

2004

The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle

Imre S. Szalai

California Western School of Law

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Szalai, Imre S. (2004) "The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle," *California Western Law Review*: Vol. 41 : No. 1 , Article 2.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol41/iss1/2>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

CALIFORNIA WESTERN LAW REVIEW

VOLUME 41

FALL 2004

NUMBER 1

THE NEW ADR: AGGREGATE DISPUTE RESOLUTION AND *GREEN TREE FINANCIAL CORP. v. BAZZLE*

IMRE S. SZALAI *

*[Q]uod aliud est iudicium, aliud est arbitrium. . . . [Q]uaero abs te, quid ita de hac pecunia, de his ipsis HS iccc de tuarum tabularum fide compromissum feceris, arbitrum sumpseris, quantum aequius et melius sit dari. . . .*¹

Trial before a judge is one thing, arbitration is another. I ask you why did you make an agreement to abide by the award of an arbitrator concerning the amount of money [you seek], 50,000 sesterces, and concerning the credit of your books? Why did you choose an arbitrator to determine how much would be fair and good to be given to you?²

INTRODUCTION

In *Green Tree Financial Corp. v. Bazzle*,³ the Justices of the Supreme Court clashed with each other regarding class arbitration under the Federal Arbitration Act (“FAA”).⁴ Historically, most reported ju-

* Visiting Fellow, California Western School of Law. The author would like to thank his wife, Andrea, and daughter, Ella, for their loving support. The author also would like to thank Barbara Cox for her insightful thoughts and comments regarding the article, Ruben Garcia for his helpful discussions regarding class arbitration and the Federal Arbitration Act, and Erik Matala for his outstanding research assistance.

1. Marcus Tullius Cicero, *Pro Quinto Roscio Comodeo*, in 6 CICERO 10, 12 (J.H. Freese trans., 1984) [hereinafter CICERO].

2. Author’s translation.

3. 539 U.S. 444 (2003) [hereinafter *Bazzle*].

4. 9 U.S.C. §§ 1-16 (2000); see *Bazzle*, 539 U.S. at 447, 454-55.

dicial opinions regarding the FAA have involved arbitration administered on a non-class basis. However, in the wake of *Bazzle*, lower courts, the American Arbitration Association (“AAA”), and arbitrators have ushered in an era of privately-created tribunals administering arbitration on a class-wide basis. Lower courts are now paving the way for class arbitration by compelling arbitration and holding that the arbitrators, and not courts, should determine whether class arbitration is permissible.⁵ In response to *Bazzle*, the AAA adopted class arbitration rules patterned after Rule 23 of the Federal Rules of Civil Procedure.⁶ The AAA Class Rules provide that arbitrators may construe arbitration agreements to determine whether they provide for class arbitration. Arbitrators may also administer the entire class arbitration proceeding, determining class certification and awarding class-wide relief.⁷ Arbitrators have already begun administering these AAA Class Rules.⁸

The Supreme Court’s *Bazzle* decision did *not* set forth binding precedent, contrary to the interpretations of various courts, the AAA, and arbitrators. The FAA has traditionally served as a valuable tool, which acknowledges and enforces agreements to arbitrate on an individual, non-class basis. Although some Justices have expressly stated that class-wide arbitration in general is consistent with the FAA,⁹ the

5. See, e.g., *Walker v. Countrywide Credit Indus., Inc.*, No. Civ.A.3:03-CV-0684-N, 2004 WL 246406, at *8 (N.D. Tex. Jan. 15, 2004) (compelling arbitration and holding that under *Bazzle*, the arbitrator must determine whether the agreement forbids or allows class arbitration).

6. See AAA Supplementary Rules for Class Arbitration <http://www.adr.org> (last visited Nov. 13, 2004) [hereinafter AAA Class Rules].

7. See AAA Class Rules, *supra* note 6, at Rules 3-7. Prior to *Bazzle*, a few courts, primarily state courts in California and Pennsylvania, had sanctioned a type of hybrid class arbitration procedure whereby a court certifies a class and then orders an arbitration to proceed on a class-wide basis. See, e.g., *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315 (Cal. Ct. App. 1986); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 861 (Pa. Super. Ct. 1991) (“[W]e find that this class action, if properly certified, may continue through arbitration on a class-wide basis. We therefore remand to the trial court for class certification proceedings. After this ruling, the trial court must compel arbitration.”).

8. The AAA’s vice president for case management reportedly said after *Bazzle*, “We are administering a number of class actions now, whereas before, we refused to take them.” *Post Green Tree: AAA Will Produce Class Action Rules*, 21 ALTERNATIVES TO HIGH COST LITIG. 138, 138 (2003). The AAA now maintains a docket of class arbitrations being administered under the AAA Class Rules on its website, <http://www.adr.org> (last visited on Nov. 13, 2004). See, e.g., *Clause Constr. Award, Goldstein v. Ibase Consulting of Fairfield County, LLC*, (“After *Green Tree Fin. Corp. v. Bazzle*, the issue of whether a contract, silent about whether a claimant may maintain a class or collection action, permits such an action, is clearly for an arbitrator to decide.”), at http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/Rules_Procedures/Topics_Interest/IdentitiesSheriesGoldstein.htm (last visited on Nov. 15, 2004) (citation omitted).

9. See *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., joined by O’Connor & Kennedy, JJ.,

Supreme Court has not set forth a controlling analysis of how the FAA's procedural mechanisms may operate in connection with class arbitration. However, a general approach for applying the FAA's procedural mechanisms in connection with class arbitration can be gleaned from other authority, and this article will explore a suggested approach.

As the opening quote shows, Cicero's statements are as relevant today with respect to this trend toward class arbitration as they were more than 2,000 years ago in ancient Rome. For example, Cicero recognized that arbitration is a matter of agreement,¹⁰ which is a foundational principle underlying the FAA. This core principle raises some concerns regarding class arbitration and the FAA. Respecting this core principle in a non-class arbitration, where the validity of one agreement to arbitrate may be at issue, is relatively uncomplicated in comparison to possibly determining the validity of thousands of agreements to arbitrate in a class-wide arbitration. Furthermore, Cicero questioned someone's choice of arbitration as a method of resolving a dispute.¹¹ Judges, recognized as "public servants"¹² who "represent the interest of society as a whole,"¹³ have usually administered class actions, which sometimes may involve claims of millions of dollars and impact a nationwide class of individuals.¹⁴ As the trend toward class arbitration as a form of collective alternative dispute resolution gains momentum, it is important to examine Cicero's question in connection with class arbitration and assess whether it is appropriate for a private arbitrator to resolve such class claims that may have wide-ranging impact.

It has been observed with respect to traditional judicial class actions that "there is no consensual tie between the represented and the representative,"¹⁵ and because of a lack of consent, "interest represen-

dissenting) ("[T]he FAA does not prohibit parties from choosing to proceed on a class-wide basis.").

10. See CICERO, *supra* note 1.

11. See CICERO, *supra* note 1.

12. *Ferri v. Ackerman*, 444 U.S. 193, 202 (1979).

13. *Id.* at 203.

14. See, e.g., 1 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 3:5 (4th ed. 2002) ("Class actions under the amended Rule 23 have frequently involved classes numbering in the hundreds, or thousands, or even millions.") (citations omitted); 2 *id.* at § 4:40 (recognizing aggregate damages to a class may involve "hundreds or thousands or millions of dollars"); 2 *id.* at § 6:24, (noting class actions may "affect hundreds of thousands, or even millions, of persons similarly situated"); *Kuenz v. Goodyear Tire & Rubber Co.*, 104 F.R.D. 474 (E.D. Mo. 1985) (certifying nationwide class); *Avagliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562 (S.D.N.Y. 1984) (certifying nationwide class).

15. John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419,

tation,”¹⁶ whereby the “plaintiff represents the interests of the class . . . is the only justification for conceiving class actions as representative lawsuits.”¹⁷ It has been argued that these non-consensual representations in traditional judicial class actions are “inherently suspect and grate against even a minimum regard for allowing individuals to be in charge of their own destiny.”¹⁸ Nevertheless, our legal system tolerates this method of representation in traditional judicial class actions primarily because “the class action is the only mechanism by which our legal system can redress a large-scale public wrong.”¹⁹ Class arbitration, which in theory should be entirely premised upon consent, has the potential to alleviate some of these concerns and serve as a representative mechanism whereby large-scale public wrongs are redressed, and whereby class members are bound by the arbitration, as a result of “consent, not coercion.”²⁰ However, appropriate safeguards must be in place to ensure that the contracts of the parties are honored and the arbitration remains consensual.

This trend toward class arbitration resolution has been occurring against the interesting backdrop of a somewhat opposite trend in Congress toward increased federal jurisdiction over judicial class actions with potential nationwide ramifications. Congress has recently attempted, but failed, to expand federal jurisdiction over certain class actions.²¹ According to congressional reports regarding the proposed legislation, increased federal oversight of class actions is justified in part because of abuses that have occurred in connection with class actions in state courts.²² This recent Congressional push toward increased federal oversight of class actions raises questions about the adjudication of class claims in a privatized arbitral forum, relatively insulated from judicial review.

This article, like ancient Gaul, is divided into three main parts. The first section will analyze the Supreme Court’s splintered *Bazzle* decision, which fails to set forth binding precedent, and examine how

1419-20 (2003).

16. *Id.* at 1420.

17. *Id.*

18. *Id.* at 1421.

19. *Id.*

20. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion.”).

21. *See, e.g.*, H.R. REP. NO. 108-144 (2003); S. 2062, 108th Cong. (2004); S. 274, 108th Cong. (2003).

22. *See, e.g.*, S. REP. NO. 108-23 (2003) (detailing abuses of class actions in state court warranting increased federal jurisdiction).

lower courts, the AAA, and arbitrators have been erroneously construing the *Bazzle* decision as authoritative. The second section will explore a suggested approach for handling class arbitration under the FAA consistent with the core principle that arbitration is a matter of agreement. This second section will also examine whether a court or arbitrator should determine whether an arbitration agreement provides for class arbitration. Finally, the third section will explore some concerns about class arbitration as a means of aggregate dispute resolution, particularly in light of due process concerns and the narrow standard of review traditionally accorded to an arbitral decision. A system of aggregate dispute resolution may be workable under the current version of the FAA. However, if parties wish to resort to such a system, a procedure should exist to ensure that the agreements of the parties are respected, and amendments to the FAA should be considered to help facilitate the system.

I. *BAZZLE* AND ITS AFTERMATH

A. The Background Leading Up to the Supreme Court's Decision in *Bazzle*

The *Bazzle* litigation began when two sets of plaintiffs separately filed actions in South Carolina state courts against Green Tree Financial Corporation ("Green Tree"), a commercial lender.²³ The plaintiffs' underlying disputes involved Green Tree's alleged failure to provide a certain form at the time of their loan transactions.²⁴ The form would have notified the plaintiffs that they had a right to name their own lawyers and insurance agents in connection with the loan transaction.²⁵ The plaintiffs claimed the failure to provide the form violated South Carolina law.²⁶

One set of plaintiffs, Lynn and Burt Bazzle (the "Bazzles"), asked the court to certify their claims as a class action, and defendant Green Tree moved to stay the court proceedings and compel arbitration.²⁷ The court certified a class and entered an order compelling arbitration.²⁸ An arbitrator found Green Tree liable for not complying with a

23. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 351 (S.C. 2002) [hereinafter *Green Tree*].

24. *Id.* at 352.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

South Carolina statute and eventually awarded the class \$10,935,000 in statutory damages in addition to attorney's fees.²⁹ The trial court confirmed the award, and Green Tree appealed to the South Carolina Court of Appeals, claiming, *inter alia*, that class arbitration was not permissible.³⁰

With respect to the other set of plaintiffs, Daniel Lackey and George and Florine Buggs (the "Lackeys"), defendant Green Tree moved the trial court to compel arbitration, and the court at first denied Green Tree's motion, finding the arbitration agreement unenforceable.³¹ A state appellate court reversed the denial of the motion to compel arbitration, and an arbitrator was thereafter selected.³² The arbitrator, the same person selected to administer the Bazzles' arbitration proceedings, certified a class and awarded \$9,200,000 in damages in addition to attorney's fees.³³ The trial court confirmed the award, and Green Tree appealed to the South Carolina Court of Appeals, claiming, *inter alia*, that class arbitration was not permissible.³⁴ The South Carolina Supreme Court withdrew both cases from the appellate court, assumed jurisdiction, and consolidated the proceedings.³⁵

The South Carolina Supreme Court recognized that all the parties agreed that the FAA applied to the contracts, but the parties disputed how the FAA impacts class-wide arbitration.³⁶ The court explained that "[t]he United States Supreme Court has not addressed the FAA's impact on class-wide arbitration . . . [t]hus, there is no binding precedent that this Court is obligated follow."³⁷

The South Carolina Supreme Court then explained that courts in other jurisdictions had adopted two different approaches.³⁸ One approach is that class-wide arbitration is prohibited when the arbitration agreement is silent as to that issue.³⁹ The South Carolina Supreme Court described this approach as first enunciated by the United States Court of Appeals for the Seventh Circuit in *Champ v. Siegel Trading*

29. *Id.* at 353.

30. *Id.* at 353-54.

31. *Id.* at 353.

32. *Id.*

33. *Id.* at 354.

34. *Id.*

35. *Id.*

36. *Id.* at 355-56.

37. *Id.* at 356.

38. *Id.*

39. *Id.*

Co.⁴⁰ According to the South Carolina Supreme Court, this *Champ* approach relies on Section 4 of the FAA, which requires arbitration in “accordance with the terms”⁴¹ of the agreement, and if an arbitration agreement is silent regarding class-wide arbitration, courts following this approach “reason that authorizing class-wide arbitration would not be in ‘accordance with the terms’ of the agreement.”⁴² The South Carolina Supreme Court also recognized that courts following the *Champ* approach often rely on case law prohibiting the consolidation of arbitration proceedings when the arbitration agreements at issue are silent regarding consolidation. These consolidation cases “place[d] strict enforcement of the terms of the agreement above the policy favoring expeditious resolution of claims.”⁴³

The South Carolina Supreme Court in *Bazzle v. Green Tree* described the opposing approach as first enunciated by the California Supreme Court in *Keating v. Superior Court*.⁴⁴ This approach allows class-wide arbitration to proceed on a case-by-case basis when the arbitration agreement is silent.⁴⁵ Under the *Keating* approach, a trial court may in its discretion permit class-wide arbitration upon consideration of certain factors including efficiency, equity, and prejudice to the drafting party likely to result from class-wide arbitration.⁴⁶

Turning next to South Carolina law, the South Carolina Supreme Court stated that although it had “not addressed whether class-wide arbitrations are permissible when the agreement is silent, this Court has considered whether consolidation of arbitration is permissible.”⁴⁷

In *Episcopal Housing Corp. v. Federal Insurance Co.*,⁴⁸ the owner of an apartment complex sued an architect and builder for design and construction defects, and the contract between the owner and architect, as well as the contract between the owner and the builder, contained an arbitration provision.⁴⁹ The architect and builder petitioned the lower court to stay the court proceedings pending arbitration, and

40. *Id.* at 356 (citing *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995)).

41. *Id.* at 356.

42. *Id.*

43. *Id.*

44. 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

45. *Green Tree*, 569 S.E.2d at 356.

46. *Id.* at 357.

47. *Id.* at 359.

48. 255 S.E.2d 451.

49. *Id.* at 451-52.

the lower court issued an order granting their petitions.⁵⁰ Thereafter, the owner made a motion to consolidate into one proceeding the arbitration demanded by the architect and by the builder, be consolidated into one proceeding the arbitration demanded by the architect and by the builder,⁵¹ and the lower court granted this motion.⁵² The builder appealed, contending that “it was error to compel it to submit to a consolidated proceeding absent contractual agreement or statutory authority.”⁵³ However, the South Carolina Supreme Court disagreed and believed there was no error in permitting consolidation.⁵⁴

After setting forth the *Champ* approach, the *Keating* approach, and the South Carolina precedent of *Episcopal Housing* permitting consolidation of arbitration proceedings, the South Carolina Supreme Court in *Green Tree* determined that “[a]s a preliminary matter, we find Green Tree’s arbitration clause was *silent* regarding class-wide arbitration.”⁵⁵ Next, the South Carolina Supreme Court rejected the *Champ* approach and explained that it is debatable whether Section 4 of the FAA applies in state courts.⁵⁶ The court announced that it “can rely on independent state grounds to permit class-wide arbitration, in the trial court’s discretion, where the agreement is silent,”⁵⁷ “and under general principles of contract interpretation . . . , Green Tree’s omission of any reference to class actions [is construed] against them.”⁵⁸ The South Carolina Supreme Court, relying on *Episcopal Housing*, then held that “class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice.”⁵⁹ The court, finding that the Bazzles’ and Lackeys’ arbitration proceedings were properly adminis-

50. See *Episcopal Housing Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647 (S.C. 1977) (In a separate opinion, the South Carolina Supreme Court affirmed this order of the trial court in its entirety, except for a portion of the order dealing with a defendant bonding company who had not signed an arbitration agreement.).

51. 255 S.E.2d at 452.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Bazze v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 359 (S.C. 2002). The clauses were silent in the sense that they did not mention class arbitration. However, whether they are consistent with class arbitration is debatable. As explained below in Parts I.B.2 and I.B.3, the Justices of the United States Supreme Court were divided regarding this preliminary finding of the South Carolina Supreme Court, both with respect to the finding itself as well as the issue of who is the appropriate decision-maker for making such a finding. *Id.*

56. *Id.* at 359-60.

57. *Id.* at 360.

58. *Id.*

59. *Id.*

tered as class arbitrations, upheld the arbitrator's awards in these proceedings.⁶⁰

On October 23, 2002, Green Tree filed a petition for a writ of certiorari in the United States Supreme Court, presenting the question of "[w]hether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration."⁶¹ The Supreme Court granted Green Tree's petition on January 10, 2003.⁶²

B. The Fragmented *Bazzle* Opinion

1. Summary of the Justices' Positions

On June 23, 2003, the Justices of the Supreme Court issued the fragmented *Bazzle* decision.⁶³ In *Bazzle*, the Supreme Court examined whether a state court's decision ordering class arbitration, in the context of arbitration agreements that were arguably silent about class arbitration, was consistent with the FAA.⁶⁴ In order to assess the precedential effect of *Bazzle*, it is important to examine the splintered opinions. After setting forth the positions of the Justices, this article will explain that *Bazzle* sets forth no binding precedent and lower courts, the AAA, and arbitrators are erroneously construing *Bazzle* as authoritative.

Justice Breyer authored a plurality opinion, joined by Justices Scalia, Souter, and Ginsburg.⁶⁵ Justice Stevens issued a separate opinion concurring in the judgment and dissenting in part.⁶⁶ Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, authored a dissenting opinion, and Justice Thomas wrote a separate dissenting opinion.⁶⁷

Justice Breyer's plurality opinion summarized the South Carolina Supreme Court's holding as follows: "(1) that the arbitration clauses are silent as to whether arbitration might take the form of class arbitra-

60. *Id.* at 361-62.

61. *See* Green Tree's Pet. for Writ of Cert., No. 02-634, 2002 WL 32101094, at *i (Oct. 23, 2002).

62. *Green Tree*, 569 S.E.2d at 349, cert. granted *Bazzle v. Green Tree Fin. Corp.*, 537 U.S. 1098 (2003).

63. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

64. *Id.* at 447.

65. *Id.*

66. *Id.* at 454.

67. *Id.* at 455, 460.

tion, and (2) that, in that circumstance, South Carolina law interprets the contracts as permitting class arbitration.”⁶⁸ The plurality reasoned that there was a preliminary question of whether the contracts at issue were in fact silent regarding class arbitration or forbade class arbitration, and the plurality believed it was improper to accept the South Carolina Supreme Court’s determination whether the agreements forbade class arbitration because such determination was to be made by an arbitrator, not a court.⁶⁹ Thus, the plurality decided to vacate the South Carolina Supreme Court’s judgment and remand the case so that the question may be resolved in arbitration.⁷⁰

Justice Stevens similarly described the holding of the South Carolina Supreme Court: “The Supreme Court of South Carolina has held as a matter of law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue.”⁷¹ Justice Stevens believed “[t]here is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina[.]”⁷² and he determined that the state court judgment should simply be affirmed.⁷³ However, recognizing that adherence to his preferred disposition would result in no controlling judgment, Justice Stevens concurred in the result reached by Justice Breyer’s plurality opinion, vacating the state court’s judgment.⁷⁴

Chief Justice Rehnquist in his dissent reasoned that the holding of the South Carolina Supreme Court, specifically, that “arbitration under the contract could proceed as a class action even though the contract does not by its terms permit class-action arbitration,”⁷⁵ is in direct contravention of “the terms of the contract and is therefore pre-empted by the FAA.”⁷⁶

Justice Thomas authored a separate dissenting opinion because, as he has explained, in other Supreme Court opinions, he believed the FAA simply does not apply in state court proceedings.⁷⁷

68. *Id.* at 447.

69. *Id.* at 449-53.

70. *Id.* at 453.

71. *Id.*

72. *Id.* at 454-55.

73. *Id.* at 453.

74. *Id.* at 453-54.

75. *Id.* at 455.

76. *Id.*

77. *Id.* at 460 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285-97 (1995) (Thomas, J., dissenting); *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting)).

The Justices disagreed whether the particular agreements permitted class arbitration. There was also disagreement regarding who was the appropriate decision-maker to determine whether the agreements permitted class arbitration, and these disagreements will be explored in the next subsection. The *Bazzle* decision has been improperly construed as establishing that arbitrators, not courts, are the appropriate decision-makers, but as explained in more detail in Section I.C., *Bazzle* did not establish any binding precedent. It is important to emphasize that there was sharp disagreement regarding the issue of the correct decision-maker, and Justice Stevens did not believe this issue regarding the correct decision-maker was properly before the Court.

2. Whether the Arbitration Agreements Permitted Class Arbitration

The Justices expressed different views as to whether the contracts at issue permitted class arbitration. The plurality in *Bazzle* believed the language in the arbitration agreements was ambiguous regarding class arbitration, and Chief Justice Rehnquist's dissenting opinion argued that class arbitration contravened the express language of the particular arbitration agreements.⁷⁸ However, the Supreme Court did not ultimately resolve this dispute regarding the contracts at issue.

In his dissenting opinion, Chief Justice Rehnquist focused on language in the agreements regarding the selection of an arbitrator and how such language was inconsistent with class-wide arbitration.⁷⁹ This language provided that disputes relating to the contract "shall be resolved by binding arbitration by one arbitrator selected by us with consent of you."⁸⁰ His dissenting opinion recognized that each contract expressly defined "us" as Green Tree and "you" as the respondent or respondents explicitly identified in the particular contract at issue.⁸¹ In other words, individual contracts covered the approximately 3,700 class members whose rights were determined by the arbitrator in the *Lackeys'* and *Bazzles'* class arbitrations. There was a Contract Number 1 signed by Buyer Number 1, in which the term "you" was specifically defined as Buyer Number 1 only. In Contract Number 2 signed by Buyer Number 2, the term "you" was specifically defined as Buyer Number 2 only, and so on with respect to each contract. Chief Justice Rehnquist's dissenting opinion construed the "us"

78. *Id.* at 459.

79. *Id.* at 455-59.

80. *Id.* at 456.

81. *Id.* at 457-58.

and “you” language in each of these contracts as “mak[ing] quite clear that petitioner [Green Tree] must select, and *each buyer* must agree to, a particular arbitrator for disputes between petitioner [Green Tree] and that specific buyer.”⁸²

According to Chief Justice Rehnquist, imposing class arbitration “contravene[d] the just-quoted provision about the selection of the arbitrator.”⁸³ Green Tree “had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members,” and such a right was denied when class arbitration procedures were imposed on Green Tree.⁸⁴ Chief Justice Rehnquist recognized that it was “reasonable” for Green Tree to exercise this contractual right in choosing a different arbitrator for each dispute in order “to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator.”⁸⁵

Justice Breyer, however, did not believe “that the contracts’ language is as clear as the Chief Justice believes”⁸⁶ and the answer to the question of whether the contracts forbid class arbitration was “not completely obvious.”⁸⁷ In analyzing the language regarding the selection of an arbitrator, Justice Breyer explained in his plurality opinion that the class arbitrator was in fact “selected by” Green Tree “with consent of” . . . the named plaintiffs[,]”⁸⁸ and thus the contractual requirement regarding consent to the selection of an arbitrator was arguably fulfilled.⁸⁹ Justice Breyer explained that the contracts stated “(I) selected by us [Green Tree],” and the contracts did not state “(II) selected by us [Green Tree] to arbitrate this dispute and no other (even identical) dispute with another customer.”⁹⁰ In the plurality’s view, “[t]he question whether (I) in fact implicitly means (II) is the question at issue,” and the language in the contracts was ambiguous.⁹¹

82. *Id.* at 458-59 (emphasis added).

83. *Id.* at 459.

84. *Id.*

85. *Id.* Chief Justice Rehnquist’s dissenting opinion also recognized that each contract at issue “specified that it governs all ‘disputes . . . arising from . . . *this* contract or the relationships which result from *this* contract.’” *Id.* His dissenting opinion viewed this language as inconsistent with class arbitration. *Id.* at 460.

86. *Id.* at 451.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* With respect to the other Justices, Justice Stevens did not specifically analyze the language of the contracts. He recognized that the South Carolina Supreme Court had made a determination that the agreement between these parties was silent regarding class arbitration, and the FAA does not preempt such a determination by a state court. Justice Thomas also did

3. Who is the Correct Decision-Maker as to Whether Class Arbitration is Permitted or Forbidden Under the Terms of an Arbitration Agreement?

The fragmented *Bazze* opinion did not ultimately resolve the issue of whether the arbitration agreements permitted class arbitration. Rather, the plurality's opinion and Chief Justice Rehnquist's dissenting opinion focused on the division of authority between arbitrators and courts and which entity was the appropriate decision-maker for certain issues, such as whether the arbitration agreements permitted class arbitration. Justice Stevens preferred to affirm the state court decision, which did not address this issue of the correct decision-maker, and Justice Stevens made it clear that this issue of the correct decision-maker was not properly before the Court.⁹²

a. Justice Breyer's Plurality Opinion: The Arbitrator is the Correct Decision-Maker as to Whether Class Arbitration is Permitted or Forbidden Under the Terms of an Arbitration Agreement

The plurality determined that the disputed issue of contract interpretation, *i.e.*, whether the contracts provided for class arbitration, was to be resolved by an arbitrator, not a court. The plurality thus could not "accept the South Carolina Supreme Court's resolution of this contract-interpretation question[,]""⁹³ and the plurality decided to vacate the judgment of the South Carolina Supreme Court, which had improperly usurped the authority of the arbitration and made the determination that the arbitration agreements were silent regarding class arbitration.⁹⁴

Justice Breyer grounded his plurality opinion on two primary considerations. The first (and probably foremost) consideration was the contractual nature of arbitration. According to the express terms of the parties' contracts, "the parties agreed to submit to the arbitrator '[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.'"⁹⁵ Because a dispute about what the terms of an arbitration contract means

not examine the language of the contracts. Only Justice Breyer's plurality opinion and Justice Rehnquist's dissenting opinion explored the language of the contracts in any detail. *Id.* at 444-60.

92. *Id.* at 454-55.

93. *Id.* at 451.

94. *Id.* at 451-52.

95. *Id.* at 451.

is a dispute “relating to this contract,”⁹⁶ the plurality reasoned that the parties had agreed that an arbitrator would resolve an issue of contract interpretation such as whether the arbitration agreement forbids class arbitration.⁹⁷ Accordingly, under the very terms of the parties’ agreements in this case, an arbitrator was the proper decision-maker regarding class arbitration.⁹⁸ The plurality concluded by emphasizing the contractual grounds for its decision: “we remand the case so that the arbitrator may decide the question of contract interpretation—*thereby enforcing the parties’ arbitration agreements according to their terms.*”⁹⁹

The plurality also relied on prior holdings where the Court recognized that certain limited “gateway matters”¹⁰⁰ were generally for a court to determine.¹⁰¹ The plurality explained that “these limited instances [that are generally for a court to resolve] typically involve matters of a kind that ‘contracting parties would likely have expected a court’ to decide.”¹⁰² Examples of such “gateway matters”¹⁰³ include “whether the parties have a valid arbitration agreement at all,”¹⁰⁴ such as “whether an arbitration agreement survives a corporate merger,”¹⁰⁵ or “whether a concededly binding arbitration clause applies to a certain type of controversy,”¹⁰⁶ such as “whether a labor-management layoff controversy falls within the scope of an arbitration clause.”¹⁰⁷ However, the plurality determined that the issue in this case, “whether the contracts forbid class arbitration,”¹⁰⁸ does not fall within this narrow category of instances that are generally for courts to determine.¹⁰⁹ The plurality characterized the question in this case as involving “the *kind of arbitration proceeding* the parties agreed to,”¹¹⁰ and such a

96. *Id.*

97. *Id.* The plurality opinion also recognized that if there is a doubt regarding whether an arbitration clause covers a particular dispute, *i.e.*, whether an issue is “arbitrable,” courts “should resolve that doubt ‘in favor of arbitration.’” *Id.* at 452.

98. *Id.* at 451-52.

99. *Id.* at 454 (emphasis added).

100. *Id.* at 452.

101. *Id.*

102. *Id.* (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

103. *Id.*

104. *Id.*

105. *Id.* (citations omitted).

106. *Id.*

107. *Id.* (citations omitted).

108. *Id.*

109. *Id.*

110. *Id.*

question implicates “contract interpretation and arbitration procedures.”¹¹¹ The plurality, acknowledging the institutional competence of an arbitrator, reasoned that “[a]rbitrators are well situated to answer that question”¹¹² involving “procedural gateway matters.”¹¹³ Accordingly, given these considerations regarding the division of authority between a court and arbitrator and the broad contract language, the plurality concluded “this matter of contract interpretation should be for the arbitrator, not the courts, to decide.”¹¹⁴

b. Chief Justice Rehnquist’s Dissent: Courts, Not Arbitrators, Are the Correct Decision-Maker

The plurality vacated the state court judgment in order for the arbitrator to make a determination whether the agreement at issue permits class arbitration. But Chief Justice Rehnquist believed that courts, not arbitrators, should make this determination:

The Supreme Court of South Carolina held that arbitration under the contract could proceed as a class action even though the contract does not by its terms permit class-action arbitration. The plurality now vacates that judgment and remands the case for the arbitrator to make this determination. I would reverse because *this determination is one for the courts*, not for the arbitrator, and the holding of the Supreme Court of South Carolina contravenes the terms of the contract and is therefore pre-empted by the FAA.¹¹⁵

Although the opening paragraph of Chief Justice Rehnquist’s dissent indicated the court is to make the determination whether a contract provides for class arbitration,¹¹⁶ the reasoning in the rest of his dissent focused on who should make the determination of a slightly different, although arguably related, issue: who is the appropriate decision-maker regarding how an arbitrator should be selected. He explained that courts are the appropriate decision-maker for this particular issue of how an arbitrator should be selected under a contract.¹¹⁷ Then, after analyzing the contract and making a judicial determination regarding the proper arbitrator selection procedure under the contract at issue, Chief Justice Rehnquist reasoned class arbitration would con-

111. *Id.* at 453.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 455 (emphasis added).

116. *Id.*

117. *Id.* at 456.

travene the particular arbitrator selection procedure agreed to by the parties.¹¹⁸

Chief Justice Rehnquist's dissent explained that "the decision of *what* to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator."¹¹⁹ "[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration,"¹²⁰ and thus if there is ambiguity or silence in a contract concerning the appropriate decision-maker to determine whether an issue is to be sent to arbitration, a court should make the determination.¹²¹ For example, suppose two parties to an arbitration agreement disagree whether fraud claims are to be arbitrated under the terms of the contract. If the agreement at issue is silent or ambiguous regarding whether a court or arbitrator is to determine whether a particular claim is to be arbitrated, the general rule is that a court should resolve whether this particular claim is to be arbitrated. Otherwise, if an arbitrator were given the power to make such a determination, the result may be to "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide."¹²²

After recognizing the rule that courts generally determine what is submitted to an arbitrator, Chief Justice Rehnquist then explained that the issue of arbitrator selection is comparable to the issue of what is to be submitted to an arbitrator, which suggests that courts should also be the decision-maker regarding issues of arbitrator selection.¹²³ Chief Justice Rehnquist explained that "[j]ust as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it

118. *Id.* at 458-59.

119. *Id.*

120. *Id.* at 456.

121. *Id.* (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)).

122. *Id.* (citing *First Options*, 514 U.S. at 945). This rule regarding the appropriate decision-maker as to the scope of an arbitration clause exists against the backdrop of another general rule of interpretation under the FAA. If there is doubt whether a particular claim is to be arbitrated under an arbitration clause, such as whether a fraud claim is to be arbitrated, there is a strong presumption under the FAA in favor of arbitration, and thus the doubt is resolved in favor of sending the claim to arbitration. *First Options* clarifies that this presumption in favor of arbitration does not apply to resolve a doubt as to who determines whether an issue is to be arbitrated, and such a doubt is to be resolved in favor of having a court make the determination. *Id.* at 944-45 ("In this manner the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption.") (citations omitted).

123. 539 U.S. at 456-57.

is submitted . . . I have no hesitation in saying that the choice of arbitrator is as important a component of the agreement to arbitrate as is the choice of what is to be submitted to him."¹²⁴

Having established the authority of courts to be the appropriate decision-maker regarding arbitrator selection, Chief Justice Rehnquist proceeded to interpret the contractual provisions regarding arbitrator selection, and he concluded that the contracts provided Green Tree with a right to choose an arbitrator for each dispute with the 3,734 individual class members.¹²⁵ Because Green Tree had the contractual right to choose a different arbitrator to hear each one of these disputes, Chief Justice Rehnquist in dissent concluded that class-wide arbitration contravened the agreement to arbitrate, and the state court's judgment must be reversed because the state court failed to enforce the agreement to arbitrate according to its terms.¹²⁶

C. *Bazzle* Does Not Set Forth Binding Precedent and Lower Courts, the AAA, and Arbitrators Have Been Erroneously Treating *Bazzle* as Authoritative

Several lower courts, without much analysis, have simply cited *Bazzle* as establishing binding precedent that an arbitrator, and not a court, must determine whether an arbitration clause provides for class arbitration. For example, a California appellate court concluded that in *Bazzle* "the Supreme Court determined that the issue of whether an arbitration clause allowed class arbitration was a matter for the arbitrator, not the court, to decide."¹²⁷ The AAA has also come to the same conclusion regarding the "holding" of *Bazzle*: "In its June 23, 2003 decision in *Green Tree Financial Corp. v. Bazzle*, the United States Supreme Court held that where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted."¹²⁸

124. *Id.* at 455; *see also id.* at 457 ("I think that the parties' agreement as to how the arbitrator should be selected is much more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options* . . .").

125. *Id.* at 457-58.

126. *Id.* at 459-60.

127. *Omar v. Ralphs Grocery Co.*, 13 Cal. Rptr. 3d 562, 565-66 (Cal. Ct. App. 2004) (discussing *Bazzle*); *see also* *Franciscan Med. Group v. Premera Blue Cross*, No. 29010-3-II, 2003 WL 22794545, at *9 (Wash. App. Nov. 25, 2003) ("The United States Supreme Court has held that whether an agreement to arbitrate allowed class arbitration is itself a dispute subject to arbitration.").

128. American Arbitration Association Policy on Class Arbitration, <http://www.adr.org/index2.1.jsp?JSPssid=15753&JSPaid=43408> (last visited Nov. 13, 2004).

These court opinions, as well as the AAA's statement, did not really address that *Bazzle* was a fragmented plurality decision, and this failure to address the fragmented nature of *Bazzle* is significant because such decisions may be of questionable precedential value. This section of the article, Section I.C., will explain how a fragmented Supreme Court decision should be analyzed and why *Bazzle* is not authoritative regarding the correct decision-maker to determine whether an arbitration clause provides for class arbitration. Section II of this article will then explore a suggested approach for handling class arbitration under the FAA and will examine whether arbitrators or courts are the correct decision-maker.

The United States Court of Appeals for the Fifth Circuit had the opportunity to address *Bazzle* in *Pedcor Management Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*,¹²⁹ and the Fifth Circuit, recognizing that *Bazzle* was a plurality opinion, discussed a special analysis used to determine the precedential effect of splintered Supreme Court decisions.¹³⁰ The Fifth Circuit, however, incorrectly applied this special analysis and thus came to the wrong conclusion regarding the holding of *Bazzle*. Nevertheless, the Fifth Circuit's opinion sheds some light on understanding splintered Supreme Court decisions like *Bazzle*.

1. The Fifth Circuit's Flawed *Pedcor* Decision

In *Pedcor*, the underlying dispute involved alleged breaches of reinsurance contracts.¹³¹ North American Indemnity, NV (NAI), an insurance company that had entered into reinsurance contracts with several employer self-funded ERISA plans, allegedly breached these contracts by defaulting on the payment of claims.¹³² NAI's reinsurance contracts with the plans contained an arbitration provision requiring that disputes between the parties be submitted to arbitration, and like the arbitration provisions in *Bazzle*, the arbitration provisions did not explicitly address class arbitration.¹³³ NAI originally sued the third party administrator of the plans, alleging negligent underwriting of the plans.¹³⁴ Subsequently, several individual plans sought to inter-

129. 343 F.3d 355 (5th Cir. 2003).

130. *Id.* at 358.

131. *Id.*

132. *Id.* at 357.

133. *Id.*

134. *Id.*

vene as plaintiffs against NAI. The lower court granted their motions for leave to intervene and NAI filed a motion to stay pending arbitration of the intervenors' complaints.¹³⁵ The intervening plaintiffs asserted claims, including breach of contract and fraud, arising out of NAI's alleged failure to pay benefits, and the intervening plaintiffs moved for certification of a class of employee welfare benefit plans that had contracted with NAI.¹³⁶

The lower court then held a hearing to discuss the possibility of certifying a class for arbitration proceedings against NAI.¹³⁷ Pedcor, an ERISA plan that was an unnamed member of the putative class, participated in the hearing as *amicus curiae* and filed suggestions advising against class certification.¹³⁸ At the hearing, the court indicated that "[a]s soon as a class is certified and the time periods have expired I will then compel arbitration."¹³⁹ In anticipation of arbitration, the lower court then certified a class "to consist of all employer plans that bought reinsurance through North American Indemnity, N.V., after January 1, [2000], whose claims have not been paid."¹⁴⁰ Pedcor then requested permission to appeal the certification order pursuant to Fed. R. Civ. P. 23(f), and the Fifth Circuit granted Pedcor's petition to appeal in August 2002.¹⁴¹

After the parties had completed their initial briefing before the Fifth Circuit, the Supreme Court issued *Bazzele*, and the Fifth Circuit in *Pedcor* addressed the precedential effect of *Bazzele* in detail.

The Fifth Circuit began its analysis of the precedential effect of *Bazzele* by explaining "[i]t is well established that when we are confronted with a plurality opinion, we look to 'that position taken by those Members who concurred in the judgments on the narrowest grounds.'"¹⁴² This approach, sometimes referred to as the *Marks* rule, guides lower courts in deriving a holding from fragmented Supreme Court decisions,¹⁴³ and the Fifth Circuit searched through the plurality

135. *Id.*; Appellants Request for Oral Argument, at *8-9, *Pedcor* (No. 02-20878).

136. *Id.* at *5.

137. *Pedcor*, 343 F.3d at 357.

138. *Id.*

139. *Id.* at 357 n.2.

140. *Id.* at 357.

141. *Id.*

142. *Id.* at 358 (quoting *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995), quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)) (internal quotation marks omitted).

143. Justices Stewart, Powell, and Stevens applied this rule in *Gregg v. Georgia*, 428 U.S. 153, 154, 169 n.15 (1976), in which these Justices explained that when there is no clear majority of the Court, "the holding of the Court may be viewed as that position taken by those

and Justice Stevens' limited concurrence for a position "on the narrowest grounds."¹⁴⁴

The Fifth Circuit summarized Justice Stevens' opinion as dissenting "to the extent that he would have permitted the state court decision allowing class arbitration to stand."¹⁴⁵ He reasoned that the decision was correct as a matter of law, *i.e.*, nothing in the court's *application* of state law to allow class arbitration violated the FAA, and he emphasized that the petitioner challenged only the merits of that decision, not whether it was made by the right decision-maker."¹⁴⁶ The Fifth Circuit then recognized that the basis for Justice Stevens' preferred disposition of the case, "that the state court judgment was correct as a matter of law—fails to constitute the most narrow grounds on which the case was decided[,] "¹⁴⁷ and thus could not form binding precedent under the *Marks* rule. The Fifth Circuit believed that "Justice Stevens did express his agreement, however, with the principle laid down by the plurality that arbitrators should be the first ones to interpret the parties' agreement."¹⁴⁸ As a result, the plurality's governing rationale in conjunction with Justice Stevens' support of that rationale substantially guides our consideration of this dispute."¹⁴⁹ After its analysis of *Bazze* under the *Marks* rule, the Fifth Circuit in *Pedcor* treated *Bazze* as holding, with "clarity," that "arbitrators, not courts, decide whether an agreement provides for class arbitration."¹⁵⁰

As a result of a flawed application of *Marks*, the Fifth Circuit in *Pedcor* erred in concluding that the holding of the fragmented *Bazze* decision is that "arbitrators, not courts, decide whether an agreement provides for class arbitration."¹⁵¹ As explained below in Section I.C.3, the Fifth Circuit's error arises from a misreading of Justice Stevens' opinion in *Bazze* in which he dissented in part and concurred in the

Members who concurred in the judgments on the narrowest grounds." Subsequently, a majority of the Court in *Marks*, 430 U.S. at 193, relied on this rule in interpreting a fragmented decision, and lower courts have followed this rule when construing the holdings of fragmented Supreme Court decisions.

144. *Pedcore Mgmt.*, 343 F.3d at 358 (citing *Campbell*, 64 F.3d at 189 (5th Cir. 1995) (quoting *Marks*, 430 U.S. at 193)).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 358-59.

150. *Id.* at 359, 363; *see also id.* at 359 (stating that *Bazze* clearly holds that "arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration").

151. *Id.* at 363.

judgment.¹⁵² Justice Stevens did not believe this issue of the correct decision-maker was properly before the Court.¹⁵³ Because *Bazzle* did not set forth binding precedent, lower courts should grapple with this issue of the correct decision-maker and rely on pre-*Bazzle* authority when addressing arbitration clauses and class arbitration under the FAA. Section II will set forth a suggested approach for courts to deal with class arbitration under the FAA.

2. The *Marks* Rule

The *Marks* rule helps lower courts interpret fragmented Supreme Court decisions. In *Marks*, “[criminal defendants] were charged with several counts of transporting obscene materials in interstate commerce in violation of [federal law]”¹⁵⁴ The conduct at issue covered a time period through February 1973, and before the trial of these defendants occurred, the Court issued *Miller v. California*,¹⁵⁵ which “announced new standards”¹⁵⁶ regarding First Amendment protection and obscenity.¹⁵⁷ The defendants argued in the district court that they were entitled to jury instructions under the standards set forth in *Memoirs v. Massachusetts*.¹⁵⁸ The defendants believed that *Memoirs* stated the law in effect prior to *Miller*, and to apply *Miller* retroactively and punish conduct that they believed was permissible under *Memoirs* violated the due process clause.¹⁵⁹ The trial court rejected the defendants’ arguments and used the *Miller* standards in the jury instructions, and the court of appeals affirmed.¹⁶⁰

The court of appeals did not believe that *Memoirs* was the governing law of the land because the standards announced *Memoirs* did not receive the assent of more than three Justices.¹⁶¹ Thus, the court of

152. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454-55 (2003).

153. *Id.* at 455.

154. *Marks v. United States*, 430 U.S. 188, 189 (1977).

155. *Id.* at 190 (citing *Miller v. California*, 413 U.S. 15 (1973)).

156. *Id.* (citing *Miller*, 413 U.S. at 29).

157. *Id.*

158. *Id.* (citing *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966)).

159. *Id.* at 190-91.

160. *Id.* at 191.

161. *Id.* at 192. In *Memoirs*, Justice Brennan “announced the judgment of the Court and delivered an opinion in which . . . C[hief] J[ustice] [Warren] and . . . Justice F[ortas] join[ed].” 383 U.S. at 414. Justices Black and Stewart concurred in the result for the reasons stated in their respective dissenting opinions in two prior cases. *Id.* at 421. Justice Douglas authored a separate concurring opinion, *id.* at 424, and Justices Clark, Harlan, and White each authored dissenting opinions, *id.* at 441-62.

appeals looked to *Roth v. United States*,¹⁶² a majority decision that pre-dated *Memoirs*, in order to determine whether *Miller* had expanded criminal liability.¹⁶³ If *Miller* were compared to *Roth* instead of *Memoirs*, *Miller* did not significantly change the law governing obscenity.¹⁶⁴ However, if *Memoirs* was governing law, *Miller* would have significantly changed the law and expanded criminal liability, and retroactive application of the *Miller* standards to the defendants would be problematic.

In *Marks*, the Court focused on whether the fragmented *Memoirs* decision set forth governing law. To construe the precedential effect of a case like *Memoirs* where there is no majority, the *Marks* Court established the following rule: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds’”¹⁶⁵

Applying this interpretative rule to the fragmented *Memoirs* decision, the *Marks* Courts concluded that “[t]he view of the *Memoirs* plurality [authored by Justice Brennan] . . . constituted the holding of the Court and provided the governing standards.”¹⁶⁶ The *Marks* Court determined that, in *Memoirs*, Justices Black and Douglas “concurred on broader grounds [than the plurality] in reversing the judgment below,”¹⁶⁷ and similarly, Justice Stewart’s concurrence was on broader grounds.¹⁶⁸ As a result, the *Memoirs* plurality represented the governing law, and retroactively applying the new *Miller* standards, which expanded criminal liability in light of the governing law set forth in the *Memoirs* plurality, violated due process.¹⁶⁹

Every federal court of appeals has scrutinized fractured Supreme Court opinions under the *Marks* rule to determine whether such opinions constitute governing law. For example, the Eleventh Circuit, applying *Marks*, has explained that “[w]hen faced with a fragmented [Supreme] Court, we may distill the various opinions down to their

162. *Miller*, 430 U.S. at 192. See generally *Roth v. United States*, 354 U.S. 476 (1957).

163. *Id.* at 192-93.

164. *Id.* at 193.

165. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

166. *Id.* at 194 (emphasis added).

167. *Id.* at 193.

168. *Id.*

169. *Id.* at 196.

narrowest grounds of concurrence to derive any binding precedent.¹⁷⁰ Likewise, the Sixth Circuit has rummaged through a splintered Supreme Court decision to find “the narrowest ground of agreement,” which would form the binding precedent of the case under *Marks*.¹⁷¹

Courts have recognized that, under the *Marks* rule, a splintered opinion may sometimes fail to establish any binding precedent. For example, in *United States v. Alcan Aluminum Corp.*,¹⁷² the Second Circuit attempted to discern a holding from *Eastern Enterprises v. Apfel*,¹⁷³ which was issued by “a deeply divided Supreme Court.”¹⁷⁴ The Second Circuit recognized that five members of the *Eastern* Court joined in the judgment to declare the retroactive liability scheme of the Coal Act unconstitutional.¹⁷⁵ However, there was no agreement on a rationale among these five Justices.¹⁷⁶ The Second Circuit reasoned that four Justices (Chief Justice Rehnquist and Justices O’Connor, Rehnquist, Scalia and Thomas) concluded that the statute was “unconstitutional based upon a takings clause analysis[,]”¹⁷⁷ and Justice Kennedy, concurring separately in the result, provided the fifth vote and “found the statute unconstitutional based on a violation of substantive due process[,]”¹⁷⁸ as opposed to a violation of the takings clause as set forth in Justice O’Connor’s opinion.¹⁷⁹ Then, citing the *Marks* rule as the framework for interpreting splintered opinions, the Second Circuit explained that the *Marks* rule “only works in instances where “one opinion can meaningfully be regarded as ‘narrower’ than another—only when one opinion is a logical subset of other, broader

170. *Redner v. Dean*, 29 F.3d 1495, 1499 (11th Cir. 1994).

171. *Reese v. City of Columbus*, 71 F.3d 619, 625 (6th Cir. 1995); see also *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) (concluding that “inferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree.”); *Village of Bolingbrook v. Citizens Utils. Co. of Illinois*, 864 F.2d 481, 483 (7th Cir. 1988) (applying *Marks* and concluding that “[o]ur obligation as an inferior court is to apply . . . the least common denominator [from the fragmented Supreme Court decision], the approach contained in Justice Blackmun’s opinion.”); *Morris v. Am. Nat’l Can Corp.*, 988 F.2d 50, 51 (8th Cir. 1993) (“Our reliance on Justice O’Connor’s opinion was premised on the fact that her opinion represented the narrowest grounds for the Court’s decision.”); *Ctr. For Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003) (applying *Marks* rule); *Tijerina v. Offender Mgmt. Review Comm.*, Nos. 03-4054, 03-4134, 2004 WL 161540, at *3 (10th Cir. Jan. 28, 2004).

172. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d. Cir. 2003).

173. *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

174. *Alcan*, 315 F.3d at 188-89 (citing *Apfel*, 524 U.S. at 537).

175. *Id.* at 189.

176. *Id.*

177. *Id.* (citing *Apfel*, 524 U.S. at 499, 537).

178. *Id.* (citing *Apfel*, 524 U.S. at 539).

179. *Id.*

opinions,” . . . that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five justices.”¹⁸⁰ In such circumstances where there is no “common denominator,” the Second Circuit explained that “there is then no law of the land because no one standard commands the support of a majority of the Supreme Court.”¹⁸¹

After explaining that some divided Supreme Court opinions produce no binding precedent under *Marks*, the Second Circuit resumed its analysis of the fractured *Eastern Enterprises* decision and recognized that “[b]ecause the substantive due process reasoning presented in Justice Kennedy’s concurrence is not a logical subset of the plurality’s takings analysis, no “common denominator” can be said to exist among the Court’s opinions.”¹⁸² The Second Circuit then explained that “[t]he only binding aspect of such a splintered decision is its specific result,”¹⁸³ and therefore, “the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to *Eastern Enterprises*.”¹⁸⁴

Similarly, in *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*,¹⁸⁵ the Sixth Circuit concluded that “*Eastern Enterprises* has no precedential effect on this case because no single rationale was agreed upon by the Court.”¹⁸⁶ In *Commonwealth Edison Co. v. United States*,¹⁸⁷ the court came to the same conclusion regarding *Eastern Enterprises*.¹⁸⁸ After setting forth the *Marks* rule, the *Edison* court explained that in splintered “cases where approaches fundamentally differ, no particular standard is binding on an inferior court.”¹⁸⁹ Then, turning to the divided *Eastern Enterprises* case, the *Edison* court held that:

180. *Id.* (citing *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

181. *Id.* at 189 (citing *Rappa v. New Castel County*, 18 F.3d 1043, 1058 (3d Cir. 1994)).

182. *Id.*

183. *Id.*

184. *Id.*

185. 240 F.3d 534 (6th Cir. 2001).

186. *Am. Premier*, 240 F.3d at 552 (citing *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910) (“[T]he principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in [the Supreme Court] or in inferior courts.”)).

187. 46 Fed. Cl. 29 (2000).

188. *Edison*, 46 Fed. Cl. at 39 (footnote omitted).

189. *Id.* (citing *Rappa v. New Castel County*, 18 F.3d 1043, 1058 (3d Cir. 1994); *Texas v. Brown*, 460 U.S. 730, 737 (1983) (criticizing lower courts for following a plurality view that did not command a majority and stating that such a plurality view is not “binding precedent”); *Hertz*, 218 U.S. at 213-14.

[T]hese principles [established in *Marks*] mean that no part of the plurality's reasoning [in *Eastern Enterprises*] constitutes binding precedent. The plurality opinion and Justice Kennedy's concurrence agree in result and focus on similar facts, but share no common denominator in terms of legal rationale. As such, the only part of the plurality opinion that is binding is the specific result—the Coal Act is unconstitutional as applied to Eastern.¹⁹⁰

Similarly, the court in *Combined Properties/Greenbriar Ltd. Partnership v. Morrow*¹⁹¹ reasoned that “Justice Kennedy’s concurrence in the judgment was based on an entirely different rationale from the plurality’s decision. Therefore, no single theory of law was adopted by a majority of the Court, and *Eastern Enterprises* is not entitled to any precedential weight.”¹⁹²

3. The Precedential Effect of *Bazzle* Under the *Marks* Rule

The Fifth Circuit in *Pedcor* erred in treating *Bazzle* as holding, with “clarity,” that “arbitrators, not courts, decide whether an agreement provides for class arbitration[.]”¹⁹³ In applying *Marks*, the Fifth Circuit recognized that Justice Stevens preferred to affirm the state court judgment, and thus the basis for his preferred disposition “fails to constitute the most narrow grounds on which the case was decided.”¹⁹⁴ The Fifth Circuit concluded that “Justice Stevens did *express his agreement*, however, with the principle laid down by the plurality that arbitrators should be the first ones to interpret the parties’ agreement.”¹⁹⁵ Consequently, the Fifth Circuit reasoned that under *Marks* and as a result of Justice Stevens’ “*express[ed] . . . agreement*”¹⁹⁶ with the plurality, *Bazzle* established, with “clarity,”¹⁹⁷ the holding that “arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration[.]”¹⁹⁸

However, contrary to the Fifth Circuit’s wishful thinking, Justice Stevens did *not* expressly agree with the principle set forth in the plu-

190. *Edison*, 46 Fed. Cl. at 39 (footnote omitted).

191. 58 F. Supp. 2d 675 (E.D. Va. 1999).

192. *Id.* at 681.

193. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 359, 363 (5th Cir. 2003).

194. *Id.* at 358.

195. *Id.* at 358-59 (emphasis added).

196. *Id.* at 358.

197. *Id.* at 359.

198. *Id.* at 358.

rality that arbitrators should decide whether an arbitration agreement permits class arbitration. His opinion deliberately avoids expressing agreement on this issue. In the portion of his opinion in which he set forth his dissent, Justice Stevens concluded that the state court's decision to permit a class arbitration was "correct as a matter of law,"¹⁹⁹ and he also concluded that whether or not the state court was the appropriate decision-maker regarding this issue was not challenged by the petitioner and not properly before the Court.²⁰⁰ Justice Stevens explained that the petitioner challenged only the merits of the court's decision "without claiming that it was made by the wrong decision-maker[.]"²⁰¹

Instead of expressly agreeing with the plurality regarding the issue of the correct decision-maker, Justice Stevens was very cautious in simply stating: "*Arguably* the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."²⁰²

Justice Stevens' statement can by no means be construed as expressing consent with the plurality on the specific issue of who is the appropriate decision-maker. He stressed that the issue should not be reached because it was not properly before the Court, and the *Bazzle* plurality *sua sponte* and erroneously chose to address this issue.²⁰³ By prefacing his statement with the word "arguably," it appears Justice Stevens was cautioning that the issue is debatable and subject to argument. The Fifth Circuit misconstrued *Bazzle* by disregarding the word "arguably" and ignoring that Justice Stevens considered the issue improper to resolve, and the Fifth Circuit erred in concluding that Justice Stevens expressly "agreed" with the plurality on this specific issue regarding the appropriate decision-maker. Also, in addition to plainly prefacing his statement with the term "arguably" and stating that the issue was not properly before the Court, Justice Stevens used other language to indicate that he was not agreeing or disagreeing with the specific issue laid down by the plurality. In explaining that the state court was correct in its decision and thus there was no need to vacate the lower court and remand the case as the plurality wished, Justice Stevens was careful to describe the state court's acting as the

199. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 455 (2003). The four-Justice plurality refused to rule on the state court's decision regarding contract interpretation and instead believed that an arbitrator was the appropriate decision-maker. *Id.* at 453.

200. *Id.* at 455 (Stevens, J. concurring in the judgment and dissenting in part).

201. *Id.*

202. *Id.* (emphasis added).

203. *See id.*

decision-maker as merely a “possible error.”²⁰⁴ Justice Stevens was deliberately cautious in not committing himself to one side or the other on this debatable issue of who was the appropriate decision-maker regarding class arbitration. The Fifth Circuit in *Pedcor* was incorrect in ignoring the plain language of Justice Stevens’ separate opinion and concluding that Justice Stevens “did express his agreement” with the plurality on this specific issue of who was the correct decision-maker.²⁰⁵

In sum, with respect to this threshold issue of the correct decision-maker for determining whether a contract permits class arbitration, there are four Justices forming the plurality who believed that an arbitrator was the correct decision-maker.²⁰⁶ Three Justices were in dissent and believed a court was the correct decision-maker,²⁰⁷ while two Justices simply did not reach the merits of this issue.²⁰⁸ *Bazzle* did not establish any binding precedent regarding this particular issue.

The Second Circuit’s application of the *Marks* rule in *Alcan* is instructive in interpreting the precedential effect of *Bazzle* under *Marks*. The Second Circuit explained that the *Marks* rule:

only works in instances where one opinion can meaningfully be regarded as narrower than another—only when one opinion is a logical subset of other, broader opinions, . . . that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five justices.²⁰⁹

In *Alcan*, the Second Circuit determined that the substantive due process rationale set forth in one justice’s concurring opinion in *Eastern Enterprises* was “not a ‘logical subset’²¹⁰ of the plurality’s takings analysis, [and] no ‘common denominator’²¹¹ could be said to exist among the . . . concurring Justices.²¹² Accordingly, there was no binding precedent set forth in *Eastern Enterprises*.²¹³ Similarly, in *Bazzle*,

204. *Id.* (emphasis added).

205. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 358-59 (5th Cir. 2003) (emphasis added).

206. *Bazzle*, 539 U.S. at 447 (Scalia, Souter, Ginsburg & Breyer, JJ.).

207. *Id.* at 455-60 (Rehnquist, C.J., O’Connor & Kennedy, JJ., dissenting).

208. *Id.* at 454-55, 460 (Thomas, J., dissenting on grounds that the FAA was inapplicable in state court, and thus he had no reason to address this issue. Stevens, J., did not reach this issue believing that the plurality had improperly raised it *sua sponte*).

209. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (citations and internal quotations omitted).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

one cannot conclude that Justice Stevens's opinion is a "logical subset"²¹⁴ of the four-Justice plurality's analysis concluding that an arbitrator should determine whether a contract permits class arbitration. As explained above, and contrary to the Fifth Circuit's conclusion in *Pedcor*, Justice Stevens did not expressly agree with the plurality on the specific issue that an arbitrator was the correct decision-maker.²¹⁵ He was cautious to avoid expressing agreement with the plurality on this particular issue, and his preferred disposition of affirming the lower court's judgment was in direct contrast to the plurality's disposition. Thus, under *Marks*, one cannot conclude that *Bazzle* establishes a holding that arbitrators must determine whether class arbitration is permissible.

Although Justice Stevens ultimately did concur in the result, he did not do so on grounds that could be considered a "logical subset" of the plurality's opinion, a "common denominator," or a "position approved by at least five justices."²¹⁶ Justice Stevens recognized "[w]ere I to adhere to my preferred disposition of the case, however, there would be no controlling judgment of the Court. In order to avoid that outcome, and because Justice Breyer's opinion expresses a view of the case close to my own, I concur in the judgment."²¹⁷

In explaining why he was concurring in the result, Justice Stevens cited Justice Rutledge's opinion in *Screws v. United States*,²¹⁸ in which Justice Rutledge expressed his preferred disposition of the case and why he ultimately switched his vote to concur in the result of the plurality to avoid the undesirable outcome of having no controlling judgment:

My convictions are as I have stated them. Were it possible for me to adhere to them in my vote, and for the Court at the same time to dispose of the cause, I would act accordingly. The Court, however, is divided in opinion. If each member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. My views concerning appropriate disposition are more nearly in accord with those stated by Mr. Justice Douglas, in which three other members of the Court concur, than they are with the views of my dissenting brethren who favor outright reversal. Accordingly, in order that disposition may be made of this case, my vote has been cast to reverse the decision of the Court of Appeals and remand the cause to the District Court for further proceedings

214. *Id.*

215. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355 (5th Cir. 2003).

216. *Id.*

217. *Green Tree Fin. Corp., v. Bazzle*, 539 U.S. 444 at 455 (2003).

218. 325 U.S. 91 (1945).

in accordance with the disposition required by the opinion of Mr. Justice Douglas.²¹⁹

Like Justice Rutledge in *Screws*, Justice Stevens, who preferred to affirm the lower court's decision and allow the class arbitration award to stand, believed that his views were more "close" to the views of the plurality than the views expressed by Chief Justice Rehnquist in dissent, who preferred outright reversal of the lower court's decision and viewed the class arbitration that had occurred as impermissible. Like Justice Rutledge in *Screws*, Justice Stevens switched his vote from his preferred disposition to avoid the undesirable outcome of having no controlling judgment for the parties.²²⁰ Appropriately, it has been observed that Justice Rutledge's vote-switching and limited concurrence in the result in *Screws* to avoid the lack of a controlling outcome for the parties prevented the four-Justice plurality opinion in *Screws* from becoming binding precedent.²²¹

Justice Stevens' limited concurrence in the plurality's result in *Bazzle*—in the vein of Justice Rutledge's limited concurrence in *Screws*—should have also prevented the *Bazzle* decision from becoming binding authority. The purpose of Justice Stevens's limited concurrence was to avoid the undesirable outcome of not having a controlling disposition of the case for the parties, and Justice Stevens was cautious to avoid expressing explicit agreement with the plurality on the specific issue of the correct decision-maker, an issue which he considered improper to reach.²²²

In *Olmstead v. L.C. ex rel. Zimring*,²²³ as in *Bazzle*, Justice Stevens also preferred to affirm the lower court's judgment.²²⁴ However, recognizing there were insufficient votes for his preferred disposition, he switched his vote in *Olmstead* and expressly joined not only in the judgment *but also in the rationale set forth in parts of an opinion au-*

219. *Screws*, 325 U.S. at 134 (Rutledge, J., concurring).

220. *Bazzle*, 539 U.S. at 455.

221. See Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2182 (1993) ("Although the plurality opinion [in *Screws*] has been assumed by some lower courts to represent the 'rule' in *Screws*, it did not command a majority of the votes of the Court and thus announced only the judgment of the Court.") (emphasis added and citations omitted); see also *United States v. Reese*, 2 F.3d 870, 880 n.16 (9th Cir. 1993) (indicating that the four-Justice plurality opinion in *Screws* did not become binding until the Supreme Court subsequently revisited the issue and the majority adopted the plurality's rationale) (citations omitted).

222. *Bazzle*, 539 U.S. at 455.

223. 527 U.S. 581 (1999) (Stevens, J., concurring).

224. *Olmstead*, 527 U.S. at 607.

thored by another Justice.²²⁵ The absence of an explicit joinder with the plurality in *Olmstead* suggests an intent not to join the plurality's rationale in *Bazzele*.²²⁶

In *Eastern Enterprises*, the divided Supreme Court opinion in *Alcan*, *Franklin*, *Edison*, and *Morrow* was interpreted as setting forth no binding precedent. The plurality opinion and concurring opinion agreed in result, but the plurality's takings analysis and concurrence's due process analysis "share[d] no common denominator in terms of [a] legal rationale"²²⁷ and therefore produced no binding precedent. Similarly, no common denominator exists in *Bazzele*, and Justice Stevens was careful in *Bazzele* to avoid expressing agreement with the plurality on the issue of the correct decision-maker, an issue that he believed was improper to reach and the very issue that numerous courts are improperly treating as conclusively determined in *Bazzele*.²²⁸ As explained by courts construing splintered Supreme Court decisions like *Bazzele*, where there is no opinion that is a "common denominator" or a "logical subset" of others, such decisions have "no precedential effect."²²⁹

Justice Stevens and the four-Justice plurality described the Supreme Court of South Carolina's holding as consisting of two parts: "(1) that the [particular] arbitration clauses [at issue were] . . . silent as

225. *Id.* at 607-08 (emphasis added).

226. Compare *id.* at 608 ("I join the Court's judgment and Parts I, II, and III-A of its opinion. Cf. . . . *Screws v. United States*") (citation omitted), with *Bazzele*, 539 U.S. at 455 ("I concur in the judgment. See *Screws v. United States*") (citation omitted).

227. *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 39 (2000).

228. Cf. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660 (2004) ("It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach.") (Souter, J., joined by Ginsburg, J.).

229. See *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001); see also *Edison*, 46 Fed. Cl. at 39 (noting in such splintered decisions, "no particular standard is binding on an inferior court"); *Combined Prop./Greenbriar Ltd. P'ship v. Morrow*, 58 F. Supp. 2d 675, 681 (E.D. Va. 1999) (splintered decision "not entitled to any precedential weight"); cf. *Savage v. Premiere Packaging, Inc.*, No. 230591, 2003 WL 1761561, at *1 n.1 (Mich. Ct. App. Apr. 1, 2003) ("[T]he decision is without precedential value because a majority of judges concurred in the result only and did not concur in the rationale underlying the decision."); Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151, 1175 (1994) (A separate opinion concurring in the result may constitute the final vote necessary to resolve the case, "but the effect in such a case is that there is no 'opinion' of the Court and thus no precedent beyond the specific facts of the controversy at hand.") (citations omitted); see also *The Supreme Court, 2002 Term—Leading Cases: III. Federal Statutes And Regulations: C. Federal Arbitration Act*, 117 HARV. L. REV. 410, 414-15 (2003) (succinctly describing *Bazzele* in its annual summaries of Supreme Court opinions as having "resolved nothing"); Igor Kirman, Note, *Standing Apart To Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084 (1995) ("The concurrence in judgment is really a dissent from the rationale of the majority opinion.").

to whether arbitration might take the form of class arbitration,²³⁰ and (2) as a matter of state law, South Carolina permits class arbitration if the arbitration clauses are silent regarding class arbitration or do not prohibit class arbitration.²³¹ With respect to the first part of the holding, there is an issue regarding whether a court or an arbitrator is to make the determination, and as explained above, there was no binding precedent established in *Bazzle* regarding this issue.

If *Bazzle* did not establish binding precedent regarding this issue of the correct decision-maker, did *Bazzle* establish any other holding? The second part of the South Carolina Supreme Court's holding raises an issue of whether the FAA preempts a particular state law of South Carolina. Justice Stevens succinctly addressed this second part of the holding, as well as the first part, by concluding that "[t]here is nothing in the Federal Arbitration Act that precludes either of th[ose two] determinations by the Supreme Court of South Carolina[.]"²³² and thus, the state court decision should simply be affirmed.²³³

What, if anything, did the four-Justice plurality indicate regarding the second part of the holding, which implicates federal preemption over state law under the FAA? It appears that the four-Justice plurality focused on the issue of whether a court or an arbitrator should make the determination that forms the first part of the holding, but the plurality did not expressly address whether the second part of the holding was consistent with and not preempted by the FAA. The plurality explained that if the state court's determination with respect to the first part of the holding was incorrect, *i.e.*, the contracts at issue were *not* silent regarding class arbitration and actually forbade class arbitration, then the state court's "holding is flawed on its own terms[.]"²³⁴ The plurality believed that an arbitrator should first interpret the contract; the arbitrator's interpretation of the contract could possibly render the holding of the state court flawed if the contract were not in fact silent regarding class arbitration.²³⁵ Only if an arbitrator eventually interprets the contract as silent regarding class arbitration, would it then become appropriate to address whether silence can be construed as permitting class arbitration.²³⁶

230. *Bazzle*, 539 U.S. at 447.

231. *Id.*

232. *Id.* at 454-55.

233. *Id.* at 455.

234. *Id.* at 450.

235. *Id.* at 451-52.

236. *Cf. PacifiCare v. Book*, 538 U.S. 401 (2003) (decided two months before *Bazzle* and holding that it would be "premature" and "unusually abstract" for the Court to determine

As recognized above, South Carolina state law provided that an arbitration agreement silent about class arbitration actually permits class arbitration,²³⁷ and this state law raises an issue of FAA preemption. Because the plurality did not go beyond the preliminary question of whether the contracts at issue were indeed silent, believing that the arbitrator should answer this preliminary question, the plurality did not seem to reach the specific issue of preemption. Justice Stevens reached this preemption issue, however, and indicated that the FAA did not preclude the state court from applying this particular state law involving silent agreements.²³⁸ Chief Justice Rehnquist believed that

whether a particular interpretation of the phrase “punitive damages” in an arbitration clause rendered the arbitration clause unenforceable before knowing how an arbitrator would ultimately construe the phrase).

237. *Bazzle*, 539 U.S. at 447 (“South Carolina law interprets the contracts as permitting class arbitration.”); *id.* at 454 (“The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement . . .”).

238. *Id.* at 454-55. As indicated by the dissenting opinion of Justice Thomas in *Bazzle*, it should also be recognized that whether the FAA even applies in state court is open to doubt. *See id.* at 460. *Compare, e.g.,* *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”), *with id.* at 35 (Congress’ intent in passing the FAA “was to create uniform law binding only in the federal courts.”), and *id.* at 31 (“Section 2, like the rest of the FAA, should have no application whatsoever in state courts.”) (O’Connor, J., dissenting, joined by Rehnquist, J.). *See also* *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (“[W]e have held that the FAA’s ‘substantive’ provisions—§§ 1 and 2—are applicable in state as well as federal court . . .”) (citations omitted); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (“In my view, the Federal Arbitration Act (FAA) does not apply in state courts.”) (Thomas, J., dissenting, joined by Scalia, J.); IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT*, § 10.1 (Supp. 1999) (“When enacted in 1925, the FAA was a procedural statute applicable only in federal courts.”). Some state courts have held that Section 2 is binding on state courts. *See Rosen v. SCIL, LLC*, 799 N.E.2d 488, 493 (Ill. App. Ct. 2003) (“It is clear the FAA applies in both state and federal courts.”) (citation omitted); *see also Adler v. Rimes*, 545 So. 2d 421, 422 (Fla. Dist. Ct. App. 1989) (“The Federal Arbitration Act (FAA) is binding on the courts of this state.”). Whether Sections 3 and 4 of the FAA, which set forth the FAA’s enforcement procedures, are applicable in state courts is also questionable. *See, e.g., Volt*, 489 U.S. at 477 n.6 (stating that “we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court”) (citations omitted). *Compare Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1068 (Cal. 1996) (“Section 4 of the [FAA] does not explicitly govern the procedures to be used in state courts.”), *with Adler*, 545 So. 2d at 422 (holding that the FAA is binding on state courts and applying Section 4). However, if Section 2 is properly applicable in state courts, it seems that arbitration agreements would be enforceable in state courts regardless of whether Sections 3 and 4 apply. *See* Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts’ Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 111 & n.96 (1998) (“Since 1983 the Supreme Court has, on multiple occasions, made it clear that the FAA requires state courts, as well as federal courts, to enforce parties’ arbitration agreements. Technically, those holdings only explicitly address section 2 of the Act, but it nonetheless seems clear that state courts have the same obligation as federal courts to enforce the

the holding of the Supreme Court of South Carolina—"that arbitration under the contract could proceed as a class action even though the contract does not by its terms permit class-action arbitration"²³⁹ "contravenes the terms of the contract and is therefore pre-empted by the FAA."²⁴⁰ A discussion of the FAA's preemption over state laws in general and the FAA's preemption over the South Carolina state law construing silence as permitting class arbitration is beyond the scope of this article.²⁴¹ Although Chief Justice Rehnquist believed that class arbitration was improper in this particular case, he did acknowledge that generally "the FAA does not prohibit parties from choosing to proceed on a class-wide basis[.]"²⁴² and this general principle seems implicit in the rationale of Justice Stevens, who believed that the South Carolina Supreme Court's holding was not precluded by the FAA.²⁴³

The analysis in Section II of this article will discuss how the enforcement mechanisms of the FAA would generally operate in connection with class arbitration when the parties "choos[e] to proceed on a class-wide basis[.]"²⁴⁴ assuming no preemption problems arise.

4. The *Garcia* GVR Adds More Confusion to the *Bazzle* Holding

About four months after the Court issued *Bazzle*, the Court used a mysterious procedure that may create even more confusion regarding the precedential effect of *Bazzle*. On October 6, 2003, the Court issued a summary order in *Hughes Electronics Corp., Inc. v. Garcia*,²⁴⁵ the complete text of which appears below:

On petition for writ of certiorari to the Court of Appeal of California, Second Appellate District. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Appeal of California, Second

statute by granting a motion to compel . . . [E]ven if sections 3 and 4 are not held to apply in state court, it is now clear that section 2, and its emanations, impose on state courts duties that are indistinguishable from those imposed by sections 3 and 4 of the FAA.") (citations omitted).

239. *Bazzle*, 539 U.S. at 455 (Rehnquist, J., dissenting).

240. *Id.*

241. See generally MACNEIL, *supra* note 238, § 10 for a discussion regarding the FAA's preemption over state laws.

242. *Bazzle*, 539 U.S. at 459.

243. *Id.* at 455-56.

244. *Id.*

245. 540 U.S. 801 (2003).

Appellate District, for further consideration in light of *Green Tree Financial Corporation v. Bazzle*.²⁴⁶

When the Supreme Court grants a petition for certiorari, vacates the lower court order, and remands for further consideration, the summary order is usually referred to as a “GVR,” which has been described as “a dark corner of Supreme Court practice.”²⁴⁷ Recent articles have implored the Supreme Court for a clarification of this GVR procedure,²⁴⁸ and the *Garcia* GVR may appear confusing in light of the splintered *Bazzle* decision.

The Chemerinsky article explains that the Supreme Court has cautioned that a GVR order is “not a disposition of the merits.”²⁴⁹ Rather, a GVR order is simply an indication from the Supreme Court that intervening precedent is “sufficiently analogous and, perhaps, decisive, to compel reexamination of the case” by the lower court.²⁵⁰ However, a “lower court remains free to reach whatever result it feels appropriate[,]”²⁵¹ and a GVR order “does not create an implication that the lower court should change its prior determination.”²⁵² A GVR order “enabl[es] [a lower court] to consider potentially relevant decisions and arguments that were not previously before it.”²⁵³ The Chemerinsky article also cited a leading Supreme Court treatise to shed some light on the GVR practice:

It seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order and the lower court is being told simply to reconsider the entire case in light of the intervening precedent—which may or may not compel a different result.²⁵⁴

246. *Garcia*, 540 U.S. at 801.

247. Theodore B. Olson & John K. Bush, *Two Recent High Court Cases List GVR Criteria, Court Clarifies When Recent Developments Justify Orders That Grant, Vacate, and Remand*, NAT’L L.J., July 29, 1996, at B10 (citation omitted).

248. Erwin Chemerinsky & Ned Miltenberg, *The Need To Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages Cases*, 36 ARIZ. ST. L.J. 513, 515 (2004) (“This article is a plea for the Supreme Court to clarify the meaning of a GVR order.”); see also Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551 (2004).

249. Chemerinsky & Miltenberg, *supra* note 248, at 517.

250. *Id.* (quoting *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964)); Martin, *supra* note 248, at 564 (citation omitted).

251. Chemerinsky & Miltenberg, *supra* note 248.

252. Martin, *supra* note 248, at 564-65 (citations omitted).

253. *Stutson v. United States*, 516 U.S. 193, 197 (1996).

254. Chemerinsky & Miltenberg, *supra* note 248, at 517 (quoting ROBERT L. STERN, ET AL., *SUPREME COURT PRACTICE* 314, 319 (8th ed. 2002)).

In sum, the Supreme Court has cautioned that a GVR order such as the one issued in *Garcia* is not a decision on the merits, and the *Garcia* GVR simply instructs the lower court to reconsider its decision in light of *Bazzle*.²⁵⁵

A GVR referring a lower court to a plenary decision would give the lower court a chance to re-examine a case using the lens of the new intervening precedent, which was not available at the time of the lower court's first examination of the issues. Such a GVR would appear to be justified because:

a GVR order conserves the scarce resources of . . . [the Supreme] Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue [sic] that it does not appear to have fully considered, assists . . . [the Supreme] Court by procuring the benefit of the lower court's insight before . . . [the Supreme Court] rule[s] on the merits, and alleviates the "[p]otential for unequal treatment" that is inherent in . . . [the Supreme Court's] inability to grant plenary review of all pending cases raising similar issues[.]²⁵⁶

But, how should the appellate court in *Garcia* interpret the GVR it received that instructed it to reconsider its decision in light of the splintered *Bazzle* decision, which failed to set forth binding precedent?

In *Garcia*, the plaintiff filed a demand for class arbitration before the American Arbitration Association, identifying claims against DirecTV, a digital home satellite television services provider.²⁵⁷ Subsequently, the plaintiff filed a class action in court against DirecTV.²⁵⁸ The trial court in *Garcia* "found that it, not the arbitrator, would have to determine the class action issues, and that the merits of the underlying dispute would then be decided by the arbitrator."²⁵⁹ Accordingly, the trial court granted DirecTV's motion to compel arbitration, "but only after determination of the class action certification issues 'by the court.'"²⁶⁰ DirecTV then appealed the trial court's order, contending

255. See, e.g., *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) ("We also reject Tyler's attempt to find support in our disposition in *Adams v. Evatt*," a GVR order, because the order did not constitute a "final determination on the merits.") (citation omitted).

256. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (citations omitted). But see Chemerinsky & Miltenberg, *supra* note 248, at 517-18 (criticizing the Supreme Court's use of the "short and cryptic" GVR order which may appear "inherently ambiguous" to lower courts).

257. *Garcia v. DirecTV, Inc.*, No. B158570, 2002 WL 31769224, at *1 (Cal. Ct. App. Dec. 11, 2002).

258. *Id.*

259. *Id.*

260. *Id.* (explaining that "[p]rocedurally, the court granted the motion to compel arbitration but stayed enforcement of that order 'pending the court's ruling on a class certification motion.'")

that class arbitration is not permitted under the FAA and that *Blue Cross of California v. Superior Court*,²⁶¹ a prior California appellate case that had authorized class arbitration in appropriate circumstances when the arbitration agreement was silent on the issue, was either wrong or distinguishable.²⁶²

DirecTV's appeal occurred prior to the Supreme Court's decision in *Bazzle*, and it does not appear that DirecTV's appeal focused on the threshold issue of whether a court or an arbitrator was the correct decision-maker regarding class arbitration. Instead, DirecTV's appeal focused on whether class arbitration was permissible.²⁶³ The appellate court, which rendered its decision prior to *Bazzle*, concluded that *Blue Cross* was indistinguishable from the case before it, and thus, the appellate court relying on *Blue Cross* affirmed the lower court's order.²⁶⁴

What were the Justices thinking in GVR'ing the *Garcia* case to be reconsidered in light of the splintered *Bazzle* decision? A lower court receiving such an order may, at first glance, assume that the *Bazzle* decision must contain binding precedent if the Supreme Court has ordered reconsideration in light of it. However, as discussed above, *Bazzle* did not establish binding precedent.²⁶⁵

The *Garcia* GVR seems odd because the lower court's reconsideration was to be undertaken in light of a splintered opinion setting forth no binding law. In issuing the GVR, the Court could not have been flagging a new law in *Bazzle* for the lower appellate court to consider in reexamining the case because no new law was established in *Bazzle*. Rather, it is possible that the GVR order was simply flagging or inviting the appellate court to take a crack at the bat in examining *de novo* the threshold, *but undecided*, issue of who was the correct decision-maker for the appellate court, a threshold issue that was not raised on appeal by the parties in *Garcia* and that the Supreme Court in *Bazzle* failed to resolve.

Although this particular use of the GVR procedure may seem unusual,²⁶⁶ the issuance of the *Garcia* GVR can be construed as consis-

261. 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998).

262. *Garcia*, 2002 WL 31769224, at *2.

263. See Appellant's Opening Brief at *2, *Garcia v. DirecTV, Inc.*, No. B158570, 2002 WL 32147423 (describing the issue presented on appeal as "[w]hether the trial court's order staying arbitration and ordering the parties to conduct class certification proceedings is erroneous as a . . . when the parties' arbitration agreement expressly provides that arbitration is to be conducted pursuant to the Federal Arbitration Act, which does not permit class arbitrations absent the parties' agreement.").

264. *Garcia*, 2002 WL 31769224, at *4.

265. See discussion *infra* Part I.C.3.

266. See Martin, *supra* note 248, at 559-60 (recognizing that the Supreme Court has or-

tent with some standards the Supreme Court had previously identified in connection with the issuance of GVRs. Some members of the Supreme Court²⁶⁷ apparently believed that the *Garcia* GVR order would “enabl[e] [the lower court] to consider potentially relevant . . . arguments [e.g., arguments regarding the threshold issue of the correct decision-maker,] that were not previously before it.”²⁶⁸ Also, issuing the *Garcia* GVR would help conserve the Supreme Court’s resources and assist the Supreme Court in future cases by obtaining the lower court’s insight on issues left unresolved by *Bazzle*.²⁶⁹ If lower courts begin reaching their own conclusions regarding issues like the appropriate decision-maker (instead of incorrectly concluding that *Bazzle* settled the issue once and for all), then the next time the issue appears before the Supreme Court, the Court may benefit from lower courts’ reasoning regarding this issue, and perhaps one position will garner five votes to become the law of the land. In sum, *Bazzle*

dered a GVR “in response to intervening Supreme Court precedent, federal statutes, state supreme court decisions, state statutes, agency regulations, proposed changes in state agency policies, changes in position by the Solicitor General or a state attorney or solicitor general, changed factual circumstances, new local federal appellate procedures, ongoing district court proceedings, and the introduction of new contentions on appeal.”).

267. The number of votes for a GVR order to be issued is not entirely clear and appears to be part of the mystery surrounding GVRs. It seems that either a Justice or a former law clerk had previously divulged in a confidential interview that the “Rule of Six” applies when summarily disposing of a certiorari petition, such as through a summary reversal, and some have suggested that, because a GVR resembles a summary reversal, the issuance of a GVR also requires six votes. *See id.* at 567 n.96 (citations omitted). However, because some GVRs have issued over the dissent of four Justices, there is some doubt regarding the Rule of Six. *Id.* (collecting cases); *see also* J. Mitchell Armbruster, Note, *Deciding Not To Decide: The Supreme Court’s Expanding Use of the “GVR” Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota*, 76 N.C. L. REV. 1387, 1399-1400 (1998). In *Bazzle*, the vote was 4-1-3-1, and it is not readily apparent how the Justices voted in connection with the *Garcia* GVR. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 444 (2003).

268. *Stutson v. United States*, 516 U.S. 193, 197 (1996). It is also possible that one or more of the Justices voting in favor of the *Garcia* GVR wanted the lower court to address one or more other issues raised in the splintered *Bazzle* opinion like preemption or the permissibility of class arbitration in general.

269. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

[A] GVR order conserves the scarce resources of [the Supreme Court] that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists [the Supreme] Court by procuring the benefit of the lower court’s insight before [the Supreme Court] rule[s] on the merits, and alleviates the ‘[p]otential for unequal treatment’ that is inherent in [the Supreme Court’s] inability to grant plenary review of all pending cases raising similar issues.

Id.

has established no precedent, and the *Garcia* GVR seems to be a subtle invitation to lower courts that has been left unanswered.

Without binding precedent from the Supreme Court in *Bazzle*, it seems reasonable that the appellate court in *Garcia* upon receiving the GVR should have undertaken a fresh examination of the undecided issues raised in *Bazzle* and implicated in *Garcia*, such as who is the correct decision-maker regarding whether the contracts provide for class arbitration. After receiving the GVR, the appellate court in *Garcia* should have come to its own independent conclusions, relying on cases other than *Bazzle*.²⁷⁰ However, after the issuance of the *Garcia* GVR, the appellate court in *Garcia*, like several other courts, misconstrued the precedential effect of *Bazzle* and forcefully concluded that “[t]he Supreme Court has spoken, and the foundational issue—whether a particular arbitration agreement prohibits class arbitrations—must (in FAA cases) henceforth be decided by the arbitrators, not the courts.”²⁷¹ Based on this fictional *Bazzle* holding, the appellate court in *Garcia* reversed the trial court.²⁷²

5. Flawed Interpretations of *Bazzle*

Courts, the American Arbitration Association, and arbitrators are treating *Bazzle* as setting forth the flawed holding that arbitrators, and not courts, should determine whether an arbitration agreement provides for class arbitration:

- “[T]he Supreme Court determined that the issue of whether an arbitration clause allowed class arbitration was a matter for the arbitrator, not the court, to decide.”²⁷³
- “The United States Supreme Court has held that whether an agreement to arbitrate allowed class arbitration is itself a dispute subject to arbitration.”²⁷⁴

270. The Chemerinsky article criticizes the Supreme Court’s practice of issuing GVR orders and implores the Supreme Court to clarify the meaning of GVR orders by, *inter alia*, setting forth in each GVR order certain language about the meaning of such order. Chemerinsky & Miltenberg, *supra* note 248, at 517-18, 525-26 (criticizing the use of the “short and cryptic” GVR order which may appear “inherently ambiguous” to lower courts and suggesting that the Supreme Court should clarify the meaning of GVR orders). The *Garcia* GVR would have perhaps been the ideal candidate for including clarifying language in the order.

271. *Garcia v. DirecTV, Inc.*, 9 Cal. Rptr. 3d 190, 191 (Cal. Ct. App. 2004).

272. *Id.* at 191, 196.

273. *Omar v. Ralphs Grocery Co.*, 13 Cal. Rptr. 3d 562, 566 (Cal. Ct. App. 2004).

274. *Franciscan Med. Group v. Premera Blue Cross*, No. 29010-3-II, 2003 WL 22794545, at *9 (Wash. Ct. App. Nov. 2, 2003).

- “[T]he Supreme Court held that it was for an arbitrator to decide whether the contracts at issue prohibited class arbitration.”²⁷⁵
- The Supreme Court held, with “clarity, . . . that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration.”²⁷⁶
- “[T]he availability of class-wide arbitration is an issue that must be decided by the arbitrator in the first instance.”²⁷⁷
- “A recent Supreme Court case specifically states that the arbitrator, not the court, should determine whether class arbitration is permitted by an ambiguous contract [Accordingly], this Court does not have the authority to decide whether the contract permits class arbitrations.”²⁷⁸
- The “United States Supreme Court . . . conclud[ed] that an arbitrator, not a court, should decide the question of contract interpretation involved in the issue whether ‘class arbitration’ could take place.”²⁷⁹
- “*Green Tree* established that in FAA cases, whether a particular arbitration agreement prohibits class arbitrations is an issue to be decided by the arbitrators and not the courts.”²⁸⁰
- “The FAA . . . permit[s] arbitrators to decide whether class actions may be arbitrated under a particular contractual provision Because we are remanding for arbitration, we leave this issue for the arbitrator to decide.”²⁸¹

275. *Reyes v. Equifax Credit Info. Servs.*, No. 03 C 1377, 2003 WL 22922190, at *2 (N.D. Ill. Dec. 10, 2003).

276. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 335, 359 (5th Cir. 2003); *see also Walker v. Countrywide Credit Indus., Inc.*, No. Civ.A.3:03-CV-0684-N, 2004 WL 246406, at *8 (N.D. Tex. Jan. 15, 2004) (stating that the Fifth Circuit in *Pedcor* recognized that “the clear import of *Green Tree* is that ‘arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration.’”).

277. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1126-27 (D. Kan. 2003); *see also id.* at 1127 (describing *Pedcor* as “analyzing *Bazzle* and concluding that the arbitrator must first decide whether class arbitration is available or forbidden where the arbitration agreement does not clearly forbid class arbitration.”).

278. *Johnson v. Long John Silver’s Rests., Inc.*, No. 3:01-1526, 2004 WL 1302268, at *9 (M.D. Tenn. July 7, 2004).

279. *Birmingham News Co. v. Horn*, Nos. 1020552-57, 2004 WL 1293993, at *25 (Ala. Jun 11, 2004).

280. *Deluna v. La Salsa Holding Co.*, No. B164161, 2004 WL 1112788, at *7 (Cal. Ct. App. May 19, 2004).

281. *Orkin Exterm. Co. v. Petsch*, 872 So. 2d 259, 266 (Fla. Dist. Ct. App. 2004) (citations omitted).

- The Supreme Court held that “question of whether contract prohibited or permitted arbitration of class action was for arbitrator to decide.”²⁸²
- “[T]he question of whether these claims may be submitted to arbitration as a class action is for the arbitrator to decide.”²⁸³
- “After *Green Tree Financial Corp. v. Bazzle*, the issue of whether a contract, silent about whether a claimant may maintain a class or collection action, permits such an action, is clearly for an arbitrator to decide.”²⁸⁴
- “In its June 23, 2003 decision in *Green Tree Financial Corp. v. Bazzle*, the United States Supreme Court held that where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted.”²⁸⁵

However, *Bazzle* does not establish the law of the land. It is incorrect to treat the divided *Bazzle* decision as a plenary decision establishing a binding holding that arbitrators, and not courts, should determine whether an arbitration agreement provides for class arbitration.²⁸⁶ The splintered *Bazzle* decision creates no binding precedent for lower courts under the *Marks* rule, and it seems that the Supreme Court through the *Garcia* GVR may have issued a subtle invitation for lower courts to address independently the issues raised in *Bazzle*.²⁸⁷ With the exception of the Fifth Circuit in *Pedcor*, the re-

282. *Lakeland Anesthesia, Inc. v. United Healthcare of Louisiana, Inc.*, 871 So. 2d 380, 389 n.15 (La. Ct. App. 2004).

283. *Flynn v. Labor Ready, Inc.*, 775 N.Y.S.2d 357, 359 (N.Y. App. Div. 2004) (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) and *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 335 (5th Cir. 2003).

284. *Clause Construction Award, Goldstein v. Ibase Consulting of Fairfield County, LLC*, 11 160 02760 03, at http://www.adr.org/upload/LIVESITE/Rules_Procedures/Topics_Interest/GoldsteinAward.pdf (last visited Nov. 14, 2004).

285. American Arbitration Association Policy on Class Arbitration, at http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/Rules_Procedures/Topics_Interest/AAA%20Class%20Action%20policy.htm (last visited Nov. 15, 2004).

286. Courts are already compounding their error by using the fictional *Bazzle* holding to overturn FAA case law regarding other issues. For example, the Fifth Circuit in *Pedcor* explained that “Green Tree has effectively overruled our holding in *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987).” *Pedcor*, 343 F.3d at 363. In *Del E. Webb*, the Fifth Circuit held that a court, not an arbitrator, must determine whether consolidation of arbitrations is permitted. 823 F.2d 145, 151 (5th Cir. 1987). The *Pedcor* court, applying the “holding” of *Bazzle*, concluded that “[t]o the extent that the issue of consolidation in arbitration is analogous to class arbitration, *Green Tree*’s holding that arbitrators, not courts, decide whether an agreement provides for class arbitration would appear to overrule *Del E. Webb*’s holding to the contrary.” 343 F.3d at 363.

287. Even assuming *arguendo* that the plurality opinion in *Bazzle* established binding

ported decisions that have erroneously treated *Bazze* as establishing a holding have thus far provided little or no analysis regarding the appropriate interpretation of a splintered Supreme Court opinion. In the future, courts should apply the *Marks* analysis and conclude that *Bazze* established no binding precedent.

II. SUGGESTED APPROACH FOR HANDLING CLASS ARBITRATION UNDER THE FAA

Courts construing splintered Supreme Court decisions like *Bazze*, where there is no opinion that is a “common denominator” or a “logical subset” of others, have concluded that such decisions have “no precedential effect,”²⁸⁸ except for the specific result in the particular case before the Supreme Court.²⁸⁹ However, left without a binding precedent from the splintered *Bazze* decision, courts are still bound by precedent established before *Bazze*.

precedent, most lower courts’ descriptions of the purported “holding” are overly simplified. Under the plurality’s rationale, a court, and not an arbitrator, may still under certain circumstances make the determination whether a contract permits class arbitration, and therefore it would be erroneous for a court following *Bazze*’s plurality to conclude that an arbitrator must always make the determination regarding class arbitration. The arbitration provisions in *Bazze* were broad clauses covering “[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.” *Bazze*, 539 U.S. at 445. The plurality reasoned in part that because a dispute about what the terms of an arbitration contract means is a dispute “relating to this contract,” *id.*, the parties had previously agreed that an arbitrator would resolve an issue of contract interpretation such as whether the arbitration agreement forbids class arbitration. *Id.* at 448. However, what would happen if an arbitration clause was not as broad in scope as the clause at issue in *Bazze*? In *Camferdam v. Ernst & Young Int’l, Inc.*, No. 02 Civ. 10100(BSJ), 2004 WL 1124649 (S.D.N.Y. May 19, 2004), the arbitration clause at issue was narrower than the clauses in *Bazze* and provided for arbitration of “[a]ny controversy or claim arising out of or relating to tax and tax related services.” *Id.* at *2. The court, comparing the clause at issue to the ones in *Bazze*, reasoned that instead of “embodying an agreement to arbitrate any claim arising out of the parties’ agreement, the clause limits arbitration to disputes relating to the tax services Defendants were to provide to Plaintiffs.” *Id.* The court held that it, and not an arbitrator, had to resolve a disputed issue of contract interpretation. *Id.* The court, citing *Bazze*, explained that “[h]ad the parties intended to submit these types of contract interpretation issues to an arbitrator, they should have included a broader arbitration clause.” *Id.*

288. *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001).

289. *Id.* at 552; *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (“The only binding aspect of such a splintered decision is its specific result,” and therefore, “the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises.”); see also *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 39 (2000) (stating that in such splintered decisions, “no particular standard is binding on an inferior court”); *Combined Props./Greenbriar Ltd. v. Morrow*, 58 F. Supp. 2d 675, 681 (E.D. Va. 1999) (splintered decision “not entitled to any precedential weight”).

When faced with a fragmented Supreme Court decision of “no precedential effect,”²⁹⁰ courts have routinely relied upon authority other than the divided Supreme Court decision to resolve their cases. In *Morrow*, for example, the court concluded that because “no single theory of law was adopted by a majority of the Court, . . . *Eastern Enterprises* is not entitled to any precedential weight. As a result, the Fourth Circuit’s decision in *United States v. Monsanto*, [which predated *Eastern Enterprises*] . . . has not been disturbed and remains controlling.”²⁹¹ If a splintered opinion sets forth no binding authority, courts should independently examine whether other decisions exist that may control or guide them in resolving the dispute before it.²⁹²

290. *Id.* at 552.

291. *Morrow*, 58 F. Supp. 2d at 681; see *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988); see also *Franklin*, 240 F.3d at 552-53 (recognizing that “[p]rior to *Eastern Enterprises*, myriad courts had sustained the constitutionality of the retrospective application of CERCLA to pre-enactment conduct” and relying on rulings from Supreme Court decisions other than the splintered *Eastern Enterprises* case in order to resolve the case before it); *Alcan*, 315 F.3d at 189 (recognizing that “courts considering the issue prior to the *Eastern Enterprises* decision consistently agreed that the retroactive liability scheme of CERCLA is constitutional” and resolving the dispute before it in accord with such authority); *Edison*, 46 Fed. Cl. at 39 (recognizing that “numerous courts [applying *Marks*] have . . . observ[ed] that *Eastern* essentially leaves takings law unaffected”); cf. *Marks v. United States*, 430 U.S. 188, 192-93 (1977) (recognizing that the appellate court would have been correct in its analysis if the Supreme Court’s splintered decision had no precedential effect and instead “the last comparable plenary decision of this Court” remained the law of the land).

292. A few courts, most noticeably the Third Circuit, have taken a different approach when confronting a splintered Supreme Court case that fails to establish a binding precedent under the *Marks* rule, and this approach entails examining whether the party at issue is in a “substantially identical” position as the party before the Supreme Court with respect to both the plurality and concurring opinions. See, e.g., *Berwind Corp. v. Comm’r of Social Security*, 307 F.3d 222, 234-42 (3d Cir. 2002). However, this “substantially identical” approach is inapplicable to *Bazzle*.

Under this “substantially identical” approach, courts still have conceded that a splintered Supreme Court decision may produce no binding holding for lower courts. *Id.* at 234. Under this “substantially identical” approach, if the party at issue is in a “substantially identical” position as the party before the Supreme Court with respect to both the plurality and concurring opinions, the lower court reasons that the Supreme Court would reach the same result in the new case, and thus the lower court is justified in reaching the same conclusion as it predicts the Supreme Court would reach. For example, assume that the plurality in a divided Supreme Court opinion held that a particular statute was unconstitutional as applied to Person X based on rationale 1, and a concurring opinion concluded the statute was unconstitutional as applied to Person X based on rationale 2. Assume further that under the *Marks* rule, this case produced no binding precedent. A new individual, Person Y, now approaches a lower court, claiming that the same statute at issue in the divided Supreme Court opinion is unconstitutional as applied to it. Under the “substantially identical” approach, if Person Y would be “substantially identical” to Person X with respect to both the plurality and concurring opinions, even though the splintered Supreme Court decision established no binding precedent, it is perhaps rational to predict that the Supreme Court would reach the same result in this new case as it did in the older case (i.e., a plurality would rule for Person Y based on rationale 1, and the concurring justices would reach the same result with respect to Person Y based on rationale 2), and the lower court would justify reaching the same conclusion on the basis that

Henceforth, instead of incorrectly concluding that the Supreme Court in *Bazzle* established that arbitrators are to resolve whether contracts permit class arbitration and instead of overturning other FAA case law based on the flawed premise that *Bazzle* is somehow controlling, courts should rely on other authority to develop their own reasoned opinions regarding class arbitration issues and simply treat *Bazzle* “as a point of reference for further discussion.”²⁹³

Authority exists to serve as guideposts for courts in addressing class arbitration issues. A suggested framework based on core arbitration law principles will be set forth in this second section of the article. Whatever approach is ultimately adopted in handling class arbitration issues, courts as well as arbitrators must be extremely vigilant in respecting the foundational principle that arbitration is, first and foremost, a matter of agreement. Section II.A. examines how the existence of an arbitration agreement is a crucial issue when courts compel arbitration, and this section also explores the procedure under the FAA used by courts in connection with non-class arbitration to determine whether a valid arbitration agreement exists. Section II.B. then discusses that compelling an entire class to arbitrate may be problematic under the procedure established under the FAA. Section II.C. examines the role of opt-outs in connection with class proceedings, and Section II.D. then explains how procedures used in connection with non-class arbitration may be used in connection with class arbitration.

the Supreme Court would likely issue yet another divided opinion and reach the same result if it had to address this new case.

This approach may appear justified in situations where the facts critical to the plurality and concurring opinions’ rationales were also identical in the case before the lower court, and in such situations, it may be reasonable to predict that the Supreme Court may reach the same outcome in this new case. However, this “substantially identical” approach, which is premised on the predictability of the Supreme Court’s result, would collapse if applied in the *Bazzle* situation. If someone with facts similar to *Bazzle* were before the Supreme Court again, it is not certain that the same result would occur. For example, if this new case properly raised the issue of the appropriate decision-maker, an issue Justice Stevens declined to rule on, it is not certain how Justice Stevens would rule on this matter. Moreover, if the new case arose in federal court, Justice Thomas may also choose to address the issue. This “substantially identical” approach used primarily in the Third Circuit would not be appropriate for use in connection with the splintered *Bazzle* decision. Rather, courts should rely on other authority and come to their own conclusions regarding class arbitrations. See, e.g., *Morrow*, 58 F. Supp. 2d at 681 (“*Eastern Enterprises* is not entitled to any precedential weight. As a result, the Fourth Circuit’s decision in *Monsanto*, [which pre-dated *Eastern Enterprises*] . . . has not been disturbed and remains controlling.”).

293. *Texas v. Brown*, 460 U.S. 730, 737 (1983) (stating that “[w]hile the lower courts generally have applied the *Coolidge* plurality’s discussion of ‘plain view,’ it has never been expressly adopted by a majority of this Court,” and recognizing that such a plurality view fails to establish “binding precedent” and should be treated as a “point of reference for further discussion of the issue”) (plurality opinion).

Section II.E. then examines whether a court or arbitrator should determine whether an arbitration agreement provides for class arbitration.

A. The Core Principle That Arbitration is a Matter of Agreement and the Enforcement of Arbitration Agreements under the FAA

Prior to the enactment of the FAA in 1925, a deep-rooted judicial hostility to the enforcement of arbitration agreements had existed at English common law and had been adopted by American courts. Congress decided to reverse the hostility by passing the FAA.²⁹⁴ The FAA, which today is divided into three chapters,²⁹⁵ “establish[es] and regulat[es] the duty to honor an agreement to arbitrate.”²⁹⁶

A cardinal principle forming the foundation of federal arbitration law is that arbitration is a matter of agreement between the parties,²⁹⁷

294. *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 & n.6 (1985)). In *Dean Witter*, the Supreme Court elaborated upon Congress’ purpose in enacting the FAA:

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.

Dean Witter, 470 U.S. at 220 n.6 (quoting H.R. REP. NO. 96-68, at 1-2 (1924)).

295. 9 U.S.C. §§ 1-16 is primarily concerned with domestic arbitration. Chapter 2, 9 U.S.C. §§ 201-208, and Chapter 3, 9 U.S.C. §§ 301-307, deal with international arbitration. This article will focus on domestic arbitration under Chapter 1. For a discussion regarding Chapters 2 and 3, see generally John P. Bowman, *The Panama Convention And Its Implementation Under The Federal Arbitration Act*, 11 AM. REV. INT’L ARB. 1 (2000) (explaining that Chapter 2 of the FAA implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and Chapter 3 of the FAA implements the Inter-American Convention on International Commercial Arbitration).

296. *Mitsubishi*, 473 U.S. at 625 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 & 25 n.32 (1983)).

297. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”); *McCarthy v. Azure*, 22 F.3d 351, 354 (1st Cir. 1994) (“We start with bedrock: ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.’”) (citations omitted); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 779 (2d Cir. 1995) (“Arbitration is strictly a matter of contract.”) (citation omitted); *Delgrosso v. Spang & Co.*, 769 F.2d 928, 933 (3d Cir. 1985) (“It is an elementary principle that arbitration is a matter of contract . . .”) (citation and internal quotations omitted); *HCMF Corp. v. District 28*, 117 F.3d 1413 (Table), 1997 WL 382026, at *1 (4th Cir. July 9, 1997) (“Arbitration is a matter of private contract.”) (citation omitted); *Smith Barney Shearson, Inc. v.*

and this principle is reflected in several sections of Chapter 1 of the FAA.²⁹⁸ Other well-established principles of arbitration flow directly from the central idea that arbitration is a matter of agreement. First, an arbitrator's authority derives from the agreement of the parties. "[A]ny power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties. He has no independent source of jurisdiction apart from the consent of the parties."²⁹⁹

Boone, 47 F.3d 750, 752 (5th Cir. 1995) ("In *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643 (1986), the Supreme Court reaffirmed the basic principle outlined in its earlier decisions that 'arbitration is a matter of contract'; *Aspero v. Shearson Am. Exp., Inc.*, 768 F.2d 106, 107 (6th Cir. 1985) ("[A]ny duty to arbitrate is founded on a contractual obligation."); *Geneva Sec., Inc. v. Johnson*, 138 F.3d 688, 691 (7th Cir. 1998) ("The Supreme Court's *Steelworkers Trilogy* makes clear a 'first principle' of federal arbitration law: '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.") (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); *Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1099 (8th Cir. 1999) ("Arbitration is a creature of contract."); *Francesco's B., Inc. v. Hotel and Rest. Emp. and Bartenders Union, Local 28*, 659 F.2d 1383, 1387 (9th Cir. 1981) ("The duty to arbitrate depends solely on the contractual agreement of the parties to settle their disputes in that manner."); *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir. 1993) ("Arbitration is a matter of contract."); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1221 (11th Cir. 2000) ("It is well established that arbitration is a creature of contract") (citation and internal quotations omitted); *Blake Const. Co. v. Laborers' Intern. Union of North Am.*, AFL-CIO, 511 F.2d 324, 327 (D.C. Cir. 1974) ("[A] duty to arbitrate rests on contract[.]"); *see also* H.R. REP. NO. 68-96, at 1 (1924) ("Arbitration agreements are purely matters of contract, and the effect of this bill is simply to make the contracting party live up to his agreement.").

298. *MCI Telecomms. Corp. v. Exalon Indus., Inc.*, 138 F.3d 426, 429 (1st Cir. 1998) ("The need for an agreement . . . manifests itself throughout the various provisions of [the FAA].").

299. *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986); *see also* *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293 (11th Cir. 2004) ("arbitration is a creature of contract, and thus the powers of an arbitrator extend only as far as the parties have agreed they will extend"); *Int'l Med. Group, Inc. v. Am. Arbitration Ass'n, Inc.*, 312 F.3d 833, 842 (7th Cir. 2002) ("arbitrators derive their authority to resolve disputes from the prior agreement of the parties to submit their grievances to arbitration") (citation omitted); *R.J. O'Brien & Assocs., Inc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir. 1995) ("The arbitrators' powers are derived from the parties' agreement.") (citation omitted); *George Day Constr. Co. v. United Bd. of Carpenters, Local 354*, 722 F.2d 1471, 1474 (9th Cir. 1984) ("[A]n arbitrator's jurisdiction is rooted in the agreement of the parties."); *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981) ("In sum, the genesis of arbitral authority is the contract, and arbitrators are permitted to decide only those issues that lie within the contractual mandate."); *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979) ("Arbitration is contractual and arbitrators derive their authority from the scope of the contractual agreement."); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3d Cir. 1972) ("It is, of course, fundamental that the authority of the arbitrator springs from the agreement to arbitrate."); *Lundgren v. Freeman*, 307 F.2d 104, 109-10 (9th Cir. 1962) ("The scope of the arbitrators' power rests ultimately on the agreement of the parties.") (citations omitted); *Smith Wilson Co. v. Trading & Dev. Establ't*, 744 F. Supp. 14, 16 (D.D.C. 1990) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration") (quoting *AT&T Techs., Inc. v. Communications Workers of America* 475 U.S. 643, 648-649 (1986)); *Bowater North Am. Corp. v.*

The entire arbitral process, including the role of the private third parties who serve as arbitrators, is legitimized by the agreement of the parties to submit to arbitration, and the end result of the arbitral process, an arbitrator's decision resolving the dispute between the parties, is tantamount to an agreement between the parties.³⁰⁰ If an arbitrator were permitted to exercise decision-making authority beyond the authority conferred by the agreement of the parties, such exercise of authority would likely chill the willingness to enter into arbitration agreements. The entire arbitral scheme acknowledged by the FAA finds its roots firmly embedded in the contractual obligation of the parties.³⁰¹

A second well-established principle flowing from the central tenet that arbitration is simply a matter of contract is that, before a court may compel parties to submit to arbitration, the court should first determine the threshold issue of whether a valid agreement to arbitrate exists between the parties. "The rationale for such an inquiry [regarding the existence of an arbitration agreement] comes from the fact that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" ³⁰² It has long been recognized that because arbitration is a matter of contract, "no arbitration may be compelled in the absence of an agreement to arbitrate."³⁰³ By sanctioning arbitral proceedings with-

Murray Mach., Inc., 604 F. Supp. 821, 822-23 (D. Tenn. 1984) ("As a matter of black letter law arbitration is a matter of contract, and the contours of the arbitrator's authority in a given case are determined by reference to the arbitral agreement."); cf. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties." *Id.* (citation omitted).

300. *E. Assoc'd. Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 62 (2000) ("[W]e must treat the arbitrator's award as if it represented an agreement between [the parties]. . . . For present purposes, the award is not distinguishable from the contractual agreement.") (citation omitted).

301. *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1286 (10th Cir. 1997) ("[T]he FAA was not enacted to force parties to arbitrate in the absence of an agreement.").

302. *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1048 (9th Cir. 1996) (quoting *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994) *cert. dismissed*, 515 U.S. 1187 (1995) (citing *United Steel Workers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))).

303. *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107-08 (3d Cir. 2000); see also *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) ("[I]f there was never an agreement to arbitrate, there is no authority to require a party to submit to arbitration."); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty.").

out a rigorous determination that the parties had actually agreed to arbitrate, courts would be undermining the arbitration process and potentially forcing an unconsenting party to undergo a somewhat Kafkaesque arbitral proceeding.

“Sections 2, 3 and 4 of [the FAA] are the key statutory provisions governing the substantive and procedural law associated with arbitration cases and the enforceability of arbitration agreements”³⁰⁴ Section 2,³⁰⁵ recognized by the Supreme Court as “the primary substantive provision”³⁰⁶ and the “centerpiece” of the FAA,³⁰⁷ declares that “a written agreement to arbitrate ‘in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”³⁰⁸ Section 2 represents a “congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”³⁰⁹ The Supreme Court has described the statutory scheme of the FAA as:

provid[ing] two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4. Both of

304. *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 451 (4th Cir. 1997).

305. 9 U.S.C. § 2 (2004).

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

307. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

308. *Moses H. Cone*, 460 U.S. at 24 (quoting 9 U.S.C. § 2 (2004)).

309. *Id.* at 22. Out of the sixteen sections in Chapter 1, the primary sections directly implicated by a party's request to compel arbitration are Sections 2, 3, and 4. With respect to the other Sections, Section 1 sets forth definitions of the terms “maritime transaction” and “commerce,” and through the definitions, exempts from the coverage of the act contracts of transportation workers. 9 U.S.C. § 1 (2004) (exempting “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”); *see also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (“Section 1 exempts from the FAA only contracts of employment of transportation workers.”). Section 5 deals with court appointment of arbitrators, 9 U.S.C. § 5 (2004), and Section 6 provides that an application to the court under Title 9 is to be treated procedurally as a motion, 9 U.S.C. § 6 (2004). Section 7 concerns compelling the attendance of witnesses before arbitrators. 9 U.S.C. § 7 (2004). Section 8 deals with admiralty claims. 9 U.S.C. § 8 (2004). Section 9 deals with confirmation of arbitration awards, 9 U.S.C. § 9 (2004) and Sections 10, 11, 12, and 13 deal with vacating, modifying, and correcting arbitration awards, 9 U.S.C. §§ 10-12 (2004). Section 14 provides that Title 9 does not “apply to contracts made prior to January 1, 1926.” 9 U.S.C. § 14 (2004). Section 15 provides that the Act of State doctrine is inapplicable to the enforcement of “arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards,” 9 U.S.C. § 15 (2004), and Section 16 involves appeals of orders regarding arbitration, 9 U.S.C. § 16 (2004).

these sections call for an expeditious and summary hearing, with only restricted inquiry into factual issues.³¹⁰

These mechanisms help ensure that the core principle of arbitration law, that arbitration is a matter of contract, is dutifully respected. As observed by the Supreme Court:

“[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered,” a concern which “requires that we rigorously enforce agreements to arbitrate.” Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.³¹¹

Likewise, every federal circuit court of appeals has steadfastly guarded the core principle that arbitration is a matter of contract and has validated the entire arbitral process by requiring courts to undertake a critical threshold examination of whether a valid agreement to arbitrate exists between the parties before issuing an order compelling arbitration.³¹²

310. *Moses H. Cone*, 460 U.S. at 22; *see also* *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 452 (4th Cir., 1997) (“[The FAA’s] enforcement provisions, sections 3 and 4, execute the purpose of section 2.”).

311. *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (alteration in original) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

312. *See, e.g., InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003) (“[A]rbitration is a matter of contract” and a court must find “that a valid agreement to arbitrate exists” before compelling parties to arbitrate.) (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citing *United Steel Workers of Am. v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582 (1960))); *Mehler v. Terminix Int’l Co.*, 205 F.3d 44, 49 (2d Cir. 2000) (before compelling parties to arbitration, the court must “determine[] the threshold issue of whether an arbitration agreement exists”); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1114 (3d Cir. 1993) (“[A]s a matter of contract, no party can be forced to arbitrate unless that party has entered an agreement to do so.” Thus, before it compels arbitration, a court should determine “that a valid agreement to arbitrate exists between the parties”) (quoting *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)); *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001) (“In order for a court to compel arbitration, the court must first find that an arbitration agreement exists between the parties.”); *Banc One Acceptance Corp. v. Hill*, No. 03-60356, 2004 WL 831240, *2 (5th Cir. Apr. 19, 2004) (“The first step of the process [in deciding whether parties should be compelled to arbitrate a dispute] entails determining ‘whether there is a valid agreement to arbitrate between the parties’”) (citing *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996)); *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 393 (6th Cir. 2003) (“Before a court can send a case to arbitration, it must first determine that a valid agreement to arbitrate exists.”); *N. Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 275 (7th Cir. 1982) (“A party cannot be required to arbitrate a dispute which he has not agreed to arbitrate” and in a proceeding to compel arbitration “the sole issue is the existence of an agreement to arbitrate the dispute.”); *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994) (“[U]nder the Federal Arbitration Act, the district court must engage in a limited inquiry to determine whether a valid agreement to arbitrate exists between the parties”); *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363

Section 4, which sets forth the particular enforcement procedure to obtain such an order, helps safeguard the core principle that arbitration is a matter of contract.³¹³ Section 4 provides that a court shall not

F.3d 1010, 1012 (9th Cir. 2004) (“[T]he district court’s role [in compelling arbitration] is limited to determining whether a valid arbitration agreement exists”); *Avedon Eng’g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997) (“Before granting a stay of litigation pending arbitration, a district court must determine that an agreement to arbitrate exists.”); *Benoay v. Prudential-Bache Sec., Inc.*, 805 F.2d 1437, 1440 (11th Cir. 1986) (“A court may not order arbitration unless and ‘until it is satisfied that a valid arbitration agreement exists.’”) (citing *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 853 (11th Cir. 1986)); *Bethlehem Steel Corp. v. Grace Line, Inc.*, 416 F.2d 1096, 1106 (D.C. Cir. 1969) (“Arbitration is . . . a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,” and thus “a party’s obligation to arbitrate . . . ‘is a matter to be determined by the Court’”) (internal footnotes omitted) (first quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960), then *Atkison v. Sinclair Ref. Co.*, 370 U.S. 238, 241 (1962)); *Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1358 (Fed. Cir. 2004) (it is “the responsibility of the judiciary to resolve the gateway dispute of whether an agreement to arbitrate exists”). However, it should be noted that parties may agree to submit an arbitrability issue directly to an arbitrator. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

313. While Section 3 provides for an order staying litigation, 9 U.S.C. § 3 (2004), Section 4 provides for an order compelling the parties to litigate, 9 U.S.C. § 4 (2004). Courts have granted requests to compel arbitration pursuant to Section 4 in two main scenarios: (1) when a defendant in a pending suit moves to compel arbitration of plaintiff’s claims, see, for example, *Gouger v. Bear, Stearns & Co.*, 823 F. Supp. 282, 288 (E.D. Pa. 1993); and (2) when a petitioner commences an independent proceeding in court seeking to compel the respondent to arbitrate see, for example, *CitiFinancial, Inc. v. Lipkin*, 143 F. Supp. 2d 657, 663 (N.D. Miss. 2000). Courts have sometimes indicated that a defendant moving to compel arbitration should do so under Section 3 rather than Section 4. *See, e.g., McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 849 F.2d 761, 763 n.1 (2d Cir. 1988) (noting that although the appellant sometimes referred to its motion to compel arbitration as brought under Sections 3 and 4, Section 4 deals with an independent proceeding brought to compel arbitration and Section 3 covers a party seeking a stay in the context of an ongoing lawsuit). *But see Garten v. Kurth*, 265 F.3d 136, 144 (2d Cir. 2001) (reversing district court’s denial of defendants’ motion to compel arbitration of plaintiff’s claims); *Gregory v. Interstate/Johnson Lane Corp.*, 188 F.3d 501 (Table), 1999 WL 674765, at *8 n.8 (4th Cir. Aug. 31, 1999) (“The district court held that the Eleventh Circuit’s reliance on 9 U.S.C. § 4 was misplaced since § 4 only applies when there is a suit seeking to compel arbitration and not when the defendant in a suit in district court seeks to dismiss or stay pending arbitration. We reject this position”); *First Liberty Inv. Group v. Nicholsberg*, 145 F.3d 647, 648 (3d Cir. 1998) (reversing the district court’s denial of defendant’s motion to compel arbitration after concluding that agreement to arbitrate existed and that the dispute fell within the scope of the arbitration agreement).

It appears that it has become fairly commonplace for defendants to request, and for courts to grant, an order compelling arbitration under Section 4 and an order staying litigation under Section 3 in an already-pending action. *See, e.g., Madol v. Dan Nelson Auto. Group*, 372 F.3d 997, 998 (8th Cir. 2004) (reversing the lower court and finding that the defendant’s motion to compel arbitration and stay litigation pursuant to Sections 3 and 4 should have been granted); *May v. Higbee Co.*, 372 F.3d 757, 758 (5th Cir. 2004) (reversing the district court’s denial of defendant’s motion to compel arbitration and stay litigation pursuant to Sections 3 and 4). Seeking relief pursuant to both sections seems justified. For example, the Supreme Court has recognized that relief under Section 3 may be inadequate in some situations. *See, e.g., Moses H. Cone*, 460 U.S. at 27.

In many cases, no doubt, a § 3 stay is quite adequate to protect the right to arbitra-

order arbitration until it is “satisfied that the making of the agreement for arbitration . . . is not in issue”³¹⁴ However, “[i]f the making of

tion. But in a case such as this, where the party opposing arbitration is the one from whom payment or performance is sought, a stay of litigation alone is not enough. It leaves the recalcitrant party free to sit and do nothing—neither to litigate nor to arbitrate.

Id. Relief under Section 3 also may be inadequate for a party who desires to minimize the uncertainties regarding potential liability due to the threat of claims. Regardless of the underlying motivation, it now appears routine for courts to grant a defendant’s motion pursuant to both Sections 3 and 4 seeking both a stay of pending litigation as well as an affirmative order compelling arbitration.

In evaluating such motions brought under both Sections 3 and 4, courts often apply one basic analysis, without really distinguishing between the two sections. *See, e.g.,* Minter v. Freeway Food, Inc., No. 103CV00882, 2004 WL 735047, at *2 (M.D.N.C. Apr. 02, 2004) (“Generally, four issues must be considered when determining whether to stay proceedings and compel arbitration: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal of the defendant to arbitrate the dispute.”); *Trodden v. Pinkerton’s Inc.*, No. 4:02-CV-90494, 2003 WL 21516580, at *3, *5-6 (S.D. Iowa May 8, 2003) (In addressing the defendant’s motion to compel and stay proceedings, the court’s role is to “determine whether there is a valid agreement to arbitrate and whether the specific dispute at issue falls within the substantive scope of that agreement,” and to grant defendant’s motion after concluding “there is no genuine issue of material fact concerning the agreement of the parties to arbitrate”) (quoting *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083, 1085 (8th Cir. 2001)); *Phox v. Atriums Mgmt. Co.*, 230 F. Supp. 2d 1279, 1282, 1283 (D. Kan. 2002) (recognizing that “[the movant] must present evidence which is sufficient to demonstrate an enforceable agreement to arbitrate” and denying movant’s motion to compel arbitration and stay litigation because the movant “has not met its burden to show a meeting of the minds on the purported agreement to arbitrate”); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1336 (D. Kan. 2000) (“[The movant] must present evidence sufficient to demonstrate the existence of an enforceable agreement to arbitrate.”); *Morales v. Rent-A-Center, Inc.*, 306 F. Supp. 2d 175, 184-85 (D. Conn. 2003) (finding “the evidence presented by [non-movant] insufficient to create a genuine issue of material fact concerning the existence or scope of the agreement” and granting motion to compel arbitration and stay litigation).

This article assumes that a request for an order to compel arbitration, whether through an independent action or by a defendant moving to compel arbitration, is encompassed by Section 4, as courts have routinely treated such requests. Moreover, even if a defendant’s request to compel arbitration is more appropriately covered by Section 3, the core principle that arbitration is matter of agreement is reflected in both Sections. It is beyond dispute that arbitration cannot be compelled pursuant to Section 4, and a stay of litigation cannot be ordered to permit arbitration to proceed under Section 3, unless a valid agreement to arbitrate exists. *Compare* 9 U.S.C. § 3 (2004) (“upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement”) with 9 U.S.C. § 4 (2004) (“upon being satisfied that the making of the agreement for arbitration . . . is not in issue”). As explained above and as recognized by the Supreme Court, relief under Section 3 may be inadequate for certain individuals, *Moses H. Cone*, 460 U.S. at 27, and thus to the extent that Section 4 is inapplicable to defendants’ motions to compel arbitration and the only other recourse would be relief under Section 3 (which is contrary to the routine practice of many courts), Congress should amend the enforcement procedures of the FAA.

314. 9 U.S.C. § 4 (2004) Section 4 reads in full:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district

the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof.³¹⁵ In evaluating motions to compel arbitration pursuant to Section 4 and ensuring an arbitration agreement exists, courts have applied a standard similar to that applicable for a motion for summary judgment. For example, in *Oppenheimer & Co. v. Neidhardt*,³¹⁶ the Second Circuit explained that:

[T]o put [the making of the arbitration agreement] in issue, it is not sufficient for the party opposing arbitration to utter general denials of the facts on which the right to arbitration depends. If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried.³¹⁷

court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 4.

315. 9 U.S.C. § 4 (As explained in more detail below, the trial regarding the making of the agreement may be a bench trial, or if proper notice is given, a jury trial.) 9 U.S.C. § 4.

316. 56 F.3d 352 (2d Cir. 1995).

317. *Oppenheimer*, 56 F.3d at 358 (citations omitted). Courts addressing a Section 3 motion for a stay have also used a similar summary judgment procedure to fulfill the core principle of arbitration law and determine whether the parties are bound by a valid arbitration agreement. See, e.g., *Choice v. Option One Mortg. Corp.*, No. Civ. A. 02-6626, 2003 WL 22097455, at *3 (E.D. Pa. May 13, 2003) ("When confronted with a motion to stay proceedings pursuant to 9 U.S.C. § 3, the appropriate standard of review for the district court is that employed in evaluating motions for summary judgment under FEDERAL RULE OF CIVIL PROCEDURE 56(c)."); See *Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096, 1103 (2d Cir. 1987) (where the application for an order compelling arbitration was supported by evi-

The party seeking an order for arbitration in *Oppenheimer* had produced sufficient evidence that it was entitled to arbitration, but the “[non-moving party’s] evidence failed to meet the thrust of the [moving party’s] evidence. It failed to raise a genuine issue of fact for trial.”³¹⁸ Thus, the Second Circuit affirmed the lower court’s order granting the motion to compel arbitration pursuant to Section 4 because the making of the arbitration agreement was not in issue, and a trial on such issue was therefore unnecessary.³¹⁹

When a party moves to compel arbitration under Section 4, “this [summary judgment type standard] requires the [movant] to present evidence sufficient to demonstrate an enforceable agreement to arbitrate.”³²⁰ Typically, when filing a motion to compel arbitration, the movant attempts to discharge its burden by submitting the purported agreement to arbitrate by means of an affidavit authenticating the

dence of entitlement, “[a] party resisting arbitration on the ground that no agreement to arbitrate exists must submit sufficient evidentiary facts in support of this claim in order to precipitate the trial contemplated by 9 U.S.C. § 4.”). See also *Interocean Shipping Co. v. Nat’l Shipping & Trading Corp.*, 462 F.2d 673, 676 (2d Cir. 1972); cf. FED. R. CIV. P. 56(c), (e); see also *supra* note 313 (It has become rather common for parties to file motions pursuant to both Sections 3 and 4, and courts’ analyses in determining whether the dispute is arbitrable do not really distinguish between the two sections.).

318. *Oppenheimer*, 56 F.3d at 358.

319. *Id.*; see also *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1116 (D. Kan. 2003) (“The Courts of Appeals have uniformly held that ‘[i]n the context of motions to compel arbitration brought under the Federal Arbitration Act (‘FAA’), 9 U.S.C. § 4 (2000), courts apply a standard similar to that applicable to a motion for summary judgment.’”); *Great Earth Cos. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002)

If the district court is satisfied that the agreement to arbitrate is not ‘in issue,’ it must compel arbitration. If the validity of the agreement to arbitrate is ‘in issue,’ the court must proceed to a trial to resolve the question. In order to show that the validity of the agreement is ‘in issue,’ the party opposing arbitration must show a genuine issue of material fact as to the validity of the agreement to arbitrate. The required showing mirrors that required to withstand summary judgment in a civil suit.

Id. (citations omitted); *Doctor’s Assocs., Inc. v. Distajo*, 107 F.3d 126, 129-30 (2d Cir. 1997)

Although a party may demand a jury trial when issues respecting arbitrability are ‘in issue,’ 9 U.S.C. § 4, we have cautioned that ‘[a] party resisting arbitration . . . bears the burden of showing that he is entitled to a jury trial.’ As when opposing a motion for summary judgment under Fed. R. Civ. P. 56, the party requesting a jury trial must ‘submit evidentiary facts showing that there is a dispute of fact to be tried.’

Id. (quoting first *Doctor’s Associates, Inc. v. Stuart* 85 F.3d 975, 983 (2d Cir. 1996), (quoting *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992) and *Oppenheimer*, 56 F.3d at 358); *Brown v. Dorsey & Whitney, LLP*, 267 F. Supp. 2d 61, 67 (D.D.C. 2003) (the summary judgment standard applies in evaluating a motion to compel arbitration).

320. *In re Universal Serv.*, 300 F. Supp. 2d at 1117.

agreement,³²¹ in which the affiant may also set forth the circumstances surrounding and establishing the making of the agreement. However, if the movant fails to demonstrate the existence of an arbitration agreement, the court denies the motion to compel arbitration, thereby enforcing the core principle that arbitration is a matter of agreement.³²²

Once the movant has presented sufficient evidence to demonstrate an enforceable arbitration agreement:

the burden shifts to [the non-movant] to demonstrate a genuine issue of material fact as to the making of the agreement to arbitrate. To accomplish this, the facts ‘must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein.’ If the [non-movant] demonstrates a genuine issue of material fact, then a trial on this issue is required.³²³

If the non-movant fails to establish a genuine issue of material fact, no trial is required, and the court may determine that an agreement exists based on the submitted papers.³²⁴ However, if there is a genuine dispute such that the making of the arbitration agreement is “in issue,”

321. See, e.g., *Mixon v. Park Place Motors*, No. 3-02-CV-0800-L, 2002 WL 32438777, at *2 (N.D. Tex. Sept. 9, 2002) (“[The movant] has properly authenticated the arbitration agreement through the Affidavit of Lee Ann Bengé, Vice President of Human Resources for Park Place Motors.”).

322. See, e.g., *Smith v. Devlin Partners, LLC.*, No. Civ.A.03-2380-KHV, 2004 WL 1490401, at *3 (D. Kan. July 2, 2004) (“[The movant] has not authenticated the documents which it contends create the arbitration agreement,” and, “[b]ecause [the movant] has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the Court overrules its motion to compel arbitration.”); *Harleysville Mut. Ins. Co. v. GE Reinsurance Corp.*, No. Civ. A. 02-171, 2002 WL 922148, at *3-5 (E.D. Pa. May 6, 2002) (striking portions of movant’s affidavit because of inadmissible statements and denying movant’s request that matter be sent to arbitration).

323. *In re Universal Serv.*, 300 F. Supp. 2d at 1117 (citing *Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992))); see also *Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096, 1103 (2d Cir. 1987) (“A party resisting arbitration on the ground that no agreement to arbitrate exists must submit sufficient evidentiary facts in support of this claim in order to precipitate the trial contemplated by 9 U.S.C. § 4.”); *Almacenes Fernandez, S. A. v. Michael Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945).

Had a genuine issue been raised as to [the making of the arbitration agreement] the appellant could have demanded a jury trial as of right under § 4 of the Arbitration Act, 9 U.S.C. § 4 To make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial.

Id.

324. See, e.g., *Gibbs v. PFS Invs., Inc.*, 209 F. Supp. 2d 620, 625, 627 (E.D. Va. 2002) (concluding “that no triable issue exists with regard to the validity of the parties’ agreement” and compelling arbitration without a trial).

“the court shall proceed summarily to the trial thereof.”³²⁵ The trial regarding the making of the agreement may be a bench trial or a jury trial under Section 4, depending on whether the non-moving party makes a timely demand for a jury.³²⁶

Also, in the context of motions to compel arbitration, courts may sometimes permit parties to engage in limited discovery regarding the critical issue of the making of the arbitration agreement. For example, in *Hooters of America, Inc. v. Phillips*,³²⁷ the court permitted “limited discovery in the form of interrogatories, requests to produce and five depositions.”³²⁸ The court reasoned that “in order for [the non-movant] to respond properly to the [motion to compel arbitration], she was entitled to limited discovery relative to the circumstances surrounding the making of the alleged arbitration agreement.”³²⁹ Another

325. 9 U.S.C. § 4 (2004); *see also* Bank of Am., N.A. v. Diamond State Ins. Co., No. 01-9075, 2002 WL 1378683, at *2 (2d Cir. June 26, 2002) (“[W]e hold that sufficient evidence has been produced substantiating an unequivocal denial that the agreement was made and thereby warranting a trial.”); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854-55 (11th Cir. 1992) (Because a substantiated denial of the non-movant indicates a genuine dispute regarding the making of an arbitration agreement, “it is clear that [the non-movant] is entitled to a trial on the issue of whether or not she is bound by the customer agreements.”); *A/S Custodia v. Lessin Int’l, Inc.*, 503 F.2d 318, 320 (2d Cir. 1974) (ordering trial regarding making of arbitration agreement because of disputed issues of fact on this issue); *Institut Pasteur v. Chiron Corp.*, 315 F. Supp. 2d 33, 39-40 (D.D.C. 2004) (denying motion to compel arbitration “because it is not clear beyond genuine dispute that there was a meeting of the minds . . . on an agreement to arbitrate” and, pursuant to Section 4, ordering trial regarding the existence of the agreement to arbitrate because of the “conclusion that the existence of an arbitration agreement is at issue”); *Prevost v. Burns Int’l Sec. Servs. Corp.*, 126 F. Supp. 2d 439, 442 (S.D. Tex. 2000) (“[Non-movant’s] sworn affidavit, in combination with the two arguably distinct signature types seen by the Court, is sufficient to carry [non-movant’s] burden and create an issue for factual determination [regarding the making of an arbitration agreement] under 9 U.S.C. § 4,” and thus a trial is warranted.).

326. *See* 9 U.S.C. § 4 (2004)

If no jury trial be demanded by the party alleged to be in default, . . . the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, . . . on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.

Id. (emphasis added); *see also* Blatt v. Shearson Lehman/Am. Express Inc., No. 84 Civ. 7715-CSH, 1985 WL 2029, at *2 (S.D.N.Y. July 16, 1985) (“[The non-movant] has not made a timely demand for jury trial under section 4 of the Act, which required such a demand on or before the return day of [movant’s] notice of application to compel arbitration . . . Accordingly the issue will be resolved by summary trial to the Court”); *Dassero v. Edwards*, 190 F. Supp. 2d 544, 557 (W.D.N.Y. 2002) (“In the case at bar, plaintiffs have made a *timely* demand for a jury trial [under Section 4].”) (emphasis added).

327. 39 F. Supp. 2d 582 (D.S.C. 1998).

328. *Hooters*, 39 F. Supp. 2d at 591.

329. *Id.*

court has characterized such discovery as “useful” to resolve the crucial threshold issue of whether an arbitration agreement exists.³³⁰

After it is certain that a valid agreement to arbitrate exists between the parties, a court usually proceeds to determine whether the dispute at issue falls within the scope of that agreement before compelling arbitration. Courts have summarized the general procedure as follows:

Before a party may be compelled to arbitrate under the Federal Arbitration Act, the district court must engage in a limited inquiry to determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the scope of that agreement. A federal court must stay court proceedings and compel arbitration once it determines that the dispute falls within the scope of a valid arbitration agreement.³³¹

330. *Blatt*, 1985 WL 2029, at *2.

I will schedule a bench trial on this issue [regarding the making of the purported arbitration agreement] after the parties have completed pre-trial discovery, which in my experience is useful in preparing such issues for resolution. Depositions should be taken of both plaintiffs, and of representatives of defendants with knowledge of the facts, in order to ascertain the circumstances under which the agreement attached to the motion papers came into being During the course of discovery, Mrs. Blatt will also be required, if so requested by defendants, to provide known samples of her handwriting, and to execute handwriting exemplars.

Id.; see also *H.L. Libby Corp. v. Skelly & Loy, Inc.*, 910 F. Supp. 195, 200 & n.2 (M.D. Pa. 1995) (“Because the parties have not adequately addressed the issue of whether their contract included the agreement to arbitrate contained in the Standard Terms and Conditions, we will permit a limited period for discovery and the filing of briefs,” and such “[d]iscovery shall be limited to the issue of whether the agreement to arbitrate was part of the parties’ contract.”); *Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963, 966 (S.D.N.Y. 1996) (finding that discovery is needed “as it should help to clarify several disputed issues of fact that may or may not give rise to special circumstances rendering the U-4 arbitration agreement unenforceable.”):

The parties shall be permitted to conduct limited discovery . . . concerning the making of the agreement to arbitrate between plaintiff and defendant. All such discovery shall be completed by February 1, 2000. “Completed” means that all discovery, objections, motions to compel and all other motions and replies relating to discovery in this action must be filed and/or noticed in time for the party objecting or responding to have opportunity under the Federal Rules of Civil Procedure to make response. “All discovery” includes all disclosures and discovery except the disclosures required by [Federal Rule of Civil Procedure] 26(a)(3).

Kincaid v. Commercial Credit Corp., No. CIV. A. 2:98-0842, 1999 WL 33510175, at *6 (S.D. W. Va. Nov. 16, 1999); *Donato v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 663 F. Supp. 669, 677 (N.D. Ill. 1987) (“[P]arties are directed to prepare an expedited discovery schedule” regarding the existence of the purported arbitration agreement.).

331. *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694-95 (8th Cir. 1994) (citation omitted); see also *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 392 (6th Cir. 2003) (before compelling arbitration, a court must, *inter alia*, “determine whether the parties agreed to arbitrate” and “determine the scope of that agreement”); (citation omitted); *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537 (5th Cir. 2003):

In sum, the entire procedure that has developed in evaluating motions to compel arbitration is designed to ensure that arbitration is a matter of agreement.³³²

The FAA provides that written agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³³³ The Supreme Court has held in light of Section 2 that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements[,]”³³⁴ and has cautioned that “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”³³⁵ Other courts have similarly explained that “generally applicable state-law contract defenses like fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability, may invalidate arbitration agreements.”³³⁶

In honoring the core principle that arbitration is a matter of contract, courts have refused to compel arbitration in a variety of situa-

The first question to be addressed in adjudicating a motion to compel arbitration under the FAA is “whether the parties agreed to arbitrate the dispute in question. This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.”

Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533, 537 (5th Cir. 2003) (quoting *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996) (citations omitted)).

When parties have entered into a valid and enforceable agreement to arbitrate their disputes and the dispute at issue falls within the scope of that agreement, the FAA requires federal courts to stay judicial proceedings, see 9 U.S.C. § 3, and compel arbitration in accordance with the agreement’s terms, see 9 U.S.C. § 4

Murray v. United Food & Commercial Workers Int’l Union, 289 F.3d 297, 301 (4th Cir. 2002)

332. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“Arbitration under the [FAA] is a matter of consent, not coercion,” and “the FAA is at bottom a policy guaranteeing the enforcement of private contractual arrangements.”) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614, 625); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984) (“[Section 4] comports with the statute’s underlying premise that arbitration is a creature of contract”) (quoting the district court’s opinion); *Comprehensive Accounting Corp. v. Ruddell*, 760 F.2d 138, 140 (7th Cir. 1985) (“[T]he premise of [Section 4] is the existence of an agreement to arbitrate, and the section sets out a procedure for determining whether there was such an agreement in the particular case.”).

333. 9 U.S.C. § 2 (2004).

334. *Doctors’ Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

335. *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

336. *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 498 (6th Cir. 2004).

tions. For example, in *Prevot v. Phillips Petroleum Co.*,³³⁷ the court refused to compel two of the employees to arbitrate in accordance with the terms of arbitration agreements they signed.³³⁸ The affidavits submitted by some of the employees indicated that they could not read English at the time of signing the agreements, and they testified they were pressured into signing the agreements.³³⁹ The court found that under these particular circumstances, the contracts of these employees were procedurally unconscionable and unenforceable, and thus, the court could not compel them to arbitrate.³⁴⁰ Also, in *Brennan v. Bally Total Fitness*,³⁴¹ the district court denied the defendant's motion to compel arbitration where the defendant gave the plaintiff insufficient time to review the agreement and used other high-pressure tactics.³⁴²

In *Fazio v. Lehman Bros., Inc.*,³⁴³ clients of a stockbroker sued the brokerage houses that had employed the stockbroker who had allegedly engaged in fraud, and the brokerage houses moved to compel arbitration.³⁴⁴ The Sixth Circuit explained that "[u]nder the [FAA], a district court must make a number of threshold determinations before compelling arbitration . . . [including] whether the parties agreed to arbitrate,"³⁴⁵ and the court also recognized that a claim of fraud in the inducement of the arbitration clause could invalidate the clause.³⁴⁶ In addressing whether valid arbitration agreements existed, the Sixth Circuit explained that "[b]ecause some parties raise issues specific to

337. 133 F. Supp. 2d 937, 941 (S.D. Tex. 2001).

338. *Prevot*, 133 F. Supp. 2d at 941.

339. *Id.* at 940.

340. *Id.* at 941; *see also* *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 536, 540 (5th Cir. 2003) (salesperson's purported misrepresentation to an illiterate consumer that arbitration agreements were merely loan documents could amount to fraud in the inducement of the arbitration agreement and holding that the district court should adjudicate this issue); *Kingston v. Ameritrade, Inc.*, 12 P.3d 929, 933-34 (Mont. 2000) (concluding plaintiff husband and wife's claim that they never received a copy of the specific terms and conditions regarding arbitration created a genuine dispute as to whether an arbitration agreement existed and remanding for the district court to determine whether a valid agreement existed); *Spahr v. Secco*, 330 F.3d 1266, 1273-1275 (10th Cir. 2003) (affirming the lower court's denial of a motion to compel arbitration due to the plaintiff's diminished mental capacity).

341. 198 F. Supp. 2d 377 (S.D.N.Y. 2002);

342. *Brennan*, 198 F. Supp. 2d at 383-84; *see also* *Am. Gen. Fin., Inc. v. Branch*, 793 So.2d 738, 751-52 (Ala. 2000) (*per curiam*) (finding one consumer's arbitration agreement unconscionable due to particular circumstances at the time of its making, but refusing to hold another consumer's arbitration agreement unconscionable under her different set of circumstances).

343. 340 F.3d 386 (6th Cir. 2003).

344. *Fazio*, 340 F.3d at 391.

345. *Id.* at 392.

346. *Id.* at 393, 397.

their arbitration agreements and because the record below is undeveloped in this regard, we are unable to conclude whether the arbitration agreements here are valid.”³⁴⁷ The court concluded there were “fact-intensive issues” to be resolved, such as whether the particular agreements were obtained by forgery, and there were also issues of whether “a trust was bound by the signature of its trustee on separate accounts containing arbitration agreements and signed in an individual capacity.”³⁴⁸ The Sixth Circuit, therefore, remanded the case in order to allow the district court to resolve these individualized, fact-intensive issues and determine the threshold question of whether each of the arbitration agreements was valid.³⁴⁹

In *Casteel v. Clear Channel Broadcasting, Inc.*,³⁵⁰ four individuals sued their former employer for discrimination, and the defendant employer moved to stay the litigation and compel arbitration.³⁵¹ The terms of the arbitration agreements, which allegedly bound each of the four employees, were identical.³⁵² However, the circumstances surrounding the purported making of each agreement differed, and after the court had analyzed the evidence regarding each plaintiff’s alleged making of the agreement, the court determined that none of the four plaintiffs were bound to arbitrate.³⁵³ With respect to one plaintiff, the defendant had failed to produce sufficient evidence of an agreement.³⁵⁴ Although there was testimony that a copy of an employment guide containing the arbitration clause was placed on her desk or in her workplace mailbox, it was not proven that the first plaintiff actually received or understood the guide’s contents, and there was no proof that this employee had signed an acknowledgment of receipt of the guide.³⁵⁵ With respect to two other plaintiffs, the court found that, although they had signed an acknowledgment of receipt, they were not bound by their signature due to unconscionability.³⁵⁶ These two plaintiffs were forced to sign the acknowledgement when their supervisor presented each with a form and demanded that it be signed while he

347. *Id.* at 397.

348. *Id.*

349. *Id.* at 397-98.

350. 254 F. Supp. 2d 1081 (W.D. Ark. 2003).

351. *Id.* at 1083.

352. *Id.* at 1085 n.2.

353. *Id.* at 1089-90.

354. *Id.* at 1089.

355. *Id.*

356. *Id.* at 1089-90.

stood over them.³⁵⁷ While these three plaintiffs purportedly entered into an arbitration agreement while they were already employed, the fourth plaintiff was a new hire who had signed an employment application that stated she agreed to be bound by an arbitration agreement if she became an employee, but the application did not provide details regarding the arbitration agreement.³⁵⁸ Although after she became employed she did sign two separate acknowledgments of receipt of the employee guide containing the arbitration clause, she signed these acknowledgments because she was told to sign immediately and return the form as soon as possible, and a manager was “standing at her desk impatiently waiting” for her signature.³⁵⁹ The court explained that “[u]nder these facts, we cannot find that mutuality of agreement has been demonstrated or that a binding contract to arbitrate was formed with regard to [the fourth plaintiff].”³⁶⁰ Accordingly, because the defendant had failed to demonstrate that any of the plaintiffs were bound by a valid arbitration agreement, the court denied the defendant’s motion to stay the proceedings and compel arbitration.³⁶¹

To summarize, in making sure that a valid arbitration agreement exists before issuing an order compelling arbitration, courts evaluate motions to compel arbitration under a standard similar to that applicable for a motion for summary judgment in making sure that a valid arbitration agreement exists before issuing an order compelling arbitration.³⁶² 9 U.S.C. section 4 provides that “[f]ive days’ notice in writing of such application [to compel arbitration] shall be served upon the party in default,”³⁶³ and service must occur in the manner provided by the Federal Rules of Civil Procedure.³⁶⁴ The moving party must present sufficient evidence of a valid agreement to arbitrate, and the party allegedly in default must be given an opportunity to present contrary

357. *Id.*

358. *Id.* at 1090.

359. *Id.*

360. *Id.*

361. *Id.*; see also *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 554 (4th Cir. 2001) (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)). (“[I]t is undisputed that fee splitting [provisions] can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the [individual] access to the arbitral forum.”) In *Bradford*, the Fourth Circuit explained that in determining the enforceability of an arbitration agreement in connection with a claim that the fee splitting provisions therein render the agreement unenforceable, courts should engage in a “case-by-case analysis that focuses, among other things, upon the claimant’s ability to pay the arbitration fees and costs.” *Id.* at 556.

362. 9 U.S.C. § 4 (2004).

363. *Id.*

364. *Id.*

evidence and also, within a certain time fixed by the statute, an opportunity to request a jury trial in case there is a genuine dispute regarding the making of the agreement.³⁶⁵ If a genuine issue exists as to the making of the agreement and the party allegedly in default has timely requested a jury trial, a jury trial is held, and if there was no timely request, a bench trial must occur regarding the critical issue of the making of the agreement.³⁶⁶ Furthermore, discovery may be permitted for the parties to collect more evidence regarding the making of the agreement, and courts have engaged in a fact-intensive, individualized inquiry to ascertain whether a valid arbitration agreement exists.³⁶⁷ Under this detailed procedure, courts in the course of enforcing arbitration agreements under the FAA stand as sentinels who protect the core principle that arbitration is a matter of agreement.

B. Is the FAA's Enforcement Procedure Consistent with Compelling an Entire Class to Arbitrate?

Suppose that one person or entity called Blue Tree entered into individual contracts with thousands of its customers providing for class arbitration, and one of these customers files a class action lawsuit in federal court against Blue Tree along with a motion to certify a class consisting of all these other individual customers. Blue Tree then moves to compel arbitration, and the court grants both motions, certifying a class and compelling arbitration. This hypothetical situation resembles what occurred in the *Pedcor* and the *Bazzles*' proceedings. In *Pedcor*, the lower court certified a class for purposes of arbitration and was about to issue an order compelling arbitration,³⁶⁸ and although not entirely clear, it appears that the lower court in *Pedcor* had certified a non-opt-out class.³⁶⁹ In the *Bazzles*' proceedings, the

365. *Id.*

366. *Id.*

367. *Id.*

368. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 335, 357 & n.2 (5th Cir. 2003).

369. The Fifth Circuit in *Pedcor* had granted *Pedcor*'s petition for permission to appeal the class certification order pursuant to Fed. R. Civ. P. 23(f). However, the Fifth Circuit did not discuss the trial court's certification order in detail or analyze the appellant's arguments regarding the purported infirmities of the certification order. Based on the "authority" of *Bazzle*, the Fifth Circuit held that the arbitrator should determine whether class arbitration is permitted, and thus the Fifth Circuit washed its hands of dealing with the allegedly flawed certification order. *Pedcor*, 343 F.3d at 363 ("As we hold today that, pursuant to *Green Tree*, arbitrators should decide whether class arbitration is available or forbidden, we do not address the parties' other arguments on appeal . . ."). Based on the available briefs on appeal, the appellant characterized the certification order as ambiguous regarding which subdivision of

trial court “issued two separate orders memorializing its rulings on December 5, 1997: (1) an order granting class certification; and (2) an order compelling arbitration In a supplemental order issued January 7, 1998, the trial court ordered that the class action in arbitration proceed on an opt-out basis.”³⁷⁰

Collectively compelling an entire class of thousands of Blue Tree customers to arbitrate their claims on a class-wide basis seems problematic under the FAA and may run counter to the core principle that arbitration is a matter of contract. The legitimacy of the arbitrator’s ultimate decision with respect to each individual class member depends on the existence of thousands of valid, individual agreements to arbitrate. Assuming that it is permissible to compel an entire class to arbitrate, before a court may issue such an order compelling thousands of customers to arbitration pursuant to the FAA, Section 4 requires that the court follow a specific procedure designed to help ensure that each of the thousands of agreements to arbitrate actually exists. For example, Section 4 provides that these thousands of customers shall receive “[f]ive days’ notice in writing”³⁷¹ regarding the application for an order to compel arbitration, and the service of such notice on the thousands of class members shall be made in the manner provided by the Federal Rules of Civil Procedure.³⁷² Under the summary judgment-like procedure for evaluating motions to compel arbitration, discovery may be appropriate regarding the making of an agreement, and each of these thousands of customers would be entitled to put forward evidentiary facts showing there is a genuine dispute regarding the making of the agreement. Should a genuine dispute arise regarding the making of an agreement, Section 4 also provides that “the court shall proceed summarily to the trial”³⁷³ regarding the making of that particular agreement, and the trial regarding the making of a particular

Fed. R. Civ. P. 23(b) the trial court was certifying a class under, although it appeared that the trial court was certifying a non-opt-out class “pursuant to Fed. R. Civ. P. 23(b)(1) and/or (b)(2).” See Brief of Appellant Pedcor Mgmt. Co. Welfare Benefit Plan at *11 & n.10, *Pedcor*, 2002 WL 32508025 (5th Cir. 2002) (No. 02-20878) (quoting transcript of certification hearing). Some of the language in the order tracked the language of Rule 23(b)(2), and a transcript indicates that the trial court stated at the certification hearing that “the normal justifications for the option to exclude yourself from a class do not seem to apply here,” which is consistent with a Rule 23(b)(1) or (b)(2) class. *Id.* at *11-*12 & n.10.

370. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 352 (S.C. 2002).

371. 9 U.S.C. § 4.

372. *Id.*; *Coughlin v. Shimizu Am. Corp.*, 991 F. Supp. 1226, 1230 (D. Or. 1998) (defendant moved to compel arbitration complied with Section 4 by providing the required five days’ notice).

373. 9 U.S.C. § 4.

customer's agreement may be a jury trial if the customer makes a timely demand for a jury "before the return day of the notice of application."³⁷⁴

The specific procedure in Section 4 envisions the enforcement of a single agreement between two parties.³⁷⁵ In *Fazio* and *Casteel*, which only involved a handful of plaintiffs, the courts had to engage in a contract-by-contract analysis, or more specifically, a fact-intensive analysis of the circumstances surrounding the making of each agreement before compelling arbitration.³⁷⁶ Under Section 4, it seems that notice would have to be given to the entire class regarding Blue Tree's motion to compel arbitration before the court could issue an order compelling each of the class members to arbitrate, and each member would need to have an opportunity to contest the making of his or her agreement, to present facts showing that a genuine dispute exists as to the making of the agreement, and to request and have a jury trial regarding the making of the agreement.³⁷⁷

Theoretically, such enforcement proceedings of the entire class of Blue Tree customers could disintegrate into several individual, fact-intensive mini-trials by juries regarding the makings of individual agreements. However, the concern may be overstated. It is possible, but not entirely clear, that the number of individualized jury trials would not be significant. Suppose a national hardware store called House Depot offered customers a House Depot credit card, and the credit card failed to comply with a regulatory statute. Suppose further that a plaintiff wanted to sue House Depot and the issuing bank in a class action for violation of this statute. The House Depot cardholder agreements would likely contain similar arbitration agreements, but perhaps the circumstances surrounding the making of each agreement varied. Some customers may have obtained the card through a telemarketer. Others may have obtained the card through a mail-in application form, and some customers may have obtained the card by filling out an application at the store with a store clerk verbally instructing them how to fill out the form. It is not certain how many

374. 9 U.S.C. § 4.

375. 9 U.S.C. § 4 ("[a] party aggrieved by the alleged failure, neglect or refusal of *another [party]* to arbitrate under *a written agreement*") (emphasis added).

376. *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 397 (6th Cir. 2003); *Casteel v. Clear Channel Broadcasting, Inc.*, 254 F. Supp. 2d 1081, 1088-90 (W.D. Ark. 2003).

377. It is not clear whether this procedure was followed in *Pedcor* or in the *Bazzles'* proceedings. If the courts compelled arbitration without providing for the consideration of the making of arbitration agreements, such a ruling would be problematic under federal arbitration law.

customers would contend there is no valid agreement. Although several people may claim they are not bound by arbitration agreements, not every argument will have merit. Some arguments may be rather weak and may be ultimately rejected. However, even if some claims are weak or meritless, a court would nevertheless first have to consider, resolve, and ultimately reject the weak claims. Stronger claims may involve forgery, fraud in the inducement of the arbitration clause itself, and perhaps procedural unconscionability. Perhaps only a handful of individuals would be successful in demonstrating no valid arbitration agreements exist. Also, it is possible that individual class members who receive notice and an opportunity to contest the making of an arbitration agreement may not even care or appreciate the nature of the underlying claims enough to contest the making of an arbitration agreement. Thus, the concern about the enforcement proceedings disintegrating into multiple mini-trials may be overstated.³⁷⁸

C. An Agreement to Arbitrate, On an Opt-Out Basis?

Even though the mechanics of enforcing an entire class to arbitrate may be workable and protect the core principle that arbitration is a matter of contract, there are still other problems regarding class arbitration, particularly on an opt-out basis. Turning back to the hypothetical example regarding Blue Tree, suppose again that Blue Tree entered into individual contracts with thousands of its customers providing for class arbitration, and one of these customers files a class action lawsuit in federal court against Blue Tree along with a motion to certify a class consisting of all these other individual customers. Suppose that Blue Tree files a motion to compel arbitration, and the court certifies a class. In addition, the court follows an appropriate procedure to ensure that every class member has a valid arbitration agreement, and the court compels class arbitration on an opt-out basis in accordance with their individual agreements. This situation resembles what occurred in the Bazzles' proceedings when "the trial court ordered that the class action in arbitration proceed on an opt-out basis,"³⁷⁹ although it is not clear whether the court followed a specific procedure to ensure that every class member had a valid arbitration

378. Also, there is an additional problem regarding compelling an entire class to arbitrate, and perhaps an order compelling arbitration should be limited to the parties in breach of an arbitration agreement, which will be addressed below in Part II. D.

379. *Bazze v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 352 (S.C. 2002).

agreement. In the Bazzles' proceedings, twelve individuals decided to exercise the opt-out option.³⁸⁰

This situation regarding class arbitration on an opt-out basis raises interesting questions regarding the meaning of an arbitration agreement under the FAA. Is an arbitration agreement providing for opt-out class arbitration really an enforceable arbitration agreement covered by the FAA?

With respect to traditional class actions in federal court, a class action must satisfy the four requirements of numerosity, commonality, typicality, and adequacy set forth Fed. R. Civ. P. 23(a), as well as the requirements of at least one of the three subsections of Fed. R. Civ. P. 23(b).³⁸¹ These three subsections of 23(b) set forth the three basic types of classes, and the Federal Rules of Civil Procedure provide a right to opt-out in connection with the third type of class, a class pursuant to Fed. R. Civ. P. 23(b)(3).³⁸² Rule 23(b)(3) "authorizes a class action when the justification for doing so is the presence of common questions of law or fact and a determination that the class action is superior to other available methods for resolving the dispute fairly and efficiently."³⁸³ Rule 23(b)(1) and (b)(2) set forth classes based upon the "effect" or "type" of relief sought.³⁸⁴ A class may be brought pursuant to Rule 23(b)(1) if prosecution of individual actions by or against individual class members may prejudice the defendant or class members.³⁸⁵ Such classes include a "limited fund" class where "a fixed asset or piece of property exists in which all class members have a preexisting interest, and an apportionment or determination of the interests of one class member cannot be made without affecting the proportionate interests of other class members similarly situated."³⁸⁶ Class actions pursuant to Rule 23(b)(2) primarily seek injunctive or corresponding declaratory relief, and it has been recognized that "Rule

380. See *Petition for Writ of Certiorari*, App. D at 68a, *Green Tree Fin. Corp. v. Bazzle*, 2002 WL 32101094 (No. 02-634).

381. See 2 CONTE & NEWBERG, *supra* note 14, § 4:1.

382. 7B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1787 (2d ed. 1986 & 2004 Supp.) (explaining that under the Federal Rules, "the privilege of being excluded from the judgment only exists in actions brought under Rule 23(b)(3)," but some courts have acknowledged opt-out rights in connection with (b)(1) or (b)(2) classes); see also *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C. Cir. 1997) ("We join those circuits holding that the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions.").

383. WRIGHT ET AL., *supra* note 382, § 1777.

384. *Id.*

385. See 2 CONTE & NEWBERG, *supra* note 14, § 4:3.

386. *Id.* § 4:9.

23(b)(2) class actions were designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons, though this type is not the exclusive type of suit that qualifies under this category.”³⁸⁷

In contrast, a class certified pursuant to Rule 23(b)(3) requires individual notice of the certification to all class members who can be identified through reasonable effort, and class members are entitled to a right to exclude themselves from the class and the binding effect of the future judgment for the class.³⁸⁸ It has been observed that a justification for the difference in treatment of (b)(3) as opposed to (b)(1) and (b)(2) classes is that “[e]ffective representation is especially important in Rule 23(b)(3) actions because the class members are only loosely associated by common questions of law or fact, rather than by any pre-existing or continuing legal relationship,”³⁸⁹ and classes certified pursuant to (b)(1) and (b)(2) are generally “more cohesive.”³⁹⁰ It has been further observed that:

In representative actions brought under [Rule 23(b)(1) and (b)(2)], the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court. In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions.³⁹¹

The opt-out procedure helps protect individual autonomy by:

preserv[ing] the right of a potential class member who feels that his interests are in conflict with, or antagonistic to, the other class members to bring his own action and, at the same time, assures that differences of opinion within the class will not necessitate a dismissal of the action itself.³⁹²

387. *Id.* § 4:11.

388. *See id.* § 4:1.

389. *See* WRIGHT ET AL., *supra* note 382, § 1786.

390. *Id.*

391. *Id.* (footnotes and citations omitted).

392. *Id.* § 1787. It has also been observed that “[b]y requiring the absentee to take af-

In *Phillips Petroleum Co. v. Shutts*,³⁹³ the Supreme Court recognized that opt-out procedures in a class action help satisfy due process concerns.³⁹⁴ In discussing procedural due process protections for absent class members when a “forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,”³⁹⁵ the Supreme Court held “that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”³⁹⁶ The Court held that an opt-out procedure can protect the interests of absent plaintiffs.³⁹⁷ In rejecting the petitioner’s argument that due process requires an opt-in procedure, the Court recognized that “[a]ny plaintiff may consent to jurisdiction,”³⁹⁸ and an opt-out procedure provides for a sufficient showing of such consent to jurisdiction.³⁹⁹

This function of an opt-out procedure regarding consent to jurisdiction in a traditional judicial class action is not perfectly analogous to the function that an opt-out procedure may serve in a class arbitration context. In a class arbitration context, the parties have already generally consented, in advance, to class arbitration by entering into the arbitration agreement. However, an opt-out procedure in class arbitration, should the parties agree to such a procedure, perhaps may function to protect absent class members who are not satisfied with the selection of a particular arbitrator or arbitration panel. Furthermore, an opt-out procedure in class arbitration perhaps may help protect a class member who feels that his or her interests are in conflict with the interests of other class members.

As indicated above, an opt-out procedure was available in the class arbitration in the *Bazzle* proceedings. Despite the possible functions an opt-out procedure may serve in class arbitration, arbitration agreements providing for class arbitration on an opt-out basis may be

firmative action to avoid being bound, the rule [providing for opt-out rights] attempts to eliminate the common practice in ‘spurious’ class suits prior to 1966 of waiting to see if the adjudication was favorable to the class before deciding whether to enter the action.” *Id.*

393. 472 U.S. 797 (1985).

394. *Id.*

395. *Id.* at 811 & n.3 (“Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.”).

396. *Id.* at 812.

397. *Id.*

398. *Id.*

399. *Id.* at 812-13.

problematic and unenforceable under the FAA. Imagine a customer of BlueTree promising “I hereby agree to class arbitration, but by the way, I may opt-out and sue in court simply because I choose to do so.” Such an agreement providing for class arbitration on an opt-out basis and allowing an opt-out to proceed in court creates no obligation to arbitrate and is simply an illusory promise. This unlimited right to avoid arbitration by opting-out may seem antithetical to an agreement to arbitrate.

The Third Circuit in *Harrison v. Nissan Motor Corp.*⁴⁰⁰ addressed whether a non-binding alternative dispute resolution procedure in Nissan warranties called the Better Business Bureau Auto Line was enforceable under the FAA.⁴⁰¹ Nissan contracted with the Better Business Bureau to administer this non-binding mechanism, described in the warranty “as a remedy available to consumers who are dissatisfied with their vehicles’ performance”⁴⁰² and as consisting of both mediation and arbitration.⁴⁰³ Under this procedure, “[i]f the complaint cannot be mediated, the consumer can present the matter to an impartial person or a three-person arbitration panel. The arbitrators’ decision is not binding unless the consumer accepts it as binding.⁴⁰⁴ The Third Circuit reasoned that an enforceable agreement to arbitrate certain disputes entails an “agree[ment] to arbitrate these disputes *through to completion, i.e.* to an award made by a third-party arbitrator.”⁴⁰⁵ The Third Circuit held that the consumer and Nissan had not entered into an enforceable agreement to arbitrate within the meaning of the FAA because the consumer would not have to pursue the procedure to completion.⁴⁰⁶

Under the rationale of *Harrison*, an agreement providing for class arbitration on an opt-out basis and permitting opt-outs to file in court would not be considered an enforceable agreement to arbitrate covered by the FAA, and in this limited sense, such an agreement for

400. 111 F.3d 343 (3d Cir. 1997).

401. *Id.*

402. *Id.* at 346.

403. *Id.*

404. *Id.*

405. *Id.* at 350 (emphasis added).

406. *Id.* at 351. *But see* *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998) (agreement to submit to non-binding arbitration is covered by the FAA). Whether non-binding arbitration agreements are covered by the FAA is not settled. *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004) (acknowledging disagreement regarding the issue, but stating that some “circuits (defensibly, in our view) have declined to treat an agreement for non-binding arbitration as ‘arbitration’ within the meaning of the [Federal Arbitration] Act”).

class arbitration would be at odds with the FAA.⁴⁰⁷ One possible solution to cure this problem regarding opt-outs and an illusory promise to arbitrate might be to specify in the agreement that opt-outs from a class arbitration would be bound to individual arbitration. Thus, for example, a customer of Blue Tree would agree that “all disputes between you and me shall be resolved in binding arbitration, either on a class action basis or in individual arbitration proceedings,” and any provision permitting opt-outs should make clear that opt-outs cannot sue in court but must instead rely on individual arbitration. With such language, the parties would be agreeing to arbitrate their dispute through to completion, thereby satisfying the Third Circuit’s rationale in *Harrison*. The current version of the AAA Class Rules provides for the possibility of opt-outs, but the opt-out language in the rules do not appear to qualify that opt-outs must bring their claims in arbitration.⁴⁰⁸ An agreement that provides for class arbitration on an opt-out basis and permits opt-outs to avoid arbitration and bring claims in court may be problematic under the Third Circuit’s rationale and not covered by the FAA. In order to create enforceable arbitration agreements covered by the FAA, the arbitration agreements should clarify that the exercise of an opt-out does not avoid an obligation to arbitrate and permit the opt-out individual to bring claims in court.

D. Suggested Procedure for Handling Class Arbitration Under the FAA’s Enforcement Mechanism

Suppose that Blue Tree and each of its 1,000 customers enter into arbitration agreements providing that all disputes between Blue Tree and a customer shall be resolved in binding arbitration, either in an in-

407. Moreover, agreements between two parties where only one party is bound to arbitrate and the other party has no such obligation have been held unenforceable. *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, No. 03-30613, 2004 WL 1622065 (5th Cir. July 21, 2004) (one-sided arbitration clause imposing the duty to arbitrate on only one party is unenforceable).

408. The language in the AAA Class Rules is patterned after the opt-out provision in the Federal Rules of Civil Procedure. *Compare* Rule 6(b)(5) of the AAA Class Rules (“The Notice of Class Determination must concisely and clearly state in plain, easily understood language: . . . (5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded”) with FED. R. CIV. P. 23(c)(2)(B) (“The notice must concisely and clearly state in plain, easily understood language: . . . that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded”). There was no need in the Federal Rules to specify that an opt-out must proceed in court, but in order to create an enforceable class arbitration agreement under the rationale of *Harrison*, an opt-out right in class arbitration should not permit an individual to completely avoid arbitration and bring claims in court.

dividual arbitration or in a class arbitration. For example, Customer #1 agrees that when bringing claims in arbitration, the customer may purport to represent a class or may simply proceed on an individual basis. If the customer purports to represent a class, the arbitrator will determine whether a class can be certified, as provided, for example, in the AAA Class Rules patterned after Fed. R. Civ. P. 23. Furthermore, the arbitration agreement provides that if another Blue Tree customer brings claims in arbitration and purports to represent a class, and if that class has been certified and Customer #1 falls within the definition of the certified class, then a class judgment by the arbitrator or a settlement approved by the arbitrator will have a binding effect on Customer #1. Customers #2 through #1000 have the same agreement.

Suppose that Customer #401 brings a claim in federal court and purports to represent a class of similarly situated individuals, and Blue Tree immediately files a motion to compel arbitration. How should a court handle the motion to compel arbitration?

1. The Named Class Representative

The FAA authorizes an order compelling arbitration when one party is “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate⁴⁰⁹ pursuant to an arbitration agreement.⁴¹⁰ Section 4 provides for “an order directing the parties [*i.e.*, the ‘aggrieved’ party and the party ‘in default,’] to proceed to arbitration in accordance with the terms of the agreement.”⁴¹¹ In *PaineWebber Inc. v. Faragalli*,⁴¹² the Third Circuit explained that an order compelling arbitration is available under the FAA “*only to those persons ‘aggrieved by the alleged failure, neglect, or refusal of another to arbitrate.’*”⁴¹³ The Third Circuit also explained the rationale underlying this limitation:

Clearly, unless [one party] has resisted arbitration, the [other party seeking the order] has not been “aggrieved” by anything. The reason for this rule, though little discussed, is evident: unless and until an adverse party has refused to arbitrate a dispute putatively governed by a contractual arbitration clause, no breach of contract has occurred, no dispute over whether to arbitrate has arisen, and no harm has befallen the [party seeking the order]—

409. 9 U.S.C. § 4 (2004).

410. *Id.*

411. *Id.*

412. 61 F.3d 1063 (3d Cir. 1995).

413. *Id.* at 1067 (quoting 9 U.S.C. § 4 (emphasis added)).

hence, the [party seeking the order] cannot claim to be “aggrieved” under the FAA.⁴¹⁴

In the Blue Tree example, who is the party “in default” with respect to an agreement to arbitrate? It appears that only Customer #401 is “in default” because Customer #401 initiated claims in court instead of arbitration, and Blue Tree has been aggrieved by Customer #401’s failure to arbitrate in accordance with the terms of Customer #401’s agreement. Accordingly, under the FAA, the court may direct Customer #401 and Blue Tree to arbitrate in accordance with Customer #401’s agreement. However, with respect to the 999 other customers, a court cannot determine at this point whether one or more of the 999 other customers have breached their individual arbitration agreements and are “in default,” and it would be premature at this point for an order directing every other customer to arbitrate. There is simply no dispute at this time between Blue Tree and the 999 other customers regarding a duty to arbitrate. For example, after Customer #401 properly commences arbitration pursuant to the court’s order, the other class members may comply with their obligations under their arbitration agreements. Indeed, the arbitration may remain an individual arbitration because a class may never be certified, and prior to certification, the 999 other customers may have little or no obligation under their arbitration agreements and may never be called to task.⁴¹⁵

414. *Id.*; see also *E.E.O.C. v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 459-460 (6th Cir. 1999) (recognizing that “[t]he FAA grants federal courts the authority to order into arbitration one who has failed, neglected, or refused to arbitrate despite having agreed in writing to do so,” and rejecting lower court’s application of the FAA because “Adams has never really failed, neglected or refused to arbitrate and has thus not breached her agreement”); *Trafalgar Shipping Co. v. Int’l Milling Co.*, 401 F.2d 568, 572 n.3 (2d Cir. 1968) (“The phrase ‘failure, neglect, or refusal’ was included in the first line of 9 U.S.C. § 4, . . . primarily to assure that the remedy which Congress was affording would not be available before there had been a demand to arbitrate and a refusal.”); *Central Park Elecs., Inc. v. Hyundai Elecs. Am.*, No. 95 Civ. 4201, 1996 WL 537660, at *2 (S.D.N.Y. Sept. 20, 1996) (“In order to decide a motion to compel arbitration, a district court must determine: (1) whether there is an agreement to arbitrate; and (2) whether one party to the agreement has failed, neglected or refused to arbitrate.”).

415. *Cf. Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974) (Prior to class certification, “potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (“Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course . . .”).

2. The Unnamed Class Members and the Contract Principle

As discussed above, a core principle of arbitration law is that arbitration is a matter of contract, and before a court may compel arbitration, it is important to honor this principle by first making a determination regarding the threshold issue of whether a valid agreement to arbitrate exists. By limiting its order to compel to Customer #401 and Blue Tree, it is easier for a court to honor this contract principle. The court may compel Customer #401 and Blue Tree to arbitrate after being satisfied that the making of the particular arbitration agreement between Customer #401 and Blue Tree is not in issue.

However, an arbitrator must also respect the core principle of arbitration. An arbitrator's very power arises from the agreement to arbitrate. Thus, for example, 1,000 valid class arbitration agreements must exist if a class award covering the entire class of 1,000 Blue Tree customers is to be justified. In a traditional non-class arbitration pursuant to a pre-dispute arbitration agreement, the claimant or initiating party typically sends written notice to the other party of its intent to arbitrate a dispute pursuant to their contract.⁴¹⁶ The initiating party usually files a copy of the demand and arbitration agreement with an arbitration association, and the respondent may file a responsive pleading. If there is no dispute as to the agreement to arbitrate, the parties will continue the arbitration process in front of an arbitrator bestowed with power arising from the parties' agreement. The parties in such a situation are willingly appearing in and utilizing a private tribunal created by their contract, and there is not likely to be any violation of the core principle that arbitration is a matter of contract. If, however, a dispute exists regarding the existence of an agreement to

416. In addition to a pre-dispute arbitration agreement, there is generally another type of agreement to arbitrate commonly known as a "submission." See 1 DOMKE ON COMMERCIAL ARBITRATION § 8:1 (2003) ("One type consists of a clause in a contract under which the parties agree to make use of arbitration to decide disputes that may, in the future, arise out of the particular contractual relationship. The other type is an independent agreement under which the parties agree to submit an existing dispute to arbitration. This second type of arbitration agreement is called a submission."); see also Rules 4 and 5 of AAA Rules for Commercial Arbitration (providing for initiation under an arbitration clause in a contract and initiation pursuant to a submission), at http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE/Rules_Procedures\National_International\...\focusArea\commercial\AA A235current.htm (last visited Nov. 15, 2004). Rule 5 of AAA Rules for Commercial Arbitration, "Initiation under a Submission," recognizes that "[p]arties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties." The existence of an agreement to arbitrate seems generally less likely to arise when an arbitration is commenced via a submission as compared to an arbitration commenced by one party pursuant to a pre-dispute arbitration agreement.

arbitrate, how should the party believing there is no agreement proceed?

In *Comprehensive Accounting Corp. v. Rudell*,⁴¹⁷ Comprehensive Accounting Corporation ("Comprehensive") commenced an arbitration against Mr. & Mrs. Rudell, who refused to participate, and the arbitration proceeded *ex parte* and resulted in an award against them.⁴¹⁸ Comprehensive subsequently moved to confirm the award in court, and the Rudells objected to the confirmation on various grounds, including an objection regarding whether a valid agreement existed.⁴¹⁹ The court rejected this objection as untimely and confirmed the award.⁴²⁰ On appeal, the Seventh Circuit similarly rejected the Rudells' argument concerning their agreement to arbitrate.⁴²¹ The Seventh Circuit explained:

No one should be forced into arbitration without an opportunity to show that he never agreed to arbitrate the dispute that is the subject of the arbitration. The Rudells had that opportunity when they were notified of the arbitration, and they let it pass by. It was then too late for them to sit back and allow the arbitration to go forward, and only after it was all done, and enforcement was sought, say: oh by the way, we never agreed to the arbitration clause. That is a tactic that the law of arbitration, with its commitment to speed, will not tolerate.⁴²²

The Seventh Circuit then suggested some options for individuals like the Rudells who were faced with an arbitration proceeding that could proceed *ex parte* pursuant to an agreement they believe does not exist:

They might have brought suit to enjoin the arbitration. At the very least, they could have told the arbitrator that they did not recognize his authority to proceed, because they had not agreed to arbitration. That would have put the arbitrator and Comprehensive on notice that the arbitrator's jurisdiction was questioned. Comprehensive might then have moved under section 4 of the Act for an order to arbitrate, and the Rudells would have gotten their day in court to challenge the existence of an agreement to arbitrate, before Comprehensive was put to the expense of the arbitration. If Comprehensive had not moved under section 4, but had gone ahead with the arbitration in the Rudell's absence, then the Rudells, having put Comprehensive on notice of their reservation, might be allowed in the confirmation proceeding to litigate the question whether there was a valid agreement to arbitrate, though we need not decide in this case whether

417. 760 F.2d 138 (7th Cir. 1985).

418. *Id.* at 139.

419. *Id.*

420. *Id.*

421. *Id.* at 140.

422. *Id.*

they should instead have sought to enjoin the arbitration. They did neither. They waited too long.⁴²³

Also, the parties may submit the question directly to the arbitrator. In *First Options*, the Supreme Court addressed a situation involving two respondents in an arbitration proceeding, Mr. & Mrs. Kaplan, who filed written objections with the arbitration panel, claiming that their dispute with claimant First Options was not arbitrable.⁴²⁴ The arbitration panel issued an award against the Kaplans, and the Kaplans filed a petition in federal court to vacate the award, while the claimant First Options cross-petitioned to confirm the award.⁴²⁵ The district court confirmed the award, but the appellate court reversed, finding that the dispute with the Kaplans was not arbitrable.⁴²⁶

The Supreme Court explained that if the parties had agreed “to submit the arbitrability question itself to arbitration . . . , then the court’s standard for reviewing the arbitrator’s decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate,”⁴²⁷ namely, by giving “considerable leeway to the arbitrator”⁴²⁸ However, if “the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.”⁴²⁹ With respect to whether the Kaplans had agreed to submit the issue to the arbitrator, First Options pointed to a written memorandum filed with the arbitration panel by the Kaplans objecting to the arbitration panel’s jurisdiction, but the Supreme Court did not believe that First Options had clearly demonstrated the Kaplans had agreed to submit the issue of arbitrability to the arbitration

423. *Id.* at 140-41; *see also* J.A. Jones Constr. Co. v. Flakt, Inc., 731 F. Supp. 1061, 1065 n.4 (N.D. Ga. 1990) (citing Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, 140 (7th Cir. 1985) and explaining that “[i]f Flakt believed that it had no obligation to arbitrate Brennan’s claims, it should have refused to participate in the proceedings and forced Brennan to bring an action to compel arbitration under Section 4.”); Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 269 (7th Cir. 1988) (“A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act.”) (quoting Ficek v. Southern Pacific Co., 338 F.2d 655, 657 (9th Cir. 1964)).

424. *First Options v. Kaplan*, 514 U.S. 938, 940-41 (1995).

425. *Id.* at 941.

426. *Id.*

427. *Id.* at 943 (emphasis in original).

428. *Id.*

429. *Id.*

panel.⁴³⁰ The Court explained that “merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator’s decision on that point.”⁴³¹ Thus, because there was no clear and unmistakable evidence that the Kaplans agreed to submit the question of arbitrability to the arbitrator, the issue should be reviewed by a court independently. The Supreme Court affirmed the Third Circuit’s judgment.⁴³²

In sum, when a respondent in a traditional, non-class arbitration believes there is no valid arbitration agreement and the arbitrator therefore has no authority, there are several options with different implications. For example, clearly agreeing to submit to the arbitrator the issue of whether a valid arbitration agreement will result in a deferential review in court regarding this issue as opposed to an independent review. Also, it has been recognized that there may be a risk that a court may treat a respondent’s objections before an arbitrator as amounting to a waiver and submission of the issue for the arbitrator to decide, resulting in a deferential review before a court.⁴³³ And doing absolutely nothing and not raising the issue of the making of the agreement may result in a finding of waiver as the Seventh Circuit found in *Rudell*.⁴³⁴

In a traditional, non-class two-party arbitration, it should become readily apparent if one of the parties believes it is not subject to a valid arbitration agreement because a party is likely to raise an objection to the arbitration proceeding if it believes there is no obligation to arbitrate. However, in a class-arbitration setting where for the most part class members are absent and not actively participating in the prosecution of the class arbitration, it will probably not be readily apparent whether every class member is bound by an arbitration agreement. Thus, in a class arbitration context (whether, for example, commenced through a court order compelling Customer #401 to arbitrate, or commenced voluntarily by Customer #401 without any court order), some

430. *Id.* at 946.

431. *Id.*

432. *Id.* at 949.

433. Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT’L ARB. 287, 296-302 (1999) (discussing the options available to a respondent and recognizing that if a respondent contests before the arbitrator the existence of an agreement and fails to convince the arbitrator that there is no agreement, “there has always been a serious risk that his arguing the point will be seen as amounting to a grant to the arbitrator of the jurisdiction to decide the arbitrability question.”) (internal quotations and citations omitted).

434. *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985).

means should be devised in order to legitimize the authority of the arbitrator or arbitrators and guarantee that the core contract principle is respected.

The Supreme Court has repeatedly held that “[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.”⁴³⁵ In accord with this principle, a lack of subject matter jurisdiction in judicial proceedings can generally be raised at any time, even on appeal, despite the waste of resources that could have occurred, and consent of the parties cannot confer subject matter jurisdiction because courts are of limited jurisdiction. However, the jurisdiction of an arbitrator is not similarly constrained by the Constitution. An arbitrator’s jurisdiction is given its scope by the consent of the parties, and courts have found that parties have waived challenges to an arbitrator’s jurisdiction: “[a] claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act.”⁴³⁶

Should these rules regarding waiver of challenges to arbitral authority apply in the class arbitration context? Rules for traditional judicial class actions do not necessarily require individual notice to individuals before an award is rendered. Although individual notice for a Rule 23(b)(3) class is mandatory, for the two other types of classes, a Rule 23(b)(1) or (b)(2) class, notice to the class is merely discretionary even though a final judgment would be binding on such members.⁴³⁷ To the extent that notice is not provided in a class arbitration,

435. *Rasul v. Bush*, 124 S. Ct. 2686, 2701 (2004) (internal quotations and citations omitted); *see also California v. LaRue*, 409 U.S. 109, 112 n.3 (1972) (“Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an ‘actual controversy’ within the meaning of . . . Art. III, s 2, cl. 1, of the Constitution.”), *overruled by 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

436. *Ficek v. S. Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964). *Cf. Marino v. Writers Guild of Am., E., Inc.*, 992 F.2d 1480, 1484 (9th Cir. 1993) (“[I]t is well settled that a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse.”); *Butler Mfg. Co. v. United Steelworkers of Am., AFL-CIO-CLC*, 336 F.3d 629, 635 (7th Cir. 2003) (“Principles of estoppel prevent a party to arbitration from taking a position before the arbitrator that invites consideration of external law, losing in arbitration, and then seeking relief from the unfavorable arbitral award in federal court by arguing that the arbitrator lacked authority to consider the law in the first instance.”); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) (“Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority.”).

437. *See* FED. R. CIV. P. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class.”) (emphasis added); 2 CONTE & NEWBERG, *supra* note 14, § 4:11 n.20 (“[T]he Federal Rules of Civil Procedure do not provide

there would be little or no opportunity for an absent class member to raise an objection regarding the existence of his or her agreement to arbitrate prior to a class award as there would normally be in a traditional, non-class arbitration.

The procedure for compelling arbitration that has developed with respect to non-class arbitrations fully honors the core contract principle underlying arbitration because the existence of an arbitration agreement is a critical threshold issue in such a proceeding. In a traditional, non-class arbitration involving only one claimant and one respondent, it should become readily apparent if one of the parties believes there is no valid arbitration agreement giving rise to the authority of the arbitrator and an obligation to arbitrate. Although a dispute regarding the contract principle should be rather easy to identify in such a non-class arbitration proceeding, there is no uniform procedure for resolving the dispute. Different options are available for resolving the issue, but each may have its own potential drawbacks. For example, if there is no consent to have the arbitrator resolve the issue of whether an arbitration agreement exists, the arbitration may continue subject to the objections of one of the parties despite the lack of authority of the arbitrator, and the issue regarding the core contract principle may not be resolved until the arbitration is over and the arbitration award resulting from the questionable authority of the arbitrator comes before a court upon a motion to vacate or confirm the award. The individual who is not bound by an arbitration agreement may have been forced to suffer through the illegitimate proceedings. Of course, there are other options available, such as the party who believes there is an obligation to arbitrate may temporarily halt the arbitration and seek an order compelling arbitration. Such a procedure would help honor the core principle that arbitration is a matter of contract.

What options would be available in connection with a class arbitration procedure to ensure respect for the core contract principle? Suppose Customer #401 commences a class arbitration (either by court order, or Customer #401 commences the class arbitration independently), and further suppose that 30 customers who signed an arbitration agreement, Customers #1 through #30, are not actually bound

comparable guarantees of those rights [regarding notice and opportunity to opt-out] for a class certified under subsections (b)(1) or (b)(2).”); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir. 1975) (any unfairness resulting to a mandatory, non-opt-out class was “thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation.”).

by the agreement. The option suggested in *Rudell* whereby the party who believes there is a duty to arbitrate stops the arbitration proceeding and seeks a court order compelling arbitration is one possibility for honoring the contract principle.⁴³⁸ However, this option would necessitate notice to all class members about the pending class arbitration.⁴³⁹ For example, assuming Customers #1 through #30 object after receiving the notice of the class arbitration, Blue Tree may then seek orders compelling arbitration with respect to these individuals and any other individuals who may object, and these individuals would be given a fair opportunity to dispute the existence of an agreement, even to the point of a trial on the issue, thereby respecting the core contract principle and the procedures established by the FAA.

Another option instead of filing a motion to compel arbitration is that Customers #1 through #30 may object after receiving notice, and the arbitration proceedings may continue subject to the objection of these class members. If Blue Tree chooses not to compel arbitration and instead continue with the arbitration, Blue Tree assumes the risk that its efforts may be in vain with respect to these thirty Customers who may not be bound by an arbitration clause, although such efforts with respect to the thirty customers are likely to be minimal because Blue Tree is essentially defending the claims of the named representative who is serving in a representative capacity. Blue Tree is not likely to conduct its defense differently. Also, Blue Tree assumes the risk that these individuals may drop their objections if the award is favorable to the individuals. If Blue Tree continues without compelling arbitration, the objections of these thirty customers may be subsequently heard by a court upon a motion to confirm or vacate an award, unless the thirty customers feel strongly enough to immediately file suit in court. They may bring suit on the underlying claim, or file a declaratory judgment action regarding the duty to arbitrate, or both,

438. *Rudell*, 760 F.2d at 140.

439. With respect to the contents of such a notice, perhaps the notice may simply inform the class members of the pending arbitration, without specifically stating that the recipient may object if the recipient believes no arbitration agreement exists or without providing a specific procedure for the recipient to register an objection. In traditional non-class arbitrations involving two parties, there is no general duty for one party to notify the other party of any particular mechanism for objecting to the existence of an arbitration agreement. Any objection would likely be raised *sua sponte* by one of the parties in a non-class arbitration, and in fact, arbitration rules may provide that any objection not raised at the commencement of the proceedings is waived. However, in a class arbitration setting, a notice that informs class members of a specific procedure for registering an objection regarding the existence of an arbitration agreement would probably be helpful in facilitating the identification of parties without a valid arbitration agreement, which in turn would help legitimize the class arbitration.

any of which may trigger a motion to compel arbitration by Blue Tree. In this manner, the contract principle will be respected.

Also, if there is consent to submit the issue of arbitrability to the arbitrator, the arbitrator may resolve the issue, as recognized by *First Options*. All of these options, whether Blue Tree moves to compel arbitration, whether the arbitration continues subject to the objection of the thirty Customers, or whether the issue is to be resolved by the arbitrator, would necessitate the giving of some type of notice to the class.

If no notice is given to the class, and class members only find out about the arbitration proceedings after an award has been rendered, then the thirty Customers should be allowed to contest the binding effect of the class award after the class award has been issued in order to honor the core contract principle. This option would provide an opportunity for individuals to wait and see whether a class award is favorable or not before raising objections regarding the existence of a valid arbitration agreement. An unfavorable class award may invite a significant number of such objections and threaten to unravel the class and its effectiveness as a tool for collective resolution of claims. By providing notice shortly after class certification and providing an opportunity to resolve the existence of disputed arbitration agreements prior to a class award, it would help legitimize the arbitral proceedings. In class arbitrations, there should be a concern regarding the contract principle because the very authority of the arbitrator arises from contracts of the class members, and some means should be devised to give effect to the contract principle in class arbitration.

E. Whether a Court or Arbitrator Should Determine Whether the Arbitration Agreement Provides For Class Arbitration

The above discussion sets forth suggested procedures for respecting the core contract principle in connection with class arbitration, and these suggested procedures assumed the arbitration agreements at issue provided for arbitration on a class-wide basis. However, what happens if the parties dispute whether a particular arbitration clause provides for class arbitration? *Bazze* left this issue unresolved.⁴⁴⁰ The *Bazze* plurality concluded that this dispute is presumptively for an arbitrator to resolve,⁴⁴¹ and Chief Justice Rehnquist's dissenting opinion concluded class arbitration was improper because the selection of arbitrator, an issue presumptively for judicial determination,

440. See *supra* Part I.C.3.

441. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 451-52 (2003).

was inconsistent with class arbitration.⁴⁴² Furthermore, as indicated above, the Supreme Court may have signaled lower courts to begin independently addressing this unresolved issue.⁴⁴³

Regardless of whether the appropriate decision-maker with respect to this issue is a court or arbitrator, the decision-maker should closely examine whether the terms of the arbitration clause provide for class arbitration. In traditional non-class arbitration, it is recognized that parties may arbitrate a particular claim even if the arbitration of this claim is not permitted under an existing arbitration clause. For example, if an arbitration clause provides a time limit for certain claims and such time limit has expired, or if the scope of an arbitration clause does not cover the particular dispute at issue, a claimant and respondent in a traditional non-class arbitration may consent to arbitrate the underlying claim despite the patent non-arbitrability of the claim under their prior agreement.⁴⁴⁴ Such consensual submission of a dispute to arbitration, even though the dispute is non-arbitrable under an arbitration clause, is a perfect example of how arbitration is a matter of consent.

However, suppose a claimant purports to represent a class in arbitration, and further suppose that the arbitration clause in the agreements of the claimant and putative class members clearly does not provide for class arbitration. It would be inappropriate for the claimant and respondent simply to consent that class arbitration is permissible and for such consent to apply to all the putative class members. These absent class members have simply not agreed to class arbitration. It is important for the decision-maker when assessing class arbitration to carefully and independently ensure that the arbitration provisions at issue actually provide for class arbitration.⁴⁴⁵

442. *Id.* at 456.

443. *See* Part I.C.4.

444. *See generally* DOMKE *supra* note 416, § 8:19 (“[T]he parties may agree to submit a dispute to arbitration which they were not otherwise bound to submit under the contract.”) (citing *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314 (5th Cir. 1994)); *see also* *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982) (“Even if the arbitration clause did not encompass Kamakazi’s claims, it is hornbook law that parties by their conduct may agree to send issues outside an arbitration clause to arbitration.”) (citations omitted).

445. *Cf.* *Hervey v. City of Little Rock*, 787 F.2d 1223, 1227 (8th Cir. 1986) (“While class stipulations by the parties may be helpful, they are not complete substitutes for ‘rigorous analysis’ [under Fed. R. Civ. P. 23]. The purpose of this analysis is to protect unknown or unnamed potential class members, and by definition those people do not and cannot participate in any stipulations concocted by the named parties.”); *but see* 3 CONTE & NEWBERG, *supra* note 14, § 7:10 (discussing that stipulations may be appropriate in class actions).

With respect to the conflicting views of Justice Breyer's plurality opinion and Chief Justice Rehnquist's dissenting opinion regarding the issue of who is the appropriate decision-maker, neither view is free from problems.

The plurality determined that the issue of whether contracts provide for class arbitration do not fall within the class of issues that are presumptively for a court to resolve as set forth in *Howsam v. Dean Witter Reynolds, Inc.*⁴⁴⁶ In *Howsam*, the Supreme Court addressed the division of authority between courts and arbitrators under the FAA. The underlying dispute involved misrepresentations that Dean Witter Reynolds, Inc. ("Dean Witter") allegedly made to its client, Karen Howsam, in connection with investment advice to purchase interests in certain limited partnerships.⁴⁴⁷ The parties were bound by an arbitration agreement, and arbitration of Howsam's dispute was to be held before the National Association of Securities Dealers ("NASD").⁴⁴⁸ The NASD Code of Arbitration Procedure provided that no dispute "shall be eligible for submission . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute."⁴⁴⁹ An issue arose whether the underlying controversy was ineligible for arbitration before the NASD because of the six-year rule, and the federal courts of appeal was split regarding whether a court or an arbitrator was to apply the six-year rule.⁴⁵⁰

In discussing who was the appropriate decision-maker regarding this six-year rule, the *Howsam* Court first recognized the core principle that arbitration is a matter of contract, and the Court acknowledged that it had long "enforced a 'liberal federal policy favoring arbitration agreements.'"⁴⁵¹ But the *Howsam* Court explained that a general interpretative rule existed that was an exception to this liberal policy favoring the enforcement of arbitration agreements: "The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'"⁴⁵² As a general interpretative rule, it is presumed that courts, and not arbitrators, are the appropriate decision-maker to resolve the

446. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002).

447. *Id.* at 81.

448. *Id.* at 81-82.

449. *Id.* at 82 (quoting NASD Code § 10304).

450. *Id.*

451. *Id.* at 83 (citations omitted).

452. *Id.* (citations omitted).

question regarding whether the parties had submitted a particular dispute to arbitration.

The *Howsam* Court recognized that there may be several gateway issues dispositive of whether arbitration will proceed, but the *Howsam* Court emphasized that not every “potentially dispositive gateway question” was a “question of arbitrability” to be resolved by a court.⁴⁵³ Rather, a court’s involvement in FAA enforcement proceedings is narrowly confined, and the *Howsam* Court, relying on some of its prior decisions, declared that the category of arbitral questions generally reserved for court determination was limited:

The Court has found the phrase [“question of arbitrability”] applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.⁴⁵⁴

The *Howsam* Court then explained that in connection with the enforcement of private arbitration agreements under the FAA, a dichotomy exists between arbitration-related disputes generally reserved for a court to resolve and arbitration-related disputes generally reserved for an arbitrator to resolve.⁴⁵⁵

The *Howsam* Court cited a few of its earlier cases as involving issues that fall within the limited category of disputes generally reserved for court determination, and Chief Justice Rehnquist’s dissenting opinion in *Bazze* would classify the dispute over class arbitration as falling within this category.⁴⁵⁶ The *Howsam* Court recognized that a “gateway [disagreement] about whether [certain] parties” “who did not sign [an arbitration] agreement” are nevertheless bound to arbitrate was generally a matter for judicial determination.⁴⁵⁷ As another example of a dispute generally reserved for court determination, the *Howsam* Court explained that courts are the appropriate decision-makers to resolve the issue of whether an arbitration agreement survived a corporate merger and bound the resulting corporation.⁴⁵⁸ Also,

453. *Id.*

454. *Id.* at 83-84.

455. *Id.* at 84.

456. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 455-60 (2003).

457. *Howsam v. Dean Witter Ryenolds*, 537 U.S. 79, 84 (2003) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995)).

458. *Id.* (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964)).

the *Howsam* Court recognized that a court should generally resolve a dispute about whether a particular type of controversy or claim is covered by an arbitration clause.⁴⁵⁹ These issues presumptively for a court to determine generally deal with the existence of an arbitration agreement and the scope of an arbitration agreement.

The *Howsam* Court then recognized a broader category of disputes “where parties would likely expect that an arbitrator would decide the gateway matter,”⁴⁶⁰ and the *Bazzle* plurality treated the issue regarding class arbitration as falling within this broader category.⁴⁶¹ The *Howsam* Court recognized that “‘procedural’ questions which grow out of the dispute and bear on its final disposition”⁴⁶² are generally for arbitrators to determine.⁴⁶³ For example, arbitrators should resolve whether the first two steps of a grievance procedure, prerequisites to arbitration, are satisfied.⁴⁶⁴ Also, the *Howsam* Court explained that an arbitrator should generally resolve “allegation[s] of waiver, delay, or a like defense to arbitrability.”⁴⁶⁵

Against this backdrop of a dichotomy between substantive and procedural arbitrability, the *Howsam* Court held that the NASD time limit rule was a question of procedural arbitrability, and an arbitrator should therefore apply the NASD time limit rule.⁴⁶⁶ The Court reasoned that “[t]he time limit rule closely resembles the gateway questions . . .”⁴⁶⁷ that are presumptively for an arbitrator, such as disputes regarding “waiver, delay, or a like defense.”⁴⁶⁸ Additionally, the institutional competence of the NASD arbitrators to interpret and apply their own rules informed the *Howsam* Court’s decision that the applicability of the NASD time limit rule is presumptively for an arbitrator. The *Howsam* Court believed that NASD arbitrators were “compara-

459. *Id.* (citing *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 651 (1986); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)).

460. *Id.*

461. *Bazzle*, 539 U.S. at 451.

462. *Howsam*, 537 U.S. at 84.

463. *Id.* (citing *John Wiley & Sons*, 376 U.S. at 557).

464. *Id.*

465. *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). After setting forth this general framework dividing decision-making authority between courts and arbitrators in connection with FAA proceedings, the *Howsam* Court then referred to some commentary of the Revised Uniform Arbitration Act of 2000, and this commentary designated issues for court determination as “issues of substantive arbitrability,” and issues for arbitral determination as “issues of procedural arbitrability.” *Id.* at 85.

466. *Id.* at 85.

467. *Id.*

468. *Id.* (citing *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24-25).

tively more expert about the meaning of their own rule, [and] are comparatively better able to interpret and to apply it.”⁴⁶⁹

The *Bazzle* plurality relied on *Howsam* and concluded that the issue of whether a contract provides for class arbitration is an issue of procedural arbitrability,⁴⁷⁰ which *Howsam* identified as involving “procedural questions . . . grow[ing] out of . . . and bear[ing] on . . . [a dispute]”⁴⁷¹ and issues such as “waiver, delay, or a like defense to arbitrability.”⁴⁷² In identifying procedural arbitrability issues as issues such as “waiver, delay, or a like defense to arbitrability,”⁴⁷³ the Court was citing its earlier decisions in *Moses H. Cone*.⁴⁷⁴ However, *Moses H. Cone* does not hold that an arbitrator should decide these issues, and *Moses H. Cone* appears to support the opposite conclusion.

In *Moses H. Cone*, Moses H. Cone Memorial Hospital (the “Hospital”) entered into a contract with Mercury Construction Corp. (“Mercury”) “for the construction of additions to the Hospital building”, and the contract “included provisions for resolving disputes arising out of the contract or its breach.”⁴⁷⁵ “All disputes involving interpretation of the contract or performance of the construction work were to be referred in the first instance to . . . an independent [architect] . . . , and [w]ith certain stated exceptions, . . . dispute[s] decided by the Architect could be submitted by either party to binding arbitration.”⁴⁷⁶ Mercury incurred certain additional costs for “extended overhead or . . . construction . . . due to delay or inaction by the Hospital,”⁴⁷⁷ and “Mercury submitted to the Architect its claims” for such costs.⁴⁷⁸ After some discussions about these costs, the Hospital indicated it would not pay Mercury’s claims, and the Hospital filed a declaratory judgment action in state court, asking the court to declare,

469. *Id.* at 85. The *Bazzle* plurality also recognized the institutional competence of an arbitrator. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003) (“Arbitrators are well situated to answer that question.”). However, the *Bazzle* plurality’s recognition of institutional competence goes beyond the recognition in *Howsam v. Dean Witter*. The *Howsam* Court recognized the institutional competence of NASD arbitrators to interpret the specific rules developed by NASD itself. However, the recognition of the *Bazzle* plurality goes beyond *Howsam* by recognizing the institutional competence of arbitrators generally to resolve arbitral procedural issues.

470. *Bazzle*, 539 U.S. at 453.

471. *Howsam*, 537 U.S. at 84.

472. *Id.* (citations omitted).

473. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25.

474. *Id.*

475. *Id.* at 4.

476. *Id.* at 4-5.

477. *Id.* at 6.

478. *Id.*

among other things, that Mercury “had lost any right to arbitration . . . due to waiver, laches, estoppel, and [the] failure to make a timely demand for arbitration.”⁴⁷⁹

Mercury filed an action in federal court seeking an order compelling arbitration under the FAA, but the federal court stayed the action pending resolution of the Hospital’s declaratory judgment action in state court.⁴⁸⁰ The Fourth Circuit “reversed the . . . stay order and remanded the case to the . . . [lower federal court] with instructions for entry of an order to arbitrate.”⁴⁸¹

The Supreme Court determined that the stay order, in “deference to the parallel litigation brought in state court,”⁴⁸² was appealable and improper.⁴⁸³ In discussing the impropriety of the federal court’s abstention, the Court recognized that federal law was involved, which is a consideration which may weigh against surrendering jurisdiction.⁴⁸⁴ The Court, recognizing a “federal policy favoring arbitration,”⁴⁸⁵ explained that under the FAA “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability,”⁴⁸⁶ which is the language cited by *Howsam* in discussing matters of procedural arbitrability for an arbitrator to decide.⁴⁸⁷ However, in *Moses H. Cone*, the Supreme Court did not hold “an allegation of waiver, delay, or a like defense to arbitrability”⁴⁸⁸ was an issue for an arbitrator to decide. Instead, the *Moses H. Cone* Court explained that the decision-maker should apply a presumption in favor of arbitration if there was a doubt regarding “an allegation of waiver, delay, or a like defense to arbitrability.”⁴⁸⁹ In other words, in resolving an allegation of waiver, delay, or like defense, a canon of construction exists whereby doubts should be resolved in favor of arbitration. In support of this rule of construction that doubts are to be resolved in favor of arbitra-

479. *Id.* at 7.

480. *Id.*

481. *Id.* at 8.

482. *Id.* at 13.

483. *Id.* at 19.

484. *Id.* at 25-26.

485. *Id.* at 24.

486. *Id.* at 24-25.

487. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002) (citing *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24-25).

488. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25.

489. *Id.* at 24-25.

tion when ruling on an allegation of waiver or delay, the *Moses H. Cone* Court cited two cases in a footnote involving *courts*, not arbitrators, applying this presumption in favor of arbitration when dealing with an allegation of waiver or delay.⁴⁹⁰

Also, the *Howsam* Court cited *John Wiley* in explaining that “‘procedural’ questions grow[ing] out of . . . and bear[ing] on [a dispute]” are generally for an arbitrator to decide.⁴⁹¹ In *John Wiley*, a union had previously entered into a collective bargaining agreement with a publishing company named Interscience, which ceased to exist after it merged with John Wiley.⁴⁹² The collective bargaining agreement contained an arbitration clause, and the union and Interscience could not agree on what the effect of the merger would be upon the collective bargaining agreement.⁴⁹³ The union took the position that it continued to represent several of the Interscience employees who became John Wiley’s employees, and the union believed John Wiley was obligated to recognize certain rights of such employees pursuant to the collective bargaining agreement.⁴⁹⁴ John Wiley, however, took the position that the merger had terminated the collective bargaining agreement and refused to recognize the union as a bargaining agent.⁴⁹⁵

490. *Id.* at 25 n.31 (citing *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360-61 (10th Cir. 1971) (“In view of the overriding federal policy favoring arbitration, waiver is not lightly inferred. . . . The court found . . . that there was no waiver of arbitration. The finding is not clearly erroneous and is sustained by the record.”) (emphasis added); *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir. 1973) (An agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon. However, waiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of a contract Our review of the record convinces us there was no waiver by RTR in the district court proceedings.). The other six cases cited in footnote 31 of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* in support of the general rule that doubts are to be resolved in favor of arbitration involve this general rule in connection with interpretation of the scope of arbitrable issues, not allegations of waiver or delay. See *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 643 (7th Cir. 1981); *Wick v. Atl. Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 44 (3d Cir. 1978) (“[D]oubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be resolved in favor of arbitration unless a court can state with ‘positive assurance’ that this dispute was not meant to be arbitrated.”); *Hanes Corp. v. Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976); *Acevedo Maldonado v. PPG Indus., Inc.*, 514 F.2d 614, 616-617 (1st Cir. 1975); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211-12 (2d Cir. 1972).

491. *Howsam*, 537 U.S. at 84 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

492. *John Wiley & Sons*, 376 U.S. at 544-45.

493. *Id.* at 545.

494. *Id.*

495. *Id.*

The union subsequently brought an action to compel arbitration pursuant to the collective bargaining agreement.⁴⁹⁶

The collective bargaining agreement provided that arbitration was to be the third and final stage of certain grievance procedures, and John Wiley argued it had no obligation to arbitrate because the first two steps of the grievance procedure, which were prerequisites to arbitration, had not been followed.⁴⁹⁷ The union argued that following the grievance procedures would be futile because John Wiley refused to recognize the union as a result of the merger.⁴⁹⁸ An issue arose whether a court or an arbitrator should resolve “whether [the] ‘procedural’ conditions to arbitration ha[d] been met.”⁴⁹⁹ In discussing whether a court or arbitrator should resolve this issue, the *John Wiley* Court recognized that it may sometimes be difficult to separate the procedural and substantive aspects of a dispute.⁵⁰⁰ The *John Wiley* Court believed that whether the grievance procedures were followed was an issue that would “ordinarily” be intertwined with the merits of the underlying dispute:

Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration.⁵⁰¹

The *John Wiley* Court had already determined that an arbitrator had the authority to resolve, and the parties were required to arbitrate, the merits of the underlying dispute.⁵⁰² Then in discussing the grievance procedures, the *John Wiley* Court reasoned that whether the grievance procedures, prerequisites to arbitration, were satisfied would implicate the merits of the underlying dispute.⁵⁰³ The *John Wiley* Court thought that an analysis of the arguments regarding the following of the grievance procedures “depends to a large extent on how one answers questions *bearing* on the basic issue, the effect of the merger.”⁵⁰⁴ The *John Wiley* Court reasoned that it was illogical for

496. *Id.* at 546.

497. *Id.* at 555-56.

498. *Id.* at 557.

499. *Id.* at 556.

500. *Id.*

501. *Id.* at 557.

502. *Id.*

503. *Id.*

504. *Id.* (emphasis added).

such “intertwined issues . . . raising the same questions on the same facts . . . to be carved up between two different forums.”⁵⁰⁵ Consequently, the court held “[o]nce it is determined, [by the court], that the parties are obligated to submit the subject matter of a dispute to arbitration,”⁵⁰⁶ then such “procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”⁵⁰⁷

In *John Wiley*, the Court determined that the procedural issue should be decided by an arbitrator because the issue was intertwined with the merits which the arbitrator had authority to resolve.⁵⁰⁸ Considered properly in the context of the *John Wiley* opinion, the phrase “‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator”⁵⁰⁹ refers to procedural questions, the consideration of which implicates the merits of the underlying dispute. In *Howsam*, the Court quoted this phrase from *John Wiley* in identifying procedural arbitrability issues.⁵¹⁰ Although the *Howsam* Court did not focus on whether consideration of the six-year time limit may involve consideration of the merits of the underlying dispute, courts have recognized that statute of limitations issues may involve consideration of issues bearing on the merits of the underlying dispute.⁵¹¹

It seems that it would not be necessary to consider the merits of an underlying claim in determining whether an arbitration agreement provides for class arbitration. For example, whether or not Green Tree violated a state statute requiring disclosures would not implicate whether the arbitration clause in Green Tree’s contracts provide for class arbitration. Determining whether an agreement provides for class arbitration is different than determining whether a particular

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002) (citing *John Wiley & Sons*, 376 U.S. at 557).

511. *Fechter v. Conn. Gen. Life Ins. Co.*, 800 F. Supp. 178, 180 (E.D. Pa. 1991) (finding “statute of limitations defense . . . inextricably intertwined with the fiduciary duty issue”); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Gregg*, No. 93-177-CIV-OC-16, 1993 WL 616691, at *5 (M.D. Fla. Dec. 8, 1993) (“This Court determines, therefore, that the arbitration panel is better equipped to address Merrill Lynch’s statute of limitations concerns because the issues surrounding the statute of limitations questions are inextricably intertwined with the Greggs’ substantive claims.”); *Corbo v. Les Chateau Assoc.*, 127 A.D.2d 657, 658 (N.Y. App. Div. 1987) (statute of limitations issues which were “intertwined with the ultimate substantive issues” should be determined by arbitrator).

claim is barred under a rule providing for a time limitation, which might necessitate consideration of facts that may be relevant to resolving the merits of the underlying claim. In *Del E. Webb Construction v. Richardson Hospital Authority*,⁵¹² the Fifth Circuit held that a court, and not an arbitrator, should determine whether a written agreement provides for consolidated arbitration proceedings.⁵¹³ In reaching this holding, the Fifth Circuit reasoned that, unlike the situation in *John Wiley* where resolving whether a claim is time barred may be intertwined with the merits, determining whether an arbitration agreement provides for consolidation would not necessitate consideration of the merits of the underlying dispute:

The question in [*John Wiley*], whether contractual prerequisites to arbitration have been satisfied, is for the arbitrator because invariably that question is intertwined with the underlying facts. The arbitrator, with the full case before it, can better determine whether there has been contractual compliance. Indeed, as Justice Harlan explained in [*John Wiley*]: “Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration.” The question of consolidation, however, is for the district court because the court must determine only whether the contract provides for consolidated arbitration, a question free of the underlying facts.⁵¹⁴

Although the Fifth Circuit in *Pedcor* treated *Del E. Webb* as overruled by *Bazzle* because *Bazzle* purportedly “held” that whether a contract provides for class arbitration is for an arbitrator to decide,⁵¹⁵ the Fifth Circuit’s *Del E. Webb* decision has not been overruled by *Bazzle* because as explained above, *Bazzle* did not result in such a holding.⁵¹⁶ Under the rationale of *Del E. Webb*, courts may properly address whether a contract provides for class arbitration.

Turning to Chief Justice Rehnquist’s dissent in *Bazzle*, although the opening paragraph of his dissent states that courts should make the determination whether a contract provides for class arbitration, the reasoning in the rest of his dissent appears to focus on who should

512. 823 F.2d 145 (5th Cir. 1987).

513. *Del E. Webb Constr.*, 823 F.2d at 150.

514. *Id.* at 149-50 (citation omitted) (emphasis added).

515. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 335, 363 (5th Cir. 2003).

516. See *supra* Part I.C.3.

make the determination of a slightly different, although arguably related, issue: who is the appropriate decision-maker regarding how an arbitrator should be selected.⁵¹⁷ After arguing that courts are the appropriate decision-maker regarding the arbitrator selection process and after determining the proper arbitrator selection procedure set forth in the contracts at issue, Chief Justice Rehnquist reasoned class arbitration would contravene the particular arbitrator selection procedure agreed to by the parties.⁵¹⁸

In concluding that there is a presumption that courts, not arbitrators, should resolve disputes regarding the selection of an arbitrator and the selection process set forth in the arbitration agreements at issue was inconsistent with class arbitration, Chief Justice Rehnquist, in *Bazzle*, relied on the Supreme Court's earlier decision in *First Options*.⁵¹⁹ In *Bazzle*, Chief Justice Rehnquist cited a passage from *First Options* explaining that courts, not arbitrators, should determine whether the parties agreed to arbitrate a matter:

[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide.⁵²⁰

Chief Justice Rehnquist then explained that "[j]ust as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted. Those are the two provisions in the sentence quoted above [from *First Options*], and it is difficult to say that one is more important than the other. I have no hesitation in saying that the choice of arbitrator is as important a component of the agreement to arbitrate as is the choice of what is to be submitted to him."⁵²¹ The concern in this passage from *First Options* involves forcing an unwilling party to arbitrate an issue that the party reasonably expected a judge to decide, and Chief Justice Rehnquist appears to be saying that there should be equal concern for forcing an unwilling party to arbitrate before Arbitrator A when the party reasonably expected Arbitrator B, selected by a different process, to administer the arbitration. Chief Justice Rehnquist then concluded that "the parties' agreement as

517. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 455-59 (2003).

518. *Id.* at 459.

519. *Id.* at 456 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)).

520. *Id.*

521. *Id.* at 456-57.

to how the arbitrator should be selected is much more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options*,⁵²² than issues of procedural arbitrability presumptively for an arbitrator under *Howsam*.⁵²³ Although the opening paragraph of his dissent states that courts, not arbitrators, should make the determination whether a contract provides for class arbitration, his dissent really focuses on who is the appropriate decision-maker for the selection process of an arbitrator.⁵²⁴

According to Chief Justice Rehnquist, the procedure for selecting an arbitrator is a component of the agreement equally important to arbitrate as the scope of issues to be submitted to arbitration, and thus there should be a presumption that a court resolve debates about the procedure. There appears to be a concern for forcing an unwilling party to arbitrate before Arbitrator A when the party reasonably expected Arbitrator B, selected by a different procedure, to administer the arbitration. This concern appears to lead down a slippery slope, and a similar concern arguably exists in connection with other arbitration procedures. For example, what if the parties disagree over the procedure for discovery in arbitration, and each party contends that they had an agreement regarding a different procedure for discovery? Shouldn't there be a similar concern for forcing an unwilling party to arbitrate under one set of discovery rules when the parties purportedly agreed to an entirely different set of discovery rules because arbitration is a matter of agreement, and under Chief Justice Rehnquist's rationale, wouldn't this concern suggest that a court should resolve issues regarding arbitral discovery procedures?⁵²⁵

Nevertheless, there is some support for treating the selection procedure for an arbitrator differently than other arbitral procedures, and thus the slope may not be too slippery. Chief Justice Rehnquist's view that the selection of an arbitrator is an issue presumptively for the courts is consistent with 9 U.S.C. § 5, which provides for judicial intervention regarding the selection of an arbitrator. Section 5, which was not cited by any of the Justices in *Bazzle*, states that "[i]f in the agreement provision be made for a method of naming or appointing an

522. *Id.* at 457.

523. *Id.*

524. *Id.* at 455.

525. Issues regarding discovery procedures have been treated as procedural arbitrability issues for an arbitrator to resolve. *See, e.g., Titan/Value Equities Group, Inc. v. Superior Court*, 35 Cal. Rptr. 2d 4 (Cal. Ct. App. 1994).

arbitrator or arbitrators or an umpire, such method shall be followed.”
However:

[I]f no method be provided [in the arbitration agreement], or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.⁵²⁶

Thus, the FAA empowers courts to play a central role in the selection process of arbitrators, including designating and appointing an arbitrator to administer an arbitration if a party fails to follow a method for selection of an arbitrator. Moreover, even if there is no method provided in the arbitration agreement for selection of an arbitrator, the court still may designate and appoint an arbitrator upon application of one of the parties.

Courts have construed the language of arbitrator selection clauses in discussing the appointment of arbitrators. For example, in *Harris v. Green Tree Financial Corp.*,⁵²⁷ the Third Circuit addressed an arbitration clause with the exact same language regarding selection of an arbitrator as the arbitration clause at issue in *Bazzle*: “selected by us [Green Tree] with the consent of you.”⁵²⁸ After finding that the consumer’s interpretation of this arbitrator selection clause was flawed and explaining how the clause should be properly construed, the Third Circuit stated that if a failure would occur in following this proper arbitrator selection process, either party may petition a court under 9 U.S.C. § 5 to appoint an arbitrator.⁵²⁹

526. 9 U.S.C. § 5 (2004) (emphasis added).

527. 183 F.3d 173 (3d Cir. 1999).

528. *Harris*, 183 F.3d at 177.

529. *Id.* at 183 (“We note, however, that the language of the arbitration clause does not comport with the *Harrises*’ interpretation of their rights regarding the choice of arbitrator. Rather, the clause provides that the arbitrator will be ‘selected by us [Green Tree] with the consent of you [the *Harrises*].’ In the event that Green Tree and the *Harrises* do not agree on Green Tree’s choice of arbitrator, section five of the FAA provides that either party may petition the court to appoint an arbitrator.”); see also *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 270 (3d Cir. 2004) (noting 9 U.S.C. § 5 provides for judicial resolution of disputes regarding the selection of an arbitrator); *Continental Cas. Co. v. QBE Ins.*, No. 03 C 2222, 2003 WL 22295377 (N.D. Ill. Oct. 7, 2003) (appointing third member of tri-partite arbitration panel pursuant to 9 U.S.C. § 5); *Neptune Maritime, Ltd. v. H & J Isbrandtsen, Ltd.*, 559 F. Supp. 531 (S.D.N.Y. 1983) (recognizing that 9 U.S.C. § 5 empowers courts to appoint arbitrators and appointing arbitrator where party failed to comply with arbitration agreement). See generally 3 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND

In discussing the division of authority between arbitrators and courts under the FAA, the Supreme Court has acknowledged the expectation of the parties. For example, in *First Options*, the Supreme Court explained that a court is generally the correct decision-maker to determine whether parties agreed to arbitrate a matter because to hold otherwise would “force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide.”⁵³⁰ Similarly, in *Howsam*, the Court explained that a substantive arbitrability issue generally involves a “circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.”⁵³¹ Procedural arbitrability, on the other hand, involves situations “where parties would likely expect that an arbitrator would decide the gateway matter.”⁵³²

It seems that parties may reasonably expect that a court would decide issues regarding the selection of an arbitrator. It has been recognized by the leading treatise on federal arbitration law that selection of an arbitrator “is the most important decision arbitrating parties can make.”⁵³³ Because of the importance of this decision, it seems that parties may generally expect that a court, with the greater protections provided through the judicial processes, would presumptively resolve issues regarding the selection of an arbitrator. If the parties dispute the selection process of an arbitrator such that a complete impasse occurs in the selection process, it would be practically impossible for an arbitrator properly selected by the parties to resolve the dispute, and it seems that parties would expect a court, rather than an arbitrator, to resolve this issue. Moreover, suppose that Party X would consent to Arbitrator A to administer non-class arbitration, but would prefer Arbitrator B to administer class arbitration. It may be problematic to force Party X to choose an arbitrator and to submit to that arbitrator the question of whether class arbitration is permitted when the answer to that question would significantly impact the initial choice of an ar-

REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 29 (Supp. 1999).

530. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

531. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83-84 (2002).

532. *Id.* at 84.

533. MACNEIL ET AL., *supra* note 529, § 27.1 (emphasis added).

bitrator, which has been recognized as the most important decision that can be made regarding arbitration.

Turning back to the hypothetical example set forth above in Section II.D., involving Customer #401 who brings a claim in federal court against Blue Tree and purports to represent a class of similarly situated individuals. If Blue Tree files a motion to compel arbitration pursuant to 9 U.S.C. § 4, the court may direct Customer #401 and Blue Tree to arbitrate in accordance with Customer #401's agreement.⁵³⁴ If the court adopts Chief Justice Rehnquist's position in *Bazze*, the court may resolve whether Customer #401's agreement provides for a class arbitration mechanism. Also, if class arbitration is commenced and if thirty of the absent class members believe there is no valid arbitration agreement to arbitrate on a class-wide basis, there is no uniform procedure for resolving the contract principle as discussed above in Section II.D.2. Blue Tree perhaps may stop the proceedings and file a motion to compel arbitration with respect to these thirty customers, and a court adopting Chief Justice Rehnquist's position in *Bazze* may determine whether a valid agreement to arbitrate on a class-wide basis exists. Alternatively, the thirty customers may object, and the arbitration proceedings may continue subject to the objection of these class members, and these objections may be subsequently heard by a court upon a motion to confirm or vacate an award, unless these thirty customers feel strongly enough to immediately file suit in court. These customers may bring suit in court on the underlying claim, or file a declaratory judgment action regarding the duty to arbitrate, or both, any of which may trigger a motion to compel arbitration by Blue Tree. A court adopting Chief Justice Rehnquist's position may then address whether these thirty individuals have a valid agreement to arbitrate on a class-wide basis.⁵³⁵ Similarly, if Customer #401 commences a class arbitration against Blue Tree, and Blue Tree refuses to participate believing there was no agreement for class arbitration, there would be several options. For example, Customer #401 may stop the proceedings and bring a motion to compel arbitration, or Blue Tree may decide to bring a declaratory judgment action in court,

534. See *supra* Part II.D.1.

535. These thirty Customers may attempt to show that there is no valid arbitration agreement at all. If these thirty Customers wish to contest whether their valid arbitration agreements provide for class arbitration or not, it may be an uphill battle to the extent that a court has already addressed the contract. For example, if Customer #401 initially filed a class action in court and the class arbitration was instituted pursuant to a court order compelling arbitration, whether the contract provided for class arbitration or not may have already been addressed by the court.

and if the court adopts Chief Justice Rehnquist's position, the court may address whether the agreement provides for class arbitration.

To summarize, the existence of an arbitration agreement is a crucial issue which legitimizes the entire arbitral process. The summary judgment-like procedure established by the FAA to determine whether a valid arbitration agreement exists before ordering a party to arbitrate is problematic in connection with ordering potentially thousands of individuals to arbitrate, but the procedure may nevertheless be workable in a class arbitration context if the court focuses on the aggrieved party and the party in default as provided by the FAA. Moreover, some type of procedure should be in place in the arbitration proceeding to help ensure that all the class members are bound by valid arbitration agreements. Finally, with respect to the issue whether a court or arbitrator should determine if an arbitration agreement provides for class arbitration, there is some support for Chief Justice Rehnquist's position in dissent that a court is the correct decision-maker.

III. CONCERNS REGARDING APPELLATE REVIEW AND DUE PROCESS IN CONNECTION WITH CLASS ARBITRATION

Rule 23 of the Federal Rules of Civil Procedure was amended in 1998 to provide for a discretionary interlocutory appeal of an order granting or denying class action certification.⁵³⁶ The Advisory Committee Notes regarding this amendment explained the concerns justifying the expansion of opportunities for appeal of certification orders:

An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.⁵³⁷

Courts have recognized a "death-knell" effect that a class certification order may have on litigation. With respect to plaintiffs, the denial of a class certification may "defeat[] the case as a practical matter because the stakes are too small and the litigation costs are too high

536. FED. R. CIV. P. 23(f) ("A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.").

537. FED. R. CIV. P. 23 advisory committee's note to 1998 amendments [hereinafter FRCP Note].

for the individual plaintiff to go forward.”⁵³⁸ With respect to defendants, the grant of class certification can “propel the stakes of a case into the stratosphere,” placing “undue pressure” on a defendant to enter into a “blackmail” settlement of potentially weak claims rather than risk “bet-the-company” liability.⁵³⁹ The Advisory Committee Notes regarding Rule 23(f) recognize that the amendments were adopted to address these death-knell concerns, which “can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review”⁵⁴⁰

Similarly, in class arbitration, the denial of certification may end the arbitration as a practical matter because costs may be too expensive for a claimant to continue, and the grant of class certification may place undue pressure on respondents to settle weak claims. In judicial class actions, the death-knell may now be silenced by means of Rule 23(f), which allows courts of appeals “unfettered discretion” to permit an interlocutory appeal based upon “any consideration that the court of appeals finds persuasive.”⁵⁴¹ However, the death-knell in class ar-

538. *In re Delta Air Lines*, 310 F.3d 953, 957 (6th Cir. 2002).

539. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), observes not only that class actions can have this effect on risk-averse corporate executives (and corporate counsel) but also that some plaintiffs or even some district judges may be tempted to use the class device to wring settlements from defendants whose legal positions are justified but unpopular. Empirical studies of securities class actions imply that this is common.”); *Delta Air Lines*, 310 F.3d at 957; *see also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (recognizing that class certification orders may impose upon defendants a “bet-your-company decision” and may “induce a substantial settlement even if the customers’ position is weak”); *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (referring to “the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement”).

540. *See* FRCP Note, *supra* note 537.

541. *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 76 (2d Cir. 2004) (citing FRCP Note, *see supra* note 537). The Advisory Committee Note also recognizes that “courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation,” and courts have adopted flexible standards regarding when leave to appeal should be granted. FRCP Note, *see supra* note 537. *See, e.g., Hevesi*, 366 F.3d at 76 & n.4 (stating that the standard for granting leave to appeal is whether the petitioner demonstrates “either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court’s decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution,” but recognizing that the standard “is a flexible one that should not be reduced to any bright-line rules”) (citing *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001)); *Delta Air Lines*, 310 F.3d at 959 (recognizing Rule 23(f) standards adopted by other circuits and concluding that “[l]ike the courts that have spoken on the issue, we eschew any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal”).

bitration may be more likely to continue somberly tolling as a result of the limited review of arbitral decisions recognized by courts, which has been described as among the “narrowest known to the law.”⁵⁴²

Section 10 of the FAA, 9 U.S.C. § 10, provides certain grounds for vacating arbitral awards upon application to a court by any party to the arbitration,⁵⁴³ and it is well-recognized that judicial review of arbi-

542. Pfeifle v. Chemoil Corp., No. 03-20047, 2003 WL 21999540, at *3 (5th Cir. Aug. 22, 2003) (“Courts consistently emphasize the narrowness of judicial review of arbitration awards, describing it as ‘among the narrowest known to the law’”) (citation omitted); Brown v. Coleman Co., Inc., 220 F.3d 1180, 1182 (10th Cir. 2000) (recognizing that “[m]aximum deference is owed to the arbitrator’s decision” and the standard of review “is among the narrowest known to law”); Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994) (“Over and over we have held that arbitrators’ errors—even clear or gross errors—do not authorize courts to annul awards.”) (internal citation omitted).

543. 9 U.S.C. § 10 provides the following grounds for vacating an arbitral award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Some courts have held that these grounds are the exclusive grounds for vacating an arbitral award. *See, e.g.,* e.spire Communications, Inc. v. CNS Communications, No. 02-1089, 2002 WL 1492560, at *6 (4th Cir. July 15, 2002) (finding FAA provides exclusive grounds for vacatur of an arbitration award); Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 205 F.3d 906, 909 (6th Cir. 2000) (finding FAA provides exclusive remedy for challenging arbitration award); Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) (“Arbitration does not provide a system of ‘junior varsity trial courts’ offering the losing party complete and rigorous *de novo* review A restrictive standard of review is necessary to prevent arbitration from becoming a ‘preliminary step to judicial resolution.’”) (citations omitted); Moseley, Hallgarten, Estabrook & Weeden, Inc., v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) (explaining that 9 U.S.C. § 10 provides the exclusive grounds for vacating an arbitral award and recognizing that “[a]rbitration is an alternative to the judicial resolution of disputes, and an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative”) (citation omitted). However, courts have recognized grounds for vacating arbitral awards such as “manifest disregard of the law” that do not track the exact language of the statute, and there has been some uncertainty regarding whether these labels are accepted non-statutory grounds or whether they simply are paraphrases of some of the grounds set forth in 9 U.S.C. § 10 such as the provisions regarding arbitrators who “exceeded their powers.” *See, e.g.,* Moseley, 849 F.2d at 268 n.7 (recognizing that some courts “have suggested that an award may be set aside if it is in ‘manifest disregard of the law,’” but refusing to adopt this non-statutory grounds for vacating an arbitral award) (citations omitted). However, some language in *First Options* indicates that the Supreme Court approves of the manifest disregard of the law standard. *See* Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 759 (5th Cir. 1999) (recognizing that “clear approval of the ‘manifest disregard’ of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court’s statement in *First Options* that ‘parties [are] bound by [an] arbitrator’s decision not in manifest disregard of the law.’”) (citation omitted); *see also* 4 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW:

tral decisions is extremely limited. The Fourth Circuit has discussed this policy behind the well-established limited review of arbitral decisions as follows:

We must underscore at the outset the limited scope of review that courts are permitted to exercise over arbitral decisions. Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it. A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. . . . Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, “[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.” Thus, in reviewing arbitral awards, a district or appellate court is limited to determining “whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it.”⁵⁴⁴

AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 40.7.1 (Supp. 1999) (explaining that *First Options* “gave reinforcement to the use of the extra-statutory ground of manifest disregard of the law,” but adoption of this rule “is by no means inconsistent with the proposition that FAA § 10 sets out exclusive grounds for vacation” and use of this manifest disregard rule “should seldom if ever affect actual outcomes of decisions” because a “court proceeding under FAA § 10(a)(4) may use what is essentially a manifest-disregard-of-the-law analysis to determine whether arbitrators exceeded their powers”); *id.* §§ 40.5.1.2-1.3.

544. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (citations omitted); *see also* *National Boatland, Inc. v. IIT Commercial Fin. Corp.*, 230 F.3d 1359, 2000 WL 1434671, at *2 (6th Cir. Sept. 19, 2000) (“[I]t is well-established that judicial review of a commercial arbitration award is extremely limited,” and “[w]hen courts are called on to review an arbitrator’s decision, the review is very narrow, one of the narrowest standards of review in all of American jurisprudence.”) (citations and internal quotations omitted); *Amicizia Societa Navigazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960) (“Were we empowered to view the matter *de novo*, we would find much to persuade in the arguments advanced by the dissenting arbitrator. But as respondent recognizes, the court’s function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated.”) (citation omitted); *MACNEIL ET AL.*, *supra* note 543, at § 40.1.4 (recognizing long history of judicial reluctance to vacate arbitration awards); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 216 n.10 (2d Cir. 2002) (refusing to vacate award despite “serious reservations about the soundness of the arbitrator’s reading of this contract” and explaining the “standard of review constrains us to affirm an arbitrator’s judgment ‘even if a court is convinced he committed serious error’”) (citations and internal quotations omitted); *B-S Steel of Kansas, Inc. v. Texas Indus., Inc.*, 321 F. Supp. 2d 1214, 1220-21 (D. Kan. 2004) (“Mere error or misunderstanding of law is not enough.” There must be a showing that “the arbitrators knew the law and explicitly disregarded it.” The court denied a motion to vacate an award where movant failed to show a “willful inattentiveness to the governing law.”) (citations omitted).

In describing this extremely limited review of arbitral awards, courts have explained that “a motion to vacate filed in a federal court is not an occasion for *de novo* review of an arbitral award,” and a “federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law.”⁵⁴⁵ Moreover, the general rule is that courts do not allow interlocutory review of an arbitral decisions pursuant to 9 U.S.C. § 10 during an arbitration proceeding.⁵⁴⁶

However, with respect to judicial class actions, discretionary interlocutory appeals are explicitly recognized by Rule 23(f), and although the standard of review with respect to judicial class certification orders is generally an abuse of discretion standard, some issues are reviewed *de novo*, in contrast to the extremely narrow review traditionally accorded to arbitral awards. For example, the First Circuit has explained that “[n]ominally, review of decisions granting or denying class certification is for ‘abuse of discretion,’ but this chameleon phrase is misleading. Express standards for certification are contained in Rule 23, so an appeal can pose pure issues of law reviewed *de novo*.”⁵⁴⁷ Class arbitrations, like judicial class actions, may have a

545. *Wallace v. Buttar*, No. 03-7158, 2004 WL 1753392, at *7 (2d Cir. Aug. 5, 2004); *see also Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62 (3d Cir. 1986) (pursuant to the very limited scope of review permitted by 9 U.S.C. § 10, courts may not “consider whether the arbitrators committed an error of law”); *Abbott Labs. v. Orasure Techs., Inc.*, No. 04 C 1857, 2004 WL 887383, at *4 (N.D. Ill. Apr. 23, 2004) (“[A]rbitrators’ errors—even clear or gross errors—do not authorize courts to annul awards.”) (citation omitted); *Choice Hotels Int’l, Inc. v. Patel*, No. Civ. A. DKC 2003-2318, 2004 WL 57658 (D. Md. Jan 13, 2004) (an error of law does not suffice to overturn an arbitral award); *Cunningham v. Pfizer Inc.*, 294 F. Supp. 2d 1329, 1331 (M.D. Fla. 2003) (“The party seeking vacatur has the burden to overcome the strong presumption under the Federal Arbitration Act that the arbitration award should stand. A court reviewing an arbitration decision does not review the issues submitted to arbitrators *de novo*.”) (citation omitted); *Companhia De Navegacao Maritima Netumar v. Armada Parcel Serv., Ltd.*, No. 96 Civ. 6441, 1997 WL 16663, at *3 (S.D.N.Y. Jan. 17, 1997) (“[E]rrors of fact or of law do not constitute reasons to vacate or modify an arbitration.”) (citations omitted); *Nitram, Inc. v. Industrial Risk Insurers*, 848 F. Supp. 162, 165 (M.D. Fla. 1994) (“Respondents are in effect, asking this Court to review the Arbitrator’s Award *de novo*. The level of scrutiny given to an Arbitrator’s award is not that intrusive and moreover, because such awards are given greater deference, this Court shall not make such a review.”).

546. *See, e.g., Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (“[A] district court does not have the power to review an interlocutory ruling by an arbitration panel” under the FAA.) (citations omitted); *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 233-34 (1st Cir. 2001) (In applying 9 U.S.C. § 10, “[i]t is essential for the district court’s jurisdiction that the arbitrator’s decision was final, not interlocutory.” “The prerequisite of finality promotes the role of arbitration as an expeditious alternative to traditional litigation,” but there are some exceptions to this general rule.) (citations omitted).

547. *Tardiff v. Knox County*, 365 F.3d 1, 4 (1st Cir. 2004) (citation omitted); *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1251 (11th Cir. 2003) (“[W]hether the district court applied the correct legal standard in reaching its decision on class certification . . . is a legal question that we review *de novo*.”) (citation omitted); *Sikes v. Teleline, Inc.*,

death-knell effect for plaintiffs and defendants, which may justify a relaxing of the traditionally narrow standard of review for arbitral decisions and the permitting of interlocutory appeals.

It should also be remembered that as arbitrations are a matter of private agreement, the procedures in a class arbitration are subject to the agreement of the parties. Although the AAA Class Rules are patterned after Rule 23, “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”⁵⁴⁸ As colorfully stated by Judge Posner, “[i]ndeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.”⁵⁴⁹ It has long been recognized that constitutional due process concerns are significant in judicial class actions,⁵⁵⁰ and there may be similar concerns regarding whether the procedures for a class arbitration created by private agreement comport with constitutional due process. However, some courts have held that private arbitration does not involve state action, and thus, constitutional due process concerns are inapplicable.⁵⁵¹

281 F.3d 1350, 1359 (11th Cir. 2002) (“If the court’s certification was ‘erroneous as a matter of law,’” then the class should be decertified.) (citation omitted).

548. *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“[P]arties are generally free to structure their arbitration agreements as they see fit, so too may they specify by contract the rules under which that arbitration will be conducted.”). *Id.* at 479.

549. *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 709 (7th Cir. 1994).

550. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (“[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (recognizing that mandatory class actions “implicate the due process ‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process’”) (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

551. In *Davis v. Prudential Sec., Inc.*, the Eleventh Circuit firmly held:

[W]e agree with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases. *See, e.g., Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) (“The arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator. Although Congress, in the exercise of its commerce power, has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim.”), *cert. denied*, 485 U.S. 987 (1988); *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) (“[T]he fact that a private arbitrator denies the procedural safeguards that are encompassed by the term ‘due process of law’ cannot give rise to a constitu-

Although the holding that private arbitration does not involve state action is not without its critics,⁵⁵² to the extent that due process challenges to arbitration are foreclosed by the acceptance of this “no state action” holding by courts, individuals would have to rely on other avenues to address a class arbitration that they believe goes awry. Although 9 U.S.C. § 10 indirectly regulates arbitral procedures by providing parties with a mechanism to request the vacating of an arbitral decision,⁵⁵³ the standard of review with respect to arbitral decisions, as recognized above, has traditionally been extremely narrow, and more relaxed standards of review may help ensure the fairness of class arbitration.⁵⁵⁴

tional complaint.”); *Int’l Ass’n of Heat & Frost Insulators & Asbestos Workers Local Union 42 v. Absolute Envtl. Servs., Inc.*, 814 F. Supp. 392, 402-03 (D. Del. 1993) (no state action in arbitration proceedings pursuant to a collective bargaining agreement between private parties); *Austern v. Chicago Bd. Options Exch., Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989) (holding that the conduct of an arbitration panel “did not in any way constitute state action”), *aff’d*, 898 F.2d 882 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990). In the present case, the arbitration was a private proceeding arranged by a voluntary contractual agreement of the parties. Accordingly, the arbitration proceeding itself did not constitute state action.

59 F.3d 1186, 1191 (11th Cir. 1995).

552. See, e.g., Richard C. Reuben, *Public Justice: Toward A State Action Theory Of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 629 (1997) (“In short, the mandatory statutory schemes that allocate the roles of the private ADR providers and the public courts toward the single end of state-enforced dispute resolution can establish an inseparable and indispensable nexus between the seemingly private actors and their governmental partners. This relationship represents an extremely high level of government assistance and benefits for otherwise seemingly private conduct. As such, the ‘private use of the [procedure] with the help of state officials constitutes state action.’”) (citation omitted).

553. See generally 4 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 40.1.1 (Supp. 1999) (recognizing that the provisions of 9 U.S.C. § 10 that allow vacation of arbitral decisions “can be brought to bear respecting the conduct of arbitration proceedings”).

554. Compare *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003) (whether notice of a proposed settlement in a judicial class action satisfies due process is a question of law reviewed *de novo*) with *Nitram, Inc. v. Indus. Risk Insurers*, 848 F. Supp. 162, 165 (M.D. Fla. 1994) (“Respondents are in effect, asking this Court to review the Arbitrator’s Award *de novo*. The level of scrutiny given to an Arbitrator’s award is not that intrusive and moreover, because such awards are given greater deference, this Court shall not make such a review.”). Compare *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985) (recognizing that in order for absent class members in a judicial class action to be bound, minimal due process protections require, *inter alia*, that the class members receive notice) with *Gingiss Int’l, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995) (“The Bormets contend that the arbitration award should be vacated because they did not receive proper notice of the arbitration proceedings. We have repeatedly held that 9 U.S.C. § 10(a) provides the exclusive grounds for setting aside an arbitration award under the FAA Inadequate notice is not one of these grounds, and the Bormets’ claim therefore fails.”).

CONCLUSION

In *Mitsubishi*, Justices Stevens, Brennan, and Marshall in dissent, raised some concerns whether arbitration agreements with respect to particular claims should be enforceable in light of the narrow standard of review for arbitral decisions and the “rudimentary procedures” that may exist in arbitration, such as procedures that do not “provide any right to evidentiary discovery or a written decision” or procedures that may require that “all proceedings be closed to the public.”⁵⁵⁵ These Justices explained that:

Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, . . . , and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator’s decision is virtually unreviewable. Despotism of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets. Instead of muffling a grievance in the cloakroom of arbitration, the public interest in free competitive markets would be better served by having the issues resolved in the light of impartial public court adjudication.⁵⁵⁶

Although these concerns were addressed in the context of the arbitrability of antitrust claims, similar concerns may exist in arbitral class actions. An error by a single arbitrator in a class arbitration with nationwide ramifications may negatively impact thousands of individuals and yet remain insulated from review, and informal procedures may not adequately protect the interests of all involved. Although increased formality in class arbitration and increased judicial intervention to review class arbitral awards may help alleviate concerns about the propriety of class arbitrations as a means of providing collective justice, imposing more court-like procedures and providing increased opportunity for judicial review would help bring class arbitration full-circle and closer to a traditional model of a judicial class action, forcing an inquiry into the value of having class arbitration as a form of aggregate dispute resolution in the first place.

It has been observed that more people are using arbitration as a means of dispute resolution than ever before, and “[a]rbitration pro-

555. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656, 657 n.31 (1985) (citation omitted).

556. *Id.* at 656-57 (citation and internal quotations omitted).

vides a valuable alternative to the time and complexity of lawsuits for consumers and companies, and for employees and employers, alike.”⁵⁵⁷ With the trend toward class arbitration in the wake of *Bazzle* and potentially more claims being resolving in arbitration, it is important for courts to recognize that *Bazzle* did not set forth binding precedent, and courts should develop their own reasoned opinions regarding class arbitration issues and treat *Bazzle* “as a point of reference for further discussion.”⁵⁵⁸ Also, Congress may want to consider amending the FAA to specifically address certain issues that may arise in class arbitration, such as the availability of interlocutory review and the appropriate standard of review of class arbitration decisions. Furthermore, specific procedures should be considered in the context of class arbitration to help respect the core principle that arbitration is a matter of agreement. As the use of class arbitration increases, there will be more opportunities to consider the intersection of class procedure and arbitration and to evaluate whether class arbitration is an appropriate method for aggregate dispute resolution.

557. AMERICAN ARBITRATION ASSOCIATION, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 7, 37 (2003); see also *id.* at 7 n.2 (“There were some 1,170,000 cases filed for administration with the American Arbitration Association from 1990 through 2001,” which was “more than the number of cases filed with AAA in the previous 65 years since its inception.”).

558. *Texas v. Brown*, 460 U.S. 730, 737 (1983) (“[W]hile the lower courts generally have applied the *Coolidge* plurality’s discussion of ‘plain view,’ it has never been expressly adopted by a majority of this Court.” Such a plurality view fails to establish “binding precedent” and should be treated as a “point of reference for further discussion of the issue.”) (plurality opinion).