, consumers will be less likely to pursue menial damages and plaintiffs' attorneys

The characteristics and expansion of arbitration, coupled with the current marketplace, proves disastrous for consumers.[13] Today, mandatory arbitration clauses are often buried in lengthy contracts drafted by sophisticated legal teams.[14] As a result, many consumers do not comprehend that they are signing away fundamental rights.[15] Several businesses are using these contracts for necessities on a take-it-or-leave-it basis,[16] and, as such, even if consumers understand the content of these clauses, their choice proves meaningless.[17] Therefore, consumers are unable to knowingly, voluntarily, or intelligently waive their right to a trial, a standard required by most state and federal courts.[18]

In unwittingly relinquishing their right to a trial, consumers are also agreeing to a potentially unfair process. The use of repeat arbitrators is rampant by businesses, causing arbitrators to lack neutrality.[19] Arbitrators compete to be selected by the parties, work under short-term contracts, and may fear a loss of future work if their decisions are seen as unfavorable to the parties that are most likely to appear in subsequent arbitrations.[20]

Applying to all consumer transactions,[21] the Wisconsin Consumer Act (WCA) attempts to protect Wisconsin consumers from such

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will be less likely to devote their attention to these suits. *See* Christopher Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 754.

13. *Arbitration: Is It Fair When Forced?: Hearing before the S. Comm. on the Judiciary*, 112th Cong. 112 (statement of Sen. Patrick J. Leahy) (asserting that the Federal Arbitration Act has become "a hammer for corporations to use against consumers"); Farmer, *supra* note 4, at 2355–61 (discussing the drawbacks of mandatory arbitration in consumer contracts); Debra L. Schneider & Michael J. Quirk, *Mandatory Arbitration of Consumer Rights Cases*, 75 WIS. LAW. 9 (2002), *available at* http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=75&Issue=9&ArticleID=351.

14. *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 55 (1997).

15. *Id.* at 36 (asserting that these contracts are "infamous for the absence of real consent"); *see also Substitute for the Jury Trial*, *supra* note 1, at 21 (discussing the absence of a knowing, voluntary, and intelligent waiver of a consumer's right to a civil jury).

16. Farmer, *supra* note 4, at 2351; *Substitute for the Jury Trial*, *supra* note 1, at 19.

17. Farmer, *supra* note 4, at 2360.

18. *Substitute for the Jury Trial*, *supra* note 1, at 21–25.

19. Farmer, *supra* note 4, at 2357–58; *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 60–61; *Mandatory Arbitration and Fairness*, *supra* note 7, at 1311; Schneider & Quirk, *supra* note 13.

20. *Mandatory Arbitration and Fairness*, *supra* note 7, at 1311; *see also Enforcing Small Print to Protect Big Business*, *supra* note 6, at 60–61.

21. Edward J. Heiser, Jr., *Wisconsin Consumer Act – A Critical Analysis*, 57 MARQ. L. REV. 389, 391 (1974).

unscrupulous business practices.[22] Wisconsin Statute section 421.102 echoes this sentiment by stating that the WCA's underlying purposes and policies are "[t]o simplify, clarify and modernize the law governing consumer transactions; [t]o protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants; [and] [t]o permit and encourage the development of fair and economically sound consumer practices in consumer transactions . . . ."[23] Yet, due to the widespread use of consumer arbitration and its potentially biased characteristics, the WCA is no longer achieving its stated purpose.

The Wisconsin State Legislature needs to update the WCA by addressing mandatory arbitration and aligning its purpose with the current consumer climate. To do so, while also preserving the policies set forth by federal law,[24] this Comment proposes that the legislature create an additional chapter of the Wisconsin Consumer Act that places restrictions on mandatory arbitration clauses in consumer contracts.[25] These restrictions would codify the doctrine of unconscionability as it relates to arbitration clauses in consumer contracts.

To address procedural unconscionability,[26] the new legislation would require businesses to employ a pre-approved, stock mandatory arbitration clause in their contracts. The clause would include in clear, lay terms what mandatory, pre-dispute arbitration entails. The proposed restrictions would also include a safe harbor provision through the Department of Financial Institutions (DFI) to promote scrupulous business activity. In order to prevent substantive unconscionability,[27] the update would require arbitration to take place in Wisconsin and apply Wisconsin law, while also limiting the choice of arbitrator.

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22. Interview with Sarah Orr, Supervising Attorney, University of Wisconsin-Madison Consumer Law Litigation Clinic, in Madison, Wis. (Oct. 12, 2012).

23. WIS. STAT. § 421.102(2)(a)–(c) (2011–12).

24. *See infra* Parts I.A, I.B.

25. Given the history of the WCA, this Comment proposes the legislature handle these changes rather than the courts. While political turmoil is certainly present in Wisconsin, attempting to pass this new legislation would allow both sides to collaborate and have a hand in the process. This was the same sentiment that originally allowed for the WCA to be passed. *See infra* note 75 and accompanying text. Furthermore, it has already proven difficult for a more concrete standard of unconscionability to be identified by the courts. *See Wis. Auto Title Loans v. Jones*, 2006 WI 53, ¶ 31, 290 Wis. 2d 514, 714 N.W.2d 155.

26. Procedural unconscionability deals with unfairness in the nature of the negotiation and the disclosure of the arbitration terms. This defense seeks to protect against the absence of meaningful choice of the consumer. *See Jones*, 2006 WI 53, ¶¶ 32, 34 (defining procedural unconscionability).

27. Substantive unconscionability ensures the fairness of the terms of the contract. *Id.* at ¶ 36 (defining substantive unconscionability).

This Comment argues that these restrictions would allow consumers to knowingly, voluntarily, and intelligently waive their rights; establish a fair and neutral arbitration process; and encourage efficiency and uniformity in the courts. Part II of this Comment outlines the rise of mandatory arbitration, as well as the background of the Wisconsin Consumer Act. Part III examines how the features of mandatory arbitration conflict with the stated purpose of the WCA and also discusses what changes the legislature needs to make to the WCA for its purpose to be reinvigorated. Part III also illustrates why imposing restrictions on mandatory arbitration through the WCA would be consistent with both federal policy and case law. This Comment concludes that placing restrictions on mandatory arbitration would promote scrupulous business practices, increase efficiency, and provide consumers with the original protections awarded to them through the WCA. In doing so, these restrictions would also promote the policies set forth in the WCA and the FAA.

I. BACKGROUND

This Part outlines the rise of mandatory arbitration, as well as the background and impact of the Wisconsin Consumer Act. It begins by discussing the origins of arbitration and the enactment of the Federal Arbitration Act. Illustrating the case law surrounding mandatory arbitration, the Part next examines the holding in *AT&T Mobility LLC v. Concepcion*[28] and touches on the latest resistance to the rise of mandatory arbitration. The Part concludes by presenting a timeline of the Wisconsin Consumer Act.

A. The Rise of Mandatory Arbitration: The Federal Arbitration Act

Although the use of mandatory arbitration in consumer contracts in the United States is a modern trend,[29] individuals employed arbitration as a means of dispute resolution long before the twentieth century.[30]

28. 131 S. Ct. 1740 (2011).

29. ROBERT V. MASSEY, JR., W. VA. UNIV. EXTENSION SERV., INST. FOR LABOR STUDIES & RESEARCH, HISTORY OF ARBITRATION AND GRIEVANCE ARBITRATION IN THE UNITED STATES, *available at* http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf (last visited Oct. 17, 2012) (discussing the use in America to have begun in the early twentieth century); *Substitute for the Jury Trial*, *supra* note 1, at 22–23 (2003) (addressing the Supreme Court's positive treatment of arbitration since the mid-1980s).

30. MASSEY, *supra* note 29; KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION

Arbitration is "coeval with the foundation of our law,"[31] with both the Romans and the Greeks preferring the method.[32] Traders, both ancient and modern, favored arbitration due to its efficiency and its arguable ability to preserve business relations.[33]

While arbitration was therefore common among merchants in the American colonies, the concept lost favor in the United States in the late nineteenth and early twentieth centuries.[34] Judges in particular proved unreceptive to arbitration, as they were not convinced that it produced just results.[35] As such, most American courts found pre-dispute arbitration agreements to be "revocable at the will of either party," and "[c]ourts of equity refused to order specific performance of an arbitration agreement."[36] Such disdain diminished when industrialization caused an influx of business disputes,[37] and in 1921, the American Bar Association created a draft of the Federal Arbitration Act.[38] Becoming law in 1925, the Federal Arbitration Act (FAA) was based on a 1920 New York statute that enforced pre-dispute arbitration agreements.[39]

Congress enacted the FAA in order to place arbitration agreements on the same footing as contracts, setting forth a federal policy favoring arbitration.[40] Section 2 of the FAA applies to most claims brought by consumers and provides that arbitration clauses are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[41] While this provision "makes contractual arbitration agreements generally enforceable," it places

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UNDER ENGLISH, US, GERMAN, AND FRENCH LAW 11 (2010); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934).

31. Wolaver, *supra* note 30, at 132.

32. *Id.*

33. *Id.* at 144–45 (arguing that business relations can be preserved in a setting that is, at times, considered less adversarial than the courtroom and also can require heightened cooperation from both traders).

34. NOUSSIA, *supra* note 30, at 13.

35. *Id.*

36. *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 73–74. *See also Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984 (2d Cir. 1942); *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007–08 (S.D.N.Y. 1915).

37. SHIMABUKURO, *supra* note 10, at 2.

38. NOUSSIA, *supra* note 30, at 13.

39. *Id.* at 13–14; *see also* MASSEY, *supra* note 29.

40. SHIMABUKURO, *supra* note 10, at 2; *see also* Schneider & Quirk, *supra* note 13.

41. 9 U.S.C. § 2 (2012).

"various limitations on their enforceability arising under both federal and state laws."[42]

The Supreme Court first recognized unconscionability as a limitation to arbitration agreements in *Doctor's Associates, Inc. v. Casarotto*.[43] The Court found that arbitration agreements could be unenforceable based upon defenses that make any contract void.[44] If, however, a state law singled out arbitration agreements, holding them to a standard not required in any other contracts, the FAA would preempt that state law.[45] In *Casarotto*, the Montana law at issue demanded that certain disclosures be placed in arbitration agreements.[46] These disclosures were not similar to any other state law contract requirements and as a result, the Court held that the FAA preempted the law.[47]

B. Making Class-Wide Arbitration Narrow: AT&T v. Concepcion

Despite the ability of certain contract defenses to overcome the presumption of the FAA, the Supreme Court has recently issued numerous decisions that not only reinforce the FAA's national policy favoring arbitration, but also broaden the scope of the FAA's control.[48] In one of these cases, *AT&T v. Concepcion*, the Supreme Court allowed the FAA to preempt a statute at the core of California's consumer protection scheme.[49] In *Concepcion*, the Concepcions attempted to file a class action suit against AT&T for false advertising and fraud by charging sales tax on phones the company advertised as free.[50] When AT&T attempted to compel arbitration, the Concepcions opposed the motion, stating that under California's Discover Bank Rule, the arbitration agreement was unlawfully exculpatory because it disallowed class-wide procedures.[51]

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42. F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 37 (6th ed. 2011).

43. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (concluding that failing to outline the costs of arbitration does not render the contract void); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995) (holding that the term involving commerce should be interpreted broadly and that the FAA applies to all contracts that involve commerce); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA preempts state law).

49. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

50. *Id.* at 1744.

51. *Id.* at 1744–45.

The Discover Bank Rule "classifies as unconscionable class action waivers contained in consumer contracts of adhesion that would insulate companies from claims that they cheated large numbers of consumers out of individually small sums of money."[52] The Supreme Court, however, approved AT&T's motion to arbitrate.[53] The Court found that this rule interfered with arbitration's goal of creating an efficient and streamlined proceeding and therefore, was inconsistent with the FAA.[54] As a result, the Court determined that the FAA preempted the Discover Bank Rule.[55]

C. Stunted Growth: Resistance to the Rise of Arbitration in Consumer Agreements

Despite some scholar's belief that the holding in *Concepcion* is advantageous,[56] there has been considerable pushback against both the decision and the corresponding rise of arbitration in consumer agreements. One critic compared the holding to a "tsunami that is wiping out existing and potential consumer . . . class actions."[57] Others have asserted that *Concepcion* "should come to signify the death for the legal claims of many potential plaintiffs."[58]

As an example of the recent resistance against consumer arbitration, in 2009, the Minnesota Attorney General sued the National Arbitration Forum (NAF).[59] At the time, the NAF served as one of the largest arbitrators for the financial services industry.[60] The suit claimed that the NAF engaged in deceptive practices by holding itself out as a neutral and independent arbitrator, hiding its ties to the debt collection and banking

52. *Tsunami*, *supra* note 5, at 705.

53. *Id.*

54. *Concepcion*, 131 S. Ct. at 1748.

55. *Id.* at 1750–51.

56. Maureen A. Weston, *The Death of Class Arbitration after* Concepcion*?*, 60 U. KAN. L. REV. 767, 769–70 (2012). Certain benefits include the ability to avoid considerable litigation by placing both mandatory arbitration clauses and class action waivers in every consumers contact. *See Tsunami*, *supra* note 5, at 704.

57. *Tsunami*, *supra* note 5, at 704.

58. *Id.*

59. Complaint, *Swanson v. National Arbitration Forum, Inc.*, No. 27-CV-0918550 (D. Minn. July 14, 2009); Kathy Chu & Taylor McGraw, *Minnesota Lawsuit Claims Credit Card Arbitration Firm Has Ties to Industry*, USA TODAY, July 15, 2009, at 6A.

60. Chu & McGraw, *supra* note 59.

industry.[61] The NAF settled with the Attorney General in July of 2009, agreeing to no longer arbitrate consumer disputes.[62]

In a more extreme attack against pre-dispute arbitration in consumer agreements, legislators have proposed several versions of the Arbitration Fairness Act (AFA) during the past decade.[63] The AFA would prohibit these mandatory arbitration agreements in consumer contracts altogether.[64] Proposed by Senators Al Franken and Richard Blumenthal, the AFA would also ban the use of binding arbitration in civil rights and employment disputes.[65] The Senate Committee on the Judiciary is reviewing the most recent version of this amendment to the Federal Arbitration Act.[66]

D. A Potential Compromise via a Compromise: The Wisconsin Consumer Act

Given the recent pushback against the use of arbitration agreements,[67] their expansion,[68] and the issues this poses for consumers,[69] Wisconsin legislators must take action to establish a clear standard regarding consumer arbitration clauses. The Wisconsin Consumer Act (WCA) provides legislators with an appropriate avenue to place restrictions on arbitration agreements in consumer contracts. Enacted with the purpose of protecting consumers from unscrupulous business practices,[70] the WCA governs most consumer transactions within Wisconsin.[71]

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61. *Id.*; Complaint, *supra* note 59.

62. Wade Goodwyn, *Arbitration Firm Settles Minnesota Legal Battle*, NAT'L PUB. RADIO (July 23, 2009), http://npr.org/templates/story/story.php?storyId=106913248. In fact, a hedge fund owned 40 percent of the NAF and at the same time, owned debt collection companies that regularly arbitrated cases before the NAF. *Id.* As a result, the NAF had a vested stake in the outcome of several of their cases and failed to disclose any of this information. *Id.*

63. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 458 (2011).

64. *Id.* at 459.

65. Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 150 (2012).

66. S. 987, 112th Cong. §§ 1–4 (2011). A full history of the bill is available at *S.987 Bill Summary & Status*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00987:@@@L&summ2=m&.

67. *See supra* notes 59–66 and accompanying text.

68. *See supra* Part I.A.

69. *See infra* Part II.A.

70. WIS. STAT. § 421.102 (2011–12).

71. § 421.201.

After "six intense months of negotiation and drafting,"[72] the Wisconsin Consumer Act became effective in March of 1973.[73] The WCA is the product of cooperation and collaboration between consumer advocates and creditors alike.[74] In fact, one scholar suggests that it "represents a solution in which consumer-creditor interests are uniquely balanced."[75]

Achieving this result began with the Wisconsin Supreme Court's holding in *Wisconsin v. J.C. Penney Co.*,[76] which exposed retailers to "great liability for past violations of the usury limitations" and sparked their interest in "obtaining passage of legislation that would eliminate the retroactive application of usury penalties to revolving sales accounts."[77] Banks also wished to achieve this exemption, fearing the same liability.[78] Governor Patrick J. Lucey, however, opposed this fragmented consumer legislation and instead advocated for comprehensive consumer-credit laws.[79]

Consumer protection advocates and consumer financial institutions began negotiations at the end of 1971 after recognizing that the passage of such a bill would require one another's support.[80] While consumer groups wished to "eliminate and prevent alleged harsh and abusive credit practices and to attempt to make the consumer more aware of the nature of his objections," creditor groups wanted to "provide legislation which would correct credit abuses without becoming so unduly burdensome on creditors as to unfairly limit legitimate extensions of credit."[81] These negotiations produced the WCA, Wisconsin Statute sections 421 to 427.[82] Although some amendments have changed particular portions of the statute, it overwhelmingly remains the same today.[83]

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72. Jeffrey Davis, *Legislative Restriction of Creditor Powers and Remedies: A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 1, 5 (1973).

73. Heiser, *supra* note 21, at 389.

74. *See* Davis, *supra* note 72, at 6.

75. *Id.* By using this balanced piece of legislation to address mandatory arbitration, an issue that recently began to greatly affect creditors and consumers, the same posture could be maintained. The amendments simply suggest that arbitration agreements be subject to the same restrictions initially enacted through the WCA, allowing a similar balance to be achieved.

76. 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

77. *See* Davis, *supra* note 72, at 8–9.

78. *Id.* at 9.

79. *Id.* at 10.

80. *Id.*

81. Heiser, *supra* note 21, at 390.

82. *Id.*; *see also* WIS. STAT. §§ 421–427 (2011–12).

83. §§ 421–427; *see also* Heiser, *supra* note 21, at 389 n.1, 390.

The WCA applies to all consumer transactions that fall under Wisconsin Statute sections 421 to 427.[84] Courts are to construe these chapters liberally in order to "promote their underlying purposes and policies."[85] Those stated purposes and policies are:

> (a) To simplify, clarify and modernize the law governing consumer transactions;
> (b) To protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants;
> (c) To permit and encourage the development of fair and economically sound consumer practices in consumer transactions; and
> (d) To coordinate the regulation of consumer credit transactions with the policies of the federal consumer credit protection act.[86]

While several provisions were originally enacted to ensure the achievement of said purpose, the legislature has not updated the WCA to reflect the realities of the current consumer climate. In fact, the WCA and the FAA have yet to decisively interact. Parties in Wisconsin have attempted to avoid arbitration in consumer suits through the use of general contract defenses, but until now, courts decided these suits on a case-by-case, piecemeal basis.[87] As a result, no clear guidance exists in Wisconsin about the effect the invigorated FAA and *Concepcion* have on the WCA and Wisconsin consumers.

II. SURVIVING THE TSUNAMI: WHY ADDING RESTRICTIONS TO THE WCA WILL PROTECT CONSUMERS, PROMOTE FAIR BUSINESS PRACTICES, AND ENCOURAGE EFFICIENCY IN THE COURTS

This Part illustrates the conflict between the features of mandatory arbitration and the stated purpose of the WCA. It discusses what changes the legislature should make to reinvigorate the WCA's purpose in light of the rise of mandatory arbitration in consumer contracts, as well as the

84. § 421.201(1).
85. § 421.102(1).
86. § 421.102(2).
87. *See generally* BLAND ET AL., *supra* note 42, at 147–71. These sections of the book depict the numerous factors and tests courts employ when determining whether or not a specific contract is unconscionable. *See also Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1096 (9th Cir. 2009) ("We must evaluate unconscionability under the circumstances existing at the time of the making of the contract . . . .") (internal quotation marks and citation omitted).

benefits of such alterations. It concludes by illustrating why imposing these restrictions on mandatory arbitration through the WCA will be consistent with both federal case law and policies.

A. Writing a Check It Cannot Cash: Why Mandatory Arbitration Inhibits the Rights Granted by the WCA

The WCA seeks to modernize the law surrounding consumer transactions and to protect consumers against unjust practices by merchants.[88] Several features of mandatory arbitration, however, impede the success of the WCA in achieving these purposes. Without additional legislation, numerous elements of mandatory arbitration will continue to promote this failure.

The first feature of mandatory arbitration that lends itself to unfairness is the lack of a meaningful and voluntary choice on the part of the consumer.[89] Most mandatory arbitration agreements "appear in standard form preprinted contracts of adhesion."[90] Business lawyers that are experienced in the area of arbitration often draft these intricate contracts of adhesion.[91] Therefore, these agreements almost exclusively include provisions that are solely beneficial to businesses.[92]

Because consumers are unlikely to have experienced legal disputes and are unable to "comprehend the implications of an arbitration clause,"[93] these agreements receive "little attention" from them.[94] As a result, "[c]onsumers may be unaware that arbitration materially changes the rules of dispute resolution" and may be unfamiliar with the other rights they waive with their signatures.[95] Even if a consumer recognizes an arbitration clause and understands the rights implicated by the agreement, there exists little to no negotiation over the terms of the clause, making it "difficult to characterize . . . as the product of 'consent.'"[96] These conditions conflict with several of the stated purposes of the WCA, including the protection of "customers against unfair, deceptive, false, misleading and unconscionable practices by

88. § 421.102(1).
89. Schneider & Quirk, *supra* note 13.
90. *Id.*
91. *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 57.
92. *Id.* Examples of these lopsided sections include venue and choice of law provisions.
93. Schneider & Quirk, *supra* note 13.
94. *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 57.
95. Schneider & Quirk, *supra* note 13.
96. *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 58.

merchants" and the "development of fair and economically sound consumer practices."[97]

Another factor that is contrary to the WCA's purpose of protecting consumers against unfair and misleading practices by merchants[98] is the use of repeat arbitrators by businesses. Arbitration should involve a neutral third party that objectively listens to the facts and makes a determination.[99] However, when businesses utilize arbitrators on a recurring basis,[100] the potential for bias proves overwhelming.[101] Since corporations overwhelmingly choose the arbitrators, "arbitration providers have an incentive to skew their proceedings in favor of the company drafting the agreement."[102]

In fact, a study by the Center for Responsible Lending[103] concluded that "[c]ompanies that have more cases before arbitrators get consistently better results from these same arbitrators"[104] and that "[i]ndividual arbitrators who favor firms over consumers receive more cases in the future."[105] Therefore, consumers opt to waive their right to trial, possibly unknowingly and involuntarily, in favor of a process that presents dangers of bias.

While advocates of arbitration offer its reduced cost as a benefit,[106] that cost reduction proves true for businesses alone, if at all.[107] As a

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97. WIS. STAT. § 421.102(2)(b)–(c) (2011–12).

98. § 421.102(2)(b).

99. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 872 (2008).

100. *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 61.

101. BLAND ET AL., *supra* note 42, at 6.

102. Farmer, *supra* note 4, at 2357.

103. The Center for Responsible Lending is a nonprofit, nonpartisan organization that works to fight predatory lending practices. The center, founded in 2002, focuses primarily on payday loans, credit cards, bank overdrafts, and auto loans. *See About CRL*, CENTER FOR RESPONSIBLE LENDING (2012), http://www.responsiblelending.org/about-us/.

104. Joshua M. Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, CENTER FOR RESPONSIBLE LENDING 1 (May 2009), http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf. This study was done in California and contains mostly arbitration agreements from consumer contracts with credit card companies; however, since the same two to three arbitration firms are often used, the study posits that the same results would occur across the board. *Id.*

105. *Id*. at 2.

106. *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276–77 (1982); Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 BUS. LAW. 1081, 1091 (1988); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89–90.

result, arbitration clashes with the WCA's purpose of promoting economically sound consumer practices.[108] In arbitration, a plaintiff is expected to cover at least half of the costs, which are often much higher than those found in a normal trial.[109] Filing and administrative fees in arbitration can reach "as high as thousands of dollars per case, [with] hourly rates [of arbitration]" ranging from $200 to $700.[110] These fees must be paid up front in arbitration, whereas in court, either statutory provisions or contingency fees can postpone or eliminate payment of attorney fees altogether.[111] Therefore, arbitration has the potential to destroy viable consumer claims, restricting consumers' ability to protect themselves against unscrupulous business practices that the WCA wishes to eliminate.[112]

Another purported advantage of arbitration involves its speed.[113] While this would seem to align arbitration with the WCA's stated purpose of simplifying consumer transactions,[114] research shows that "there is reason to believe that litigation is faster than arbitration."[115] Furthermore, consumers often challenge the validity of arbitration clauses in court, and because the courts lack specific statutory guidance about arbitration clauses in consumer contracts, these disputes must be resolved on a case-by-case basis.[116] Such mini-trials diminish much of the alleged efficiency and speed of the arbitration process.

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107. Businesses may find it cheaper to defend themselves in arbitration rather than a trial due to the elimination of pretrial motions and discovery practice. *See Enforcing Small Print to Protect Big Business*, *supra* note 6, at 60. For the same reasons, businesses will often have to pay lower plaintiff's attorney's fees as well when required by state and federal law. *Id.* Plaintiff's attorneys are also less likely to take on arbitration cases, viewing it as an unfavorable forum, and as a result plaintiffs are more likely to appear *pro se*. *Id.*

108. WIS. STAT. § 421.102(2)(c) (2011–12).

109. *Enforcing Small Print to Protect Big Business*, *supra* note 6, at 61.

110. *Id.*

111. Schneider & Quirk, *supra* note 13.

112. Some commentators believe that people bring fewer suits when they have to pay up front. *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 754.

113. *See* Burger, *supra* note 106; Golann, *supra* note 106.

114. WIS. STAT. § 421.102(2)(a) (2011–12).

115. *Mandatory Arbitration and Fairness*, *supra* note 7, at 1312. There are unknown factors that make this assertion tentative and heavily debated, including state court versus federal court time and the frequency of arbitration cases terminating prehearing. *Id.* at 1312 n.191.

116. *See* BLAND ET AL., *supra* note 42, at 147–71. (depicting the numerous factors and tests courts employ when determining whether or not a specific contract is unconscionable); *see also Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1096 (9th Cir. 2009) ("We must evaluate unconscionability under the circumstances existing at the time of the making of the contract . . . .") (internal quotation marks and citation omitted).

B. Arbitration Escalation: Why the Legislature Needs to Codify a Standard of Unconscionability in the WCA

With arbitration on the rise, it appears that arbitration will play a large role in the future of consumer transactions. While many of the factors of arbitration currently conflict with the stated purposes of the WCA, the WCA further fails to achieve its goal of modernizing consumer transactions by not addressing arbitration. Although the WCA touches on certain practices that promote a finding of unconscionability,[117] these characterizations provide little guidance to courts, consumers, or businesses.[118] As a result, the WCA needs more descriptive restrictions to eliminate unscrupulous business practices, ensure fairness, and promote an efficient use of the court system.[119]

By placing more defined restrictions on the format and substance of consumer arbitration agreements through an amendment of the WCA, the legislature would align arbitration with the stated purpose of the WCA. These WCA restrictions, however, must still place general consumer contracts requirements and arbitration agreement provisions on the same footing in order to avoid preemption by the FAA.[120] To achieve the goals of the WCA, yet still reaffirm the FAA, the legislature should place restrictions on arbitration by codifying a standard of unconscionability. In doing so, the WCA would be addressing the modernized state of consumer transactions,[121] ensuring the fairness of such transactions,[122] and also promoting efficiency by eliminating several case-by-case disputes from court dockets.[123] In order to codify unconscionability as it

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117. WIS. STAT. § 425.107 (2011–12). This statute lists certain factors that a court may consider in determining unconscionability but there is no guarantee that these factors alone will render a condition unconscionable or what weight the court will give these factors.

118. These factors listed in the WCA regarding unconscionability are rather broad and leave room for much uncertainty which is the source of a great deal of litigation. *See generally Cottonwood Financial, Ltd. v. Estes*, 2012 WI App 12, 339 Wis. 2d 472, 810 N.W.2d 852; *Aul v. Golden Rule Ins. Co.*, 2007 WI App 165, ¶¶ 24–35, 304 Wis. 2d 227, 737 N.W.2d 24; *Coady v. Cross Country Bank*, 2007 WI App 26, 299 Wis. 2d 420, 729 N.W.2d 732; *Wis. Auto Title Loans v. Jones*, 2006 WI 53, 290 Wis. 2d 514, 714 N.W.2d 155.

119. *See infra* notes 122–24.

120. *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745, 1747 (2011).

121. *See supra* Part I.A.

122. *See supra* notes 26–27 and accompanying text.

123. Several cases depict the journey these arbitration agreements go through once challenged in court. First, the court must determine whether the arbitration agreement is enforceable because if it is, the court then lacks jurisdiction. In determining whether the arbitration agreement is valid, the court must first analyze the contractual

pertains to consumer arbitration agreements, the legislature will need restrictions that cover both procedural unconscionability and substantive unconscionability.[124]

1. PROCEDURAL RESTRICTIONS AND POTENTIAL BENEFITS

Procedural unconscionability deals with unfairness in the nature of the negotiation and the disclosure of arbitration terms.[125] It seeks to protect against the absence of meaningful choice by the consumer.[126] As such, the proposed procedural restrictions focus on the nature of the discussion between the consumer and the merchant, as well as the disclosure of the arbitration terms.[127] In particular, this Comment advocates for the addition of two provisions to the WCA to ensure the fairness of the format and negotiations of consumer arbitration clauses.[128] These provisions include a pre-approved format for arbitration clauses and a safe harbor for businesses that would promote their compliance with the other procedural provisions.

The pre-approved stock format of an arbitration agreement would help to ensure consumers possess the ability to knowingly sign these agreements.[129] It would explain what rights the individuals were

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language. This requires the court to examine many layers of the contract and balance several factors. For example, the court must look at whether or not the contract requires the consumer to pay too many of the fees, whether the consumer was under duress when he or she signed, whether the consumer signed due to fraud, whether there is an inconvenient forum, and whether it is unconscionable. Many of these factors also contain individual subparts the court needs to identify in order to determine their presence. For an example that tracks this process through the courts, see *Armendariz v. Found. Health Psychcare Servs., Inc*., 6 P.3d 669, 689–94 (2000).

124. *See supra* notes 26–27 and accompanying text (explaining that there are two facets to unconscionability).

125. *See Wis. Auto Title Loans v. Jones*, 2006 WI 53, ¶ 34, 290 Wis. 2d 514, 714 N.W.2d 155.

126. *Id.* at ¶¶ 32, 34.

127. *See supra* note 26.

128. *See supra* notes 26–27 and accompanying text. *See also* DAVE STUTE, WIS. LEGIS. COUNCIL STAFF, INFORMATION BULLETIN 72-3: AN EXPLANATION OF THE PROVISIONS OF THE WISCONSIN CONSUMER ACT 15 (1972) (discussing how certain sections of the WCA were "directed at correcting abuses which result" in consumer contracts).

129. *See* STUTE, *supra* note 128 (explaining that certain provisions of the WCA were meant to regulate the formation of contracts between a business and a consumer to limit the ability of creditors to include clauses that would be a disadvantage to consumers). While this may not ensure that consumers actually *are* knowingly signing the agreements, it gives them the ability to do so. The rest is up to the consumer. In doing so, general consumer contracts and arbitration agreements are kept on the same footing

surrendering, use lay terminology to encourage understanding, and require specific spacing, font size, and font to increase readability. While some critics may argue this update would place too great of an administrative burden on businesses,[130] the WCA already requires businesses to comply with a stock format for certain sections of consumer credit and consumer approval transaction contracts, which businesses do with ease.[131] As a result, it would not place a limitation on arbitration agreements that do not also pertain to general consumer contracts under the WCA.

A second provision, a safe harbor for businesses, would promote both scrupulous business practices and efficiency.[132] Businesses would have the opportunity to turn their forms in to the Department of Financial Institutions (DFI) for them to be approved prior to their use. In doing so, the DFI would determine whether the forms are consistent with the WCA, specifically the restrictions on arbitration. If the DFI approves the forms, the business would then be sheltered from any consumer claims brought against them for use of said forms. Critics may argue that the new restriction would burden the DFI with additional costs or administrative time; however, the WCA already contains a provision that allows for a similar review.[133] As a result, it would assign the DFI a task with which they are familiar and are equipped to handle.

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and the rights of the consumer are balanced with the ability of a corporation to conduct its business.

130. *See* Farmer, *supra* note 4, at 2353. One of the purported benefits of arbitration is its speed and efficiency. *Id.* By adding certain requirements to that, people may believe such benefits are weakened.

131. *See* WIS. STAT. § 422.303 (2011–12) (requiring a notice to consumers entering into a consumer credit transaction that they possess an obligation to pay); §422.305 (explaining the personal obligation and liability that arises from a consumer credit transaction); WIS. STAT. § 423.203 (2011–12) (describing what language is necessary when depicting a consumer's right to cancel). These statutes depict that a system is already in place and could be employed for mandatory arbitration agreements as well as general consumer contracts. No one would need to search to develop a system and although there might be a bit more administrative burden in the beginning, it has the potential to be a very smooth transition. Furthermore, because it reflects previous provisions of the WCA, which were thought to balance the interests of both creditors and consumers, it is an arguably a worthwhile burden should it occur. *See* Davis, *supra* note 72, at 6.

132. The powers of the administrator were enacted to protect businesses that rely on the rulings and decisions of the administrator. *See* STUTE, *supra* note 128.

133. WIS. STAT. § 426.104(4) (2011–12). While this statute allows businesses to utilize the DFI in ensuring their consumer contracts governed by the WCA are complying with the statutes, at times these contracts will be incredibly long and complicated. As a result, this new amendment would allow businesses to simply send portions of their contracts—the arbitration agreements—to the DFI to ensure their compliance. This will be particularly important if certain updates are required and will save the DFI

2. SUBSTANTIVE RESTRICTIONS AND POTENTIAL BENEFITS

Substantive unconscionability seeks to ensure the fairness of the terms of a contract.[134] Therefore, the substantive restrictions would pertain to the fairness of the terms of the arbitration clause.[135] Amendments to the WCA in this area would include a restriction on which law could apply to the arbitration, where the arbitration could take place, and who could serve as arbitrator.

The first provision, explaining which law could apply in arbitrations, would require that the Wisconsin law to apply for arbitrations concerning Wisconsin transactions with Wisconsin consumers. Such a provision would guarantee that unscrupulous businesses could not enter into transactions with Wisconsin consumers and require the law of a more lenient jurisdiction to apply, allowing them to get away with harming consumers by skirting the requirements.[136] Some critics may argue that this requirement could deter businesses from conducting transactions in Wisconsin; however, a jurisdiction requirement already exists in the WCA, requiring that any consumer transaction in which the "customer consents to the jurisdiction of another state" be invalid.[137] This existing provision has not yet infringed upon the economic health of the state and expanding this provision into the realm of arbitration would simply place it on equal footing with general consumer contract requirements.[138]

A similar provision would limit the venue that parties could select in an arbitration agreement. This restriction would require that venue be either the location where the transaction took place or the jurisdiction

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administrative time and costs as a result of these updates. Furthermore, these provisions again seek to establish a balance between the rights of the consumer with the rights of the business and to ensure that businesses still possess certain protections to ensure their compliance.

134. *See supra* note 27.

135. *Id.*

136. Interview with Sarah Orr, *supra* note 22 (discussing several different cases, as well as the types of contracts Orr has confronted professionally).

137. WIS. STAT. § 421.201(10) (2011–12). It is important to specify that this provision explicitly pertains to arbitration agreements since venue setting occurs most frequently in these agreements. Businesses most often attempt to set a venue far away from the location of a consumer to raise arbitration costs and dissuade the consumer from continuing to pursue the claim. Furthermore, by defining more clearly that this certain provision is a violation in all consumer contracts, businesses will hopefully behave more scrupulously in all agreements embedded in their contracts, courts will be more apt to use their resources on more unclear issues, and consumers will be more apt to defend their claims in these areas. Interview with Sarah Orr, Supervising Attorney, University of Wisconsin-Madison Consumer Law Litigation Clinic, in Madison, Wis. (Feb. 6, 2013).

138. *See* Interview with Sarah Orr, *supra* 137.

where the consumer resides. By requiring a consumer to travel to a remote, unrelated location, businesses place an undue burden on consumers and potentially attempt to halt their attempts to seek relief.[139] This sanctions unfair business practices, and consumers are being targeted without legitimate recourse.[140] The legislature placed a venue requirement in the WCA for a claim arising out of either a consumer transaction or a consumer credit transaction[141] and therefore, adding a similar restriction to arbitration agreements would treat them the same as these two general contracts.

The last provision would disallow businesses from placing the names of arbitration firms in their contracts. This restriction would attempt to curb the potential bias that arbitrators face due to their desire to contract with businesses on a repeat basis.[142] Instead, this amendment would require the DFI to assign an arbitrator to a case based on availability. Since the business will have no control over whether a particular arbitrator can resolve their future disputes, this requirement would eliminate the allegiance an arbitrator might have to a business and allow consumers, who have waived their right to a trial, a fair alternative resolution.[143] While there is no specific section in the WCA that currently corresponds with this proposed restriction, the WCA does contain sections that place similar limitations on consumer agreements and transactions.[144] As such, this proposed update to the WCA would not place higher burdens on arbitration agreements alone.

Regardless, critics may argue that this provision would diminish several of the benefits of arbitration, such as speed and efficiency.[145] Certainly, the DFI would need to have a streamlined proceeding for their assignments, with little to no flexibility and subjectivity involved.[146] Such proceedings may require additional personnel or costs; however,

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139. Interview with Sarah Orr, *supra* note 22 (discussing several different cases, as well as the types of contracts Orr has confronted professionally); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (Stevens, J., dissenting).

140. *See Carnival Cruise Lines*, 499 U.S. 585.

141. WIS. STAT. § 421.401 (2011–12).

142. *See supra* notes 101–05 and accompanying text.

143. *See supra* notes 101–05. The main reason for bias in these agreements is based on money and the potential for an arbitrator to become a repeat client of the business. If the business lacks the ability to possess clients, the source of the bias would be eliminated.

144. *See* WIS. STAT. §§ 422.401–.422 (2011–12).

145. Farmer, *supra* note 4, at 2353.

146. Without such proceedings, the same type of bias could again invade the process and allow for corruption in the government. At least in the government setting, though, there is generally more oversight and certain disciplinary measures in place compared to that in the business arena.

this restriction has the potential to make the largest impact on mandatory arbitration, allowing the WCA to finally achieve its stated purposes.[147] As a result, the legislature should not sacrifice its goals and the fundamental rights of citizens for efficiency.

These proposed provisions would not only protect consumers, but also scrupulous businesses.[148] First, the businesses would be shielded from frivolous suits. Consumers often challenge the validity of arbitration agreements using unconscionability.[149] Given the specificity of the proposed restrictions, however, there would be much less for a consumer to debate and a court to consider. Instead, it would be readily apparent whether an arbitration agreement is unconscionable. Therefore, consumers would be less motivated to bring suits against businesses that do not blatantly violate the restrictions.

If, however, there were a truly unconscionable arbitration agreement that initially slipped through the cracks, consumers would still possess the ability to bring a challenge in court. It would therefore be the businesses that unequivocally fail to conform their standards to the WCA that would be most vulnerable to suit. Furthermore, this practice would also prove efficient for the courts, eliminating cases from their dockets.[150] With proponents of arbitration listing delay as one of the greatest problems in the legal system, they should find these streamlined proceedings appealing.[151]

C. Consumer Consistency: Updating the WCA Is in Accord with Other Case Law and Federal Policies

In order for the legislature to enact any of these amendments to the WCA, current case law and federal policies surrounding arbitration as a whole must not preempt or conflict with the proposed changes.[152] If the updates were inconsistent with federal policies, they would most likely be preempted and, therefore, irrelevant.[153] If the restrictions conflicted with modern case law, there is a greater risk that they would be judicially challenged and invalidated.[154] Since the proposed restrictions are

147. *See supra* Part II.A.

148. Interview with Sarah Orr, *supra* note 22.

149. *See supra* note 118.

150. *Id*.

151. Farmer, *supra* note 4, at 2352.

152. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (stating that the FAA preempts state laws).

153. FAA, 9 U.S.C. § 2 (2012).

154. *See Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 232–33 (3d Cir. 2012); *Litman v. Cellco P'ship*, 655 F.3d 225 (3d Cir. 2011)*; In re Apple & AT&T*

compatible with those placed on general contracts, they do not conflict with either federal policies or case law.[155] In fact, these restrictions mirror the AFA, a proposed change to federal policies surrounding mandatory arbitration. Although the AFA goes further in its restriction than would the updates to the WCA, it still bolsters the modernization of the WCA.[156]

1. *CONCEPCION* AND THE FAA DO NOT PREEMPT THE PROPOSED LEGISLATION

The legislature would not frustrate the purpose of the FAA by codifying a general contract defense through narrow restrictions that apply to consumer contracts as a whole.[157] The leading case on consumer arbitration agreements is *AT&T v. Concepcion*, in which the Supreme Court thoroughly examined a state law regarding arbitration agreements in light of the FAA.[158] In *Concepcion*, the Court agreed to review California's Discover Bank Rule,[159] which "classifie[d] as unconscionable class action waivers contained in consumer contracts of adhesion."[160] Specifically, the Court considered whether Section 2 of the FAA, the Savings Clause, preempts[161] the Discover Bank Rule.[162]

In a five to four decision, the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[163] The Court found that a rule barring most class action waivers as

iPad Unlimited Data Plan Litig., No. 10-2553, 2011 U.S. Dist. LEXIS 78276, at *9–14 (N.D. Cal. July 19, 2011). These cases used the holding in *Concepcion* to eradicate practices that conflicted with the precedent set by it. The same could also occur here if the practices conflicted with such case law.

155. *See infra* Part II.C.1.

156. *See infra* Part II.C.2.

157. *See Concepcion*, 131 S. Ct. at 1746. In *Concepcion*, the Supreme Court ruled that the Discover Bank Rule carved out too large of an exemption to arbitration, making it inconsistent with the FAA. *Id.* at 1748, 1753. The proposed limits prove much smaller than the restriction in the Discover Bank Rule.

158. *Id.* at 1744.

159. Weston, *supra* note 56, at 769.

160. *Tsunami*, *supra* note 5, at 705.

161. Preemption occurs when a federal statute displaces a state statute that attempts to influence the same area of law. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000). The federal statute will control over the state statute in certain instances. *Id.* Where a federal statute contains a preemption clause, as does the FAA with the Savings Clause, it becomes apparent that the federal statute will trump the state statute. *Id.* at 226–27.

162. *Concepcion*, 131 S. Ct. at 1746.

163. *Id.* at 1743, 1748.

unconscionable proves too large an exemption from arbitration.[164] To allow such a large exclusion in the case of class action arbitration would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in the FAA]"[165] by eliminating the efficient, cheap, and streamlined nature of arbitration proceedings.[166] As a result, the Court determined that the FAA preempted the Discover Bank Rule.[167] Still, the Court reiterated that general contract defenses—such as fraud, duress, or unconscionability—still could invalidate arbitration agreements.[168]

Placing restrictions on mandatory arbitration in consumer contracts through the WCA would not interfere with this holding or prove contrary to the FAA. First, the *Concepcion* holding responds to the issue of "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class wide arbitration procedures."[169] None of the proposed restrictions would eliminate or curb the use of class-wide waivers in arbitration.[170] The proposed restrictions would instead codify the general contract defense of unconscionability, a concept that the Supreme Court in *Concepcion* stated individuals could still employ to invalidate arbitration agreements under the Savings Clause of the FAA.[171]

Furthermore, in *Concepcion*, the Court stated that "[s]tates remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted."[172] Several of the proposed restrictions, specifically the procedural requirements, prove similar to the example given by the Court.[173] As such, they further the proposition that the proposed restrictions are aligned with the decision in *Concepcion* and the FAA.

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164. *Id.* at 1746, 1748.

165. *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

166. *Id.* at 1749.

167. *Id.* at 1753.

168. *Id.* at 1746.

169. *Id.* at 1744.

170. *See supra* Part II.B.

171. *Concepcion*, 131 S. Ct. at 1746.

172. *Id.* at 1750 n.6.

173. *See supra* Part II.B.1 (procedural restrictions). Highlighting serves to draw the attention of the individual to a particular portion of the contract. It suggests that the consumer is able to recognize a provision and therefore sign the contract knowingly. These restrictions place requirements on the format of the contract to ensure that a consumer is likely to read and recognize certain provisions. *See supra* Part II.B.1.

Even when examining the holding broadly, the restrictions still do not oppose *Concepcion* or the FAA. In *Concepcion*, the Court determined that the California rule that eliminated the use of an entire category of consumer arbitration proved contrary to the goals of the FAA.[174] The proposed restrictions, however, do not eliminate any one portion of arbitration. Instead, the restrictions place additional requirements on the format and substance within the agreements, without eliminating any portion of arbitration.[175] Furthermore, these proposed restrictions would not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA by reducing the efficiency of arbitration.[176] Instead, the proposed restrictions possess the potential to increase efficiency and create a uniform standard of unconscionability in consumer arbitration agreements.[177]

Both the FAA and the decision in *Concepcion* require that arbitration agreements be placed on "equal footing with other contracts."[178] As a result, critics may argue that the proposed restrictions conflict with both the FAA and *Concepcion* by requiring different conduct from businesses in consumer arbitration agreements than in any general contract situation. These restrictions, however, place arbitration agreements on the same footing as any other consumer contract governed by the WCA.[179] Thus, the requirements enable general consumer contracts and consumer arbitration agreements to be governed similarly and equally under the WCA.

2. THE ARBITRATION FAIRNESS ACT SUPPORTS CODIFICATION

While the decision in *Concepcion* may suggest that the approval of arbitration is increasing, there has been some recent opposition to the use of arbitration, specifically in consumer contracts, as seen in the Arbitration Fairness Act (AFA).[180] Believing that the FAA "was intended

174. Weston, *supra* note 56, at 769.

175. *See supra* Part II.B.

176. *Concepcion*, 131 S. Ct. at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

177. *See supra* Part II.B.

178. *Concepcion*, 131 S. Ct. at 1745 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

179. The proposed restrictions simply require businesses to employ practices that mimic those of general consumer contracts in Wisconsin. *See* WIS. STAT. § 422.303 (2011–12) (requiring a notice to consumers entering into a consumer credit transaction that they possess an obligation to pay); § 422.305 (explaining the personal obligation and liability that arises from a consumer credit transaction); WIS. STAT. § 423.203 (2011–12) (describing what language is necessary when depicting a consumer's right to cancel).

180. *See supra* note 66.

to apply to disputes between commercial entities of generally similar sophistication and bargaining power," the AFA seeks to eliminate the use of arbitration in consumer, employment, and civil rights disputes.[181] Congress has not yet passed the AFA.[182]

While the AFA is much more comprehensive than the proposed restrictions, both seek to achieve similar goals and suggest that more attention needs to be given to arbitration agreements in consumer contracts.[183] The creation of the AFA illustrates that federal law surrounding mandatory arbitration is evolving. This indicates that state law should broach the topic as well and helps to support the proposed updates to the WCA.[184]

CONCLUSION

In the past decade, mandatory arbitration has permeated and dominated the landscape of consumer transactions. While Congress has since enacted federal legislation to address this surge in mandatory arbitration, Wisconsin has not yet updated the WCA, its existing consumer protection legislation, to reflect the current state of consumer transactions. As a result, this Comment advocates that for the WCA to successfully achieve its stated purposes of modernizing consumer transactions, protecting consumers against unconscionable practices, and encouraging the development of fair consumer practices,[185] the Wisconsin Legislature must update the WCA.

This revision should not only *include* mandatory arbitration, but also *restrict* its use in consumer transactions. These restrictions would act to codify a standard of unconscionability and, as a result, would be both procedural and substantive in nature. Since these updates resemble restrictions placed on all contracts by the WCA, they are in line with existing federal policies and case law regarding mandatory arbitration, such as the FAA and *Concepcion*. In addition, they are comparable to newly proposed federal policies limiting mandatory arbitration. These proposed restrictions are necessary for the WCA to achieve its purpose of protecting consumers, for courts to allocate their resources more efficiently by reviewing fewer cases regarding the unconscionability of mandatory arbitration agreements, and for businesses to promote scrupulous business practices.

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181. Arbitration Fairness Act of 2011, S. 987, 112th Cong. §§ 2–3 (2011).
182. *See supra* note 66.
183. Arbitration Fairness Act of 2011, S. 987, 112th Cong. §§ 2–3 (2011).
184. *See supra* note 66.
185. WIS. STAT. § 421.102(2)(a)–(c) (2011–12).