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A common criticism of arbitration is that its upfront costs (arbitrators' fees and administrative costs) may preclude consumers and employees from asserting their claims. Some commentators have argued further that arbitration costs undercut the benefits to consumers and employees of contingent fee contracts, which permit the claimants to defer payment of attorneys' fees and litigation expenses until they prevail in the case (and if they do not prevail, avoid such costs altogether). This paper argues that this criticism has it exactly backwards. Rather than arbitration costs interfering with the workings of contingent fee contracts, the contingent fee mechanism provides a means for overcoming liquidity and risk aversion barriers to arbitration. Arbitration costs are just another form of litigation expense, which attorneys should be willing to advance on behalf of clients with viable claims. As a result, even accepting the premises of the cost-based criticism, it does not follow that arbitration costs necessarily preclude individuals from bringing their claims in arbitration. Even if individual claimants cannot afford the forum costs of arbitration, at least some of those individuals – those with viable claims given the total costs of the dispute resolution process – should nonetheless be able to bring their claims. For this reason, much of the legal analysis of arbitration costs is misdirected, focusing too much on the personal finances of the individual claimant and too little on the incentives for attorneys to take the case (such as the value of the claim and possible recovery under fee-shifting statutes). In the vast majority of federal court cases adjudicating cost-based challenges to arbitration agreements, the claimant is represented by counsel and, in most, has asserted a claim that, if successful, would permit the recovery of attorneys' fees. This evidence suggests that in most reported cases, even those in which courts invalidated the arbitration agreement on cost grounds, arbitration costs were not a barrier to asserting the claim in arbitration.

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I. INTRODUCTION

In a widely publicized report, *The Costs of Arbitration*, the consumer advocacy group Public Citizen concluded that high upfront costs in arbitration "have a deterrent effect, often preventing a claimant from even filing a case."[1] Indeed, according to Public Citizen, "few consumers have actually navigated the [arbitration] process—most individuals, when confronted by the costs, are forced to drop their claims."[2] Many commentators echo this cost-based criticism of arbitration. Mark Budnitz stated that "[t]he costs of arbitration can be so high that they deny consumers access to a forum in which to air their disputes."[3] Charles Knapp asserted that "where the claimant is an individual buyer of goods or services, an employee, a health-care patient, a bank customer, or even a small business attempting to pursue a claim against a much larger one, the cost of arbitrators' fees may be prohibitive."[4] Reginald Alleyne explained that "[e]ven when arbitration litigation costs less than judicial litigation, the timing of some required arbitration costs, such as upfront fees for the arbitrator, can make it likely that the arbitration-plaintiff will be unable to proceed in that forum."[5] The National Consumer Law Center concluded bluntly: "The upshot is that high arbitration costs favor companies and hurt consumers by deterring valid claims."[6]

The upfront costs of arbitration provide a common ground on which consumers and employees challenge the enforceability of

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1. PUBLIC CITIZEN, THE COSTS OF ARBITRATION 1 (2002), *available at* http://www.citizen.org/documents/ACF110A.PDF.

2. *Id.* at 5. Public Citizen provides no empirical evidence to support this provocative statement, however, and it seems to be contradicted by the over 5,000 consumer and employment arbitrations reported by the AAA from January 1, 2005 through June 30, 2005 (as required by California law), many of which settled or resulted in an award. *See* American Arbitration Association, CCP Section 1281.96 Data Collection Requirements (July 1, 2005), www.adr.org/CDataQ2.pdf (last visited Apr. 30, 2006).

3. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161 (2004).

4. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 781 (2002).

5. Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMPL. L. 1, 30 (2003).

6. NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS § 1.3.6, at 9 (4th ed. 2004); *see also* Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?*, 53 DISP. RESOL. J. 40, 47 (1998) ("[S]haring the arbitrator's fees and expenses might prove an insurmountable barrier for the putative grievant.").

arbitration agreements in court as well.[7] The United States Supreme Court recognized the availability of such a challenge (in dicta) in *Green Tree Financial Corp.–Alabama v. Randolph*,[8] stating that "[i]t may well be that the existence of large arbitration costs could prevent a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[9] Federal courts typically evaluate cost-based challenges to arbitration agreements by comparing the upfront costs of arbitration to the upfront costs of litigation, taking into account the individual claimant's ability to pay.[10] For example, the Sixth Circuit in *Morrison v. Circuit City Stores, Inc.*[11] required that the costs of arbitration be compared to the costs of litigation "in a realistic manner,"[12] by which the court evidently meant considering only the upfront forum costs of each. The court explained that "many litigants will face minimal costs in the judicial forum, as the attorney will cover most of the fees of litigation and advance the expenses incurred in discovery," while "[i]n the arbitral forum, the litigant faces an additional expense–the arbitrator's fees and costs–which are never incurred in the judicial forum."[13] In determining whether this additional expense precludes claimants from proceeding in arbitration, a court "should take the actual plaintiff's income and resources as representative of [the ability of similarly situated litigants] to shoulder the costs of arbitration."[14]

The cost-based criticisms and legal challenges are based on three, seemingly self-evident premises. First, upfront forum costs are higher in arbitration than in court. Unlike court litigation, which is subsidized by the government, the parties to arbitration proceedings must pay all the forum costs—that is, the arbitrator's fees and any administrative costs. Ordinarily, forum costs in arbitration increase as the amount of the claim increases, unlike court filing fees, which are a flat, low amount.[15] Moreover, arbitration rules typically require the claimant to pay administrative costs and to make a deposit of

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7. *See* Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution: The Ever* Green Tree *of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 176–77 (2002) (reporting results of empirical study of cost challenges).

8. 531 U.S. 79 (2000).

9. *Id.* at 90. But the Court held in *Green Tree* that the plaintiff had failed to make a sufficient showing of the likely cost of arbitration (without indicating what showing would have been sufficient). *See infra* text accompanying notes 94–98.

10. Budnitz, *supra* note 3, at 154–56; *see also infra* text accompanying notes 101–116.

11. 317 F.3d 646, 664 (6th Cir. 2003) (en banc).

12. *Id.* at 664; *see also* Cooper v. MRM Inv. Co., 367 F.3d 493 (6th Cir. 2004).

13. *Morrison*, 317 F.3d at 664.

14. *Id.* at 663.

15. *See infra* text accompanying notes 48–49.

arbitrator's fees when the claim is filed.[16] As a result, Public Citizen concluded, "[t]he cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit"–an amount "up to five thousand percent higher in arbitration than in court litigation."[17]

Second, at least some individuals cannot afford to pay the higher upfront costs in arbitration. The Public Citizen report illustrated this point largely with anecdotes. For example, the report described cases in which the claimant was an unemployed woman asserting a legal malpractice claim, a waitress seeking insurance coverage for chemotherapy and stem cell rescue treatment, and a retired optometrist who lost his entire retirement savings.[18] More generally, the report asserted that arbitration costs are likely to be beyond the means of "people of low- or moderate- income," particularly in cases in which an individual has lost his or her job or is unable to pay debts on time.[19]

Third, the contingent fee system in litigation permits individual claimants to avoid paying other process costs—most notably attorneys' fees—upfront. Under contingent fee contracts, consumers and employees agree to pay their attorney a percentage of any recovery, thus enabling even low-income claimants to obtain representation. Moreover, as the court stated in *Morrison*, often attorneys are willing to "cover most of the fees of litigation and advance the expenses incurred in discovery."[20] Public Citizen contended that the "requirement of a large upfront filing fee and deposit toward arbitrator fees . . . severely restricts, or eliminates, the advantage a consumer has under the contingency fee system."[21]

This Article challenges the cost-based criticism of arbitration and argues that the approach to legal challenges taken by courts, like the Sixth Circuit in *Morrison*, is misguided. It certainly is not the first to take issue with the criticisms of arbitration costs, particularly as set out in the Public Citizen report.[22] A common theme among the

16. *See infra* text accompanying note 50.

17. PUBLIC CITIZEN, *supra* note 1, at 1.

18. *Id.* at 8, 21, 25. Not all of the arbitrations cited by Public Citizen involved low-income claimants. At issue in one arbitration, for example, were alleged defects in a $605,000 home. *Id.* at 16.

19. *Id.* at 52.

20. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 664 (6th Cir. 2003) (en banc).

21. PUBLIC CITIZEN, *supra* note 1, at 65.

22. *See, e.g.*, Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiad on the "Cost of Arbitration"*, DISP. RESOL. J. 8, 10 (Nov. 2002/Jan. 2003) ("[T]he Public Citizen report makes the faulty assumption that lower-income parties are otherwise being denied their 'day in court' due to mandatory predispute arbitration

responses is that even if upfront forum costs are higher in arbitration than in court, as Public Citizen asserts, overall process costs—including attorneys' fees and other litigation expenses (such as discovery costs)—are lower.[23] As a result, these commentators conclude that, rather than reducing access to justice, arbitration enhances access to justice by permitting claimants to bring claims they could not afford to bring in court.[24] The Supreme Court echoed a form of this argument in *Allied-Bruce Terminix Cos. v. Dobson*,[25] stating that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[26]

But noticeably lacking from the defenses of arbitration is any response to the central premises of the cost-based criticism: that the upfront forum costs in arbitration can exceed the forum costs in court; that some individuals cannot afford to pay the upfront forum costs in arbitration; and that the contingent fee system permits individuals to avoid paying other upfront costs. The defenses of arbitration largely

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agreements."); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U.L. REV. 761, 770 n.50 (2003) ("Public Citizen's report fails to consider, however, the costs of legal representation in its analysis—costs that are often substantial."); News Release, Cato Institute, *Public Citizen Arbitration Study Contains Errors, Half-Truths and Exaggerations, Scholar Says* (May 3, 2002) ("Any honest comparison of arbitration and litigation must include the cost of legal fees, discovery and delay. Those costs are generally lower in arbitration, and Public Citizen offers no persuasive evidence to the contrary.") (quoting Professor Stephen J. Ware), *available at* http://www.cato.org /new/05-02/05-03-02r-2.html; AMERICAN ARBITRATION ASSOCIATION, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION (Jan. 2003) [hereinafter AAA, FAIR PLAY].

23. *E.g.*, AAA, FAIR PLAY, *supra* note 22, at 23 (quoting Lewis L. Maltby):

> Arbitration, because it is private, inherently requires those who use the system to pay the costs. The real question is, and has always been, whether the *total* cost to the employee/plaintiff is higher or lower in arbitration. An employee/plaintiff is far better off spending $2,000 on forum costs and $10,000 on legal fees in arbitration than virtually nothing on forum costs and $20,000 on legal fees in court.

24. The available empirical evidence provides some support for this view. In a recent study of American Arbitration Association employment arbitrations, Theodore Eisenberg and Elizabeth Hill reported being "unable to compare litigation and arbitration results for lower-paid employees due to the lack of data about litigation commenced by employees in this economic group." Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44, 45. In other words, while the lower-paid employees in their dataset were able to bring claims in arbitration, the employment cases in court (at least those not involving discrimination claims) were brought mostly by higher-paid employees. Eisenberg and Hill concluded that "[l]ower-pay employees seem unable to attract the legal representation necessary for meaningful access to court." *Id.* at 61.

25. 513 U.S. 265 (1995).

26. *Id.* at 280; *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

ignore those premises to focus on the total costs of arbitration. But in Public Citizen's critique, the total process costs of arbitration—whether higher or lower[27]—are largely irrelevant. Because of the contingent fee system, individuals do not need to come up with the money to pay those costs. Instead, the argument goes, it is only the upfront costs of arbitration that affect the individual's decision to file a claim.[28] The response—that the total process costs of arbitration are lower than in court—is thus non-responsive, or at least incomplete.

This Article argues that the contingent fee contract is the missing link in the arbitration defenders' chain of argument, providing a mechanism by which arbitration can enhance, rather than restrict, claimants' access to justice. Beginning with economic models of the decision to litigate (or arbitrate),[29] it shows first that, as a general matter, claimants consider the total cost of the dispute resolution process in evaluating whether to bring a claim, not merely the upfront costs. As an economic matter, then, arbitration costs would preclude claimants from asserting their claims when the expected total costs (not just the upfront costs) of arbitration exceed the expected value of the claim. Under these models, the upfront costs of arbitration are relevant only if the claimant lacks the resources to finance the litigation or is risk averse. The cost-based critique of arbitration thus necessarily is based on concerns about liquidity constraints and risk aversion of consumers and employees.

But that critique ignores the standard device in American litigation for providing financing and risk sharing: the contingent fee contract itself. By entering into a contingent fee contract, claimants are able to defer not only payment of attorneys' fees, but also payment of other litigation costs, because attorneys may advance such costs on behalf of their clients.[30] Moreover, attorneys only seek to recover the litigation expenses they advance from claimants who win their case, so that "the lawyer effectively insures the client for the expenses associated with pursuing a claim."[31] Thus, attorneys provide liquidity

27. Public Citizen argues as well that no evidence exists that total process costs are lower in arbitration than in court. PUBLIC CITIZEN, *supra* note 1, at 61.

28. *See supra* text accompanying notes 20–21.

29. *See infra* text accompanying notes 161–180.

30. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 48 DEPAUL L. REV. 267, 270 (1998); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 624 (5th ed. 1998) ("The solution to this liquidity problem is the contingent fee contract."); *see infra* text accompanying notes 190–191.

31. Kritzer, *supra* note 30, at 270.

to finance their clients' litigation costs and share the risk of an unsuccessful claim.

Arbitration costs are simply another form of expense—like discovery costs, investigation costs, expert witness fees, and so on. Given that lawyers are willing to finance and insure against these other sorts of expenses, one would expect the same to be true for arbitration costs. Indeed, anecdotal evidence indicates that at least some contingent fee contracts include arbitration costs and arbitrators' fees in the definition of "costs" that the attorneys will advance.[32] To the extent lawyers do not treat arbitration costs the same as other costs, it may well be due to cases like *Morrison*. So long as attorneys can use the upfront costs of arbitration as a ground for challenging an arbitration agreement (enabling their client to bring his or her claim in court instead of in arbitration), attorneys have an incentive not to finance arbitration costs.

In short, Public Citizen's contention—that arbitration costs "severely restrict, or eliminate, the advantage a consumer has under the contingency fee system"—has it exactly backwards. Arbitration costs do not impair the functioning of the contingent fee system. Rather, the contingent fee mechanism provides a means for overcoming liquidity and risk aversion barriers to arbitration. As a result, even accepting the premises of the cost-based criticism, it does not follow that arbitration costs necessarily preclude individuals from bringing their claims in arbitration. Even if individual claimants cannot afford the forum costs of arbitration, at least some of those individuals—those with economically viable claims given the total costs of the dispute resolution process—should nonetheless be able to bring their claims.

Part II provides an overview of the cost structure of arbitration. Part III takes an in-depth look at current case law and legislation dealing with arbitration costs as a ground for challenging the enforceability of arbitration agreements, and reports the results of an empirical study of 163 post-*Green Tree* federal court cases. Part IV sets out the economic analysis, using both expected value and option models of the decision whether to file a claim. Part V reexamines the current case law in light of the economic analysis, suggesting significant changes in the legal doctrine. Continuing the empirical analysis, it also finds that in most reported cases, even those in which courts invalidated the arbitration agreement on cost grounds, arbitration costs do not appear to have been a barrier to asserting the claim in arbitration.

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32. *See infra* text accompanying notes 194–200.

II. THE COST STRUCTURE OF ARBITRATION (AS COMPARED TO LITIGATION)

A party litigating or arbitrating a case faces three types of costs: attorneys' fees, other litigation expenses, and forum costs.[33] First, assuming a party does not proceed pro se, the party must pay its attorney. Consumers and employees often agree to pay their attorneys on a contingent fee basis, which enables individuals to defer payment until after the case is over (and avoid payment altogether unless they prevail). Second, the party must pay other litigation expenses, such as discovery costs, expert witness fees, and the like. It appears to be common practice for attorneys to advance those expenses on behalf of their contingent fee clients.[34] Third, the party (at least the plaintiff or claimant) must pay forum costs—a filing fee in court or the arbitrators' fees plus the fees charged by the institution (if any) administering the arbitration.

No definitive empirical evidence exists comparing attorneys' fees and other litigation costs incurred in litigation and arbitration.[35] But in many cases, forum costs are likely higher in arbitration than in litigation. To file suit in federal court, a plaintiff must pay only a flat filing fee of $250.[36] The filing fee is the same regardless of the amount at stake or the length of time the claim takes to resolve. Even that filing fee may be waived by the court on a showing of financial hardship.[37] The rest of the forum costs are subsidized by the government.[38]

By contrast, parties to arbitration proceedings ordinarily bear the full costs of the process. Arbitration is not subsidized by the government in the same way as the court system: "[i]t's a private service provided on an individual basis and paid for case-by-case."[39]

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33. *See, e.g.*, PUBLIC CITIZEN, *supra* note 1, at 4–5. In addition, losses due to the time value of money might also be classified as a cost (or benefit) of arbitration. *See* Matthew T. Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 GA. L. REV. 1, 12 (2004) (explaining that supporters of arbitration argue that "an arbitral award might have a higher expected value since it would be granted more quickly than a litigation award").

34. *See infra* text accompanying notes 190–191.

35. *E.g.*, Herbert M. Kritzer & Jill K. Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUSTICE SYS. J. 6 (1983). Case selection effects make carrying out such studies extremely difficult. *See infra* text accompanying notes 135–137.

36. 28 U.S.C. § 1914(a) (2006).

37. *Id.* § 1915(a)(1).

38. *E.g.*, POSNER, *supra* note 30, at 639–40; Frank A. Sander, *Varieties of Dispute Resolution*, 79 F.R.D. 76, 125–26 (1976).

39. CPR Institute for Dispute Resolution, *Defenders and Proponents Square Off on New Report*, 20 ALT. TO THE HIGH COSTS OF LITIG. 91, 104 (2002) (quoting India Johnson, Vice

The rest of this Part describes the fee structure for arbitrations administered by the American Arbitration Association ("AAA"), which is illustrative of the characteristics of arbitration fees generally. It begins by looking at arbitrators' fees, then discusses the administrative fees charged under the AAA Commercial Arbitration Rules, and concludes by examining low-cost arbitrations under the AAA's Supplementary Procedures for Consumer Arbitrations.[40] Of course, the parties need not use administrative services provided by institutions such as the AAA. Instead, the arbitrators themselves may handle the administrative duties. If so, presumably the arbitrators' fees would increase to some extent (although it is uncertain whether the increase would be more or less than the administrative fees avoided).

Unlike litigation, in which the government pays the judge's salary, the parties in arbitration must pay the arbitrators. The AAA Commercial Rules do not establish a uniform fee for arbitrators but permit the arbitrators to set their own fees.[41] Table 1 summarizes data collected by the AAA on arbitrators' fees, which reveal mean and median arbitrators' fees in the sample of well over $1000 per day (and up to $5000 per day for at least one commercial arbitrator).[42]

President, American Arbitration Association). *But see* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 357–58 (1996) (arguing that private dispute resolution is subsidized to some extent by the government).

40. For a comparison of the fees charged by the National Arbitration Forum and JAMS with the AAA fee structure, see Budnitz, *supra* note 3, at 138–43.

41. *See* American Arbitration Association, *Commercial Arbitration Rules*, Rule R-51(a) (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22440 ("Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.") [hereinafter AAA Commercial Arbitration Rules]. By comparison, some international arbitration institutions set out a schedule for arbitrators' fees based on the amount in dispute. *See, e.g.*, International Chamber of Commerce, *Rules of Arbitration of the International Chamber of Commerce*, App. III, Art. IV(B) (effective Jan. 1, 1998), *available at* http://www.jus.uio.no/lm/icc.arbitration.rules.1998.

42. The sources for data in the table are the following: Affidavit of Frank Zotto ¶ 13, Phillips v. Associates Home Equity, Case No. 01 CH 1944 (N.D. Ill. July 9, 2001) (reporting results of "random sampling of 60 arbitrators on the Commercial Panel in the Chicago, Illinois area"); Affidavit of Frank Zotto ¶ 10, Pope v. AutoNation USA, Case No. A-0001609 (Ohio Ct. Common Pleas Aug. 15, 2001) (reporting results of "sampling of 31 arbitrators on the Commercial Panel in Hamilton County, Ohio"); Affidavit of Christine Newhall ¶ 6, Cowart v. Credit Counselors Corp., Inc., Case No. IP00-0701 (S.D. Ind. Apr. 18, 2001) (reporting on the results of "random sampling of 26 arbitrators on the Commercial Panel in the State of Indiana"); Affidavit of Frank Zotto ¶ 9, Calvo v. PIA Merchandising Co., Case No. 2:OOcv873 (E.D. Va. Oct. 4, 2001) (reporting results of "sampling of 15 arbitrators on the Employment Panel in the Virginia, North Carolina, Washington, D.C. and Maryland area"); Affidavit of Frank Zotto ¶ 7(h), Physicians Data, Inc. v. Quest Wireless, L.L.C., Case No. OOCV631 (Colo. Dist. Ct. June 28, 2001) (reporting results of "random sampling of 38 arbitrators on the Commercial Panel in the Denver, Colorado area"). All of the affidavits are included in the CD-ROM Appendix to NATIONAL

Although the arbitrators earn their fees by doing work over the course of the case, Rule R-52 of the AAA Rules permits the AAA to require the parties to make a deposit prior to any hearing to cover anticipated arbitrators' fees.[43] As an alternative for low-income claimants, according to the AAA, it has "thousands of arbitrators" on its panel who are willing to serve for one hearing day on a pro bono basis.[44] The AAA indicates that it will seek to appoint an arbitrator who will serve pro bono when the claimant qualifies for a waiver of the AAA's administrative fees, as discussed below,[45] and when arbitrators' fees may preclude the claimant from bringing his or her case. A party may request a pro bono arbitrator even if the AAA does not grant a fee waiver. The AAA makes clear that it "cannot guarantee the appointment of a pro bono or reduced rate arbitrator," but that it will "make every effort to accommodate the request."[46]

Table 1. Arbitrators' Fees in AAA Arbitrations

	AAA Panel	Mean (per day)	Median (per day)	Range (per day)	n
Chicago, IL	Commercial	$1800	$1698	$750-$5000	60
Colorado	Commercial	$1442	$1500	$600-$2500	38
Hamilton County, OH	Commercial	$1468	$1400	$600-$2100	31
Indiana	Commercial	$1308	$1225	$700-$1800	26
VA, NC, MD, DC	Employment	$1403	$1500	$700-$2000	15

In addition to the arbitrators' fees, the AAA charges administrative fees "to compensate it for the cost of providing

CONSUMER LAW CENTER, *supra* note 6; *see also* Ting v. AT&T, 182 F. Supp. 2d 902, 934 (N.D. Cal. 2002) (citing "average daily rate of arbitrator compensation in Northern California" as $1899), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003).

43. AAA Commercial Arbitration Rules, *supra* note 41, Rule R–52.

44. American Arbitration Association, *AAA Implements New Consumer Initiatives, Revises Consumer Rules*, www.adr.org/sp.asp?id=21892 (last visited Apr. 30, 2006). Because more complex cases are likely to have longer hearings, one would expect the availability of arbitrators willing to serve pro bono would be more helpful to claimants with small claims than those with large claims.

45. *See infra* text accompanying notes 54–58.

46. American Arbitration Association, *Administrative Fee Waivers and Pro Bono Arbitrators Services*, http://www.adr.org/sp.asp?id=22040 (last visited Apr. 30, 2006) [hereinafter AAA Administrative Fee Waivers].

administrative services."[47] Under the AAA's Commercial Arbitration Rules, the administrative fees consist of a filing fee and what the AAA calls a "case service fee,"[48] both of which increase as the amount of the claim increases.[49] Claimants (or counter-claimants) must advance the filing fee at the time they file the claim.[50] The case service fee is payable when the first hearing in the case is scheduled, subject to being refunded if no hearing takes place.[51] Table 2 summarizes the fee schedule under the AAA Commercial Arbitration Rules.[52] As discussed in more detail below, consumer claims are governed by the AAA's Supplementary Procedures for Consumer-Related Disputes, which alters the fees consumers pay (among other things).[53]

Table 2. Fee Schedule - AAA Commercial Arbitration Rules

Amount of Claim	Initial Filing Fee	Case Service Fee
Above $0 to $10,000	$750	$200
Above $10,000 to $75,000	$950	$300
Above $75,000 to $150,000	$1800	$750
Above $150,000 to $300,000	$2750	$1250
Above $300,000 to $500,000	$4250	$1750
Above $500,000 to $1,000,000	$6000	$2500
Above $1,000,000 to $5,000,000	$8000	$3250
Above $5,000,000 to $10,000,000	$10,000	$4000
Above $10,000,000	$12,500 plus .01% of the claim amount above $10,000,000 (capped at $65,000)	$6000
Nonmonetary Claims	$3250	$1250

47. AAA Commercial Arbitration Rules, *supra* note 41, Rule R–49.

48. *Id.*

49. Putting aside access issues, charging fees that vary with the amount of the claim has potential benefits for dispute resolution processes. *See, e.g.*, Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 129 (2004) (noting possible constraint on attorneys seeking to benefit from anchoring effects by claiming large amounts of damages).

50. AAA Commercial Arbitration Rules, *supra* note 41, Rule R–4(a)(ii).

51. *Id.* ("Fees").

52. *Id.*

53. *See infra* text accompanying notes 63–70. Employee claims are dealt with under the AAA's Employment Arbitration Rules, which contain similar provisions for low-cost arbitration of small claims.

Like the court system, the AAA Rules permit low-income claimants to seek a waiver of the administrative fees. Rule R-49 provides that "[t]he AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees."[54] According to the AAA, it will consider waiving or deferring its administrative fee for parties whose gross annual income is below 200% of the federal poverty guidelines.[55] In addition to annual income, the AAA may take into account past income, potential future income, and assets in deciding whether to waive its fees.[56] All claimants must file an affidavit of hardship when seeking a fee waiver. The bottom line is that the determination is within the AAA's discretion. As the AAA explains, "[s]ince every hardship request is unique and involves many variables, the AAA reserves the right to deny or grant any request based on the information given by the requesting party."[57] Note that even if the AAA waives its administrative fees, the waiver does not include arbitrators' fees. It is the arbitrators' decision whether to serve on a pro bono basis, as discussed above.[58]

Finally, under the AAA Commercial Arbitration Rules, the parties share the costs of arbitration equally (except for the expenses of their own witnesses), unless they agree otherwise or "unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties."[59] The costs that may be reallocated include "required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of proof produced at the request of the arbitrator."[60] Likewise, while claimants must pay the AAA's administrative fees in advance, those fees are "subject to final apportionment by the arbitrator in the award."[61] Thus, a successful claimant ultimately may be able to recover its arbitration costs, but only at the discretion of the arbitrator at the end of the proceeding. Some arbitration clauses override this default rule and specify that the parties are to share arbitration costs equally

54. AAA Commercial Arbitration Rules, *supra* note 41, Rule R–49.

55. AAA Administrative Fee Waivers, *supra* note 46. Those amounts range from $17,180 for a one-person family in the 48 contiguous United States and Washington D.C., to $74,380 for an eight-person family in Alaska. *Id.*

56. *Id.* Although the potential proceeds from the claim involved in the arbitration might be characterized either as potential future income or an asset of the claimant, there is no indication that the AAA has used such an interpretation.

57. *Id.*

58. *See supra* text accompanying notes 44–46.

59. AAA Commercial Arbitration Rules, *supra* note 41, Rule R–50.

60. *Id.*

61. *Id.* Rule R–49.

without regard to the arbitrators' usual power to reallocate those costs in the award.[62]

The discussion so far has focused on the AAA's Commercial Arbitration Rules. But for arbitration agreements in standard form contracts between businesses and consumers, the AAA supplements the Commercial Arbitration Rules with its Supplementary Procedures for Consumer-Related Disputes.[63] The AAA's Consumer Procedures treat costs differently than its Commercial Arbitration Rules in several respects.[64]

First, the Consumer Procedures cap arbitrators' fees for small claims, that is, "cases in which no claim exceeds $75,000."[65] For a desk arbitration (i.e., an arbitration based solely on the parties' paper submissions with no oral hearing), the arbitrator is paid $250. For a telephone hearing, the arbitrator is to receive $750 per day. For claims over $75,000, arbitrators continue to be compensated at their standard rate.[66]

Second, for small claims, the consumer and the business share the arbitrator's fees. For claims less than $10,000, the consumer must pay one-half of the arbitrator's fee, but no more than $125. For claims between $10,000 and $75,000, the consumer must pay one-half of the arbitrator's fee, but no more than $375. For claims over $75,000, the consumer must make a deposit of one-half the arbitrator's fee.[67] In all cases, the business is to pay the remainder of the arbitrator's fee to the extent not paid by the consumer.[68]

Third, for small claims, the consumer pays no administrative fee.[69] Instead, the business is responsible for all administrative fees.

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62. *See* Linda J. Demaine & Deborah Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 70–71 (2004) (various consumer contracts); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 735–36 (franchise agreements).

63. American Arbitration Association, *Supplementary Procedures for Consumer-Related Disputes*, http://www.adr.org/sp.asp?id=22014 (last visited Apr. 30, 2006) [hereinafter AAA Consumer Procedures]. More precisely, the AAA Consumer Procedures apply to any "agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices," and when the product or service involved is "for personal or household use." *Id.* Rule C–1(a).

64. The Consumer Procedures differ in a number of ways other than costs from the AAA Commercial Arbitration Rules, but those differences are not relevant here.

65. AAA Consumer Procedures, *supra* note 63, Rule C–8 ("Arbitrator Fees").

66. *See supra* text accompanying notes 41–42.

67. AAA Consumer Procedures, *supra* note 63, Rule C-8 ("Fees and Deposits to be Paid by the Consumer").

68. *Id.* ("Fees and Deposits to be Paid by the Business").

69. *Id.* ("Fees and Deposits to be Paid by the Consumer").

As set out in the Consumer Procedures, for claims under $10,000, the business must pay an administrative fee of $750 and, if the case goes to hearing, a Case Service Fee of $200. For claims between $10,000 and $75,000, the administrative fee is $950 and the Case Service Fee in the event of a hearing is $300. Only for claims over $75,000 is the consumer responsible for paying administrative fees, determined under the AAA Commercial Rules as described above.[70]

In short, the forum costs faced by consumers under the AAA Consumer Procedures for small claims are similar to the forum costs they would face in court. Other arbitration institutions likewise have instituted low-cost arbitration schemes for consumer claims.[71] Thus, concerns about upfront costs precluding claimants from asserting claims in arbitration, at present, seem limited to claims over $75,000 (in institutional arbitrations) and to claims in arbitrations not administered by an arbitration institution with a low-cost arbitration scheme.

III. COSTS AS A GROUND FOR CHALLENGING ARBITRATION AGREEMENTS

Claimants commonly rely on the upfront costs of arbitration as a ground for challenging the enforceability of arbitration agreements. The legal theories used are twofold. The first theory, applicable to cases in which a claimant seeks to assert a federal statutory claim, is that the upfront costs of arbitration prevent the claimant from vindicating his or her federal statutory rights.[72] The second theory, more generally applicable, is that arbitration agreements with high upfront costs are unconscionable.

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70. *See supra* text accompanying notes 41–62.

71. *E.g.*, NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE, "FEE SCHEDULE" (effective Jan. 1, 2005), *available at* http://www.arb-forum.com/programs/code_new/2005_fees.pdf. In addition, Rule 44(G) of the NAF Code of Procedure sets out a process whereby a consumer "who asserts that arbitration fees prevent the Consumer Party from effectively vindicating the Consumer's case in arbitration may . . . prior to paying any filing fee" request the arbitrator to require "another Party or Parties [to] pay all or part of the arbitration fees" or declare the arbitration agreement "unenforceable." *Id.* Rule 44(G), *available at* http://www.arb-forum.com/programs/code_new/2005_code.pdf. "If there is no agreement by the Parties," the arbitrator is directed to resolve the request "based on the applicable law." *Id.*

72. Claimants sometimes make an analogous challenge based on a state law cause of action, asserting that an arbitration agreement is invalid because it precludes claimants from vindicating their state statutory rights. So long as the Federal Arbitration Act applies to the arbitration agreement (i.e., it is within the scope of Congress's Commerce power) such an argument likely is preempted by federal law. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 270-72 (2006).

Although the theories differ, the underlying analysis is similar. Courts first compare the upfront costs of arbitration to the (usually lower) upfront costs of litigation and then evaluate whether the claimant can afford to pay the additional costs based on his or her assets and income.[73] Thus, courts typically take an ex post rather than an ex ante approach to cost-based challenges: they do not look at the claimant's financial situation at the time the contract was entered into, but rather his or her financial situation at the time the claim is filed.[74] The burden is on the claimant to show both the expected costs of arbitration and that those costs are likely to preclude him or her from asserting the claim. If the claimant carries that burden, the court will invalidate the arbitration agreement in whole or in part.[75] Cost-based challenges to arbitration agreements are frequently raised but rarely successful—although the rate of success varies widely across the circuits.

In addition to court challenges, several state legislatures have adopted statutes that regulate arbitration costs. The legal effect of such legislation has not yet been widely tested. Federal statutes addressing arbitration costs have been introduced in the U.S. Congress but have not yet been enacted.

A. Court Challenges: "Vindication-of-Statutory-Rights" Theory[76]

Since the 1970s, the Supreme Court has held repeatedly that claims arising under federal statutes can be arbitrated based on the assumption that claimants are not giving up their legal rights by

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73. A preliminary legal question is whether a court even can make such determinations, or whether they are matters for the arbitrator. Given the Supreme Court's recent decisions in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *PacificCare Health Systems v. Book*, 538 U.S. 401 (2003); and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the question is an interesting one, but is beyond the scope of this paper. For a case that considers the question, see Scovill v. WSYX/ABC, 425 F.3d 1012, 1019 (6th Cir. 2005).

74. For one exception, see Pro Tech Indus., Inc. v. URS Corp., 377 F.3d 868, 873 (8th Cir. 2004) ("Under Texas law, we only consider the circumstances at contract formation to determine if a contract is unconscionable, rendering Pro Tech's current inability to afford the costs of arbitration irrelevant to the conscionability determination."). *Cf.* Ware, *supra* note 72, at 267-68 (stating that in applying unconscionability doctrine to arbitration clauses, "a court should assess the 'values exchanged' as of the time the contract was formed, rather than as of a later time, such as the time of a dispute").

75. This description is an overgeneralization; the approaches taken by the courts differ to some degree, as described in more detail in the following sections. But with only limited exceptions, it is clear that the claimant must show that cost *precludes* him or her from vindicating statutory rights, not merely that the claimant is worse off in arbitration than in litigation.

76. *See* Budnitz, *supra* note 3, at 157.

going to arbitration.[77] In *Gilmer v. Interstate/Johnson Lane Corp.*,[78] for example, the Court explained that "so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum," the federal statute (there the Age Discrimination in Employment Act) would continue to serve its purpose.[79] Implicit in the Court's statement is that if, for some reason, a claimant may not "effectively . . . vindicate" his or her statutory rights in arbitration, the federal statutory claim may be resolved in court.[80] One such reason asserted by claimants is cost. This Part first discusses the *Green Tree* case (the governing Supreme Court precedent)[81] and then examines how the circuits have dealt with cost-based challenges since *Green Tree*.

1. *Green Tree*

In the leading case, *Green Tree Financial Corp.–Alabama v. Randolph*,[82] the Supreme Court rejected a cost-based challenge to a consumer arbitration agreement.[83] The claimant in *Green Tree*, Larketta Randolph, financed her purchase of a mobile home through a loan from Green Tree Financial Corporation. Included in her contract with Green Tree was an arbitration clause that neither contained any provision addressing the costs of arbitration nor specified a governing set of institutional arbitration rules.[84]

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77. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

78. *Gilmer*, 500 U.S. 20 (1991).

79. *Id.* at 28 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

80. The theory seems to be that if a prospective waiver of statutory rights would be invalid, an arbitration clause that has the effect of a prospective waiver of statutory rights also should be invalid.

81. Actually, the Supreme Court has decided two *Green Tree* cases: *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U.S. 79 (2000), and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The earlier case (*Randolph*) typically is known as "*Green Tree*," while the later case is known as "*Bazzle*."

82. 531 U.S. 79 (2000). Prior to *Green Tree*, the leading court of appeals case was *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), which construed an assertedly ambiguous arbitration clause to require the employer to pay all arbitration costs.

83. Also at issue in *Green Tree* was whether the court of appeals had jurisdiction to review the district court's order under 9 U.S.C. § 16. The Supreme Court held that the court of appeals' exercise of appellate jurisdiction was proper. Green Tree Fin. Corp.–Alabama v. Randolph, 531 U.S. 79, 89 (2000).

84. The language of the arbitration clause, which is problematic in other respects, is in relevant part as follows:

Randolph thereafter filed a class action in federal court against Green Tree asserting that Green Tree violated the Truth in Lending Act ("TILA")[85] by failing to include the cost of required insurance as a finance charge.[86] Randolph sought to recover statutory damages (equal to twice the finance charge on the loan[87]) and attorneys' fees, for herself and on behalf of a class of similarly situated borrowers.[88]

The district court granted Green Tree's motion to compel arbitration, but the Eleventh Circuit reversed.[89] The court of appeals focused on the fact that the arbitration agreement was completely silent as to costs. Nothing in the agreement addressed how much arbitration would cost or who would bear those costs. Nor did the arbitration agreement specify a set of rules, such as those promulgated by the AAA,[90] that contained provisions on arbitration costs. Although Randolph presented some limited evidence on possible arbitration costs in her rehearing petition before the district

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> All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with the consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws, including, but not limited to, contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract.

Green Tree Fin. Corp.–Alabama v. Randolph, 531 U.S. 79, 83 n.1 (2000). One problem with the clause is its language on arbitrator selection, which provides that Green Tree shall select the arbitrator "with the consent of Buyer(s)." An important element of arbitration is that the arbitrator be neutral, with both sides involved in selection. In *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999), the Third Circuit rejected a challenge to the enforceability of the clause on the basis of the arbitrator selection language. *Id.* at 183–84.

85. 15 U.S.C. § 1601 *et seq.* (2006).

86. Green Tree required Randolph to buy Vender's Single Interest insurance, which provided coverage for its expenses in the event Randolph defaulted on the loan. *Green Tree*, 531 U.S. at 82.

87. 15 U.S.C. § 1640 (2006).

88. Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1415 (M.D. Ala. 1997).

89. Randolph v. Green Tree Fin. Corp., 178 F.3d 1149 (11th Cir. 1999) (reversing Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410 (M.D. Ala. 1997)).

90. *See supra* text accompanying notes 40–70.

court,[91] the court of appeals did not rely on that evidence. Instead, the court concluded that because the agreement was silent on the costs of arbitration, Randolph faced a risk that arbitration costs would preclude her from vindicating her statutory rights.[92] On the basis of that risk, the court invalidated the arbitration agreement.

The Supreme Court granted certiorari[93] and reversed. It began (after reciting as background its cases dealing with the arbitrability of federal statutory claims) by acknowledging that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."[94] But it concluded that there was no evidence in the record that Randolph would bear prohibitive arbitration costs. Indeed, the Court stated, the record "contains hardly any information on the matter."[95] In a footnote, the Court recited the limited evidence (an estimate of the AAA filing fee of $500 for claims in the amount of that brought by Randolph and an article reciting average arbitrators' fees of $700 per day[96]) and dismissed those estimates as based "entirely on unfounded assumptions"—that the AAA would administer her arbitration and that, if it did, it would charge her the fees she indicated. According to the Court, "[t]hese unsupported statements provide no basis on which to ascertain the actual costs and fees to which she would be subject in arbitration."[97] Similarly, the Court found the Eleventh Circuit's rationale for invalidating the arbitration agreement—the agreement's silence on the matter of costs—"plainly insufficient to render [the arbitration agreement] unenforceable."[98]

Thus, the Court's holding essentially is a negative one: that an arbitration agreement is silent on costs is not a sufficient basis on which to invalidate the agreement. As such, *Green Tree* provides little guidance on what sort of showing is needed for a court to invalidate an arbitration agreement on cost grounds. The Court did state that the claimant challenging the arbitration agreement "bears the burden of

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91. As described by the Supreme Court, that evidence consisted of (1) a statement that the filing fee for AAA arbitration for claims under $10,000 would be $500 (not including arbitrators' fees or administrative fees); and (2) an article quoting an AAA executive that arbitrators' fees averaged $700 per day. Green Tree Fin. Corp.–Alabama v. Randolph, 531 U.S. 79, 90 n.6 (2000).

92. Randolph v. Green Tree Fin. Corp., 178 F.3d 1149, 1158 (11th Cir. 1999).

93. Green Tree Fin. Corp.–Ala. v. Randolph, 529 U.S. 1052 (2000).

94. 531 U.S. at 90.

95. *Id.*

96. Bureau of National Affairs, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, DAILY LABOR REPORT, Feb. 15, 1996 (cited in Green Tree Fin. Corp.–Alabama v. Randolph, 531 U.S. 79, 90 n.6 (2000)).

97. 531 U.S. at 90 n.6.

98. *Id.* at 91.

showing the likelihood" that he or she will incur prohibitive arbitration costs.[99] But the Court gave no indication "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence."[100]

2. The Circuits after *Green Tree*

Since *Green Tree*, the circuits have taken differing approaches to determining what sort of showing the claimant must make to carry its burden.[101] Virtually every circuit to have addressed the question

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99. *Id.* at 92.

100. *Id.*

101. The courts of appeals also appear to differ as to several other issues that arise in cost-based challenges. First, there appears to be some difference among the circuits as to the proper timing of the challenge. The circuits all seemingly permit claimants to challenge the enforceability of the arbitration agreement in court prior to the arbitration proceeding. *See infra* App. A. The Eleventh Circuit, however, while apparently willing to consider such challenges, has suggested that such challenges are unlikely to prevail because the claimant can challenge the arbitration award after it is made. *See* Musnick v. King Motor Co., 325 F.3d 1255, 1261 (11th Cir. 2003) (refusing to remand a cost-based challenge to the district court for further evidentiary development, concluding that "there is no record that could be made at this point" because the agreement permitted the prevailing party to recover the costs of arbitration, and if the claimant prevails "he will incur no fees at all. . . . In this event, obviously, he will not have been deprived of any statutory right or remedy by the mandatory arbitration"); *see also* Summers v. Dillards, Inc., 351 F.3d 1100, 1101 (11th Cir. 2003) (reversing a district court decision invalidating arbitration agreement on cost grounds as "too speculative"; "It is unclear at this time which party may prevail at arbitration and Summers may seek judicial review of an award if she feels that her available remedies were hindered."). By contrast, the en banc Sixth Circuit in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc), expressly rejected the adequacy of post-award challenges. *Id.* at 662 (contending that claimant would be in a "Catch-22" because the fact that claimant obtained an arbitration award might be used to demonstrate that cost did not deter him or her from arbitrating the statutory claims).

Second, the circuits differ as to the effect of a post-dispute offer by the respondent to pay all arbitration costs. Such offers are common in the reported cases. *See infra* App. A (in 42 out of the 163 federal court cases studied, the court stated that the respondent had offered to pay the claimant's arbitration costs after a dispute arose). The courts are split on the relevance of such an offer–when it is rejected by the claimant–to the cost-based challenge. The Sixth Circuit in *Morrison* held that the respondent's offer should be disregarded, reasoning that "[b]ecause the employer drafted the arbitration agreement, the employer is saddled with the consequences of the provision *as drafted*." 317 F. 3d at 677 (emphasis in original). A number of other courts, however, have concluded that such an offer effectively moots the cost-based challenge, presumably because arbitration costs cannot preclude a claimant from vindicating statutory rights when the claimant does not have to pay any costs. *E.g.*, Large v. Conseco Fin. Servicing Co., 292 F.3d 49, 56–57 (1st Cir. 2002).

Third, the circuits differ as to the consequences of a successful challenge (although the differences may be due at least in part to differences among the challenged arbitration clauses). *See* Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84 (D.C. Cir. 2005) ("Decisions striking an arbitration clause entirely often involved agreements without a severability clause . . . or agreements that did not contain merely one readily severable illegal provision, but were instead pervasively infected with illegality. . . . Decisions severing an illegal provision and compelling arbitration, on the other hand, typically considered agreements with a severability clause and

since *Green Tree* has adopted a case-by-case approach to cost-based challenges.[102] But the specifics of the case-by-case approaches vary among the circuits.[103] Comparing the Fourth Circuit's decision in *Bradford v. Rockwell Semiconductor Systems, Inc.*[104] with the Sixth Circuit's decision in *Morrison*[105] illustrates the point.

The Fourth Circuit in *Bradford* was the first court of appeals after *Green Tree* to address the question of the showing required of claimants. The claimant, John Bradford, filed a demand for arbitration before going to court, asserting identical age discrimination and breach of contract claims in both arbitration and court. The arbitration hearing occurred (with Bradford presenting witnesses) prior to the district court's rejection of Bradford's argument

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discrete unenforceable provisions.") (Roberts, J.). In some cases, courts have held the cost provision severable from the arbitration clause, thus directing the parties to arbitrate while imposing the arbitration costs on the respondent. *E.g.*, Spinetti v. Service Corp. Int'l, 324 F.3d 212, 219–23 (3d Cir. 2003). In other cases, the courts have held the cost provision not severable and invalidated the arbitration agreement in its entirety. *E.g.*, Alexander v. Anthony Int'l., L.P., 341 F.3d 256, 271 (3d Cir. 2003). Such a result is more common when the claimant challenges the enforceability of other provisions of the arbitration agreement as well, such as a provision limiting the damages that can be recovered in arbitration. A third alternative would be to direct the parties to arbitrate all claims but the federal statutory claim at issue in the case. This alternative draws on the doctrinal basis for the vindication-of-statutory rights theory in the first place–that Congress intended to permit arbitration of federal statutory claims so long as the individual could vindicate his or her statutory rights in the arbitral forum. If the costs preclude the claimant from effectively vindicating federal statutory rights, then those claims–but not any others–should be resolved in court. *Cf.* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985) (holding that when claimant files suit raising both arbitrable claims and nonarbitrable claims, "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"). Few if any courts seem to take this third approach, although the D.C. Circuit has relied on this reasoning to reject cost-based challenges in cases not raising federal claims. *See* Brown v. Wheat First Sec., Inc., 257 F.3d 821 (D.C. Cir. 2001).

102. *E.g.*, Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 (11th Cir. 2003) ("Since *Green Tree*, all but one of the other Circuits that have reconsidered this issue have applied a similar case-by-case approach."). The *Musnick* court cites the Ninth Circuit as adopting a per se rule. *See id.* at 1259 n.3 (citing Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (stating that a clause providing for the sharing of arbitration costs between claimants and respondents "alone would render an arbitration agreement unenforceable")). The Ninth Circuit's decisions, in *Adams* and other cases, are based on state law unconscionability grounds rather than a vindication-of-statutory-rights theory. *Id.*; *see also* Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1260–62 (9th Cir. 2005) (Washington law); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1178–79 (9th Cir. 2003) (California law); Ting v. AT&T, 319 F.3d 1126, 1151 (9tb Cir. 2002) (California law). *See generally infra* text accompanying notes 104–116.

103. *See, e.g.*, Budnitz, *supra* note 3, at 154 ("Courts are split over what type of showing is required to prove that costs are so high as to bar access to justice. Interpretations of what *Green Tree* requires focus on three factors: the financial condition of the claimant, the absolute cost of arbitration, and the relative cost of arbitration when compared to court proceedings.").

104. 238 F.3d 549 (4th Cir. 2001).

105. 317 F.3d 646 (6th Cir. 2003) (en banc).

that a fee-sharing provision in the arbitration agreement (i.e., a provision that required the parties to "share equally the fees and costs of the arbitrator") prevented him from vindicating his statutory rights in arbitration. In affirming the district court's decision, the Fourth Circuit set out a "case-by case analysis" focusing on three factors: (1) "the claimant's ability to pay the arbitration fees and costs"; (2) "the expected cost differential between arbitration and litigation"; and (3) "whether that cost differential is so substantial as to deter the bringing of claims."[106] On the facts of the case, the Fourth Circuit rejected the cost-based challenge, in large part because Bradford was not in fact deterred from arbitrating his claim.[107]

The Sixth Circuit in *Morrison* expressly rejected the Fourth Circuit's approach, adopting a more favorable standard for claimants. The Sixth Circuit cited two failings of the *Bradford* approach. First, it "asks too much" of claimants "to come forward with concrete estimates of anticipated or expected costs of arbitration" at an early phase of the case.[108] Second, it focuses solely on the individual bringing the challenge rather than "other similarly situated individuals" who also might be deterred by upfront arbitration costs.[109] The Sixth Circuit described its "revised case-by-case approach" as requiring claimants "to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum."[110] One key difference, as identified by the court, is that under *Morrison* the Sixth Circuit will look to the circumstances of potential claimants "similarly situated" to the claimant raising the cost challenge. Thus, a court should take the claimant's personal financial resources "as representative of this larger class's ability to shoulder the costs of arbitration."[111] Moreover, the claimant need not show the actual arbitration costs he or she is likely to incur in this particular case; instead, evidence of "average or typical arbitration costs" is enough.[112] Nor should the court consider the possibility of the arbitrator awarding the claimant his or her arbitration costs in the final award because claimants are risk averse ("inclined to err on the side of

106. 238 F.3d at 556. The court of appeals noted that "parties to litigation in court often face costs that are not typically found in arbitration, such as the cost of longer proceedings and more complicated appeals on the merits." *Id.* at 556 n.5.

107. *Id.* at 558.

108. 317 F.3d at 660.

109. *Id.* at 661.

110. *Id.* at 663.

111. *Id.*

112. *Id.* at 664.

caution," in the Sixth Circuit's words).[113] According to the *Morrison* court, for low-level employees, "this standard will render cost-splitting provisions unenforceable in many, if not most, cases."[114]

Central to the Sixth Circuit's analysis was its view of contingent fee contracts. According to the court of appeals, most employees with federal statutory claims (particularly Title VII claims) are represented by counsel on a contingent fee basis. As a result, "many litigants will face minimal costs in the judicial forum, as the attorney will cover most of the fees of litigation and advance the expenses incurred in discovery."[115] But in arbitration, according to the court, claimants must pay arbitrators' fees and administrative costs, expenses "which are never incurred in the judicial forum."[116] The court never considered the possibility that the attorney would advance those costs as well, just like the other litigation expenses in court. Indeed, even under the Fourth Circuit's approach, as noted above, a key factor is "the claimant's ability to pay the arbitration fees and costs," which does not seem to consider the possibility that costs may be advanced by the attorney.

B. Court Challenges: Unconscionability

In addition to a vindication-of-statutory-rights theory, claimants also raise cost-based challenges to the enforceability of arbitration agreements under the doctrine of unconscionability.[117] Unconscionability is the principal theory for challenging arbitration agreements on cost grounds in state court[118] but is relied upon in federal court cases as well.[119] Although derived from a different

113. *Id.* at 665.

114. *Id.* By contrast, "[i]t will find, in many cases, that high-level managerial employees and others with substantial means can afford the costs of arbitration, thus making cost-splitting provisions in such cases enforceable." *Id.*

115. *Id.* at 664.

116. *Id.*

117. *See infra* App. A.

118. *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000) (holding an arbitration agreement unconscionable); Brower v. Gateway 2000, Inc., 676 N.Y.S. 2d 569 (N.Y. App. Div. 1998) (holding an arbitration agreement unconscionable on cost grounds but remanding based on substitution of alternative institutional rules).

119. Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006). Courts look to general contract defenses under state law for evaluating the enforceability of arbitration agreements. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Unconscionability is one of the most commonly asserted such defenses. *See, e.g.*, Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 195–98 (2004) (highlighting the resurgence in successful assertion of unconscionability claims against enforcement of arbitration agreements); Jeffrey W. Stempel,

doctrinal source, the analysis is very similar to that under the vindication-of-statutory rights theory.[120]

This theory was advanced in *Brower v. Gateway 2000, Inc.*,[121] decided by the Appellate Division of the New York Supreme Court. A computer user filed a class action against Gateway 2000, Inc. alleging claims for breach of contract, breach of warranty, fraud, and unfair trade practices due to Gateway's alleged failure to provide promised service for computers it sold. Gateway sought to compel arbitration, relying on an arbitration clause in its Standard Forms and Conditions[122] that provided for arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC").[123] According to the court, "a claim of less than $50,000 required advance fees of $4,000 (more than the cost of most Gateway products)."[124] The court held the cost provision unconscionable, reasoning that "the excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process."[125] Based on Gateway's willingness to arbitrate before the AAA rather than the ICC, however, the court remanded the case to the trial court to determine whether the AAA's costs of arbitration were so excessive as to be unconscionable.

More recent is the Ninth Circuit's opinion in *Ferguson v. Countrywide Credit Industries, Inc.*,[126] one in a line of cost-based unconscionability challenges adjudicated in the Ninth Circuit.[127] The

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Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism, 19 OHIO ST. J. ON DISP. RESOL. 757, 799–803 (2004) (same).

120. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 6, § 5.4.1, at 113:

> If high fees are assessed to arbitrate a federal claim, the consumer can argue both that the fees conflict with the federal statute and that they make the clause unconscionable. If high fees are assessed to arbitrate a state statutory claim, however, the consumer should rely on an unconscionability argument or another argument that would apply to any contract term, such as the argument that the term is unenforceable as against public policy.

121. 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

122. Gateway was the defendant in a series of cases involving challenges to the enforceability of the arbitration clause in the Gateway Standard Terms and Conditions. *E.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997); Klocek v. Gateway, Inc. 104 F. Supp. 2d 1332 (D. Kan. 2000); Westendorf v. Gateway 2000, Inc., No. 16913, 2000 Del. Ch. LEXIS 54 (Del. Ch. March 16, 2000). *Brower* is unusual among those cases in the court's reliance on the doctrine of unconscionability. 676 N.Y.S.2d at 252–55.

123. International Chamber of Commerce, *supra* note 41, App. III.

124. *Brower*, 676 N.Y.S.2d at 571.

125. *Id.* at 574.

126. 298 F.3d 778 (9th Cir. 2002).

127. *E.g.*, Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005); Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101 (9th Cir. 2003); Ingle v. Circuit City Stores, Inc., 328 F.3d

claimant filed suit against her employer, Countrywide, alleging various claims, including a claim for sexual harassment under Title VII of the Civil Rights Act of 1964.[128] The district court refused to compel arbitration, and the Ninth Circuit affirmed. Relying on California law, particularly the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*,[129] the court of appeals concluded that the arbitration clause was unconscionable. The arbitration clause contained three provisions the court found objectionable: the clause (1) excluded certain claims from arbitration; (2) provided that the parties would share all arbitration costs (other than the $125 initial filing fee, which the claimant would pay, and the fee for the first day of any hearing, which the employer would pay); and (3) imposed more stringent limitations on the employee's discovery of the employer than on the employer's discovery of the employee. Applying California law, the Ninth Circuit held all three provisions unconscionable and, finding them not severable, invalidated the entire arbitration clause. The court stated in dicta that "the only valid fee provision is one in which an employee is not required to bear any expense beyond what would be required to bring the action in court."[130] Subsequent Ninth Circuit cases have echoed this language in striking down arbitration agreements as unconscionable, at least in part, on cost grounds.[131]

C. An Empirical Study of Cost-Based Challenges in Federal Court

While the previous Sections examined particular cases, this Section takes a more general perspective, summarizing some key characteristics of the reported[132] federal court decisions adjudicating cost-based challenges to arbitration agreements from December 11, 2000, to June 30, 2005.[133] The Supreme Court decided *Green Tree Financial Corp.—Alabama v. Randolph* on December 11, 2000,[134] so the cases studied are limited to post-*Green Tree* decisions. Included

1165 (9th Cir. 2003); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002). Most of the decisions are based on California law and at least purport to rely on *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000), the leading California Supreme Court case.

128. 42 U.S.C. §§ 2000e-2a, 2000e-3 & 1981a(c) (2006).

129. 6 P.3d 669 (Cal. 2000).

130. 298 F.3d at 786.

131. *See supra* note 127.

132. I include the decision so long as it is available on LEXIS, even if the opinion is formally unpublished by the court.

133. Other results are reported in Part V.B. The cases are listed *infra* in Appendix A.

134. 531 U.S. 79 (2000).

are both court of appeals decisions and district court decisions, although the description of the results below sometimes distinguishes the two. Each case is included only once, either at the district court level or at the court of appeals level. If, for example, the court of appeals reversed the district court's decision on the cost issue, only the court of appeals' decision is included, and the case is characterized accordingly.

One important caveat needs to be noted: reported court cases are subject to various selection biases making generalizing from the results problematic. First, the sample of cases arising under arbitration clauses is affected by "ex ante selection"–selection due to parties deciding whether to agree to pre-dispute arbitration agreements.[135] Second, selection occurs when claimants decide whether to assert their claims in arbitration. This sort of "ex post selection" bias may be particularly problematic here, where the cases in which arbitration costs preclude a party from asserting his or her claim might be precisely those that never make it to court. Third, the parties—either the plaintiff by filing suit or the defendant by removing the case—select between federal court and state court. Fourth, selection occurs when the parties settle their dispute prior to the resolution of any challenge to the arbitration agreement.[136] As Joel Waldfogel said: "any model of the settlement decision is also at least implicitly a model of the selection of cases for trial."[137] Fifth, judges select among cases when they identify the cases in which to issue written opinions and designate those opinions as published or unpublished. Moreover, the facts of the cases, and particularly the evidence introduced by claimants to show their inability to pay

135. Christopher R. Drahozal, *Ex Ante Selection of Disputes for Litigation* (Feburary 27, 2004) (Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=510162.

136. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5 (1984) (describing case selection by settlement). For additional studies of case selection by settlement, see Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 235 (1996); Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 93 (1995); Peter Siegelman & John J. Donahue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1996); Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 188 (1993); Luke Froeb, *The Adverse Selection of Cases for Trial*, 13 INT'L REV. L. & ECON. 317, 317 (1993); Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, *in* DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 17 (David A. Anderson ed., 1996).

137. Joel Waldfogel, *Selection of Cases for Trial*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 419, 419 (Peter Newman ed., 1998).

arbitration costs, vary by case. There is no reason to assume that the different courts are dealing with comparable cases. Accordingly, the results below are presented simply as descriptive of the reported cases.

Federal courts issued opinions in 163 cases involving cost-based challenges to arbitration agreements during the roughly four-and-one-half-year period studied. Of those cases, 31 (19%) gave rise to an opinion in the court of appeals, while the other 132 (81%) were resolved by a district court with no evidence of an appeal on the cost issue.[138] Not surprisingly, given that the cases were brought in federal court, the most common theory discussed in the opinions was the vindication-of-statutory-rights theory, relying on *Green Tree*: 85 (52.1%) of the opinions addressed only the vindication-of-rights theory, while another 11 (6.7%) discussed that theory along with another. In 65 cases (39.9%), the court addressed unconscionability as the sole doctrinal basis for the cost-based challenge.[139] In many of those cases, the argument that the arbitration agreement was unconscionable closely tracked the vindication-of-rights theory and included a citation to *Green Tree*.

Many of the cases involved employees suing their employer (or former employer): 81 of 163 (or 49.7%) were employment cases. Most of the rest (47 of 163, or 28.8%) involved consumer borrowers suing lenders (banks, credit card issuers, etc.).[140] The substantial majority of the cases (121 of 163, or 74.2%) were brought by individuals suing on their own behalf, while the remainder (42 of 163, or 25.8%) were filed on a class basis.[141] The distribution of class versus individual relief by type of claimant (consumer versus employee) is summarized in Table 3.

138. In a handful of cases, the court of appeals issued an opinion that did not address the cost issue. In such cases, the district court opinion is used rather than the court of appeals' opinion.

139. Two courts described the cost-based challenge as based on public policy.

140. Other consumer claims were against companies such as debt collectors, brokerage firms, home builders, mobile home manufacturers, telephone companies, insurers, a payment service provider, and a fast food restaurant chain.

141. Because the motion to compel arbitration was resolved before a class was certified, it is not possible to determine whether a class would have been certified. Thus, in characterizing these cases I rely solely on whether the claimant sought to proceed on a class basis.

Table 3. Cost-Based Challenges in Individual and Class Actions

Type of Claimant	Individual Action	Class Action
Consumer	41	32
Employee*	73	8
Other	7	2
Total	121	42

*One claim involved an employee suing an insurer

A large proportion of claimants asserted at least one federal statutory claim, again not surprising given that the cases were in federal court. The most common claims asserted were Title VII employment discrimination claims (44 of 163, or 27%) and claims under the Truth in Lending Act (31 of 163, or 19%). Other federal statutory claims asserted by claimants (in cases in which they did not raise a Title VII or TILA claim[142]) included claims under the federal antitrust laws, the Magnuson-Moss Warranty Act ("MMWA"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Fair Labor Standards Act ("FLSA"), the Fair Credit Reporting Act ("FCRA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and tbe Real Estate Settlement Procedures Act ("RESPA"). In 37 of 163 cases (or 22.3%), the claimant apparently did not assert any claim based on federal law.

Overall, the vast majority of cost-based challenges to arbitration agreements were unsuccessful. Of the 163 cases studied, courts rejected the challenge and upheld the arbitration clause in 122 (or 74.8%). The success rate varied significantly by circuit. Claimants in courts in the First, Fifth, Eleventh, and D.C. Circuits never successfully challenged an arbitration agreement on cost grounds after *Green Tree*, while claimants in courts in the Ninth Circuit succeeded in having the clause invalidated in whole, or in part, in 12 of 20 cases (or 60%).[143] Table 4 summarizes the outcomes by circuit, breaking down the outcomes between courts of appeals and district courts.

142. I did not attempt a comprehensive cataloguing of the types of claims asserted by claimants. Thus, so long as the claimant asserted either a Title VII claim or a TILA claim I saw no reason to examine the case further. Only in cases in which the claimant did not assert either a Title VII claim or a TILA claim did I collect information on what other federal law claim the claimant alleged, if any. Likewise, only if the claimant did not assert a federal law claim did I make note of what sort of state law claim the claimant asserted.

143. Once again I emphasize that this differential does not necessarily reflect differences in approaches by the courts. Instead, it may merely reflect cases with different factual records being decided by the courts.

Table 4. Outcomes in Cost-Based Challenges by Circuit

	Clause Upheld	Struck Down	Provision Severed	Case Remanded	Total
First Circuit	**4 (100%)**	**0 (0%)**	**0 (0%)**	**0 (0%)**	**4**
Court of Appeals	1	0	0	0	1
District Court	3	0	0	–	3
Second Circuit	**13 (92.9%)**	**1 (7.1%)**	**0 (0%)**	**0 (0%)**	**14**
Court of Appeals	0	0	0	0	0
District Court	13	1	0	–	14
Third Circuit	**16 (69.6%)**	**3 (13%)**	**2 (8.7%)**	**2 (8.7%)**	**23**
Court of Appeals	2	1	1	2	6
District Court	14	2	1	–	17
Fourth Circuit	**6 (85.7%)**	**1 (14.3%)**	**0 (0%)**	**0 (0%)**	**7**
Court of Appeals	3	0	0	0	3
District Court	3	1	0	–	4
Fifth Circuit	**17 (100%)**	**0 (0%)**	**0 (0%)**	**0 (0%)**	**17**
Court of Appeals	3	0	0	0	3
District Court	14	0	0	–	14
Sixth Circuit	**9 (52.9%)**	**0 (0%)**	**6 (35.3%)**	**2 (11.8%)**	**17**
Court of Appeals	0	0	1	2	3
District Court	9	0	5	–	14
Seventh Circuit	**16 (80%)**	**4 (20%)**	**0 (0%)**	**0 (0%)**	**20**
Court of Appeals	1	0	0	0	1
District Court	15	4	0	–	19
Eighth Circuit	**4 (50%)**	**1 (12.5%)**	**2 (25%)**	**1 (12.5%)**	**8**
Court of Appeals	2	0	0	1	3
District Court	2	1	2	0	5
Ninth Circuit	**8 (40%)**	**11 (55%)**	**1 (5%)**	**0 (0%)**	**20**
Court of Appeals	0	5	1	0	6
District Court	8	6	0	–	14
Tenth Circuit	**6 (60%)**	**4 (40%)**	**0 (0%)**	**0 (0%)**	**10**
Court of Appeals	0	0	0	0	0

District Court*	6	4	0	–	10
Eleventh Circuit	**19**	**0**	**0**	**0**	
	(100%)	**(0%)**	**(0%)**	**(0%)**	**19**
Court of Appeals	4	0	0	0	4
District Court	15	0	0	0	15
D.C. Circuit	**4**	**0**	**0**	**0**	
	(100%)	**(0%)**	**(0%)**	**(0%)**	**4**
Court of Appeals	1	0	0	0	1
District Court	3	0	0	0	3
Totals	**122**	**25**	**11**	**5**	
	(74.8%)	**(15.3%)**	**(6.7%)**	**(3.1%)**	**163**
Court of Appeals	17	6	3	5	31
District Court	105	19	8	–	132

* Includes one Bankruptcy Court opinion

D. Legislation

In addition to the courts, several state legislatures have enacted statutes seeking to regulate arbitration costs. As part of a series of laws regulating consumer arbitration enacted in 2002,[144] the California legislature enacted what is now Section 1284.3 of the California Code of Civil Procedure.[145] Section 1284.3 regulates in various ways the costs and fees that can be charged to a consumer by a "private arbitration company," including arbitration institutions such as the AAA. Subsection (a) prohibits a private arbitration company or neutral arbitrator from administering a consumer arbitration under an agreement that provides for costs to be shifted to the consumer in the event the consumer loses in the arbitration.[146] Subsection (b) requires a private arbitration company to waive "[a]ll fees and costs charged to or assessed upon a consumer party . . . exclusive of arbitrator fees" for an "indigent consumer," which the statute defines as "a person having a gross monthly income that is less than 300 percent of the federal poverty guidelines."[147] The arbitration institution must provide written notice of the availability of this option to consumers, and the only evidence it can require in support of

144. *See* Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120–23 (2003) (describing legislation).

145. CAL. CIV. PROC. CODE § 1284.3 (2006).

146. *Id.* § 1284.3(a).

147. *Id.* § 1284.3(b). In its fee waiver procedures, the American Arbitration Association identifies indigent consumers based on a maximum monthly income of 200 percent of the federal poverty standard. *See supra* text accompanying note 55. But for consumers in California, the fee waiver procedures expressly acknowledge and apply the California statutory definition. *Id.*

a request for waiver is a sworn declaration by the consumer of his or her monthly income and the number of persons in the household.[148] The California statute, by its terms, does not provide for the invalidation of a consumer arbitration agreement due to excessive cost. But in *Gutierrez v. Autowest, Inc.*,[149] the California Court of Appeal relied on Section 1284.3(b) in part in permitting claimants to "resist enforcement of an arbitration agreement that imposes unaffordable fees."[150]

New Mexico took a different approach to regulating arbitration costs when it enacted the Revised Uniform Arbitration Act ("RUAA") in 2001.[151] The New Mexico non-uniform version of RUAA defines a "disabling civil dispute clause" as a clause that modifies or limits "procedural rights necessary or useful to a consumer, borrower, tenant or employee in the enforcement of substantive rights against a party drafting a standard form contract or lease."[152] The definition specifically lists as an example a clause requiring a consumer to "assert a claim against the party who prepared the form in a forum that is . . . more costly . . . than a judicial forum established in this state for resolution of the dispute."[153] Section 44-7A-5 of the New Mexico Act then provides that in a consumer or employment arbitration, such a clause "is unenforceable against and voidable by the consumer, borrower, tenant or employee."[154] The Section adds that "[i]f the enforcement of such a clause is at issue as a preliminary matter in connection with arbitration, the consumer, borrower, tenant or employee may seek judicial relief to have the clause declared unenforceable in a court having personal jurisdiction of the parties and subject matter jurisdiction of the issue."[155] The provision has not yet been applied in any reported cases.[156]

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148. *Id.* § 1284.3(b)(3). The arbitration institution must keep all information received from the consumer confidential. *Id.* § 1284(b)(4). But the arbitration institution "may not keep confidential the number of waiver requests received or granted, or the total amount of fees waived." *Id.*

149. 114 Cal. App. 4th 77 (Ct. App. 2003).

150. *Id.* at 98.

151. For an overview of RUAA, see Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1.

152. N.M. STAT. ANN. § 44-7A-1 (2006).

153. *Id.* § 44-7A-1(b)(4)(a).

154. *Id.* § 44-7A-5.

155. *Id.*

156. Oklahoma has taken yet another approach in its version of RUAA. *See* 12 OKLA. STAT. § 1880 (2006):

> B. In applying and construing the Uniform Arbitration Act, to the extent permitted by federal law, recognition shall be given to the following considerations as applicable:

The United States Congress has considered at least one bill that would regulate arbitration costs, but it has not enacted the bill into law.[157] The Arbitration Fairness Act of 2002 would have authorized arbitrators or arbitration institutions to:

> (A) provide for reimbursement of arbitration fees to the claimant, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice; and
>
> (B) waive, defer, or reduce any fee or charge due from the claimant in the event of extreme hardship.[158]

Neither of those provisions would add much to typical institutional arbitration rules, although presumably they would preclude parties from contracting for a different rule.[159]

These legal approaches, both by courts and legislatures, are based, to varying degrees, on the assumption that arbitration costs pose a serious barrier to individual claimants seeking to vindicate their legal rights. The next Part explores that assumption from an economic perspective.

> 1. Agreements to arbitrate are often included in standard forms prepared by one party and in a context where there is little or no ability to negotiate or change the terms of the agreement to arbitrate; and
>
> 2. In such cases, clauses providing . . . for the expenses of arbitration . . . and for other matters that may represent a serious disadvantage to the party or parties that did not prepare the form shall be closely reviewed for unconscionability based on unreasonable one-sidedness and understandable or unnoticeable language or lack of meaningful choice and for balance and fairness in accordance with reasonable standards of fair dealing.

157. More generally, a number of bills have been introduced into Congress that would limit or restrict consumer or employment arbitration, either by excluding certain claims from arbitration or invalidating pre-dispute arbitration agreements in certain contracts. *See, e.g.*, Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 840 (2002). Only one bill has been enacted into law, however: the Motor Vehicle Franchise Contract Arbitration Fairness Act makes pre-dispute arbitration agreements unenforceable in motor vehicle franchise agreements (i.e., franchise agreements between car manufacturers and car dealers). *See* 15 U.S.C. § 1226(a) (2006).

158. S. 3026, 107th Cong. § 2(b)(10) (Oct. 1, 2002).

159. In his statement on introducing the bill, Senator Sessions touted the benefits of arbitration, asserting that "arbitration can give the consumer and employee a cost-effective forum in which to assert their claim," particularly for the "overwhelming majority of the people who could not afford a lawyer to litigate in court." 148 CONG. REC S9721 (daily ed. Oct. 1, 2002) (statement of Sen. Sessions). He explained the arbitration cost provision as follows:

> 11. Expenses. The bill grants all parties the right to have an arbitrator provide for reimbursement of arbitration fees in the interests of justice and the reduction, deferral, or waiver of arbitration fees in cases of extreme hardship. It does little good to take a claim to arbitration if the consumer or employee cannot even afford the arbitration fee. This provision ensures that the arbitrator can waive or reduce the fee or make the company reimburse the consumer or employee for a fee if the interests of justice so require.

Id.

IV. ECONOMIC ANALYSIS OF ARBITRATION COSTS

This Part takes an economic approach to analyzing when the upfront costs of arbitration might preclude a party from asserting a claim.[160] It relies principally on the expected value model of litigation (and arbitration) but also considers insights from a real options approach. The central conclusion is that rather than arbitration costs interfering with the workings of the contingent fee system, as some arbitration critics have asserted, the contingent fee system provides a means for overcoming possible liquidity and risk aversion barriers to arbitration.

A. Expected Value Model

Under the expected value model of litigation, a prospective claimant decides whether to file suit in court by comparing the costs and benefits of litigation.[161] The benefits of litigation are the expected award by the decisionmaker (Jp), either a judge or jury.[162] The costs of litigation (Cp) include forum costs, other litigation expenses, and attorneys' fees.[163] Under the expected value model, a claimant will file suit when the expected recovery is greater than the expected litigation costs—in other words, when $Jp - Cp > 0$. If $Jp - Cp < 0$, the claimant will not proceed with the suit.[164]

The decision to file a claim in arbitration is analogous to the decision to file suit, although the expected award (J'p) and the expected costs (C'p) in arbitration may differ from the expected judgment and the expected costs in court (in other words, J'p may be

160. Thus, I do not address whether consumers and employees are better off in arbitration than in court, although certainly whether they can assert their claim in arbitration is relevant to that inquiry.

161. For overviews of the expected value model, see ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE (2003); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2003); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (3d ed. 2003); STEVEN SHAVELL, FOUNDATIONS OF THE ECONOMIC ANALYSIS OF LAW (2004); ROBERT D. COOTER & THOMAS S. ULEN, LAW AND ECONOMICS (4th ed. 2004); Bruce H. Kobayashi & Jeffrey S. Parker, *Civil Procedure: General*, *in* V THE ENCYCLOPEDIA OF LAW & ECONOMICS 1, 3–4 (Boudewijn Bouckaert & Garrit De Geest eds., 2000). For other writings on the subject, see William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

162. Benefits also could include non-financial considerations. A more sophisticated model would focus on the settlement value of the case rather than the expected judgment. The more simplified model used here is sufficient for my purposes.

163. *See supra* text accompanying notes 33–34.

164. Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 226–27 (2000).

more or less than Jp, and C'p may be more or less than Cp).[165] The party will assert its claim in arbitration so long as the expected arbitration award is greater than the expected cost of the arbitration process (J'p > C'p). The party will not assert its claim in the converse case: when the expected cost is greater than the expected award (J'p < C'p).

Lawsuits that are not economically viable under this model are known as negative expected value suits (or in arbitration, presumably, negative expected value claims). As defined by Lucian Bebchuk, "[a] negative expected value suit is one in which the plaintiff would obtain a negative expected return from pursuing the suit all the way to judgment–that is, one in which the plaintiff's expected total litigation costs would exceed the expected judgment."[166] Actually, an extensive literature exists identifying a variety of circumstances in which claimants have the incentive to assert claims with a negative expected value.[167] In other words, even the fact that a claim has a negative expected value does not necessarily mean that the claimant will not bring the claim in court (or in arbitration). Nevertheless, to the extent it is useful to try and give an economic content to the idea that arbitration costs may be a barrier to a claimant asserting a claim, a negative expected value claim seems like a reasonable shorthand for such a claim (even though an overbroad one).

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165. I assume here that the parties have entered into a pre-dispute arbitration clause, so that the claimant's options after the claim arises are either to file a claim in arbitration or not to file a claim in arbitration. A third possibility, of course, is for the claimant to challenge the enforceability of the arbitration agreement in court, which I take up momentarily. For an economic analysis of the decision whether to enter into a pre-dispute arbitration agreement, see Hylton, *supra* note 164, at 223–28; Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995).

166. Lucian Ayre Bebchuk, *Suits with a Negative Expected Value*, *in* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 551–54 (Peter Newman ed., 1998). The fact that a claim has a negative expected value does not necessarily mean that it is a frivolous claim. It may be a meritorious claim but one that is so costly to litigate that a claimant cannot do so economically. POSNER, *supra* note 30, at 632.

167. *See, e.g.*, Lucian Ayre Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988) (imperfect information); Avery Katz, *The Effects of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3 (1990) (imperfect information); David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985) (differences in the timing of litigation costs incurred by plaintiffs and defendants); David C. Croson & Robert H. Mnookin, *Scaling the Stonewall: Retaining Lawyers to Bolster Credibility*, 1 HARV. NEGOT. L. REV. 165 (1996) (plaintiff's pre-commitment to pay his or her attorney part of the litigation costs); Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Game*, 18 INT'L REV. L. & ECON. 147 (1998) (attorney who develops a reputation for bringing negative expected value claims); Lucian A. Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996) (the possibility that the claimant can subdivide his or her litigation expenses).

It should be clear that the mere fact that a claimant prefers to bring his or her claim in court does not show that the claim has a negative expected value in arbitration. A claimant may for any number of reasons prefer litigation over arbitration ex post, despite having agreed to arbitrate ex ante.[168] Indeed, under the simple expected value model described above, once a dispute arises, a claimant will prefer to be in court instead of arbitration so long as expected value of the claim in court is greater than its expected value in arbitration ($(Jp - Cp) > (J'p - C'p)$).[169] This condition certainly can be satisfied in cases in which the claim is not a negative expected value claim in arbitration (i.e., when $J'p - C'p > 0$).

Of course, the fact that a claim has a negative expected value in arbitration does not necessarily mean that it has a positive expected value in litigation. Indeed, one would expect that most claims that are not cost justified to pursue in arbitration also are not cost justified to pursue in litigation. Thus, for costs to preclude a claimant from asserting a claim in arbitration, the claim must have a positive expected value in court.

Finally, note that in the expected value model, what matters to the claimant's decision whether to file a claim in arbitration is the expected award and the expected costs—the total costs, not merely the upfront costs. A claim has a negative expected value if the entire expected cost of the process (including attorneys' fees and other litigation expenses, not just arbitrator's fees and administrative fees) exceeds the expected award. Thus, the expected value model seems consistent with those who have defended arbitration against cost-based challenges by arguing that the total process costs are lower in arbitration.[170] Likewise, the claimant's personal financial condition plays no role in the decision whether to file a claim under this model. What matters are the characteristics of the claim—its value (the expected award) and the resources it will take to obtain that value (the expected cost).

B. Option Theory and Arbitration

The expected value model assumes that the claimant faces a one-time decision whether to file a claim and makes that decision by

168. Drahozal, *supra* note 62, at 749–50.

169. Moreover, the claimant will challenge the enforceability of the arbitration agreement in court so long as the expected cost of the challenge (e) is less than the expected benefit from the challenge (the probability of success (p) times the claimant's benefit from being in court (i.e., $e < p((Jp - Cp) - (J'p - C'p))$).

170. *See supra* text accompanying notes 23–26.

comparing the expected costs and benefits. Bradford Cornell described the assumptions underlying the expected value model as follows:

> In deciding whether to sue or whether to settle, the litigants consider the costs and benefits under the assumption that they must either settle promptly or go to trial. There are no intermediate decisions to be made along the way. Under these conditions, the discounted cash flow model can be used to analyze litigation investments.[171]

This assumption, of course, is overly simplistic. At a number of points during the litigation (or arbitration) process, claimants obtain new information and can decide whether to continue with or drop a claim. As a result, it is increasingly common to model the litigation process as involving a series of options, with the claimant deciding at the appropriate time whether to exercise each option (pay his or her lawyer to continue with the case) or not (and simply drop the claim).[172]

Under the option model, a claimant will file suit when the option value of the case is greater than the exercise price (or strike price) of the option—the costs of proceeding to the next decision point. While seemingly just a restatement of the requirements for positive expected value claims under the expected value model, in fact there are important differences between the two models. Most fundamentally, the option value of a case will never be lower, and may well be higher, than its expected value.[173] This reality has several implications for the problem of arbitration costs.

First, the option model provides another set of circumstances in which it may make economic sense to assert a negative expected value claim. Because the option value of a claim may exceed its expected value, the claimant may have an incentive to file a claim with a negative expected value in court (or in arbitration).[174] Although the expected value is negative, the option value may still exceed the exercise price of the option. The intuition is straightforward. At the time of filing, a case has a range of possible outcomes—some positive, some negative. Because filing does not commit the claimant to litigate the case to judgment, the claimant might file even a claim with a negative expected value. As information is revealed during the litigation process, the claimant can simply drop the claim if it proves to have a negative outcome without incurring the cost of litigating the

171. Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173, 173 (1990).

172. *E.g.*, Cornell, *supra* note 171, at 173; Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47 (2004); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation*, 58 STAN. L. REV. 1267 (2006).

173. Cornell, *supra* note 171, at 176–82.

174. Grundfest & Huang, *supra* note 172, 1277; Huang, *supra* note 172, at 63–64.

matter all the way to judgment.[175] As a result, the option value even of negative expected value claims can be positive. Thus, as stated above, using negative expected value as a proxy overstates the number of cases in which arbitration costs truly are a barrier to asserting a claim.

Second, the option model suggests another reason why claimants may have an ex post preference for litigation over arbitration—in other words, another reason why claimants may have an incentive to challenge the enforceability of arbitration clauses in court.[176] Under the expected value model, the variance of the expected award and the expected costs are immaterial to whether risk neutral claimants will file a claim or which forum they prefer. What matters is the mean, not the variance. By contrast, increased variance is highly material to the option value of a claim. As Joseph Grundfest and Peter Huang stated, "a lawsuit's variance can be important because it reflects the value of the ability to adjust to newly learned information independently of the litigants' attitudes toward risk."[177] The greater the variance of a claim, the more upside it has. If the upside does not pan out, the claimant simply drops the claim—i.e., declines to exercise the next option. Thus, cases with a higher variance have a higher option value. If, as some evidence suggests, jury decisions have a higher variance than decisions by arbitrators,[178] the option value of a case will be higher in court than in arbitration, giving the claimant added incentive to try to avoid arbitration.

Third, the option model highlights a possible economic effect of upfront arbitration costs on a claimant's decision to file a claim. Under the expected value model, arbitration may have higher expected costs than litigation—even assuming total process costs are the same–by changing the timing of those costs. Costs incurred earlier in the process have a higher discounted present value. Under the option model, even if the mean expected costs are identical, the

175. The characterization is even stronger when viewed from the perspective of the plaintiff's attorney. As Kritzer explains, "[t]he work of the contingency fee lawyer can best be viewed as the management of a *portfolio* of cases." HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 11, 12–16 (2004). The attorney can have an incentive to bring (and finance) even negative expected value cases as part of his or her portfolio because the attorney can drop the cases that prove to have poor outcomes while continuing to litigate the cases that prove to have favorable outcomes.

176. *See supra* text accompanying notes 168–69.

177. Grundfest & Huang, *supra* note 172, at 1276.

178. NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS 221–35 (1995); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Malpractice: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 891–92 (1993).

timing of those costs can have a significant affect on the option value of the claim. According to Grundfest and Huang, "all other factors constant, a rule that causes litigation costs to be front-loaded will tend to reduce a lawsuit's option settlement value because a plaintiff must then incur larger expenses before gaining the advantage of the information that is disclosed" later in the case.[179] By increasing the cost of filing a claim—i.e., by increasing the costs a claimant must incur before obtaining information about the case after filing—arbitration reduces the option value of the claim, making it less likely that the claim will be economical to assert.

At bottom, however, the inquiry under the option model is conceptually the same as under the expected value model. A claimant will assert a claim when the value of the option exceeds the cost of exercising that option. The values are different but the comparison is the same. Notably, under both theories it is not just the upfront costs of arbitration that affect the parties' decision whether to arbitrate, but the total costs of the process.[180] In addition, under neither theory—in this simple model—does the wealth of the claimant enter into the determination. Thus, the option model, like the expected value model, raises questions about the legal analysis of cost-based challenges in the courts.

C. Liquidity, Risk Aversion, and Contingent Fee Contracts

Under both the expected value model and the option model, as described above, a claimant considers the total costs of arbitration, not merely the upfront costs, in deciding whether to file a claim. Similarly, it is the value of the claim (relative to the total costs) on which the decision to file is based, not the wealth or financial condition of the claimant. But the simple models described above implicitly (if not explicitly) assume claimants are risk neutral. They also assume away any liquidity constraints a claimant might have in financing the litigation. If, however, claimants are risk averse[181] or face liquidity constraints, upfront costs might preclude a claimant from asserting his or her claim in arbitration.

For a claimant in arbitration, the prospect of obtaining an award is an uncertain event: there is only a probability that the

179. Grundfest & Huang, *supra* note 172, at 1312.

180. *Id.* at 1275.

181. A claimant is risk averse when he or she would prefer a smaller, certain amount to a larger, uncertain amount. For example, a claimant is risk averse if he or she would prefer a certain sum of $100 to a 50% chance of receiving $200. A claimant is risk neutral if he or she is indifferent between a certain sum of $100 and a 50% chance of receiving $200.

arbitrator will find in the claimant's favor, and then a range of possible amounts the arbitrator might award. By comparison, arbitration costs are a (relatively) certain amount that the claimant must pay upfront in order to bring the claim.[182] To the extent claimants are risk averse, they may be unwilling to incur the certain upfront cost in an attempt to obtain an uncertain recovery. As a result, even if the claim otherwise is economically viable, the upfront costs of arbitration may deter a risk averse claimant from asserting the claim.[183]

In addition, legal claims are not freely transferable among parties, which limits the ability of claimants to finance litigation (or arbitration) by using their claim as collateral for a loan.[184] To the extent individuals cannot obtain financing from outside sources, they must rely on their own income and assets to finance the case. If individuals face serious liquidity constraints in arbitrating their claims, then the upfront costs of arbitration might preclude them from filing a claim in the first place. Moreover, in such a case, the extent of the claimant's income and assets certainly would be relevant in evaluating the extent of the liquidity constraint.

Indeed, at least some courts and commentators appear to recognize that risk aversion and liquidity constraints of individuals are central to the cost-based criticisms of arbitration. The Sixth Circuit in *Morrison v. Circuit City Stores, Inc.*[185] noted the importance of risk aversion when it asserted that claimants may be "inclined to err on the side of caution" in deciding whether to file a claim in arbitration.[186] In *The Costs of Arbitration*, Public Citizen cited the difficulty that low-income claimants may face in trying to raise the

182. I say "relatively" certain because if the claimant prevails the arhitrator may require the respondent to reimburse the claimant for the upfront arbitration costs. *See supra* text accompanying notes 59–62.

183. Under prospect theory, individuals are assumed to he risk averse as to gains but risk seekers as to losses. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); *see, e.g.*, Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 14 (2002); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000). If arbitration costs were framed as losses, then they might be less likely to deter claimants from arbitrating their claims.

184. *See* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 700–01 (2005); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI-KENT L. REV. 625 (1995). Of course, if a claimant can obtain financing for his or her claim, then liquidity barriers would not be a reason for invalidating the arbitration clause.

185. 317 F.3d 646 (6th Cir. 2003) (en banc).

186. *Id.* at 665.

money needed to pay the upfront costs of arbitration.[187] Other courts and commentators, too, while not explicitly citing liquidity and risk aversion, necessarily assume that those barriers exist.

But while liquidity constraints and risk aversion are central to the cost-based criticism of arbitration, those same courts and commentators ignore the principal device used in American litigation for providing financing and risk management for individual claimants: the contingent fee contract. Contingent fees are widely used in American litigation, not only in personal injury cases but in a wide variety of cases.[188] Similarly, many claimants in arbitration are represented on a contingent fee basis.[189]

A typical contingent fee contract provides that in exchange for the attorney's legal representation, the claimant will pay the attorney some percentage (often although not always 33%) of any recovery obtained in the case.[190] If the claimant recovers nothing, no fee is owed. Under a contingent fee contract, however, the claimant purchases more than merely legal services. As Herbert M. Kritzer explained:

> The normal hourly fee or flat fee simply purchases the services of a lawyer. Under a contingency fee arrangement, the client also purchases additional services. The first is financing .... By their nature, contingency fees are not normally collected until the matter is closed. Very often, lawyers also defer the collection of expenses until the close of a case. Thus, the contingency fee lawyer finances the litigation for the client while a case is pending.
>
> The second additional service that the client purchases is a form of insurance. While in many states clients are liable for expenses regardless of the outcome of a case, the reality is that lawyers who pursue a case unsuccessfully on a contingency basis seldom collect those expenses (or even seek to collect them). Thus, the lawyer effectively insures the client for the expenses associated with pursuing a claim.[191]

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187. PUBLIC CITIZEN, *supra* note 1, at 52–53.

188. KRITZER, *supra* note 175, at 36 (listing types of cases handled by lawyers on contingent fee basis); Painter, *supra* note 184, at 626 & n.3 (listing types of cases and noting that "[n]inety-five percent of personal injury cases are taken on a contingency").

189. *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J. 9, 12 (May-June 2003) (finding that in the sample of AAA employment arbitrations studied, "most lower-income employees have agreed to representation on a contingency basis").

190. KRITZER, *supra* note 175, at 39.

191. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270 (1998); *see also* POSNER, *supra* note 30, at 624 ("The solution to this liquidity problem is the contingent fee contract."); ALEXANDER TABARROK & ERIC HELLAND, TWO CHEERS FOR CONTINGENT FEES 6–7 (2005) (arguing that contingent-fee system results in "Improved Access to the Legal System" and "Risk Spreading"); Painter, *supra* note 184, at 653 (arguing that "[a] lawyer working on a contingent fee" is not only providing legal services, but also is providing "credit – postponing payment until the client collects on a judgment" and "insurance – agreeing to waive payment for legal services that do not achieve favorable results"); Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*,

The contingent fee contract thus provides a mechanism to overcome both the liquidity and risk aversion constraints individuals face in litigating their claims.

As noted by Kritzer, a common practice in contingent fee cases is for the claimant's attorney to advance on behalf of the client the costs of litigating the case. Examples of costs that might be advanced include discovery costs, expert witness fees, and the like. If the claimant prevails, the attorney obtains repayment of the advances from the judgment or award. If the claimant does not prevail, the attorney rarely if ever seeks to recover the advance, a practice expressly approved by at least some states' ethics rules[192] and seemingly common regardless.[193] As a result, contingent fee contracts provide financing and insurance not only for attorneys' fees but other litigation expenses as well.

But forum costs, including arbitration costs, are simply another form of litigation costs. On the face of it, there is no reason to expect contingent fee contracts to treat arbitration costs differently than they treat other litigation expenses. One would expect lawyers to advance arbitration costs for their clients, just like any other litigation expense—provided that the claim is economically viable based on the expected award and the expected total costs of arbitration.

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47 DEPAUL L. REV. 371, 376–77 (1998) (citing four functions of contingent fee contracts: (1) expanding access to justice by enabling claimants to finance litigation; (2) providing a source of financial credit; (3) avoiding agency costs due to shirking by lawyers; and (4) "offer[ing] clients a form of legal expense insurance"); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1125 (1969-1970) (citing, among other "common justifications" given for contingent fees, that "[t]he contingent fee allows the client to shift some of the risk inherent in his case to the lawyer" and "allows the client to borrow the lawyer's services in advance of settlement").

192. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2006):

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

193. *See* Lester Brickman, *Effective Hourly Rates of Contingeney-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH U. L.Q. 653, 735 (2003) ("[M]any firms make no effort to seek reimbursement of expenses if there is no recovery."); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 532 n.3 (1978) ("In event of defeat, the client theoretically must refund all of these litigation expenses advanced by the lawyer. . . . [In] [a]ctual practice, however, . . . the client usually does not pay back these expenses."); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 349 n.71 (1991) ("In practice, attorneys rarely attempt to collect expenses from personal injury clients, both because it would be impractical and because such a practice might drive away future clients.").

Indeed, some anecdotal evidence suggests that this is in fact the case. For example, the Missouri Bar's *Sample Fee Agreement* for contingent fee contracts provides that "Client agrees to pay for all costs and expenses paid or owed by Client in connection with this matter, or which have been advanced by Lawyer on Client's behalf."[194] The form contract goes on to state that "[c]osts and expenses commonly include . . . professional mediator, arbitrator and/or special master fees and similar other items."[195] A fee agreement for the Caruso Law Offices, P.C., available on the Internet, defines costs as "any expenditure, fee or charge which, at Attorneys' discretion, may be incurred to prosecute Client's claim, including but not limited to . . . mediation or arbitration fees."[196] The fee agreement (for premises liability cases) for Winer Menuela & Devens LLP likewise includes "arbitration costs" in its list of costs to "be reimbursed by the client(s) at the conclusion of the case," implying that the attorneys typically would advance those costs if necessary.[197]

An additional anecdote comes from the federal district court's opinion in *Mattox v. Decision One Mortgage Co.*[198] The plaintiff in *Mattox* filed a class action against a bank and mortgage company asserting violations of the Real Estate Settlement Procedures Act. The district court rejected a cost-based challenge to the arbitration agreement, holding that the respondent's offer to pay all arbitration costs protected the claimant from having to bear excessive costs. Included as part of the evidence introduced by the claimant in support of the challenge was an affidavit by the claimant's attorney, in which the attorney stated that he "would not, as a matter of business discretion, advance arbitration fees on the claims at issue in this case, if the matter is referred to arbitration."[199] The affidavit is suggestive of a practice among at least some contingent fee attorneys of advancing arbitration costs, even if on the facts of this case the attorney would not do so.[200]

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194. THE MISSOURI BAR, SAMPLE FEE AGREEMENT: FORMS & COMMENTS 15 (Revised Apr. 2003), *available at* http://home.mobar.org/lpmonline/fdrsamples.pdf.

195. *Id.*

196. Caruso Law Offices, Agreement for Representation by Counsel, ¶ 3 (copy on file with author). The agreement goes on to state that the "[c]lient is responsible for costs irrespective of outcome" and that "[a]ttorneys have the option to advance costs but are not required to do so." *Id.*

197. Winer Mehuela & Devens LLP, Attorney Fee Agreement and Authorization (Premises Liability), http://www.pacificlaw.com/files/attorney_fee-premises-f.pdf (last visited Apr. 30, 2006).

198. No. 01-10657-GAO, 2002 U.S. Dist. LEXIS 18066 (D. Mass. Sept. 26, 2002).

199. *Id.* at *9–10.

200. As noted above, the claimant sought to bring the suit as a class action in court, which likely would not have been permitted in arbitration. According to the claimant's attorney, the

This anecdotal evidence plainly is not conclusive,[201] but it is suggestive. Certainly more systematic empirical work would be useful. But even if such studies fail to find that attorneys regularly advance arbitration costs,[202] it may be due to cases like the Sixth Circuit's *Morrison* decision. Cases invalidating arbitration agreements on cost grounds provide a strong disincentive for lawyers to finance arbitration costs, because if the lawyers do so, they may deprive their clients of a possible ground for invalidating the arbitration agreement in court.

At bottom, then, Public Citizen and the *Morrison* court have it exactly backwards. Arbitration costs do not "severely restrict, or eliminate, the advantage a consumer has under the contingency fee system."[203] Instead, the contingent fee system provides a mechanism for overcoming possible liquidity and risk aversion constraints due to arbitration costs.

V. REEXAMINING THE LEGAL DOCTRINE

The previous Part challenges the cost-based criticism of arbitration as misguided in a critical respect: instead of arbitration costs interfering with the workings of contingent fee contracts, contingent fee contracts provide a mechanism for overcoming possible liquidity and risk aversion constraints due to the upfront costs of arbitration. This Part suggests some doctrinal implications of that analysis and revisits the empirical study of federal court cases resolving cost-based challenges.

A. Analyzing Cost-Based Challenges to Arbitration Agreements

The analysis in Part IV has several implications for the analysis of cost-based challenges to arbitration agreements in the

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individual claims in arbitration likely would have provided a "relatively small recovery." *Id.* at *10.

201. One possibility for some of the contracts is that the provisions were intended to deal with court-annexed arbitration, rather than contractual arbitration.

202. *See, e.g.*, Sprague v. Household Int'l, No. 04-0106-CV-W-NKL, 2005 U.S. Dist. LEXIS 11694, at *21 (W.D. Mo. June 15, 2005):

> During a teleconference with the parties on July 20, 2004, Household argued that the Plaintiffs would not be responsible for paying arbitration fees due to a contingency fee arrangement with their counsel. When the Plaintiffs denied that allegation, the Court ordered the Plaintiffs to submit their fee agreement under seal for *in camera* inspection. After reviewing the agreement, the Court determined that the agreement would require the Plaintiffs to bear all costs of arbitration, including the arbitration fees.

203. PUBLIC CITIZEN, *supra* note 1, at 65.

courts. First, as a case-by-case approach, it differs from what has been described as a per se standard used by the Ninth Circuit in holding arbitration clauses unconscionable on the basis of cost. The Ninth Circuit stated that (under both California and Washington law) an arbitration clause is unconscionable when it imposes higher costs than the otherwise applicable court filing fee.[204] The analysis here suggests that a case-by-case approach is preferable because in at least some cases the claimant's attorney may be able to advance the costs of arbitration on behalf of the claimant. In such cases, the upfront costs of arbitration will not be a barrier to claimants bringing a claim.[205]

Second, the analysis raises serious questions about the holdings of courts, like the Sixth Circuit in *Morrison*, that are explicitly based on a misunderstanding of the relationship between contingent fee contracts and arbitration costs. The Sixth Circuit in *Morrison* reasoned that contingent fee contracts enable claimants to avoid most, if not all, upfront costs in litigation, but that claimants must pay arbitration costs upfront regardless of whether they have a contingent fee contract with their attorney. That view incorrectly treats arbitration costs as somehow different from other litigation expenses, when there is every reason to treat them the same. This fundamental misunderstanding suggests that the Sixth Circuit should revisit its approach to resolving cost-based challenges. Possible changes are discussed below.

Third, at least in cases in which the claimant is represented by counsel, any case-by-case approach for analyzing arbitration costs must consider the availability of possible sources of financing in addition to the claimant's personal income and assets. Courts that focus solely on the claimant's personal assets and income are taking too narrow of a view.

Beyond these general implications, stating the economic analysis is much easier than implementing it in the form of a legal test. Courts are not well suited to calculate the expected award in arbitration and to compare it to expected arbitration costs (much less to calculate the option value of a claim and to compare it to the exercise price). Cost-based challenges occur early in the case when

204. *See* Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1261–62 (9th Cir. 2005) (Washington law); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1178-79 (9th Cir. 2003) (California law); Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2002) (California law); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (California law); *see also* Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 n.3 (11th Cir. 2003) (citing Ninth Circuit as applying per se standard to cost-based challenges).

205. Indeed, the claimants might be better off in arbitration than in litigation if the total process costs in arbitration are less.

little evidence on the merits may be available. Moreover, if in fact the arbitration agreement is enforceable, having a court make findings on the merits of the case would usurp the function of the arbitrator in adjudicating the parties' dispute.

A few proxies are available. First, the amount sought in the complaint provides some indication of the maximum expected value of the claim. Claimants have little incentive to minimize the amount they assert as damages (although this analysis might give them a reason to do so).[206] Of course, a large amount claimed does not necessarily mean that a claim has a large expected value (even from the claimant's perspective). While the amount sought may be large, the probability of recovery may be small.

Second, courts should take into account the applicability of fee shifting statutes in determining whether a claim is economical to bring in arbitration. As the Supreme Court stated in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*,[207] the purpose of fee-shifting statutes is to "enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."[208] The prospect of a fee recovery may make even a case seeking small monetary damages attractive to an attorney.[209] Thus, in evaluating the amount at stake in arbitration (and thus whether the claim is economical to bring), a court must consider not only the damages sought by the claimant but also any possible attorneys' fee recovery.[210]

Third, whether a claimant is represented by counsel is an important consideration. Certainly, if the claimant is proceeding pro se, the claimant does not have a lawyer to advance the costs of arbitration. In such a case, the central argument of this Article would be inapplicable. Conversely, however, the fact that a claimant currently is represented by counsel in court does not necessarily mean that the claim is a viable one if brought in arbitration. Some of the

206. In fact, claimants in court have an incentive to claim larger rather than smaller amounts of damages because of possible anchoring of jury awards on the amount sought by the plaintiff. Arbitration costs may constrain that incentive to some degree, as noted earlier. *See supra* note 49.

207. 478 U.S. 546 (1986).

208. *Id.* at 565.

209. *See* Brief of Petitioners at 46–47, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235) (citing attorneys' fee provision of TILA and stating that "[g]iven these incentives, it is no surprise that this Court has addressed numerous cases involving parties who brought individual lawsuits to vindicate their rights under TILA").

210. *See, e.g.*, Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638–639 (4th Cir. 2002); Battels v. Discover Bank, No. 2:03cv238-A, 2004 U.S. Dist. LEXIS 28012, at *37 (M.D. Ala. Aug. 27, 2004).

value of the claim in court may be due to the possibility that the court would invalidate the arbitration clause, permitting the claim to be resolved in court.

One possible approach would be to permit discovery into the fee arrangements between claimants and their attorneys.[211] If the fee agreement provides for the attorney to advance arbitration costs on behalf of the claimant, the court should reject the cost-based challenge. The problem with this approach is that it provides a strong incentive for strategic contracting between attorneys and their clients. Attorneys would only agree to advance arbitration costs for clients when they did not intend to challenge the arbitration agreement in court.[212] As a result, discovery is not likely to provide meaningful information. At the very least, however, courts should consider the possible availability of other financing sources, in particular the claimant's attorney, when ruling on cost-based challenges.

None of this is to deny that there may be cases in which upfront arbitration costs might preclude claimants from asserting claims. Cases with pro se claimants are of particular concern, as are claimants with small individual claims and no possible attorneys' fee recovery. But this analysis gives reason to doubt that such cases are as common as some have asserted and argues for taking a more critical view of cost-based challenges.

B. Revisiting the Cases

This Section revisits the empirical study in Part III.C in light of the preceding analysis.[213] It examines the sample of post-*Green Tree* federal court cases and finds little evidence that (1) arbitration costs would preclude claimants from bringing a claim in those cases;[214] or (2) that the cases in which courts invalidated arbitration clauses on cost grounds were more problematic than those cases in which the courts rejected the cost-based challenge.

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211. At least one court already has done so. Sprague v. Household Int'l, No. 04-0106-CV-W-NKL, 2005 U.S. Dist. LEXIS 11694, at *21 (W.D. Mo. June 15, 2005).

212. Indeed, there may already be a two-tiered market for legal services under contingent fee contracts. One tier of lawyers, willing to handle cases in arbitration, might routinely advance the costs of arbitration. Another tier of lawyers, who handle only cases in court, would not advance arbitration costs, instead relying on the possibility a claimant might incur prohibitive costs as a basis for challenging the enforceability of the arbitration agreement. The different tiers of lawyers might follow different business models, with lower-risk/lower-return firms in the first tier and higher-risk/higher-return firms in the second tier.

213. *See supra* text accompanying notes 132–143.

214. Of course, some claimants deterred from bringing claims might not challenge the enforceability of the arbitration agreement in federal court (or any court). The cases studied obviously provide no information about how many such cases exist.

Given the role that contingent fee contracts can play in overcoming liquidity and risk aversion barriers to arbitration, an important consideration is the extent to which the claimants are represented by counsel. Again, representation by counsel is not determinative, as a case might be economically viable in court solely because of the possibility that the court would invalidate the arbitration agreement.[215] Nonetheless, if a substantial proportion of claimants in litigated cases were proceeding pro se, it would cast serious doubt on the importance of contingent fee contracts as a means of mitigating the possible effects of arbitration costs.

Of the claimants in the 163 federal court cases listed in Appendix A, only one proceeded pro se;[216] the rest (161 of 162, or 99.4%) were represented by counsel.[217] Of the claimants represented by counsel, only eight (of 161, or 5.0%) were identified in the court's opinion as being represented solely by a law school clinic or non-profit public interest group.[218] Thus, most claimants who challenged arbitration agreements in federal court appear to have been represented by an attorney who was in a position to advance the costs of arbitration on behalf of the claimant.

Another consideration is the amount at stake in the case. All else being equal, claimants with small claims would seem at greater risk of being adversely affected by arbitration costs. For cases in which the only basis for federal court jurisdiction is diversity of citizenship (i.e., those involving only state court claims), the diversity statute requires that the minimum amount in controversy be at least $75,000.[219] For cases based on federal question jurisdiction, there is no minimum amount in controversy required.[220] Hence the dollar amounts of those claims could be quite small. Notably, however, most of the cases included claims under federal statutes that authorize the award of attorneys' fees to the prevailing party.[221] A substantial

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215. *See supra* text accompanying notes 210–211.

216. *See* McBride v. St. Anthony Messenger Magazine, No. 2:02-cv-0237-JDT-WTL, 2003 U.S. Dist. LEXIS 6449 (S.D. Ind. Feb. 6, 2003). The court in that case upheld the arbitration clause against the cost-based challenge.

217. In one case, the opinion did not indicate whether either the plaintiff or the defendant was represented by counsel.

218. In some cases, while counsel for the claimant was identified by name, no affiliation for the attorney was listed.

219. 28 U.S.C. § 1332(a) (2006).

220. *Id.* § 1331.

221. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (2006) (Title VII); 12 U.S.C. § 2607(d)(5) (2006) (Real Estate Settlement Practices Act); 15 U.S.C. § 1640(a)(3) (2006) (Truth in Lending Act); 29 U.S.C. § 626(b) (2006) (Age Discrimination in Employment Act); 15 U.S.C. § 2310(d)(2) (2006) (Magnuson-Moss Warranty Act).

proportion of the cases—at least 78.1% (57 of 73) of those brought by individual employees[222] and 63.4% (26 of 41) of those brought by individual consumers,[223] as well as 83.3% (35 of 42) of the class claims[224]—included at least one federal claim permitting a successful claimant to recover attorneys' fees.[225] When a claimant has a claim for attorneys' fees, the stakes are much greater than simply the amount of the claimant's loss.

Class claims present some additional issues. In some class cases, particularly consumer cases, the individual amount at stake can be very small. The likely arbitration costs may greatly exceed the amount the individual claimant is likely to recover. Of course in many of the class cases studied here, the claimant has at least one claim under a federal statute permitting recovery of attorneys' fees. Without such a statute, an individual's claim would appear to be a negative expected value claim. With such a statute, that is by no means clear.

Even if a class claim has a negative expected value in arbitration, however, that should not provide a legal basis for challenging the arbitration agreement on cost grounds. In such cases, it is the lack of a means of aggregating claims in arbitration that makes the claim a negative expected value claim, not higher costs in arbitration. The individual, non-aggregated claims would be no more

222. Of the cases brought by individual employees, forty-two included claims under Title VII, five included claims under the Age Discrimination in Employment Act, four included claims under the Americans with Disabilities Act, two included claims under the Family and Medical Leave Act, two included claims under tbe Fair Labor Standards Act, and two included civil rights claims under 42 U.S.C. § 1981. Twelve cases raised solely state claims, including claims under the D.C., Florida, and Virgin Islands Civil Rights Acts, and two others were described as involving a claim of discrimination and a claim of age discrimination respectively. Two case reports did not specify the claims at issue.

223. Of the cases brought by individual consumers, eighteen included claims under the Truth in Lending Act, three included claims under the Fair Credit Reporting Act, two included claims under the Magnuson-Moss Warranty Act, two included RICO claims, and one included securities fraud claims. Fourteen cases raised solely state law claims, including a claim under the New Jersey Consumer Fraud Act and a claim under the Oregon Unfair Trade Practices Act. One case report did not specify the claims at issue in the case.

224. Of the class cases, fourteen included claims under the Truth in Lending Act, five included claims under the Fair Labor Standards Act, four included claims under the Fair Credit Billing Act, three included claims under the federal antitrust laws, two included claims under Title VII, and one each included claims under the Real Estate Settlement Practices Act, the Equal Credit Opportunity Act, RICO, the Fair Credit Reporting Act, the Credit Repair Organizations Act, and the Fair Debt Collection Practices Act. One included unspecified federal claims. Five cases raised solely state law claims, one of which was a claim under the California Consumer Protection Act and one of which was a claim under the Illinois Consumer Fraud Act. Two case reports did not specify the claims at issue.

225. The other cases may have included such a claim, but there was no indication from the court's opinion that they did.

economical to pursue in court than in arbitration. It is only because class relief generally is not available in arbitration that the claim has a negative expected value in arbitration.

As an economic matter, the lack of class relief in arbitration can have exactly the same effect as a difference in expected costs–it can turn positive expected value claims into negative expected value claims. But as a legal matter, the distinction can be a critical one. As the Supreme Court stated in *Perry v. Thomas*, [226] the Federal Arbitration Act ("FAA") precludes a court from "rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable," for example, because it would treat arbitration clauses differently than other contract provisions—which the FAA does not permit.[227] Accordingly, state law challenges to arbitration agreements cannot be based on unique characteristics of the arbitration process, such as the lack of class relief.[228]

Indeed, many courts have rejected challenges to the enforceability of arbitration agreements based on the ground that class relief is (generally) unavailable in arbitration.[229] By recasting the challenges as based on arbitration costs, at least some claimants are seeking to do an end run around these cases.[230] Myriam Gilles described these sorts of cases as involving "second-wave challenges" to the lack of class relief in arbitration and concluded that "[i]t is not clear to what extent these . . . challenges will find traction in the federal courts."[231] These cases are not properly brought as cost-based

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226. 482 U.S. 483 (1987).

227. *Id.* at 492 n.9 (dicta).

228. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 411 (2004).

229. *See, e.g.*, Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 816–19 (11th Cir. 2001). *See generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

230. *See* Lloyd v. MBNA Am. Bank, N.A., No. 01-1752, 2002 U.S. App. LEXIS 1027 at *7 (3d Cir. Jan. 7, 2002) (unpublished) ("But *Johnson* [*v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000)] makes clear that the TILA does not provide an unwaivable right to a class action. Lloyd may not attempt to end-run that holding by couching his claim in terms of unvindicated rights."); Taylor v. First N. Am. Nat'l Bank, 325 F. Supp. 2d 1304, 1318 (M.D. Ala. 2004):

> [T]he gist of her argument is that it does not make economic sense to bring individual TILA claims. This may be true as a matter of fact, but it is an argument that applies to claims litigated in federal court as much as to claims litigated before an arbitrator. Furthermore, to the extent that Taylor's argument is that the bad economics of individual lawsuits means that she should have a right to bring a class action as the only way to enforce her rights under TILA and the FCBA, that argument is exactly the one rejected by the court in *Randolph* [*v. Green Tree*].

231. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 408 (2005).

challenges. If the lack of class relief in (at least some) arbitration proceedings is a problem, it should be addressed directly, not under the pretense of excessive arbitration costs.

Overall, the cases studied provide little evidence that the cases in which federal courts invalidated arbitration agreements on cost grounds are significantly different from the ones in which the courts upheld the agreements. Individual claims involving only state law claims (and hence with no federal fee-shifting statute involved) would seem to be potentially problematic on cost grounds.[232] Yet the courts upheld the arbitration agreement in 13 out of 14 such cases with consumer claimants (92.9%) and 9 out of 12 cases involving employee claimants (75%). Conversely, for class claims, in which the real objection is to non-cost characteristics of arbitration, the courts upheld the agreement in 25 of 32 cases with consumer claimants (78.1%) and in only 5 out of 8 cases involving employee claimants (62.5%).

A closer look at the cases in which federal courts invalidated arbitration agreements on cost grounds likewise provides little indication that they were particularly problematic under the analysis suggested here. In the 36 cases in which a federal court invalidated the arbitration agreement in whole, or in part, on cost grounds, the claimant was represented by counsel in every case (36 of 36, or 100%) and asserted a claim that permitted recovery of attorneys' fees in all but four (32 of 36, or 88.9%)—both above the percentages for the sample as a whole. The only contrary indication is that in 5 of the 36 (or 13.9%) cases the claimant was represented by a law school or public interest clinic—a much higher percentage than in the rest of the sample[233]—although in all of those cases the claimant asserted a claim under which attorneys' fees could be recovered. This evidence suggests that in a substantial majority of those reported cases in which courts invalidated the arbitration agreement on cost grounds, arbitration costs may well not have been a barrier to asserting the claim in arbitration.

Several caveats are in order. First, as discussed earlier, selection bias limits the inferences that can be drawn from the results.[234] Second, the study looks only at federal cases, not state cases. State cases may present a different picture of the nature of cost-based challenges. Third, the study does not purport to determine whether some claimants simply never file a claim either in arbitration

232. Some of the state law claims, however, likely involved state fee-shifting statutes.

233. Indeed, the court invalidated the arbitration agreement in five of the eight cases (62.5%) in which the opinion indicated the claimant was represented by a clinic.

234. *See supra* text accompanying notes 135–137.

or in court due to upfront arbitration costs. Nonetheless, the limited evidence presented suggests that while many circuits have properly taken a skeptical view of cost-based challenges, others may have been too willing to invalidate arbitration agreements on cost grounds.

VI. CONCLUSION

A common criticism of arbitration is that upfront costs deny claimants—particularly consumers and employees—a forum in which to assert their claims. Some have argued further that arbitration costs undercut the benefits to claimants of contingent fee contracts, which permit claimants to defer payment of attorneys' fees and litigation expenses until they prevail in the case (and if they do not prevail, avoid such costs altogether). This Article argues that this criticism has it exactly backwards. Rather than arbitration costs interfering with the workings of contingent fee contracts, contingent fee contracts provide a mechanism for overcoming possible liquidity and risk aversion problems caused by arbitration costs.

For this reason, much of the legal analysis of arbitration cost challenges is misdirected, focusing too much on the personal finances of the individual claimant and too little on the incentives for the attorney to take the case (such as the value of the claim and possible recovery under fee-shifting statutes). In the vast majority of federal court cases adjudicating cost-based challenges to arbitration agreements, the claimant is represented by counsel, and in most cases has asserted a claim that, if successful, would permit the recovery of attorneys' fees. This evidence is consistent with the fact that the substantial majority of federal court decisions (74.8%) since the Supreme Court's *Green Tree* case rejected the cost-based challenge. The decisions invalidating arbitration agreements on cost grounds are concentrated in only a few circuits. This analysis suggests that those circuits should reconsider their approaches.

VII. APPENDIX
Post-*Green Tree* Federal Court Cases Adjudicating Cost-Based Challenges to Arbitration Agreements

Case	Cite	Claimant	Respondent	Claim	Counsel?	Challenge	Offer?	Outcome
First Circuit								
(1) Large v. Conseco Finance Servicing Corp.	292 F.3d 49 (1st Cir. 2002)	Consumer	Lender	TILA	Yes	VSR	Yes	Clause Upheld
(2) Mattox v. Decision One Mortgage Co.	2002 U.S. Dist. LEXIS 18066 (D. Mass Sept. 26, 2002)	Consumer class	Lender	RESPA	Yes	VSR	Yes	Clause Upheld
(3) Fluehmann v. Associates Financial Services	2002 U.S. Dist. LEXIS 5755 (D. Mass. Mar. 29, 2002)	Consumer class	Lender	TILA	Yes	VSR	Yes	Clause Upheld
(4) Klinedinst v. Tiger Drylac, USA, Inc.	2001 U.S. Dist. LEXIS 20551 (D.N.H. Nov. 28, 2001)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
Second Circuit								
(5) Perry v. New York Law School	2004 U.S. Dist. LEXIS 14516 (S.D.N.Y. July 28, 2004)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(6) Williamson v. Public Storage, Inc.	2004 U.S. Dist. LEXIS 3799 (D. Conn. Mar. 1, 2004)	Employee	Employer	Title VII	Yes	Unconsc.		Clause Upheld
(7) Chamois v. Countrywide Home Loans	2003 U.S. Dist. LEXIS 23202 (S.D.N.Y. Dec. 29, 2003)	Employee	Employer	Title VII	Yes	VSR	Yes	Clause Upheld
(8) Martin v. SCI Mgmt. L.P.	296 F. Supp. 2d 462 (S.D.N.Y. 2003)	Employee	Employer	Title VII	Yes	VSR	Yes	Clause Upheld
(9) Ciago v. Ameriquest Mortgage Co.	295 F. Supp. 2d 324 (S.D.N.Y. 2003)	Employee class	Employer	FLSA	Yes	VSR		Clause Upheld
(10) Valdez v. Swift Transp. Co.	292 F. Supp. 2d 524 (S.D.N.Y. 2003)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(11) Cicchetti v. Davis Selected Advisors	2003 U.S. Dist. LEXIS 20747 (S.D.N.Y. Nov. 17, 2003)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(12) In re Currency Conversion Fee Antitrust Litigation	265 F. Supp. 2d 385 (S.D.N.Y. 2003)	Consumer class	Lender	Antitrust/ TILA	Yes	Unconsc.	Yes	Clause Upheld
(13) Gruber v. Louis Hornick & Co.	2003 U.S. Dist. LEXIS 8764 (May 22, 2003)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(14) Stewart v. Paul, Hastings, Janofsky & Walker LLP	201 F. Supp. 2d 291 (S.D.N.Y. 2002)	Employee	Employer	ADA	Yes	Unconsc.		Clause Upheld
(15) Mildworm v. Ashcroft	200 F. Supp. 2d 171 (E.D.N.Y. 2002)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(16) Ball v. SFX Broadcasting, Inc.	165 F. Supp. 2d 230 (N.D.N.Y. 2001)	Employee class	Employer	Title VII	Yes	VSR		**Struck Down**

(17) Rajjak v. McFrank & Williams	2001 U.S. Dist. LEXIS 9764 (S.D.N.Y. July 13, 2001)	Employee	Employer	Title VII	Yes*	VSR		Clause Upheld
(18) Hale v. First USA Bank N.A.	2001 U.S. Dist. LEXIS 8045 (S.D.N.Y. June 19, 2001)	Consumer class	Lender	TILA	Yes	VSR		Clause Upheld
Third Circuit								
(19) Bolinger v. Virgin Islands Telephone Co.	2004 U.S. App. LEXIS 25939 (3rd Cir. Dec. 15, 2004) (unpub.)	Employee	Employer	Fraud				
Contract	Yes	VSR		Clause Upheld				
(20) Parilla v. IAP Worldwide Services VI, Inc.	368 F.3d 269 (3rd Cir. 2004)	Employee	Employer	Title VII	Yes	Unconsc.		Remand
(21) Alexander v. Anthony International, L.P.	341 F.3d 256 (3rd Cir. 2003)	Employee	Employer	Virg. Isl. Civ. Rts.	Yes	Unconsc.		**Struck Down***
(22) Spinetti v. Service Corp. Int'l	324 F.3d 212 (3rd Cir. 2003)	Employee	Employer	Title VII ADEA	Yes	VSR	Yes	**Severed**
(23) Blair v. Scott Specialty Gases	283 F.3d 595 (3rd Cir. 2002)	Employee	Employer	Title VII	Yes	VSR		Remand
(24) Lloyd v. MNBA America Bank, N.A.	2002 U.S. App. LEXIS 1027 (3rd Cir. Jan. 7, 2002) (unpub.)	Consumer class	Lender	TILA	Yes	VSR	Yes	Clause Upheld
(25) Contawe v. Crescent Heights of Am., Inc.	2005 U.S. Dist. LEXIS 11557 (E.D. Pa. June 14, 2005)	Consumer	Condo Builder	RESPA RICO	Yes	VSR		Clause Upheld
(26) Delta Funding. Corp. v. Harris	2004 U.S. Dist. LEXIS 28730							
(D.N.J. Mar. 1, 2004)	Consumer	Lender	N.J. Cons. Fraud Act	Yes	VSR			
Pub policy	Yes	Clause Upheld						
(27) Bellevue Drug Co. v. Advance PCS	333 F. Supp. 2d 318 (E.D. Pa. 2004)	Pharmacy class	Prescription benefit mgr.	Antitrust	Yes	VSR Unconsc.		Clause Upheld
(28) Choice v. Option One Mortgage Corp.	2003 U.S. Dist. LEXIS 9714 (E.D. Pa. May 12, 2003)	Consumer	Lender	TILA RESPA	Yes	VSR	Yes	Clause Upheld
(29) Paschal v. Household Finance Consumer Disc. Co.	2003 U.S. Dist. LEXIS 4686 (E.D. Pa. March 17, 2003)	Consumer	Lender	TILA	Yes	VSR	Yes	**Struck Down***

(30) Lloyd v. Hovensa LLC	243 F. Supp. 2d 346 (D.V.I 2003)	Employee	Employer	42 USC § 1981	Yes	VSR		Clause Upheld
(31) Malone v. Bechtel Int'l, Inc.	2002 U.S. Dist. LEXIS 1112 (D.V.I. Jan. 22, 2002)	Employee	Employer	Not specified	Not specified	Unconsc.	Yes	Clause Upheld
(32) Hurdle v. Fairbanks Capital Corp.	2002 U.S. Dist. LEXIS 18357 (E.D. Pa. Sept. 18, 2002)	Consumer	Lender	TILA	Yes*	VSR		**Struck Down**
(33) Ritch v. Eaton	2002 U.S. Dist. LEXIS 24726 (E.D. Pa. Dec. 9, 2002)	Consumer	Brokerage Firm	Securities fraud	Yes	Unconsc.		Clause Upheld
(34) Evans v. Atria Assisted Living	2001 U.S. Dist. LEXIS 24040 (E.D. Pa. Dec. 24, 2001)	Employee	Employer	FMLA	Yes	VSR	Yes	Clause Upheld
(35) Federico v. Charterers Mut. Assurance Ass'n Ltd	158 F. Supp. 2d 565 (E.D. Pa. 2001)	Employee	Insurer	Insurance coverage	Yes	Unconsc.		Clause Upheld
(36) Dabney v. Option One Mortgage Corp.	2001 U.S. Dist. LEXIS 4949 (E.D. Pa. April 19, 2001)	Consumer	Lender	TILA RESPA	Yes	VSR		Clause Upheld
(37) Vera v. First USA Bank N.A.	2001 U.S. Dist. LEXIS 9052 (D. Del. Apr. 19, 2001)	Consumer class	Lender	TILA	Yes	VSR		Clause Upheld
(38) Giordano v. Pep Boys – Manny, Moe & Jack Inc.	2001 U.S. Dist. LEXIS 5433 (E.D. Pa. Mar. 29, 2001)	Employee class	Employer	FLSA	Yes	VSR		**Severed**
(39) Dowling v. Anthony Crane Int'l	2001 U.S. Dist. LEXIS 5355 (D.V.I. Mar. 20, 2001)	Employee	Employer	Wrongful term.	Yes	Public policy		Clause Upheld
(40) Goodman v. ESPE America, Inc.	2001 U.S. Dist. LEXIS 433 (E.D. Pa. Jan. 19, 2001)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(41) Zumpano v. Omnipoint Communications	2001 U.S. Dist. LEXIS 376 (E.D. Pa. Jan. 18, 2001)	Employee	Employer	Title VII	Yes	Unconsc. VSR	Yes	Clause Upheld
Fourth Circuit								
(42) Adkins v. Labor Ready, Inc.	303 F.3d 496 (4th Cir. 2002)	Employee class	Employer	FLSA	Yes	Unconsc.		Clause Upheld
(43) Sydnor v. Conseco Financial Servicing Corp.	252 F.3d 302 (4th Cir. 2001)	Consumer	Lender	TILA	Yes	Unconsc.	Yes	Clause Upheld
(44) Bradford v. Rockwell Semiconductor Sys., Inc.	238 F.3d 549 (4th Cir. 2001)	Employee	Employer	ADEA	Yes	VSR		Clause Upheld
(45) Jones v. Genus Credit Mgmt. Corp.	353 F. Supp. 2d 598 (D. Md. 2005)	Consumer class	Credit mgmt company	Not specified	Yes	Unconsc.	Yes	Clause Upheld
(46) Merrill Lynch, Pierce, Fenner & Smith v. Coe	313 F. Supp. 2d 603 (S.D. W. Va. 2004)	Consumer	Brokerage Firm	Contract Fraud	Yes	Unconsc. VSR		Clause Upheld

(47) Russell County School Bd. v. Conseco Life Ins. Co.	2001 U.S. Dist. LEXIS 20691 (W.D. Va. Dec. 12, 2001)	School Board	Insurance Co.	Contract	Yes	Unconsc.		Clause Upheld
(48) Camacho v .Holiday Homes, Inc.	167 F. Supp. 2d 892 (W.D. Va. 2001)	Consumer	Home Mfgr.	TILA	Yes*	VSR		**Struck Down**
Fifth Circuit								
(49) Carter v. Countrywide Credit Indus., Inc.	362 F.3d 294 (5th Cir. 2004)	Employee class	Employer	FLSA	Yes	VSR		
Unconsc.	Yes	Clause Upheld						
(50) Primerica Life Ins. Co. v. Brown	304 F.3d 469 (5th Cir. 2002)	Consumer	Not specified	Contract	Yes	Unconsc.		Clause Upheld
(51) American Heritage Life Ins. Co. v. Orr	294 F.3d 702 (5th Cir. 2002)	Consumer	Lender	Fraud	Yes	Unconsc.		Clause Upheld
(52) Pacific Life Ins. Co. v. Heath	370 F. Supp. 2d 539 (S.D. Miss. 2005)	Consumer	Insurance company	Fraud	Yes	Unconsc.		Clause Upheld
(53) Arriaga-Jobe v. McAfee, Inc.	2005 U.S. Dist. LEXIS 1060 (N.D. Tex. Jan. 23, 2005)	Employee	Employer	Discrim.	Yes	Unconsc.		Clause Upheld
(54) O'Quin v. Verizon Wireless	256 F. Supp. 2d 512 (M.D. La. 2003)	Consumer class	Wireless provider	Contract Fraud	Yes	Unconsc.		Clause Upheld
(55) Costanza v. Allstate Ins. Co.	2002 U.S. Dist. LEXIS 21991 (E.D. La. Nov. 12, 2002)	Consumer	Warranty insurer	Contract Fraud	Yes	Unconsc.		Clause Upheld
(56) North Am. Ins. Co. v. Moore	2002 U.S. Dist. LEXIS 22753 (N.D. Miss. Aug. 29, 2002)	Consumer	Lender's Insurer	Fraud	Yes	Unconsc.		Clause Upheld
(57) Henley v. Pioneer Credit Co.	2002 U.S. Dist. LEXIS 22752 (N.D. Miss. July 11, 2002)	Consumer	Lender	Fraud	Yes	Unconsc.		Clause Upheld
(58) Sparks v. Stone Street Capital, Inc.	2002 U.S. Dist. LEXIS 11808 (N.D. Tex. July 1, 2002)	Consumer	Financial services co.	Fraud	Yes	Unconsc.	Yes	Clause Upheld
(59) First Family Fin'l Services, Inc. v. Sanford	203 F. Supp. 2d 662 (N.D. Miss. 2002)	Consumer	Lender	Fraud	Yes	Unconsc.	Yes	Clause Upheld
(60) Bloxom v. Landmark Publishing Corp.	184 F. Supp. 2d 578 (E.D. Texas 2002)	Distrib.	Supplier	Tex. CPA Fraud	Yes	Unconsc.		Clause Upheld
(61) Gill v. Jim Walter Homes of LA, Inc.	187 F. Supp. 2d 618 (W.D. La. 2002)	Consumer	Home builder	Contract	Yes	Unconsc.		Clause Upheld
(62) First Family Fin'l Servs. v. Fairley	173 F. Supp. 2d 565 (S.D. Miss. 2001)	Consumer	Lender	Not specified	Yes	Unconsc.	Yes	Clause Upheld

(63) Bowie v. Edison Security Corp.	2001 U.S. Dist. LEXIS 14116 (N.D. Tex. Sept. 12, 2001)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(64) Bank One, N.A. v. Coates	125 F. Supp. 2d 819 (S.D. Miss. 2001)	Consumer	Lender	TILA	Yes	VSR		Clause Upheld
(65) Bank One, N.A. v. Harris	2001 U.S. Dist. LEXIS 9615 (S.D. Miss. Jan. 2, 2001)	Consumer	Lender	TILA	Yes	VSR		Clause Upheld
Sixth Circuit								
(66) Cooper v. MRM Investment Co.	367 F.3d 493 (6th Cir. 2004)	Employee	Employer	Title VII	Yes	VSR	Yes	Remand
(67) Morrison v. Circuit City Stores, Inc.	317 F.3d 646 (6th Cir. 2003) (en banc)	Employee	Employer	Title VII	Yes	VSR Unconsc.	Yes	**Severed**
(68) Burden v. Check Into Cash of Kentucky, LLC	267 F.3d 483 (6th Cir. 2001)	Consumer	Lender	TILA	Yes	Unconsc.		Remand
(69) Shadeh v. Circuit City Stores, Inc.	334 F. Supp. 2d 938 (W.D. Ky. 2004)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(70) Scovill v. WSYX/ABC	312 F. Supp. 2d 955 (S.D. Ohio 2004)	Employee	Employer	ADEA	Yes	VSR		**Severed**
(71) Pack v. Damon Corp.	320 F. Supp. 2d 545 (E.D. Mich. 2004)	Consumer	Motor home manufact.	MMWA	Yes*	Unconsc.		Clause Upheld
(72) Anderson v. Delta Funding Corp.	316 F. Supp. 2d 554 (N.D. Ohio 2004)	Consumer	Lender	TILA	Yes*	Unconsc.	Yes	Clause Upheld
(73) Jones v. Household Realty Corp.	2003 U.S. Dist. LEXIS 25882 (S.D. Ohio Dec. 17, 2003)	Consumer	Lender	TILA	Yes*	Unconsc.	Yes	**Severed**
(74) DeOrnellas v. Aspen Square Mgmt., Inc.	295 F. Supp. 2d 753 (E.D. Mich. 2003)	Employee	Employer	Mich. WPA	Yes	VSR		**Severed**
(75) Garrett v. Hooters-Toledo	295 F. Supp. 2d 774 (N.D. Ohio 2003)	Employee	Employer	Title VII	Yes	Unconsc.		Clause Upheld
(76) Walker v. Ryan Family Steak Houses, Inc.	289 F. Supp. 2d 916 (M.D. Tenn. 2003) (dicta)	Employee class	Employer	FLSA	Yes	VSR		**Severed**
(77) Rickard v. Teynor's Homes, Inc.	279 F. Supp. 2d 910 (N.D. Ohio 2003)	Consumer	Mfd. Home seller	MMWA	Yes	Unconsc.		Clause upheld
(78) Smith v. Beneficial Ohio, Inc.	284 F. Supp. 2d 875 (S.D. Ohio 2003)	Consumer	Lender	TILA	Yes*	VSR	Yes	**Severed**
(79) Johnson v. Countrywide Home Loans, Inc.	2003 U.S. Dist. LEXIS 14059 (E.D. Tenn. 2003)	Consumer	Lender	TILA	Yes	Unconsc.		Clause Upheld

(80) Raasch v. NCR Corp.	254 F. Supp. 2d 847 (S.D. Ohio 2003)	Employee	Employer	ADEA	Yes	Unconsc.		Clause Upheld
(81) Wilks v. The Pep Boys	241 F. Supp. 2d 860 (M.D. Tenn. 2003)	Employee	Employer	FLSA	Yes	VSR Unconsc.		Clause Upheld
(82) Manuel v. Honda R&D Americas, Inc.	175 F. Supp. 2d 987 (S.D. Ohio 2001)	Employee	Employer	Title VII	Yes	Unconsc.		Clause Upheld
Seventh Circuit								
(83) Livingston v. Associates Finance, Inc.	339 F.3d 553 (7th Cir. 2003)	Consumer class	Lender	TILA	Yes	VSR	Yes	Clause Upheld
(84) The Quizno's Master, LCC v. Kadriu	2005 U.S. Dist. LEXIS 7626 (N.D. Ill. Apr. 4, 2005)	Franch'ee	Franchisor	Rescission	Yes	VSR		Clause Upheld
(85) Chandler v. AT&T Wireless Servs., Inc.	358 F. Supp. 2d 701 (S.D. Ill. 2005)	Consumer class	Wireless provider	Ill. Cons. Fraud Act	Yes	Unconsc.		Clause Upheld
(86) In re McDonald's Corp. Promotional Game Litigation	2004 U.S. Dist. LEXIS 4471 (N.D. Ill. Mar. 22, 2004)	Consumer	Fast food restaurant	Contract Fraud	Yes	VSR	Yes	Clause Upheld
(87) Barker v. Trans Union LLC	2004 U.S. Dist. LEXIS 874 (N.D. Ill. Jan. 22, 2004)	Consumer	Lender	FCRA	Yes	VSR		Clause Upheld
(88) Reyes v. Equifax Credit Information Services	2003 U.S. Dist. LEXIS 22235 (N.D. Ill. Dec. 10, 2003)	Consumer	Lender	FCRA	Yes	VSR		Clause Upheld
(89) Bellavia v. First USA Bank, N.A.	2003 U.S. Dist. LEXIS 18907 (N.D. Ill. Oct. 22, 2003)	Consumer class	Lender	TILA	Yes	VSR	Yes	Clause Upheld
(90) Walton v. Experian	2003 U.S. Dist. LEXIS 16029 (N.D. Ill. Sept. 9, 2003)	Consumer	Lender	FCRA	Yes	VSR		Clause Upheld
(91) McBride v. St. Anthony Messenger Magazine	2003 U.S. Dist. LEXIS 6449 (S.D. Ind. Feb. 6, 2003)	Magazine solicitor	Publisher	Contract Fraud	No	VSR		Clause Upheld
(92) U.S. ex rel. Schultz v. Cancer Trtmnt. Centers of Am.	2002 U.S. Dist. LEXIS 21681 (N.D. Ill. Nov. 7, 2002)	Employee	Employer	Wrongful term.	Yes	Public policy	Yes	Clause Upheld
(93) Feltner v. Bluegreen Corp.	2002 U.S. Dist. LEXIS 20449 (S.D. Ind. Oct. 8, 2002)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(94) Arnold v. Goldstar Financial Systems, Inc.	2002 U.S. Dist. LEXIS 15564 (N.D. Ill. Aug. 22, 2002)	Consumer class	Credit repair company	CROA	Yes*	VSR		**Struck Down**
(95) Abbott v. Lexford Apartment Services, Inc.	2002 U.S. Dist. LEXIS 14746 (S.D. Ind. Aug. 2, 2002)	Employee	Employer	ADA	Yes	VSR		Clause Upheld
(96) Curry v. MidAmerica Care Foundation	2002 U.S. Dist. LEXIS 14737 (S.D. Ind. June 4, 2002)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld

(97) Smith v. Steinkamp	2002 U.S. Dist. LEXIS 11227 (S.D. Ind. May 22, 2002)	Consumer class	Debt Collector	RICO				
FDCPA	Yes	VSR		Clause Upheld				
(98) Arellano v. Household Finance Co.	2002 U.S. Dist. LEXIS 2184 (N.D. Ill. Feb. 13, 2002)	Consumer	Lender	TILA	Yes	VSR	Yes	Clause Upheld
(99) Popovich v. McDonald's Corp.	189 F. Supp. 2d 772 (N.D. Ill. 2002)	Consumer class	Fast food restaurant	Contract Fraud	Yes	VSR		**Struck Down**
(100) DeGroff v. Mascotech Forming Techs.	179 F. Supp. 2d 896 (N.D. Ind. 2001)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(101) Phillips v. Associates Home Equity Services, Inc.	179 F. Supp. 2d 840 (N.D. Ill. 2001)	Consumer class	Lender	TILA	Yes	VSR		**Struck Down**
(102) Geiger v. Ryan's Family Steak Houses, Inc.	134 F. Supp. 2d 985 (S.D. Ind. 2001)	Employee	Employer	Title VII	Yes	VSR		**Struck Down***
Eighth Circuit								
(103) Pro Tech Indus. v. URS Corp.	377 F.3d 868 (8th Cir. 2004)	Sub-contractor	General contractor	Contract	Yes	Unconsc.		Clause Upheld
(104) Faber v. Menard, Inc.	367 F.3d 1048 (8th Cir. 2004)	Employee	Employer	ADEA	Yes	Unconsc.		Remand
(105) Lyster v. Ryan's Family Steak Houses, Inc.	239 F.3d 943 (8th Cir. 2001)	Employee	Employer	Title VII	Yes	Unconsc.		Clause Upheld
(106) Sprague v. Household Int'l, Inc.	2005 U.S. Dist. LEXIS 11694 (W.D. Mo. June 15, 2005)	Consumer class	Lender	TILA	Yes	Unconsc.		**Severed**
(107) Marlar v. Yellow Transportation	2004 U.S. Dist. LEXIS 26653 (W.D. Mo. Nov. 29, 2004)	Employee	Employer	ADEA	Yes	Unconsc.		Clause Upheld
(108) Scherrey v. A.G. Edwards & Sons, Inc.	2003 U.S. Dist. LEXIS 11010 (W.D. Ark. Apr. 15, 2003)	Employee	Employer	ADA	Yes	Unconsc.		Clause Upheld
(109) Gooden v. Village Green Management Co.	2002 U.S. Dist. LEXIS 22365 (D. Minn. Nov. 15, 2002)	Employee	Employer	Title VII	Yes	Unconsc.	Yes	**Severed**
(110) Bailey v. Ameriquest Mortgage Co.	2002 U.S. Dist. LEXIS 1343 (D. Minn. Jan. 23, 2002)	Employee	Employer	FLSA	Yes	VSR		**Struck Down**
Ninth Circuit								
(111) Al-Safin v. Circuit City Stores, Inc.	394 F.3d 1254 (9th Cir. 2005)	Employee	Employer	Title VII	Yes	Unconsc.		**Struck Down***
(112) Circuit City Stores, Inc. v. Mantor	335 F.3d 1101 (9th Cir. 2003)	Employee	Employer	Age discrim.	Yes	Unconsc.		**Struck Down***

(113) Ingle v. Circuit City Stores, Inc.	328 F.3d 1165 (9th Cir. 2003)	Employee	Employer	Title VII	Yes	Unconsc.		**Struck Down***
(114) Ting v. AT&T	319 F.3d 1126 (9th Cir. 2003)	Consumer class	Phone company	Cal. Cons. Prot. Act	Yes	Unconsc.		**Severed**
(115) Ferguson v. Countrywide Credit Indus., Inc.	298 F.3d 778 (9th Cir. 2002)	Employee	Employer	Title VII	Yes	Unconsc.		**Struck Down**
(116) Circuit City Stores v. Adams	279 F.3d 889 (9th Cir. 2002)	Employee	Employer	Constr. discharge	Yes	Unconsc.		**Struck Down***
(117) Veliz v. Cintas Corp.	2005 U.S. Dist. LEXIS 9230 (N.D. Cal. May 4, 2005)	Employee class	Employer	Not specified	Yes	Unconsc.		Clause Upheld
(118) Ramirez v. Cintas Corp.	2005 U.S. Dist. LEXIS 9237 (N.D. Cal. Mar. 22, 2005)	Employee class	Employer	Title VII	Yes	VSR		
Unconsc.		Clause Upheld						
(119) Blanchard v. Lithia Rose-FT, Inc.	2004 U.S. Dist. LEXIS 21162 (D. Ore. Oct. 15, 2004)	Employee	Employer	Title VII	Yes	VSR	Yes	Clause Upheld
(120) Taylor v. Ash Grove Cement Co.	2004 U.S. Dist. LEXIS 11956 (D. Ore. Feb. 25, 2004)	Employee	Employer	Title VII	Yes	Unconsc.		**Struck Down**
(121) Roque v. Applied Materials, Inc.	2004 U.S. Dist. LEXIS 10477 (D. Ore. Feb. 20, 2004)	Employee	Employer	ADA				
FMLA	Yes	Unconsc.		Clause Upheld				
(122) Owner-Operator Ind. Drivers Ass'n v. Swift Transp.	288 F. Supp. 2d 1033 (D. Ariz. 2003)	Truck drivers	Trucking company	Truth in Leasing	Yes	VSR		Clause Upheld
(123) Marshall v. John Hine Pontiac	287 F. Supp. 2d 1229 (S.D. Cal. 2003)	Employee	Employer	Wrongful term.	Yes	Unconsc.		Clause Upheld
(124) Torrance v. Aames Funding Corp.	242 F. Supp. 2d 862 (D. Ore. 2002)	Consumer	Lender	Or. Unfair Trade PA	Yes	Unconsc.		**Struck Down**
(125) Luna v. Household Finance Co.	236 F. Supp. 2d 1166 (W.D. Wash. 2002)	Consumer	Lender	TILA	Yes	Uuconsc.		**Struck Down***
(126) Comb v. Paypal, Inc.	218 F. Supp. 2d 1165 (N.D. Cal. 2002)	Consumer class	Payment service	Fed – not specified	Yes	Unconsc.		**Struck Down***
(127) Acorn v. Household Int'l, Inc.	211 F. Supp. 2d 1160 (N.D. Cal. 2002)	Consumer class	Lenders	Fraud	Yes	Unconsc.		**Struck Down***
(128) LeLouis v. Western Directory Co.	230 F. Supp. 2d 1214 (D. Ore. 2001)	Employee	Employer	Title VII	Yes	Unconsc. VSR	Yes	**Struck Down***

(129) Luong v. Circuit City Stores, Inc.	2001 U.S. Dist. LEXIS 16713 (C.D. Cal. 2001)	Employee	Employer	Not specified	Yes	VSR		Clause Upheld
(130) Stuart v. Household Retail Servs., Inc.	2000 U.S. Dist. LEXIS 22509 (C.D. Cal. 2000)	Consumer class	Lender	TILA	Yes	VSR		Clause Upheld
Tenth Circuit								
(131) Owner-Operator Ind. Drivers Ass'n v. CR England	2004 U.S. Dist. LEXIS 13488 (D. Utah July 13, 2004)	Truck drivers	Trucking company	Truth in Leasing	Yes	VSR		**Struck Down***
(132) Stocker v. Syntel, Inc.	2004 U.S. Dist. LEXIS 16559 (D. Kan. Aug. 16, 2004)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(133) Perkins v. Rent-A-Center, Inc.	2004 U.S. Dist. LEXIS 8203 (D. Kan. May 5, 2004)	Employee	Employer	42 U.S.C. § 1981	Yes	VSR		Clause Upheld
(134) Gratzer v. Yellow Corp.	316 F. Supp. 2d 1099 (D. Kan. 2004)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(135) In re: Universal Service Fund Telephone Billing Pract.	300 F. Supp. 2d 1107 (D. Kan. 2003)	Consumer class	Telephone company	Antitrust	Yes	VSR		Clause Upheld
(136) Perez v. Hospitality Ventures Denver LLC	245 F. Supp. 2d 1172 (D. Colo. 2003)	Employee	Employer	FMLA	Yes	VSR	Yes	**Struck Down***
(137) Pierce v. Kellogg, Brown, & Root Inc.	245 F. Supp. 2d 1212 (E.D. Okla. 2003)	Employee	Employer	ADEA Title VII	Yes	VSR		Clause Upheld
(138) In re: Hicks	285 B.R. 317 (W.D. Okla. 2002)	Consumer	Lender	TILA	Yes	VSR		**Struck Down**
(139) Gourley v. Yellow Transportation	178 F. Supp. 2d 1196 (D. Colo. 2001)	Employee	Employer	Title VII	Yes	VSR		**Struck Down***
(140) Dumais v. American Golf Corp.	150 F. Supp. 2d 1182 (D.N.M. 2001)	Employee	Employer	Title VII	Yes	VSR	Yes	Clause Upheld
Eleventh Circuit								
(141) Summers v. Dillards, Inc.	351 F.3d 1100 (11th Cir. 2003)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(142) Anders v. Hometown Mortgage Services, Inc.	346 F.3d 1024 (11th Cir. 2003)	Consumer class	Lender	RESPA TILA	Yes	VSR	Yes	Clause Upheld
(143) Musnick v. King Motor Co. of Fort Lauderdale	325 F.3d 1255 (11th Cir. 2003)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(144) Bess v. Check Express	294 F.3d 1298 (11th Cir. 2002)	Consumer class	Lender	RICO	Yes	VSR		Clause Upheld

(145) Battels v. Sears Nat'l Bank	365 F. Supp. 2d 1205 (M.D. Ala. 2005)	Consumer	Lender	FCBA	Yes	Unconsc.		Clause Upheld
(146) Madden v. Protection One Alarm Monitoring, Inc.	358 F. Supp. 2d 1218 (N.D. Ga. 2005)	Employee	Employer	Contract	Yes	VSR		Clause Upheld
(147) Lawrence v. Household Bank (SB), NA	343 F. Supp. 2d 1101 (M.D. Ala. 2004)	Consumer class	Lender	TILA	Yes	Unconsc.		Clause Upheld
(148) Battels v Discover Bank	2004 U.S. Dist. LEXIS 28012 (M.D. Ala. Aug. 27, 2004)	Consumer class	Lender	FCBA	Yes	Unconsc.		Clause Upheld
(149) Sims v. Clarendon National Insurance Co.	336 F. Supp. 2d 1311 (S.D. Fla. 2004)	Consumer	Insurance company	Contract	Yes	Unconsc.		Clause Upheld
(150) Taylor v. First North American Nat'l Bank	2004 U.S. Dist. LEXIS 13671 (M.D. Ala. July 16, 2004)	Consumer class	Lender	TILA	Yes	VSR Unconsc.		Clause Upheld
(151) Hughes v. Alltel Corp.	2004 U.S. Dist. LEXIS 20705 (N.D. Fla. Mar. 31, 2004)	Consumer class	Wireless company	FCRA	Yes	Unconsc.		Clause Upheld
(152) Kotch v. Clear Channel Broadcasting, Inc.	2004 U.S. Dist. LEXIS 4424 (S.D. Fla. Mar. 8, 2004)	Employee	Employer	Fla. Civil Rights Act	Yes	VSR		Clause Upheld
(153) Billups v. Bankfirst	294 F. Supp. 2d 1265 (M.D. Ala. 2003)	Consumer class	Lender	FCBA	Yes	Unconsc.	Yes	Clause Upheld
(154) Gipson v. Cross Country Bank	294 F. Supp. 2d 1251 (M.D. Ala. 2003)	Consumer class	Lender	FCBA	Yes	Unconsc.	Yes	Clause Upheld
(155) Taylor v. Citibank USA	292 F. Supp. 2d 1333 (M.D. Ala. 2003)	Consumer class	Lender	FCBA	Yes	Unconsc.	Yes	Clause Upheld
(156) Pitchford v. AmSouth Bank	285 F. Supp. 2d 1286 (M.D. Ala. 2003)	Consumer class	Lender	ECOA	Yes	VSR Unconsc.		Clause Upheld
(157) Roberson v. Clear Channel Broadcasting, Inc.	144 F. Supp. 2d 1371 (S.D. Fla. 2001)	Employee	Employer	Title VII	Yes	VSR	Yes	Clause Upheld
(158) Boyd v. Town of Haynesville	144 F. Supp. 2d 1272 (M.D. Ala. 2001)	Employee	Employer	Title VII	Yes	VSR		Clause Upheld
(159) In re Managed Care Litigation	132 F. Supp. 2d 989 (S.D. Fla. 2000)	Consumer	Insurance Company	RICO	Yes	VSR		Clause Upheld
D.C. Circuit								
(160) Brown v. Wheat First Securities, Inc.	257 F.3d 821 (D.C. Cir. 2001)	Employee	Employer	Wrongful term.	Yes	VSR		Clause Upheld
(161) Jung v. Association of American Medical Colleges	300 F. Supp. 2d 119 (2004)	Residents class	Medical schools	Antitrust	Yes	VSR	Yes	Clause Upheld

(162) Adams v. Am. Residential Servs., LLC	2003 U.S. Dist. LEXIS 26478 (D.D.C. May 8, 2003)	Consumer class	Lender	TILA	Yes	Uncons.		Clause Upheld
(163) Nelson v. Insignia/ESG, Inc.	215 F. Supp. 2d 143 (D.D.C. 2002)	Employee	Employer	D.C. Civil Rights	Yes	VSR	Yes	Clause Upheld

Key

Claim (abbreviated federal statutes)

ADA: Americans with Disabilities Act

ADEA: Age Discrimination in Employment Act

CROA: Credit Repair Organizations Act

ECOA: Equal Credit Opportunity Act

FCBA: Fair Credit Billing Act

FCRA: Fair Credit Reporting Act

FDCPA: Fair Debt Collection Practices Act

FLSA: Fair Labor Standards Act

FMLA: Family and Medical Leave Act

MMWA:Magnuson-Moss Warranty Act

RESPA: Real Estate Settlement Procedures Act

RICO: Racketeer Influenced and Corrupt Organizations Act

TILA: Truth in Lending Act

Title VII: Title VII of the Civil Rights Act of 1964

Counsel?

Yes: Court's opinion indicates that claimant was represented by counsel in litigating the cost-based challenge

Yes*: Court's opinion indicates that claimant was represented by counsel from a law school clinic or non-profit public interest legal organization

No: Court's opinion indicates that claimant litigated the case pro se

Challenge

VSR: Claimant challenged arbitration agreement on ground that cost prevented the claimant from vindicating his or her statutory rights

Unconsc.: Claimant relied on doctrine of unconscionability to challenge enforceability of arbitration agreement

Public Policy: Claimant relied on public policy to challenge the enforceability of arbitration agreement

Offer?

Yes: Court's opinion indicates that, after the dispute arose, respondent offered to pay claimant's arbitration costs

No: Court's opinion does not indicate that, after the dispute arose, respondent offered to pay claimant's arbitration costs

Outcome

Clause Upheld: Court upheld arbitration agreement against cost challenge

Struck Down: Court struck down arbitration agreement based on cost challenge

Struck Down*: Court struck down arbitration agreement, in part, on basis of cost challenge

Severed: Court enforced arbitration agreement after striking provision dealing with arbitration costs

Remand: Court of appeals remanded case to district court for further proceedings without ruling on validity of arbitration agreement

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