

BUCKEYE, BULL'S-EYE, OR MOVING TARGET: THE FAA, COMPULSORY ARBITRATION, AND COMMON-LAW CONTRACT

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INTRODUCTION

On February 21, 2006 the United States Supreme Court handed down *Buckeye Check Cashing, Inc. v. Cardegna*.¹ Perhaps the most significant arbitration decision from the Court in a decade, *Buckeye* implicitly overrules decisions from a wide range of state courts including Alabama, California, and Montana. *Buckeye* offers an opportunity for these and other courts to tailor the common law of contracts to meet its requirements. To do so, the courts will need to make conscious and deliberate choices about century-old contract doctrines.

While *Buckeye* concerned a compulsory arbitration clause in a consumer loan situation, its principles apply more broadly to all compulsory arbitration agreements. Its impact will be widespread as compulsory arbitration agreements appear in professional sports such as baseball, football, and basketball.² They play a prominent role in labor negotiations in industries as diverse as heavy manufacturing and airlines.³ They are seen by consumers in routine purchases of computers, home appliances, automobile warranties, and software for the office or home.⁴ They are even seen in educational settings.⁵ The American Arbitration Association

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1. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006).

2. *See, e.g., Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 618–19 (8th Cir. 1976) (discussing the jurisdiction of a Major League Baseball arbitration panel); Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55 (2003) (discussing issues of arbitration in Major League Baseball).

3. *See, e.g., Stephen L. Hayford, The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKELEY J. EMP. & LAB. L. 521, 525 (2000) (discussing arbitration in labor disputes); 48 AM. JUR. 2D *Labor and Labor Relations* § 115 (2005) (discussing rail and air employees' duty to work towards a settlement in bargaining disputes so as to avoid stoppages).

4. *See, e.g., Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1198 (C.D. Cal. 2006) (dealing with a putative class action against computer manufacturer who, pursuant to the agreement in the computer's packaging, sought to compel arbitration).

5. *See, e.g., Kathleen S. Herbert, Balancing Teachers' Collective Bargaining Rights with the Interests of School Districts, Students and Taxpayers: Current Legislation Strikes Out*, 99 DICK. L. REV. 57, 70–73 (1994) (providing a good introduction to the arbitration dynamic in education).

reported that its caseload nearly quadrupled from 59,000 to 230,000 cases in the 8 year period from 1994 to 2002.⁶

Despite its staggering proportions, arbitration as a remedy for contract breach has been viewed with widespread disfavor.⁷ Notions of judicial economy and reduced costs notwithstanding, several jurisdictions remain hostile toward arbitration.⁸ This hostility is not a new phenomenon. It led Congress to pass the Federal Arbitration Act in 1925.⁹ In issuing *Buckeye*, the United States Supreme Court affirmed Congress's intent to encourage arbitration and extended the substantive reach of federal law into what was once the solitary province of state common law procedural issues.

This Article addresses the high-stakes and widespread controversy involving the interplay of state and federal notions of fair play and reasonable access to the judicial process. This Article proposes that both state law principles and federal policies can be accommodated. Several decisions by the United States Supreme Court and the California Supreme Court will be used to line a path of reconciliation.

Compulsory arbitration is often an uncomfortable fit in state common-law contract doctrine. If imposed with only the form of a bargain rather than heartfelt assent, compulsory arbitration may be adhesive or even unconscionable when parties are unable to prevent its inclusion and when they lack the ability to adequately pursue the arbitration remedy. An inability to pursue arbitration means that its exclusivity as a remedy will deny these parties any effective remedy. The presence of standard-form provisions compelling arbitration raises concerns in classic contract doctrine. They may be obscure, difficult to read and understand, or even substantively harsh—such as where they compel arbitration in distant locations or compel arbitration for one party but not for the other. An examination of historic Supreme Court and modern state court opinions will show that there is a place under the FAA and *Buckeye* for these classic inquiries of adhesion and unconscionability.

The starting point of this Article will be the fact patterns of *Buckeye* and three quite different but contemporary cases from the courts of three states. They suggest the relative bargaining position of the parties and demonstrate the presence of some hostility toward arbitration as an

6. Paul M. Secunda, "Arasoi O Mizu Ni Nagasu" or "Let the Dispute Flow to Water": Pedagogical Methods for Teaching Arbitration Law in American and Japanese Law Schools, 21 OHIO ST. J. ON DISP. RESOL. 687, 697–98 (2006).

7. See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (listing several advantages of trials over arbitration).

8. *Id.*

9. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2000).

alternative to traditional suits in law or equity. Next, the language and history of the FAA will be explored. These, examined together with several court interpretations, will demonstrate that the intent and purpose of the FAA was to intercede in the decision-making process and demand proper respect for arbitration as an alternative to judicial processes.

I. *BUCKEYE* AND THREE STATE COURT DECISIONS

John Cardegna and Donna Reuter were Florida residents who obtained loans by giving Buckeye their personal checks for an amount of cash plus a finance charge.¹⁰ Buckeye agreed to defer presentment of the checks for various periods of time thereby making an advance of funds against the future receipt of money from their accounts.¹¹ As a part of each transaction, the drawers signed an arbitration agreement that was drafted by Buckeye, the payee, and was included in the “Agreement” between the parties.¹²

A group of borrowers filed a putative class action in the Florida trial court alleging, among other failings, violation of Florida usury laws and consumer protection provisions, which made the agreement criminal and void.¹³ Buckeye moved to compel arbitration of these issues, but the trial court refused, holding instead that resolution of validity issues was a matter for the court.¹⁴ The appellate court reversed.¹⁵ On appeal, the Florida Supreme Court reversed the appellate court.¹⁶ It determined that under Florida law the issue of validity was for the court in order to prevent arbitration “breath[ing] life into a contract that not only violates state law, but also is criminal in nature.”¹⁷

The United States Supreme Court reversed the Florida Supreme Court, noting two types of challenges to the validity of the agreement under section 2 of the FAA.¹⁸ One type of challenge is to the agreement as a whole.¹⁹ In this case, that would be the entire set of terms which governed

10. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1207 (2006).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228, 229 (Fla. Dist. Ct. App. 2002), *rev'd* 894 So. 2d 860 (Fla. 2005), *rev'd* 126 S. Ct. 1204 (2006).

15. *Id.* at 232.

16. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005), *rev'd*, 126 S. Ct. 1204 (2006).

17. *Id.* at 862 (quoting *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000)).

18. *Buckeye*, 126 S. Ct. at 1208.

19. *Id.*

the advance against deferred presentment.²⁰ The other is a challenge to the arbitration term itself.²¹ The Court extended the holdings of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*²² and *Southland Corp. v. Keating*²³ to say four things. First, the Court held that as a matter of substantive federal law, arbitration agreements are severable from contracts as a whole.²⁴ In addition, the Court ruled that an arbitrator should decide the issue of a contract's validity in the first instance, unless the challenge is limited to the actual arbitration clause.²⁵ Third, these arbitration laws apply in state as well as federal courts.²⁶ Finally, the Court held that because the respondents in *Buckeye* challenged the contract as a whole rather than specifically the arbitration provisions, those provisions remained enforceable.²⁷ Thus, the challenge should be considered by an arbitrator.

The counterintuitive conclusion reached by the court is that where a party to a contract claims that the arbitration clause alone is invalid on common-law grounds, the state court can hear the issue.²⁸ However, where the claim is for broader invalidity—that the entire deal is a fraud, sham, or hoax—the required forum of first instance is arbitration.²⁹ I say counterintuitive because the more narrow claim is directly related to the dignity of the arbitration forum and presents less of a challenge to state law principles. On the other hand, the broader claim of invalidity calls upon the full force of state common-law doctrine of contract to search for justice in the entire deal. This seems to be a peculiarly state-centered judicial function rather than one suitable for an arbitrator.

Three state-court decisions illustrate how disruptive *Buckeye* will be to

20. *Id.*

21. *Id.*; see also U.C.C. §§ 1-201(b)(3), (12) (2006) (distinguishing between the terms “agreement” and “contract”). Agreement in the Code—and therefore all fifty states for this commercial paper transaction—which is covered by article 3 of the Code and therefore by article 1 general provisions, demonstrates how shaky the ground is on which the Court treads. Although the preemption argument makes Florida law largely irrelevant, it also begs the question of whether Congress intended to displace common law and uniform law concepts of agreement and contract. Was that really the intent of a 1925 statute that was thought by its drafters to be a statement about federal actions?

22. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (“[I]n passing upon a[n] . . . application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.”).

23. *Southland Corp. v. Keating*, 465 U.S. 1, 13–16 (1984) (holding that the FAA preempted a California law that disfavored arbitration because Congress did not intend the FAA to be limited to federal courts).

24. *Buckeye*, 126 S. Ct. at 1209.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

the common law scheme. One is an Alabama case. In *McConnell Automotive Corp. v. Jackson*,³⁰ Kisha Jackson purchased a 1999 Cadillac from McConnell in March of 2001.³¹ Jackson's complaint alleged that she asked the salesman if the vehicle had been "wrecked" and was assured by him that it had not been.³² Jackson signed a separate arbitration agreement along with the purchase contract.³³ Unfortunately, the Cadillac had suffered collision damage.³⁴ When Jackson filed her lawsuit, the dealership responded with a motion to compel arbitration.³⁵ The trial court denied the motion.³⁶ The Alabama Supreme Court affirmed, based on its conclusion that the trial court had properly determined that the transaction did not have a substantial effect on interstate commerce.³⁷ Under Alabama law, agreements to compel arbitration of intrastate contract disputes are not binding.³⁸

*Armendariz v. Foundation Health Psychcare Services, Inc.*³⁹ is a California case that began as a complaint by two employees claiming wrongful termination against their employer on account of their sexual preference.⁴⁰ Armendariz and her co-worker were hired in 1995.⁴¹ Both signed application forms that contained clauses that compelled arbitration for any future claim of wrongful termination.⁴² The compulsory arbitration of any such claim was also set forth in a separate agreement that termed the agreement to arbitrate "a condition of my employment" and stated that in any arbitration proceeding the "exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award."⁴³ The agreement further provided that this remedy precluded all others, "including but not limited to reinstatement."⁴⁴ It is significant to note that the employer was not similarly constrained; all legal remedies for breach by the employee

30. *McConnell Auto. Corp. v. Jackson*, 849 So. 2d 160 (Ala. 2002).

31. *Id.* at 160.

32. *Id.*

33. *Id.*

34. *Id.* at 160 n.1.

35. *Id.* at 160.

36. *Id.* at 161.

37. *Id.*

38. ALA. CODE § 8-1-41(3) (LexisNexis 2002).

39. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

40. *Id.* at 674-75.

41. *Id.* at 674.

42. *Id.* at 675.

43. *Id.*

44. *Id.*

remained available to the employer, including, presumably, damages and injunction.⁴⁵ Therefore, the employees received employment in return for a severe restriction on their usual common-law remedies while the employer suffered no similar constraint.

The California Supreme Court held that the arbitration clauses were unconscionable, although it was careful to treat them as it would any other type of contract provision.⁴⁶ Applying its two-prong test, the court found that the arbitration agreements were both procedurally and substantively unconscionable.⁴⁷ That is, the provisions were both products of unequal bargaining power and had one-sided results.⁴⁸ The court discussed its reasoning at length, so as not to appear to be singling out arbitration agreements as a class.⁴⁹

In a Montana case, *Iwen v. U.S. West Direct*,⁵⁰ John Iwen decided to acquire a toll-free number for his solo practice and redesign his advertisement in the phone directory.⁵¹ Upon publication, Iwen noticed that his advertisement, toll-free number, home number, and residential address had been either botched or deleted.⁵² His attempts to resolve the quality issues yielded no satisfaction, but he did continue to receive invoices and later, sharp demands for payment.⁵³ Iwen filed suit against U.S. West Direct on March 21, 1996, in Montana state court seeking damages for the negligent construction of the advertisement, infliction of emotional distress, and for punitive damages.⁵⁴ U.S. West Direct moved to stay litigation and to compel arbitration pursuant to a clause in the advertising contract, both of which the district court granted.⁵⁵ In its order, the district court held that the arbitration provision was “valid.”⁵⁶

To resolve the matter, the Montana Supreme Court first asked whether the agreement or provision was adhesive.⁵⁷ “When determining whether a contract is one of adhesion, we focus on the nature of the contracting

45. *See id.* at 675 (observing that the agreement did not limit the employer to arbitration). The court calls this a lack of even a “modicum of bilaterality.” *Id.* at 691 (quoting *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 150 (Ct. App. 1997)). Perhaps not the most felicitous of phrases, it is an adequate description of the deal’s complete lack of even-handedness.

46. *Armendariz*, 6 P.3d at 693.

47. *Id.* at 690.

48. *Id.*

49. *Id.* at 690–96.

50. *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999).

51. *Id.* at 991.

52. *Id.*

53. *Id.* at 991–92.

54. *Id.* at 992.

55. *Id.*

56. *Id.*

57. *Id.* at 995.

process, rather than the parties' relative sizes, resources, or bargaining power."⁵⁸ Adhesion itself is insufficient to void an agreement, but it "is generally noted to support other contract formation defenses such as unconscionability or public policy."⁵⁹ The second, and final, step in the analysis is a determination of whether the agreement or provision is unconscionable.⁶⁰

The Montana Supreme Court held the entire contract invalid because it was one-sided, lacked mutuality of obligation, and contained the arbitration clause that was unreasonably favorable to the drafter.⁶¹

These cases exemplify both the widespread use of arbitration in classic contract situations and the continuing hostility in some jurisdictions toward the procedure to resolve questions of contract breach. Rather than deal with the issue of fairness in its imposition, these courts used a variety of approaches to reach their conclusions that arbitration was not required.

Buckeye could have a substantial impact on common-law doctrine. All three illustrative cases involve arbitration agreements that should have been offered first to the arbitrator for decision. However, because the one-sidedness of the bargains in all three cases is readily apparent, most judges in a common-law system of contract interpretation and implementation would prefer to have the whole contract before them. Yet to preserve the question of the arbitration clause's enforceability, the lawyers arguing against its enforcement and the judge must find a way to sever it from the entire contract or see the issue bundled into the arbitration and before the arbitrator. This seems both counterintuitive and subject to manipulation. It also seems far from the original intent of the FAA.

58. *Id.* This formulation seems to be unique. Most other jurisdictions focus on the relative nature, power, and position of the contracting parties. *See, e.g.,* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (stating that contracts can be found unconscionable where "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money"). Despite the verbiage, the application of the test seems identical to the traditional form of adhesion (focusing on relationships, not processes). *Iwen*, 977 P.2d at 995 ("Hence, we have held that contracts of adhesion 'arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party'" (quoting *Passage v. Prudential-Bache Securities, Inc.*, 727 P.2d 1298, 1301 (Mont. 1986))).

59. *Iwen*, 977 P.2d at 995.

60. *Id.*

61. *Id.* at 996.

II. THE FAA and *BUCKEYE'S MOVING TARGET*

A. *The Federal Arbitration Act (FAA)*

The Federal Arbitration Act (FAA) became law in 1925.⁶² Section 2 of the Act provided:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁶³

The FAA also provided for a stay of judicial proceedings on the petition of any party to such an agreement until the arbitration had been conducted in accordance with the agreement.⁶⁴ In *Marine Transit Corp. v. Dreyfus*, one of the earliest cases interpreting the FAA, the Court had no difficulty with the proposition that Congress's power to regulate maritime and interstate commerce encompassed the creation of an exclusive remedy such as specific performance.⁶⁵ Thus extended, that power certainly encompassed a direction to the court to recognize arbitration as the exclusive remedy where the parties had agreed to it.⁶⁶ The Court made an effort to clarify Congress's role in setting jurisdictional limits and providing for remedies in pursuit of its power to regulate maritime and interstate commerce.⁶⁷ Its conclusion was that the constitutional question of authority to provide or dictate a remedy is not limited to "ancient and established forms."⁶⁸ Instead, it is for Congress to decide whether a jury trial or some other procedure is more just, or just more appropriate.⁶⁹

The FAA should be placed in its historical context. The Act was

62. 9 U.S.C. §§ 1–16 (2000); *see also* *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 270–74 n.1 (1932) (setting forth the full language of the 1925 Act).

63. *Marine Transit Corp.*, 284 U.S. at 270 n.1 (quoting 9 U.S.C. § 2).

64. 9 U.S.C. § 3.

65. *Marine Transit Corp.*, 284 U.S. at 278.

66. *Id.* at 277–79.

67. *Id.* at 278.

68. *Id.*

69. *Id.* at 279.

passed in 1925, 13 years prior to the *Erie Railroad Co. v. Tompkins*⁷⁰ decision, which reversed the *Swift v. Tyson* line of cases.⁷¹ The *Swift* line had encouraged federal courts to think of themselves as somewhat removed from the state law principles and doctrines present in cases of diversity of citizenship.⁷² So at the time of the FAA's passage the notion of a federal common law and a strong procedural basis had not yet suffered the blow of *Erie*. Although it is an oversimplification to say that *Swift* encouraged a federal common law, it is true that federal courts were encouraged to look at the same sources as the state courts and draw their own conclusions about what the state law should be.⁷³ This led to federal interpretations of a state's law more heavily influenced by general common-law principles than the interpretation would have been if the state courts sought to articulate that same principle or doctrine. In other words, states became more comfortable at looking to their own precedents as the body of law deepened and became richer so that *stare decisis* became easier to apply and extend. Federal courts were more removed from that development and visited the state-law principles and doctrines only intermittently. Thus, they were likely to be too rigid or too speculative in formulating principles and doctrines for those state law questions. By the time of *Erie* it became apparent to the Court that the attempt to be an independent arbiter of good doctrine and principle was causing inconsistency and even claims of unconstitutionality because the diversity of law no longer existed if the federal courts were in fact applying a third system, one of the federal court's own speculative creation and one askew from either of the underlying state views.⁷⁴

The FAA was one of the symptoms of the tensions that built toward the *Erie* holding. Federal courts were as prone to prejudice against arbitration as the state courts.⁷⁵ There was a long history of denying effect to arbitration agreements even in the face of carefully negotiated bargains by similarly situated parties.⁷⁶ The ability to articulate doctrines and principles on behalf of the state without the more limited constraints in following *stare*

70. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

71. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

72. *See Erie*, 304 U.S. at 74–75 (describing how the *Swift* doctrine led to the uneven application of state laws).

73. *Swift*, 41 U.S. (16 Pet.) at 18–19.

74. *Erie*, 304 U.S. at 74–78.

75. *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1106, 1011–12 (S.D.N.Y. 1915) (stating that the Supreme Court has held arbitration clauses void in a federal forum).

76. *See, e.g., id.* at 1006, 1012 (denying arbitration clause in contract between a corporation and a chartered owner of steamships).

decisis exacerbated the hostility felt towards arbitration.⁷⁷ In other words, a federal judge could find state doctrines and principles to deny arbitration and even if faced with some comfort in the doctrine toward arbitration could fashion a response that was hostile by looking at more general principles and speculating about the development of the law generally, rather than the law particular to the state jurisdiction and the facts at bar.⁷⁸ Congress acted to affect this substantive trend.⁷⁹ Regarding the FAA, the Second Circuit noted:

[W]e find a reasonably clear legislative intent to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions. Thus we think we are here dealing not with state-created rights but with rights arising out of the exercise by the Congress of its constitutional power to regulate commerce and hence there is involved no difficult question of constitutional law under *Erie*.⁸⁰

It became well settled that the FAA would control the “substantive questions as to the validity and interpretation of arbitration agreements.”⁸¹ Congress, having shortcut the development of *Swift v. Tyson* rules, at least within the purview of Congress’s power to regulate maritime and interstate commerce, mandated a shift in the viewpoint of some courts. Therefore, the courts hostility toward compulsory arbitration was no longer as fashionable.⁸² Given diversity jurisdiction’s impact on state doctrines, a change in some state results is to be expected.

One question left was whether an impediment to traditional doctrines that limited the availability of arbitration was also created. The face of the statute said that while Congress intended a welcoming attitude toward arbitration, it did not intend to set aside those traditional limits.⁸³ The validating provision in section 2 of the FAA makes it clear that validity is

77. *See id.* at 1011 (noting that federal courts do not have to follow state court decisions).

78. *See, e.g.,* Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 250 F. 935, 937–39 (2d Cir. 1918) (noting that under questions of general law, state court decisions are not binding on federal courts’ decision to deny arbitration).

79. *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) (recognizing that the reason for the FAA’s passage was to counter judicial hostility towards arbitration).

80. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404–05 (2d Cir. 1959), *cert. denied*, 364 U.S. 801 (1960).

81. Grand Bahama Petroleum Co., v. Asiatic Petroleum Corp., 550 F.2d 1320, 1324 (2d Cir. 1977).

82. *See id.* (granting a district court jurisdiction to compel arbitration in the face of a conflicting statute).

83. 9 U.S.C. § 2 (2000).

mandated, “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁸⁴ This has been the interpretation of the better-reasoned decisions as well.⁸⁵ In other words, so long as a court treats arbitration agreements as they would any other consensual provision, it can consider legal or equitable limits on the bargain. Even if the result is one that invalidates the arbitration clause, it is allowed to do so if the court reaches its conclusion after an even-handed application of doctrines and principles that it would apply in good faith to other clauses. Thus, the question becomes: what is the relative status of arbitration with regard to the application of limiting doctrines?

B. *The FAA, and How Buckeye Has Moved the Target*

The *Buckeye* decision is not the result of the FAA. It is the result of judicial interpretations of the FAA and more general federalism principles that have been articulated in the intervening years.⁸⁶ To understand this, consider the following sequence:

(1) in 1825, the Supreme Court announced *Swift v. Tyson*, a diversity case in which Justice Story said the federal diversity court should deduce the doctrines to be applied from the general principles of commercial law; in other words they should act as any common-law court would to determine the current state of the law;⁸⁷

(2) by 1920 there was substantial resistance in the federal courts to enforcement of compulsory arbitration agreements;⁸⁸

(3) The FAA was passed in 1925 to effect a substantive change toward acceptance of compulsory arbitration⁸⁹ (this was seen as a pre-*Erie* prescription of “general law” applicable in federal courts), but this was a substantive change in federal law only and was not intended as a federal bludgeon to force states toward a similar acceptance of arbitration;⁹⁰

84. *Id.*

85. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (discussing states’ ability to regulate contracts); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (discussing the congressional intent in other statutes to identify arbitration agreements that are unenforceable).

86. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209–10 (2006).

87. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

88. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

89. *Id.*

90. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (discussing

(4) in 1938 *Erie* overturned *Swift v. Tyson*, and federal diversity courts were made responsible for determining the applicable state doctrine and were told to act as would the state court in determining the state rule in an attempt to reach the same result as the state court would reach;⁹¹

(5) *Bernhardt v. Polygraphic Co. of America*, a 1956 decision by the Court, applied the *Erie* doctrine to the FAA and concluded that the contract, one of employment, was not one in interstate commerce and as such its breach was a matter of substantive state law requiring the federal court to allow its revocation if the state substantive law so provided, despite the FAA's provisions;⁹²

(6) *Prima Paint v. Flood & Conklin Manufacturing Co.*, decided in 1967, called the FAA a matter of federal substantive law in which the issue of the compulsory arbitration agreement was severable or separable from the contract in its entirety, and because the sale of a paint manufacturing company was interstate commerce, the federal substantive law applied;⁹³

(7) in 1983 the Court extended the FAA, holding in *Southland Corp. v. Keating* that the FAA's favoritism for arbitration was a valid exercise of Congress's plenary power to regulate under the Commerce Clause and therefore "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements";⁹⁴ and

(8) with the *Buckeye* decision, the Court has now combined the *Prima Paint* and *Southland* holdings to conclude that the state court must apply the substantive federal rule of severability announced in *Prima Paint*, so that a court can only ask about the validity of the arbitration agreement and must leave for the arbitrator the question of the validity of the entire agreement.⁹⁵

III. *BUCKEYE CHECK CASHING, INC. v. CARDEGNA*

When John Cardegna, Donna Reuter, and Wendy Betts needed small

Congressional intention to enforce private agreements).

91. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

92. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200–01, 203 (1956).

93. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404–06 (1967).

94. *Southland Corp. v. Keating*, 465 U.S. 1, 11, 16 (1984).

95. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006).

loans to pay personal bills all three chose to use a “payday” loan or deferred presentment lender.⁹⁶ This meant an exchange of their personal checks in return for a check of the company that could be cashed immediately and the company’s promise to delay presentment of their personal checks until their next payday, typically two or three weeks. The lender exchanged three \$100 company checks for three personal checks of \$125 each.⁹⁷ The lender stood to earn \$75 interest on a \$300 principal amount for a two-week loan.⁹⁸ When the checks were due to be presented the borrowers could, and did in some cases, choose to pay the interest and renew or rollover the principal by writing new checks of \$125 for each \$100.⁹⁹ In this way one of the parties incurred \$900 interest for the \$300 loan over an eight-month period.¹⁰⁰ When Betts could no longer pay the interest, the checks were presented and dishonored for insufficient funds.¹⁰¹ Betts then brought an action against the lender alleging fraudulent and deceptive practices, unconscionability, and usury.¹⁰² Cardegna was the first named party in a putative class action that made the same allegations on behalf of the class that were made against Buckeye.¹⁰³ In both actions the lender moved to compel arbitration.¹⁰⁴

Betts was successful at both trial and on appeal in her resistance of arbitration.¹⁰⁵ The court of appeal held that arbitration should not be compelled:

where a party alleges and offers colorable evidence that a contract violates usury laws, the trial court must determine the usury question before ordering the parties to arbitrat[e] ‘[A] claim that a contract is illegal and . . . criminal in nature is not a matter which can be determined by an arbitrator. An arbitrator cannot order a party to perform an illegal act.’¹⁰⁶

96. The factual synopsis here is drawn from *FastFunding The Co. v. Betts*, 758 So. 2d 1143, 1143 (Fla. Dist. Ct. App. 2000). The legal team of attorneys was essentially the same as those who later brought the class action in *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. Dist. Ct. App. 2002), *rev'd*, 894 So. 2d 860 (Fla. 2005), *rev'd*, 126 S. Ct. 1204 (2006). The factual allegations led the Florida Supreme Court to consolidate the appeals and resolve the differences in the opinions of the Florida Courts of Appeal. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005), *rev'd*, 126 S. Ct. 1204 (2006).

97. *FastFunding*, 758 So. 2d at 1143.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1143–44.

103. *Buckeye*, 824 So. 2d at 229.

104. *FastFunding*, 758 So. 2d at 1144; *Buckeye*, 824 So. 2d at 229.

105. *FastFunding*, 758 So. 2d at 1143.

106. *FastFunding*, 758 So. 2d at 1144 (quoting *Party Yards, Inc. v. Templeton*, 751 So. 2d 121,

The class action did not fare as well. While the trial court refused to compel arbitration, the court of appeals reversed and ordered arbitration.¹⁰⁷ To the court of appeals it was not a question of how deep the fraud went, that is, whether it was fraud in the creation or illegality of the transaction, but a matter of how wide it spread.¹⁰⁸ Applying the holding of *Prima Paint* it determined that if the claim of fraud was broad and extended to the whole contract, then it was for the arbitrator.¹⁰⁹ Only a claim of fraud or illegality of the arbitration clause itself could go to the trial court, thereby avoiding the compulsory arbitration called for in the parties' agreement.¹¹⁰

The Florida Supreme Court sided with the *FastFunding* court and overruled the *Buckeye* court.¹¹¹ To the Florida Supreme Court it was a matter of long and uncontroversial settled law.¹¹² Contracts that are determined to be void are unenforceable and are treated as if they did not exist.¹¹³ Moreover, it was critical that the determination of voidability be made by the trial court before compelling arbitration.¹¹⁴ This was thought to be the only way to vindicate those public policies and doctrines, because those public policies "prohibit breathing life into a potentially illegal contract" by enforcing the arbitration portion of an otherwise illegal contract.¹¹⁵ For this court then, the issue was whether a portion of the contract should be salvaged by the severability doctrine. It concluded that if arbitration were to be compelled and the contract, in its entirety, was later found to be void, an absurdity would result.¹¹⁶ The court saw no way to salvage a piece of something that was by long-established contract doctrine a legal nullity.¹¹⁷ The court foreshadowed its own reversal by the Supreme Court with this telling summary:

In other words, there are no severable, or salvageable, parts of a contract found illegal and void under Florida law. . . . [A] contrary holding would lead to an absurd result We do not

123 (Fla. Dist. Ct. App. 2000).

107. *Buckeye*, 824 So. 2d at 229, 232.

108. *Id.* at 230–32.

109. *Id.* at 230, 232.

110. *Id.* at 230.

111. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005), *rev'd.*, 126 S. Ct. 1204 (2006).

112. *Id.* at 864.

113. *Id.*

114. *Id.* at 862.

115. *Id.* at 864.

116. *Id.* at 862.

117. *Id.* at 864.

believe federal arbitration law was ever intended to be used as a means of overruling state substantive law on the legality of contracts.¹¹⁸

This is exactly what the *Buckeye* Court decided.¹¹⁹

Justice Cantero, in dissent, cited three federal courts of appeal cases that had achieved the very result that the majority called absurd.¹²⁰ In each, the federal court had applied *Prima Paint* to conclude that where the allegation of invalidity reached the whole contract rather than the making of the arbitration agreement itself that the FAA and principles of federal law required that initial determination be made by the arbitrator.¹²¹

The disconnect between the majority and dissent can be laid squarely at the feet of the majority in *Southland Corp. v. Keating*.¹²² Both Florida Supreme Court opinions state completely correct views; one from the perspective of long-established common law and the other from the perspective of more recently-created federal substantive law of arbitration. To the majority it is about voidness and the lack of force any contract has when it is void *ab initio*.¹²³ To the dissent it is about who will decide that question, and because Congress and the Court have determined this to be a predicate question for the arbitrator, it cannot be “void” in the classic sense and will at least have sufficient power to appear before the arbitrator.¹²⁴

Between the two perspectives, the Supreme Court chose the dissent: “Likewise in *Southland*, which arose in state court, we did not ask whether the several challenges made there—fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the California Franchise Investment Law—would render the contract void or voidable.”¹²⁵

Buckeye offers a moving target to courts who wish to apply the substantive state-law doctrines of adhesion and unconscionability. The movement is a product of the Court’s attempt to paint *Buckeye* as a simple deduction from the *Prima Paint* and *Southland* decisions. The majority opinion said:

118. *Id.*

119. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006).

120. *Cardegna*, 894 So. 2d at 870–71 (Cantero, J., dissenting) (citing *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), *cert. denied*, 537 U.S. 1087 (2002); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002)).

121. *Id.*

122. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

123. *Cardegna*, 894 So. 2d at 864.

124. *Id.* at 869–70 (Cantero, J., dissenting).

125. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006).

Prima Paint and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of those holdings. Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.¹²⁶

The *Prima Paint* rule rejected application of state severability rules which often turn on classic contract distinctions such as voidness and voidability.¹²⁷ By extending this rule to the “affecting interstate commerce” cases, the *Buckeye* Court rejected Justice Black’s dissent in *Prima Paint*, which pointed out that common-law contract doctrine distinguishes between voidness and voidability.¹²⁸ In its place, the Court grafted the *Prima Paint* position that Congress intended to make no distinction. Gone is the *Bernhardt* preference of the state-based rules and in its place is the *Prima Paint* rule which contained the severability concept only because after *Erie* and *Bernhardt* there were no similar federal substantive rules of formation and voidness to affect.

By privileging federal coverage, the Court was forced to also privilege *Prima Paint*'s novel understanding of severability. This understanding reasoned that to protect arbitration, the Court must sever the compulsory arbitration clause from the rest of the contract and consider only the validity of that clause.¹²⁹ Thus any substantive objection to the contract as a whole was simply irrelevant to the determination of what must be construed as a

126. *Id.* Justice Scalia wrote for a seven-judge majority. *Id.* at 1207. Justice Alito did not participate, and Justice Thomas dissented. *Id.* at 1211. The Court “reaffirmed” that regardless of the identity of the court as state or federal, a challenge to the contract in its entirety must first be presented to the arbitrator. *Id.* at 1210. This holding reversed the Florida Supreme Court’s decision. *Id.* at 1211. The Florida Supreme Court held that a challenge on the basis that the entire contract was void *ab initio* could be heard by the trial court despite the presence of the compulsory arbitration clause. *Cardegna*, 894 So. 2d at 865.

127. *Buckeye*, 126 S. Ct. at 1209.

128. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407–25 (1967) (Black, J., dissenting) (arguing that a court should decide the issue of voidness but that an arbitrator may decide issues of voidability).

129. *Buckeye*, 126 S. Ct. at 1209.

stand-alone arbitration agreement.¹³⁰

This leads to a counterintuitive position. The state court naturally will be thinking about classic contract doctrine, which privileges discussions of voidness such as illegality, fraud in the factum, discharge in bankruptcy, lack of capacity, and similar real defenses to contract. Classic contract doctrine treats these deficiencies as negating the existence of the contract. It is as if the contract never existed if it is the product of illegality or fraud in the factum. For the Supreme Court to say that these are no longer the predicate questions is to deny matters that have long been settled state-law questions. To replace them with the rubbery test of severability, which looks to whether the challenge is to the arbitration clause specifically as opposed to the entire contract, is to substitute the settled for the unknown and to introduce a sense of dislocation or motion to the announced standard.

This mobility or malleability is a rolling consequence of the rather innocent first steps taken in *Bernhardt* and *Prima Paint*. These holdings became insidious only when coupled with *Southland's* extension of the FAA to cases affecting interstate commerce and therefore arising under the substantive state law of diversity actions. The *Buckeye* Court concluded, quite logically, that this sequence of cases sealed the fate of common-law notions of voidness and voidability.¹³¹

The injustice done to state-law interests in our federalist system was not enough to overcome this conclusion.¹³² What we must now be aware of is the opportunity to create a bull's-eye from the moving target. State courts should still apply their long-standing principles of contract formation, including questions of voidness and voidability, but because the arbitration clause is severable, its validity is a predicate question. For this reason, the doctrines of adhesion and unconscionability offer the most promise in policing bad bargains.

The history of adhesion and unconscionability demonstrate an ample opportunity for even-handed examination of compulsory arbitration clauses without frustrating the congressional effort to encourage bargained-for exchanges that choose arbitration as the compulsory remedy. Classic contract doctrine has a long history of off-the-rack or standard-form terms like those seen in these compulsory arbitration cases. The fact that the term

130. *Id.* at 1210.

131. *Id.* at 1208–09 (reasoning that courts are forbidden from applying common-law voidability rules to contracts as a whole if there is an arbitration agreement because: (a) *Prima Paint* held that the FAA required that these were questions for the arbitrator; and (b) *Southland* applied this rule to state as well as federal courts).

132. *See id.* at 1211 (Thomas, J., dissenting) (making the sole argument that the FAA does not apply to state-court proceedings).

calls for an arbitration remedy as opposed to, say, an exculpation-of-liability provision in the classic cases, does not change the nature of the inquiry. The FAA was not meant to prevent courts from invalidating arbitration clauses that crossed the lines drawn for contract malfeasance generally. An obscure, hidden, or predatory arbitration clause should be viewed in no better light than an obscure, hidden or predatory exculpation clause. To see this we must examine the pre- and post-*Erie* history of adhesion and unconscionability in the Supreme Court, as well as related common law developments.

IV. THE UNITED STATES SUPREME COURT AND ITS ACCEPTANCE OF THE COMMON-LAW DOCTRINES OF ADHESION AND UNCONSCIONABILITY

Contracts have always been seen as legal creations of special or limited circumstance.¹³³ That is, there has never been absolute enforcement of all promises. In modern law, contracts have become devices recognized only in the presence of consideration or a suitable substitute.¹³⁴ As nineteenth-century American law moved toward the bargained-for-exchange model of contracts, it was the Supreme Court that offered some significant insights into the limits of pure objectivism in contract law.

Several Supreme Court opinions that precede *Erie Railroad Co. v. Tompkins*¹³⁵ illustrate the tension between the more objective model of bargained-for-exchange and the more subjective meeting-of-the-minds model. They also foreshadow the concern, still voiced today, that the Federal Arbitration Act might preempt common-law doctrines that look beyond objective assent to deny enforcement of compulsory arbitration clauses that are adhesive or unconscionable.

We begin with the developing law of adhesion and unconscionability as decided by the United States Supreme Court in the late nineteenth century, a time when federal courts were more involved in creating the common law and a time before some courts began to see arbitration as a

133. A complete study of the doctrines of adhesion and unconscionability is beyond the scope here. Others have made notable contributions to the inquiry. See, e.g., Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123 (2005) (discussing the limiting roles of adhesion and unconscionability with respect to the objective theory of contract formation); Comment, *Are Compulsory Arbitration Clauses in Consumer Contracts Enforceable? A Contractual Analysis*, 75 TEMP. L. REV. 125 (2002) (describing various courts' tests for unconscionability); Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW 511, 519–23 (1998) (discussing the circumstances under which state and federal law may bar enforcement of adhesive contracts).

134. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71–94 (1979) (listing the requirements of bargain, consideration and their acceptable substitutes).

135. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

threat. The law of this era represents a “pure” look at bargains imposed by one party against the other without the influence of either side in the normative debate about the good and bad of arbitration.

A group of four cases in the early 1870s offered the United States Supreme Court the opportunity to either foster unadulterated freedom of bargaining or to temper that freedom with notions of genuine assent and fair play.¹³⁶ This group of cases is instructive for two reasons. First, the opinions were issued long before *Erie* and are presumptively the Court’s best effort at stating the general law of contracts. Thus, those developments in the general law of contracts were established when Congress addressed the issue of arbitration clauses some fifty years later in 1925. Second, they coincide with the expected pattern of economic development that some academics have suggested gave rise to the use of form contracts and thus gave urgency to the need to deal with adhesive situations. That is, in dealing with common carriers, insurance policies, and towage contracts, the Court handled the types of fact patterns the academics have suggested were the leading edge of standard-form, or off-the-rack, contract provisions. As the following discussion will show, the Court in its holdings refused to enforce contracts that lacked the essential element of voluntary assent, but was willing to require the performance of agreements freely and fairly entered into.

In 1871, the Court held that a towing-boat company could not exempt itself from liability for its own negligence in a towage contract.¹³⁷ In the same term, the Court held that an insurance company could not disclaim, by way of numerous paragraphs of complicated fine print, certain liabilities that it appeared to undertake in the body of the insurance policy.¹³⁸ In

136. *The Steamer Syracuse*, 79 U.S. (12 Wall.) 167 (1870); *Phoenix Ins. Co. v. Slaughter*, 79 U.S. (12 Wall.) 404 (1871); *Mich. Cent. R.R. Co. v. Mineral Springs Mfg. Co.*, 83 U.S. (16 Wall.) 318 (1873); *N.Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873).

137. *The Steamer Syracuse*, 79 U.S. (12 Wall.) 167, 171 (1870). In *The Steamer Syracuse*, the owners of the canal-boat Eldridge brought a libel in admiralty against the steamer *Syracuse*, seeking to recover damages sustained when the canal-boat, while it was being towed by the steamer, collided with a brig at anchor and shortly thereafter sank. *Id.* at 167–68. On review, the Court held that the terms of the towage contract were irrelevant because even if the contract provided that the canal-boat would be towed at her own risk, the steamer would not be exempt from liability for its own negligence. *Id.* at 171. The Court stated that the policy of law required that a towing boat be held responsible for the consequences of neglecting its duty to exercise reasonable care, caution, and maritime skill. *Id.* In other words, the terms at issue were of the type to which no party could be permitted to assent.

138. *Phoenix Ins. Co. v. Slaughter*, 79 U.S. (12 Wall.) 404, 407 (1871). In *Phoenix Insurance Co. v. Slaughter*, the insurance company issued an insurance policy to Slaughter, covering goods which were located in a storehouse described by the policy. *Id.* at 404. When the goods were destroyed by fire and the insured attempted to collect on the policy, the insurer disclaimed liability for the loss, arguing that the policy was void because the insured violated the terms of the policy by keeping a certain amount of gunpowder in the storehouse where the goods were kept. *Id.* at 405. These terms, incidentally, were

1873, the Court held that a general, unsigned notice printed on the back of a form receipt was not a special contract by which a common carrier could limit its common-law liability.¹³⁹ The Court held that this type of general disclaimer, where the carrier imposed its own terms and conditions on the shipper, was not the type of special contract by which a carrier could limit its liability.¹⁴⁰ The Court essentially refused to find that the shipper's acceptance of the receipt constituted either objective or subjective assent of the carrier's terms. The terms were unilaterally imposed on the shipper by the carrier, which was in a position of substantially superior bargaining power.

The fourth and perhaps most significant of the decisions on adhesive contracts from this era is *New York Central Railroad Co. v. Lockwood*.¹⁴¹ In *Lockwood*, the Court held that a common carrier could not validly exempt itself from liability for its own negligence.¹⁴² Lockwood, traveling along with his livestock on the railroad carrier's train, was injured as a result of the carrier's negligence.¹⁴³ Lockwood brought a claim to recover damages for the injuries caused by the carrier, and the carrier sought to defend itself by arguing that its contract with Lockwood absolved it of

among those contained in the several paragraphs of confounding fine print that followed the body of the policy. *Id.* at 404–05. The Court held that if an insurance company does not intend to take a certain risk on property where gunpowder and other like substances are kept for ordinary use, then good faith requires that it must declare that intention in unambiguous terms that are printed in large enough type “to arrest the attention of an interested party.” *Id.* at 406–07.

139. *Mich. Cent. R.R. Co. v. Mineral Springs Mfg. Co.*, 83 U.S. (16 Wall.) 318, 330 (1873). The manufacturer had contracted with a carrier for shipment of wool from Michigan to another state. *Id.* at 319. In accordance with the contract, the carrier transported the goods to one of its depots, where the wool was to be kept until the carrier was able to deliver it to a steamboat for transport to its final destination. *Id.* at 320. The wool remained in the depot for six days, and then was destroyed by an accidental fire. *Id.* The carrier argued, in pertinent part, that it was not liable for the loss of the wool because the general disclaimer printed on the back of the receipt given to the manufacturer stated that the carrier would not be liable for any loss occasioned by any cause other than the negligence of the carrier. *Id.* at 319, 327–28.

140. *Id.* at 328–30. In reaching this decision, the Court reasoned:

It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice . . . merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

Id. at 329.

141. *N.Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 384 (1873).

142. *Id.* at 384.

143. *Id.* at 358.

liability for its own negligence.¹⁴⁴

The contract consisted of an agreement that Lockwood was required to sign in order to secure transport for himself and his livestock. It included a “drover’s pass,” which was essentially a passenger ticket that certified that Lockwood was shipping enough livestock to pass free to his destination.¹⁴⁵ The signed agreement stated that Lockwood and his livestock were traveling at their own risk, and the drover’s pass declared that acceptance of the pass was a waiver of all claims for damages for any injuries received on the train.¹⁴⁶ The carrier argued that these terms were absolute in their meaning, and thus, that such terms must be construed to exempt the carrier from liability for all injuries, including those caused by the carrier’s own negligence.¹⁴⁷ The Court vigorously disagreed and adamantly refused to construe the contract to exempt the carrier from liability for its own negligence.¹⁴⁸

The Court conceded that a carrier could limit its liability by special contract with its customers, provided that the contract was just and reasonable; however, this attempt to excuse the carrier’s negligence was seen as repugnant to the law and the public good, and thus was anything but just and reasonable.¹⁴⁹ Essentially, the Court here found that the alleged bargain was unenforceable, not only because it was unjust and unreasonable, but also because it lacked the essential element of voluntary assent.¹⁵⁰

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 362.

148. *Id.* at 381–84.

149. *Id.*

150. *See* *The Kensington*, 183 U.S. 263, 268 (1902) (“[E]xemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent . . .”). By way of contrast, in *Baltimore & Ohio Southwestern Railway Co. v. Voigt*, the Court upheld a contract exonerating a railroad carrier from all liability, including for its own negligence. *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 512–20 (1900) (reasoning that because the passenger was an express carrier who freely entered into the contract with equal bargaining power and gained some benefits from the contract, the contract should be upheld). Similarly, in *Sun Oil Co. v. Dalzell Towing Co.*, the Court held that parties of equal bargaining power, dealing at arms length, could validly contract so as to exempt one party from liability for negligence to the other. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 294–95 (1932). Here, a steamer owner entered into a contract with a tugboat owner, whereby the tugboat owner agreed to supply tugs to take the steamer through a certain stretch of water to its destination. *Id.* at 292–95. The parties’ contract included a clause which provided, in pertinent part, that the tugboat owner would not be liable for any damage to the steamer resulting from the tug, whether caused by the negligence of the tugboat owner, the tugboat captains, or otherwise. *Id.* at 292–93. The steamer was damaged and the steamer’s owner sought to recover from the tugboat owner in an action for negligence. *Id.* at 293. The Court held that the terms of the parties’ contract, exempting the tugboat owner from all liability,

The *Lockwood* contract fell squarely within limits of classic doctrine and focused on substantive as well as procedural advantage-taking. The circumstances and process of the bargain were such that true bargaining was neither invited nor expected. This is a classic take-it-or-leave-it deal, although the Court did not use the phrase. As such, it instructs us that because these inquiries are used in other contexts, a modern court should not hesitate to review a compulsory arbitration clause using these elements of procedural and substantive advantage-taking.

The Court made an observation that is as true today as it was 130 years ago:

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.¹⁵¹

Today's standardized contracts are subject to the same misuse. The appearance of bargaining through an exchange of forms does not create the contract. The law of contracts demands that we find a genuine exchange; a true bargain, not just its form. *Lockwood* tells us that we should not replace the substance of fairness with a form that is the mere appearance of equality. Routine forms can be used to transform small and inconsequential points into such devastating provisions that the idea of bargain is lost. At some point, the combination of substantive advantage-taking, repugnancy, and the lack of choice, combine to divest the standardized form of its validity and essential purpose. Power and surprise become conscious advantage-taking and present a radical break from the original purpose of economy which justified the standardized term.¹⁵²

including for its own negligence, were valid and enforceable, and thus controlling. *Id.* at 294. The Court stated that there was no basis in this case for the application of the doctrine that common carriers may not, by any form of agreement, secure exemption from liability for damage caused by their own negligence. *Id.* at 294.

151. *Lockwood*, 84 U.S. at 381–82.

152. Some would say there is a duty to read. There are certainly some courts that disagree with

While standardization saves transactional costs, this savings comes at the cost of rigidity.¹⁵³ As in *Lockwood*, where a ticket agent sold the drover's pass to the cattle owner, the standardized form is usually presented and accepted with little notice or thought by either party to the actual sale. There would be a steep increase in cost for the seller's agent to renegotiate items in the standardized form. Sellers are likely to resist incurring the costs needed to bargain about standard terms. The seller then must make a decision about what terms to include and must be forceful in resisting their alteration to gain the economy inherent in standard forms. Meanwhile, goods and services change as the market changes. During these changes it is the seller who, by repetition, gains sophistication from accumulated experience. It is only natural that the rigidity compels the seller to stay in front of the curve. Some railroad, somewhere, must have been the first to see the advantage of exculpation in return for a reduced ticket price. The seller, as contract drafter, will likely stay ahead of the understanding of its consumers through its experiences as provider of volume goods. Volume goods or services make the seller better able to write advantageous standard forms because volume sales mean volumes of information about the good or service. But the cost is rigidity. Standardized forms will trail the knowledge curve of the seller because, unlike the typical custom deal, standard forms offer no bargaining stage and therefore no opportunity to respond in an individual transaction to the accumulated knowledge.

What this should suggest to the thoughtful seller is an opportunity for competitive advantage-taking. Mr. Lockwood is pitting his limited experience and greater need for the services against a service provider with

this open approach. At least one court has unapologetically rejected unconscionability founded on the failure to read or understand by the weaker party in a very sophisticated arrangement. The Seventh Circuit has taken this much sterner approach to the unconscionability doctrine. *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 667 (7th Cir. 2003). *Dugan* brought suit on behalf of the railroad's employees alleging a failure to make contributions to an ERISA plan that were required by the collective bargaining agreement with the union. *Id.* at 664. The question was one of pension contributions for "casual employees." *Id.* The question hinged on a clause in the contract defining "casual employee," and whether this definition, which was spelled out in a "boilerplate" provision, was affected by prior agreements between the parties. *Id.* at 667. The court then explained:

[W]idespread judicial suspicion of the form contract—the dreaded 'contract of adhesion,' the contract that is offered by the authoring party on a take it or leave it basis rather than being negotiated between the parties . . . has never crystallized . . . in a rule making such contracts unenforceable, on grounds of fraud or duress or unconscionability or mistake or what have you, or even presumptively unenforceable Although the vagueness of the concept of unconscionability may seem to place contracts of adhesion under a cloud, they are generally upheld against attacks from that direction.

Id. at 668 (quoting *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990)).

153. E. ALLAN FARNSWORTH, *CONTRACTS* § 4.26 at 295–96 (3rd ed. 1999).

immense experience and little need for an individual transaction. Given that rigidity will be present, the seller can replicate past experience or can innovate. Common sense tells us that a competitive economy favors innovation. If the railroad or any other standard-form seller wishes to be competitive, it should not only address past practices, but should think about where it would like the substantive terms to take them. Unless the forms integrate the changing information, their inherent rigidity will pull back on progress rather than push it forward. If they change, they will drag with them the substantive terms of the bargain. This means that the consumer with no bargaining power will be an uninformed subject in an ongoing social experiment to maximize the seller's profit and advantage-taking. If sellers stretch to accommodate new patterns and practices, their standard forms will have to shoot beyond current understandings. Without predicting the forward edge, the forms would be doomed to constant anachronism. As commerce changes, commercial practices change in response, and the forms written to govern them would do no more than create a monument to what those practices have been. In order for the seller to innovate, it must disguise change as the typical and the ordinary. Standard forms hide innovation, and industry encourages the view that standard forms are typical and ordinary. All the while, standard forms are introducing inevitable and substantive change because of changes in commerce.

The continued presumption of assent that attaches to standard forms must, at some point, fail.¹⁵⁴ The presumption of assent rests on the belief that standard forms are objective manifestations of what would be said in a subjective and customized deal. To the extent this is fiction, it is forgiven because of the notion that standardization saves transactional costs. Cost savings presumably benefit both parties. When the goods are changing or the expectations of society are changing, the forms will inevitably lag behind. To be the most efficient competitor, a seller is encouraged to push this curve and therefore the envelope of expectations. When sellers stretch to accommodate new patterns and transactions, they continue to use standard forms incorporating the innovations, some of which are markedly different from objective expectations and disadvantageous for the consumer. It is this accumulation of learning and envelope-expansion that

154. *See id.* (noting that standardized agreements may allow one party to "impose terms on another unwitting or even unwilling party"); *see also* Richard L. Barnes, *Toward a Normative Framework for the Uniform Commercial Code*, 62 TEMP. L. REV. 117, 158-60 (1989) (discussing the difference between provisions of the UCC that directly implement fundamental values, and those that pursue ancillary goals in furtherance of those values).

takes a benign fiction and makes it a tool of advantage-taking.¹⁵⁵

Adhesion and unconscionability are major palliatives of this tension. Although the Court in the 1870s lacked our current perspective, its reaction was sound and consistent with our enriched perspective. Adhesion and unconscionability are now sufficiently established to be found in uniform laws such as the Sales Article of the Uniform Commercial Code.¹⁵⁶ If used properly, adhesion and unconscionability are less manipulative and therefore present less risk of abuse to the values mandated by the FAA.¹⁵⁷

What emerges is a picture of the U.S. common law, including the views of the U.S. Supreme Court in its decisions before *Erie*. That picture includes the classic doctrines of adhesion and unconscionability. They were a central part of contract law and offer valuable insights into the appropriateness of modern courts' treatment of compulsory arbitration clauses. They help answer the question of whether a compulsory arbitration clause is being singled out for differential treatment. Any analytical model of the *Buckeye* legacy should account for the need to incorporate these classic doctrines without imposing an additional burden on the exercise of arbitration rights. This can be accomplished if compulsory arbitration is nothing more than a consistent subset of general contract principles.

This treatment of compulsory arbitration as a consistent subset can be simplified by considering a classic case from last century in which the Supreme Court found a contract to be neither adhesive nor unconscionable. In *Baltimore & Ohio Southwestern Railway Co. v. Voigt*, the Court upheld a contract exonerating a railroad carrier from all liability—including for its own negligence—to a particular passenger.¹⁵⁸ However, in this case the Court found it determinative that the passenger in question was not an ordinary passenger; rather, he was an express carrier who held a position of equal bargaining power with the railroad, freely entered into the contract,

155. FARNSWORTH, *supra* note 153, at 296.

156. U.C.C. § 2-302.

157. There are dissenters. One court stated, “[t]he fact that a contract is an adhesion contract is significant to determining whether it is procedurally unconscionable, but ‘not dispositive of this point.’” *Pritchard v. Dent Wizard Int’l Corp.*, 275 F. Supp. 2d 903, 917 (S.D. Ohio 2003) (quoting *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999)). Another court has flatly stated that an adhesive contract does not necessarily contain unconscionable terms. *Walters v. A.A.A. Waterproofing, Inc.*, 85 P.3d 389, 393 (Wash. Ct. App. 2004). At least one court more carefully crafted the relationship between adhesion and unconscionability when it stated, “the *danger* of an adhesion contract is that it *might contain* unconscionable clauses, and adhesion contracts are *scrutinized* to avoid enforcement of unconscionable clauses.” *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961, 974 (N.D. Iowa 2003), *rev’d on other grounds*, 367 F.3d 1048 (8th Cir. 2004). The court went on to say, however, that “the fact that a contract is one of adhesion does not necessarily make it unconscionable or unenforceable under Iowa law.” *Id.*

158. *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 520 (1900).

and received the benefits of the contract.¹⁵⁹ Before reaching this conclusion, the Court reiterated the well-established rules of law that: (1) any exemption from liability claimed by a carrier will not be binding and will be regarded as extortion unless the claimed exemption is reasonable and just; and (2) “all attempts [by] carriers, by general notices or special contract, to escape from liability for losses to shippers, or injuries to passengers,” occasioned by the carriers’ own negligence, “cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.”¹⁶⁰

Ultimately, the exculpatory clause of *Voigt* was found to be reasonable, just, and enforceable because it was an express agreement that was freely entered into and supported by ample consideration.¹⁶¹ In other words, it was a bargained-for exchange that had clearly been sealed with the assent of parties on relatively equal footing. Presumably, an agreement to arbitrate would have been given similar force if tested by the same standards. The key to unlocking the state-court power under *Buckeye* is for courts to face the specific question of compulsory arbitration clause validity. They must ask whether the clause itself is the product of adhesion and a violation of public policy. If so, the court can even-handedly ignore the compulsion to arbitrate.

V. RECENT CONTROVERSIES FROM ALABAMA, CALIFORNIA, AND MONTANA

A. *The Alabama Case*

Alabama is a state that remains steadfastly hostile toward arbitration as an alternative procedure. This has lead Alabama courts to rethink some very basic principles in an effort to avoid the FAA’s reach.¹⁶² The threshold inquiry in any Federal Arbitration Act case—whether the case affects interstate commerce—is usually answered with a presumptive “yes.”¹⁶³ This is not the case in Alabama, where a longstanding disdain for

159. *Id.* at 507–14.

160. *Id.* at 507.

161. *Id.* at 520.

162. The applicability of the FAA is set forth at 9 U.S.C. §§ 1–3 (2000).

163. Consider *Gonzales v. Raich*, a decision in which Justice Stevens increased Congress’s Interstate Commerce authority exponentially by defining “economics” as “the production, distribution, and consumption of commodities.” *Gonzales v. Raich*, 125 S. Ct. 2195, 2211 (2005). Consequently, by this definition, Justice Stevens has placed nearly every conscious act ever contemplated by a human being within Congress’s regulatory ambit. For a recent example of, and testament to, this shift, see

arbitration—reflected in, for example, the state’s statutory refusal to enforce intrastate arbitration¹⁶⁴—causes the Alabama Supreme Court to linger, often dispositively, on the threshold inquiry of whether the arbitration agreement affects interstate commerce.¹⁶⁵

In *McConnell Auto. Corp. v. Jackson*, the question of an automobile’s sale as a transaction affecting interstate commerce drew far more attention than most readers would expect.¹⁶⁶ In March of 2001, Kisha Jackson bought a 1999 Cadillac Deville through Terry Anderson, a sales representative for McConnell Auto.¹⁶⁷ According to an affidavit filed in the trial court, Jackson specifically asked Anderson if the car “had been wrecked.”¹⁶⁸ After he assured her that it had not been, Jackson purchased the car.

The car had, in fact, been involved in a collision and Ms. Jackson was understandably upset.¹⁶⁹ The snag in her recovery was a separate arbitration agreement she signed when purchasing the vehicle.¹⁷⁰ The arbitration agreement, complete with acknowledgments of the interstate character of the transaction, provided that *both* parties would submit “all claims, demands, disputes, or controversies of every kind or nature that may arise” to binding arbitration.¹⁷¹

United States v. Jeronimo-Bautista, 425 F.3d 1266, 1271 (10th Cir. 2005), in which the court applies the *Raich* definition of economics to hold that the production of child pornography is interstate commerce.

164. ALA. CODE § 8-1-41(3) (2005).

165. Alabama’s strategy has been tested, and rejected, numerous times in the U.S. Supreme Court. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269, 282 (1995) (reversing Alabama Supreme Court’s decision that arbitration agreement *sub judice* did not evince an interstate transaction).

166. *McConnell Auto. Corp. v. Jackson*, 849 So. 2d 159, 159–60 (Ala. 2002).

167. *Id.* at 160.

168. *Id.*

169. *Id.* at 160 n.1.

170. *Id.* The agreement provided:

Buyer/lessee acknowledges and agrees that the vehicle purchased or leased herein has traveled in interstate commerce. Buyer/lessee thus acknowledges that the vehicle and other aspects of the sale, lease or financing transaction are involved in, affect, or have a direct impact upon, interstate commerce.

Buyer/lessee and dealer agree that all claims, demands, disputes, or controversies of every kind or nature that may arise between them concerning any of the negotiations leading to the sale, lease or financing of the vehicle, terms and provisions of the sale, lease or financing agreement, arrangements for financing, purchase of insurance, purchase of extended warranties or service contracts, the performance or condition of the vehicle, or any other aspects of the vehicle and its sale, lease or financing shall be settled by binding arbitration conducted pursuant to the provision of 9 U.S.C. Section 1 et seq. . . .

Id. at 160–61.

171. *Id.* at 161.

When Ms. Jackson filed her suit, McConnell responded with a motion to compel arbitration, which the trial court summarily denied.¹⁷² The Alabama Supreme Court surmised that, “[a]lthough the trial judge did not state his reasons for denying the defendants’ motion to compel arbitration, it seems apparent from the record that the trial judge . . . determined that the transaction did not have a substantial effect on interstate commerce.”¹⁷³ After making de novo findings on this issue, the court moved to the “crucial issue on this appeal: Did the defendants present sufficient evidence to show that the subject transaction had a substantial effect on interstate commerce?”¹⁷⁴

Alabama requires that there be a “substantial” effect on interstate commerce for a transaction to fall under the provisions of the FAA.¹⁷⁵ *McConnell* cited two other cases involving arbitration and motor vehicles, and noted a factual similarity between the two and its case.¹⁷⁶ The court conceded that they were factually similar to the case sub judice. The distinction lay in “Kisha Jackson [having] paid cash for the vehicle.”¹⁷⁷ Therefore, despite other factual similarities, this case was purely *intrastate*.¹⁷⁸ At one point in Alabama, a used-car transaction was a *per se*

172. *Id.* at 161. In addition to the dealership itself, Terry Anderson, a sales representative, and Stacy Hill, the used-car manager, were named as defendants, allegedly having committed fraud, misrepresentation, suppression, and deceit during the sale of the Cadillac DeVille. *Id.* at 160. For simplicity, all defendants will be collectively referred to as “McConnell.”

173. *Id.* at 161. The Alabama Supreme Court requires, as a threshold inquiry, that the party seeking to compel arbitration demonstrate that the transaction “involv[es] interstate commerce in fact, so as to be within Congress’s power to regulate under the Commerce Clause.” *Coastal Ford, Inc. v. Kidder*, 694 So. 2d 1285, 1287 (Ala. 1997). “The burden of proving that the transaction at issue . . . substantially affect[s] interstate commerce is on [the] . . . defendants, because they seek to compel arbitration.” *McConnell*, 849 So. 2d at 163. The “substantially affects” test, a homegrown Alabama creation, was first adopted by the Alabama Supreme Court in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759, 760–64 (Ala. 2000) (using the test after a careful discussion of *Lopez* and *Allied-Bruce*), but was abrogated by the U.S. Supreme Court in *Citizen’s Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003) (rejecting Alabama’s interpretation of the FAA’s reach in favor of the broader “affecting commerce” test).

174. *McConnell*, 849 So. 2d at 162. The Alabama Supreme Court conducted a de novo review of this finding and noted the following evidence that was before the trial court: McConnell purchased the Cadillac from GM Auction Department, located in Warren, Michigan, at an auction in Moody, Alabama. *Id.* When purchased, the vehicle had a Georgia certificate of title. *Id.* The owner, as listed on the title, was GMAC, Daniel, Dolores R., P.O. Box 55306, Birmingham, AL 35255. *Id.* The first lien holder was GMAC, PO Box 8101, Cockeysville, MD 21030. *Id.* The vehicle was transported from Georgia to Alabama to be sold. *Id.*

175. *Id.*

176. *Id.* The two cases that the *McConnell* court cited were: (1) *Hurst v. Tony Moore Imports, Inc.*, 699 So. 2d 1249, 1258 (Ala. 1997) (plurality opinion) (holding that the sale of used motor vehicles is per se an interstate transaction); and (2) *Jim Burke Automotive, Inc. v. McGrue*, 826 So. 2d 122, 129 (Ala. 2002) (distinguishing *Hurst* and applying the factors listed in *Sisters of the Visitation*).

177. *McConnell*, 849 So. 2d at 165.

178. *Id.* at 166.

interstate transaction.¹⁷⁹ Despite the application of what appears to be a more discerning group of five factors from *Sisters of the Visitation*, the *McConnell* court seemed to concentrate on the fact that Ms. Jackson paid cash for the Cadillac.¹⁸⁰ This appeared dispositive, notwithstanding extensive evidence of the deal's interstate character offered to the trial court and to the Alabama Supreme Court on de novo review.¹⁸¹

Justice See's *McConnell* dissent lays bare the result-oriented reasoning of the majority and offers evidence of one of the corners of this debate, which has warped state-law doctrines to achieve a hidden goal. To Justice See, *McConnell* was an easy case. Although there was ample evidence of the interstate character of the transaction, "the main opinion concludes that the transaction did not substantially affect interstate commerce because, it reasons, the sale from McConnell to Jackson was an in-state sale, for cash, between an in-state seller and an in-state buyer."¹⁸²

As Justice See argued, the majority's error, however, was legal rather than factual: "the main opinion applies the wrong test and therefore reaches an incorrect result."¹⁸³ Justice See offered a relatively comprehensive description of both the interstate commerce doctrine and the Federal Arbitration Act.¹⁸⁴ His ultimate conclusion: Alabama missed the point with its "substantial effects" test, announced in *Sisters of the Visitation*, and has since relied on a myopic view of the U.S. Supreme Court's decisions in Commerce Clause cases.¹⁸⁵ The test is not whether each individual

179. See *Hurst*, 699 So. 2d at 1258 (reasoning that the individual intrastate transaction was part of a broader class of interstate activities). This rule, reached by a plurality of the Alabama Supreme Court, was jettisoned some five years later when the Court returned to a multi-factor test for determining whether a transaction involved interstate commerce. See *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759, 764–66 (Ala. 2000) (listing as factors: citizenship, allocation of cost of service and materials, movement across state lines, tools and equipment, and degree of separability from other contracts).

180. *McConnell*, 849 So. 2d at 165–66 ("Here, it is undisputed that, although the vehicle was initially leased from GMAC, Kisha Jackson paid cash for the vehicle.").

181. *Id.* at 161–62.

182. *Id.* at 167 (See, J., dissenting).

183. *Id.* Incidentally, Justice See was ultimately proven right. The U.S. Supreme Court seized upon his dissents, making substantial note of them when it finally overrode the Alabama Supreme Court's "substantial effects" test. See *Citizen's Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) ("Echoing Justice See's dissenting opinion, petitioner contends that the decision below gives inadequate breadth to the 'involving commerce' language of the [FAA]. We agree.").

184. See *McConnell*, 849 So. 2d at 168–72 (See, J., dissenting).

185. *Id.* at 171. In *Sisters of the Visitation*, the Alabama Supreme Court supports its test by turning to *United States v. Lopez*, 514 U.S. 549, 567–68 (1995), where the Supreme Court overturned portions of the Gun-Free School Zones Act as unconstitutional. *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759, 760–64 (Ala. 2000). *Lopez*, as Justice See notes, "was not a new standard" of determining a statute's constitutionality. *McConnell*, 849 So. 2d at 171 (See, J., dissenting).

transaction has a substantial effect on interstate commerce, but whether the “aggregate nationwide participation in the activity” substantially affects interstate commerce.¹⁸⁶

Interestingly, Justice See’s dissent and criticism of this moribund line of cases says much about why compulsory arbitration is a danger to the proper use of classic state doctrine in the contracts field. This line of cases is a testament to Alabama’s hostility towards arbitration. Justice See notes five cases since *Sisters of the Visitation* in which the Alabama Supreme Court has improperly denied arbitration based on its skewed “substantial effects” test.¹⁸⁷ *McConnell* is severely wounded by *Buckeye*, but also by *Citizens Bank v. Alafabco, Inc.*, which disapproves of it to the extent it relied on the “substantial effects” test.¹⁸⁸ Thus as precedent, *McConnell* has little value. Though it was not reversed, it has been effectively overruled by *Buckeye* because it denied the applicability of the FAA to an interstate transaction and it addressed the full agreement rather than the arbitration agreement alone.¹⁸⁹

McConnell and many of the other Alabama decisions beg the question of whether the court has lessened its hostility for arbitration or has sought to avoid muddying the waters of contract law by misapplying the interstate commerce test. What would settle the area is for the Alabama Supreme Court to recognize the FAA’s policy and learn to live with it. Inherent in this recognition is restraint, where the entire contract is challenged as adhesive or unconscionable with a concomitant offering up of the issue to the arbitrator. *Buckeye* is clear that if Alabama wishes to use these doctrines in a state court venue it must be because the challenge is directed specifically at the process and substance that led to the arbitration clause itself.¹⁹⁰ A general sense of unfairness or a finding of contract unconscionability is not enough after *Buckeye*.¹⁹¹

186. *McConnell*, 849 So. 2d at 172 (See, J., dissenting).

187. *Id.* at 171 (citing *Aronov Realty Brokerage, Inc. v. Morris*, 838 So. 2d 348, 360 (Ala. 2002); *Liberty Nat’l Life Ins. Co. v. Douglas*, 826 So. 2d 806, 810 (Ala. 2002); *Ex parte Kamps*, 826 So. 2d 819, 824 (Ala. 2002); *Alternative Fin. Solutions, LLC v. Colburn*, 821 So. 2d 981 (Ala. 2001); *Ex parte Learakos*, 826 So. 2d 782, 786 (Ala. 2001)). In 2003, the Court overruled Alabama’s “substantial effects” test. *Citizen’s Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003) (per curiam). It should come as no surprise that the Alabama Supreme Court was not particularly happy with *Alafabco*. See, e.g., *Service Corp. Int’l v. Fulmer*, 883 So. 2d 621, 624 (Ala. 2003) (stating that the Court’s decision was not a novel statement of congressional Commerce Clause power).

188. *Alafabco, Inc.*, 539 U.S. at 55, 58.

189. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210 (2006).

190. *Id.*

191. *Id.*

B. California Cases

Unlike the manipulation that is readily apparent in many of the Alabama cases, California courts have been more discerning. They apply a classic form of unconscionability and use it to police the substance of all contracts. The California definition of the term of adhesion is “a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”¹⁹² Second, if the contract is adhesive, the court considers whether (1) the contract or the particular provision does not “fall within the reasonable expectations of the weaker . . . party”;¹⁹³ and (2) the contract or provision, even if consistent with the weaker party’s expectation, is on the whole “oppressive or ‘unconscionable.’”¹⁹⁴ If either factor is present, then a court can, under established rules of law, elect not to enforce the agreement.¹⁹⁵

The *Armendariz* case was brought by Marybeth Armendariz and a co-plaintiff (Armendariz) who were employees of Foundation Health Psychare, Inc. (Foundation).¹⁹⁶ Armendariz was a supervisor for about a year when her position was eliminated.¹⁹⁷ The plaintiffs alleged that during their employment they were the victims of sexual harassment and were discriminated against because of their heterosexuality.¹⁹⁸

Armendariz alleged violations of the California Fair Housing and Employment Act (FEHA)¹⁹⁹ and filed a complaint in the California District

192. *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) (quoting *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Dist. Ct. App. 1961)).

193. *Id.* at 689 (quoting *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981)).

194. *Id.* (quoting *Graham*, 623 P.2d at 173). Interestingly, the California Supreme Court, to this point, has failed to offer a workable definition of the term ‘unconscionable’. Moreover, note the language, “*reasonable expectations* of the weaker . . . party” that the court uses. *Id.* (emphasis added) (quoting *Graham*, 623 P.2d at 172).

195. *Armendariz*, 6 P.3d at 689. The legislature has stated that “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” CAL. CIV. CODE § 1670.5(a) (West 1985).

196. *Armendariz*, 6 P.3d at 669.

197. *Id.* at 674–75.

198. *Id.* at 675. There is no evidence in the record that Armendariz was specifically targeted because she was a heterosexual. It seems more likely that her sexual orientation was included to trigger the provisions of the California Fair Employment and Housing Act (FEHA), CAL. GOV. CODE §§ 12900–12993 (West 2005). This is more plausible since the California Supreme Court notes that same-sex harassment and discrimination is unlawful under the FEHA. *See Mogilefsky v. Superior Court*, 26 Cal. Rptr. 2d 116 (Ct. App. 1993) (allowing a sexual harassment cause of action against a member of the same sex under CAL. GOV. CODE § 12940).

199. CAL. GOV. CODE §§ 12900–12993.

Court despite a mandatory arbitration clause.²⁰⁰ There were actually two arbitration clauses, one in the application of employment filled out by Armendariz prior to her hire, the second in the employment agreement written by Foundation and signed by both Armendariz and Foundation.²⁰¹ She alleged unfairness because the contract required that she arbitrate any wrongful termination claim, but left Foundation free to litigate.²⁰²

The trial court held that the arbitration agreement was unconscionable.²⁰³ The California Court of Appeal disagreed with the trial court; it held that the specific provision concerning the limitation of damages was unconscionable,²⁰⁴ but the rest of the agreement was deemed conscionable if the offending provision were stricken.²⁰⁵

The California Supreme Court applied a two-prong analysis to determine whether the arbitration agreement was unconscionable.²⁰⁶ The court applied a fairly conventional test of unconscionability with two aspects: (a) procedural unconscionability and (b) substantive unconscionability.²⁰⁷ Procedural unconscionability focuses on “oppression” or “surprise” in the bargaining, while substantive unconscionability focuses on “overly harsh” or “one-sided” results.²⁰⁸ To

200. *Armendariz*, 6 P.3d at 675.

201. *Id.*

202. *See id.* (noting that the employees argued that the arbitration agreement was unconscionable because it was not bilateral). The arbitration clause, in relevant part, is as follows:

I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at section 1280 et seq. or any successor or replacement statutes. I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants or employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief.

Id.

203. *Id.* The California Supreme Court also discusses the similarities and differences between the FAA and the California Arbitration Act (CAL. CIV. PROC. CODE § 1280 (West 1992)) as an integral part of this analysis. For that discussion, see *Armendariz*, 6 P.3d at 675.

204. *Id.*

205. *Id.* at 674.

206. *Id.* at 689. The trial court applied this same two-prong analysis in its determination, which is derived from *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172–73 (Cal. 1981). *Id.*

207. *Armendariz*, 6 P.3d at 690.

208. *Id.* Consider, however, that the court states, “[e]ssentially a sliding scale is invoked which

prevail, the aggrieved must show that both factors are present, but where there is ample evidence of procedural unconscionability, a correspondingly smaller amount of substantive unconscionability is necessary and vice versa.²⁰⁹

While the court's rapid fire conclusions make it appear eager to invalidate the arbitration provision, they seemed to highlight the court's desire to avoid the criticism that an arbitration agreement was singled out as a suspect provision under the common-law rules.²¹⁰ The court moved inexorably, relying on well-beaten paths well marked by substantial judicial precedent, legislative authority, and traditional notions of equity.²¹¹

To begin, the court observed, "[t]here is little dispute" the deal is adhesive.²¹² Especially noteworthy was an observation that echoed the *Lockwood* court's observation about relative bargaining power. The economic pressure exerted on an individual in search of a job to sustain self and family is significantly greater than that of the employer who may have the luxury of choosing from a large pool of applicants.²¹³ While California policy encourages arbitration, its use as a leverage device by an employer is not favored and may require a court to intervene to restore fairness.²¹⁴

As to the substantive result, the court found a sufficient "lack of mutuality" as to call the result unfair.²¹⁵ While the court did not hold that every agreement must produce symmetrical results, it held that this result was so asymmetrical that it required some objective, legitimate business need to justify the asymmetry.²¹⁶ That business need must be something more than the simple desire of an employer to have a friendly forum.²¹⁷

disregards the regularity of the procedural process of the contract formation . . . in proportion to the greater harshness or unreasonableness of the substantive *terms* themselves." *Id.* (emphasis added) (quoting 15 WILLISTON ON CONTRACTS § 1763A, at 226–27 (3d ed. 1972)).

209. *Id.* at 690.

210. The United States Supreme Court has ruled that states cannot "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The California court contrasted its view with that of an Alabama case, which "flies in the face" of *Doctor's Associates. Armendariz*, 6 P.3d at 693.

211. See *Armendariz*, 6 P.3d at 690–94 (following the reasoning of *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997); *Kinney v. United HealthCare Servs, Inc.*, 83 Cal. Rptr. 2d 348 (Ct. App. 1999)).

212. *Armendariz*, 6 P.3d at 690.

213. Some of the downsides of arbitration include waiver of a trial by jury, limited discovery, and limited judicial review; the upside is efficiency, informality, and lower cost. *Id.*

214. *Id.* at 690–91 (quoting *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 927 (Cal. 1997)).

215. *Id.* at 691. The court makes no mention of the procedural unconscionability in the arbitration agreement. Clearly, this is to be inferred from the adhesive nature of the contract.

216. *Id.* at 692.

217. *Id.* Interestingly, the *Stirlen* court noted, the terms of the arbitration clause were outrageous enough "as to appear unconscionable according to the mores and business practices of the

The court relied on two previous decisions, *Stirlen v. Supercuts, Inc.*²¹⁸ and *Kinney v. United HealthCare Services, Inc.*,²¹⁹ to show that its concern was with the asymmetry or lack of mutuality rather than a novel treatment for arbitration clauses.²²⁰ In both cases the court had held a unilateral arbitration agreement between an employer and an employee to be substantively unconscionable for symmetry.²²¹ Since Foundation offered no legitimate business need beyond conscious advantage-taking, the court concluded that the arbitration agreement was substantively unconscionable and, therefore, unenforceable.²²² A substantial amount of the opinion works toward dispelling the notion that arbitration was being singled out.²²³

Prior to *Buckeye*, any fair reading of section 2 of the FAA would have led to the conclusion that California had treated compulsory arbitration with the respect and dignity required by the spirit of the Act. In holding this arbitration agreement substantively unconscionable, the *Armendariz* court considered only this agreement and did not pass judgment on arbitration generally.²²⁴ The essence of the holding was simply that the arbitration agreement lacked mutuality and was therefore substantively unconscionable unless that lack of mutuality was justified with an objective, legitimate business need.²²⁵ “It does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee’s expense.”²²⁶

After *Buckeye*, a predicate question would need to be asked: did the court consider the arbitration provision itself, or did it make its determination on the whole contract? The California Supreme Court made it clear that under California contract doctrine it would not be possible to separate the unconscionable arbitration provision from the rest of the

time and place.” *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965)).

218. *Stirlen*, 60 Cal. Rptr. 2d at 138.

219. *Kinney v. United HealthCare Servs., Inc.*, 83 Cal. Rptr. 2d 348 (Ct. App. 1999). The *Kinney* court is particularly harsh to arbitration. *See id.* at 354 (“Given the basic and substantial nature of the rights at issue, we find that the unilateral obligation to arbitrate is itself so one-sided as to be substantively unconscionable.”).

220. *Armendariz*, 6 P.3d at 690–93.

221. *Stirlen*, 60 Cal. Rptr. 2d at 152; *Kinney*, 83 Cal. Rptr. 2d at 354.

222. *Armendariz*, 6 P.3d at 692.

223. *Id.* at 692–94. It appears that the California court wants to avoid singling out arbitration as a suspect class and discourages this as an interpretation of their position by using the Alabama cases as a “contra positive.” *Id.* at 692–93.

224. *See id.* at 693 (stating the court’s view that “enforcing a ‘modicum of bilaterality’ in arbitration agreements” does not single out arbitration as a suspect class).

225. *Id.* at 692–93.

226. *Id.* at 693.

contract, thereby saving other parts of the agreement.²²⁷ But it is clear that this determination, coming before the decision in *Buckeye*, was more a statement of general principle analogized from refusals to separate illegal provisions from a contract while enforcing the rest.²²⁸ The court considered the challenge to be one to the arbitration clause specifically.²²⁹ There were complications involved in this approach. It was the unconscionable actor's request that the conscionable provisions be saved even though it was Foundation's overreaching that had put them at risk.²³⁰ *Buckeye's* safe harbor in severability will offer the California court a tender trap: accept severability inconsistent with traditional use or risk being overturned for dealing with the entire contract rather than the severable provision.

Despite California's tidy, coherent, and entirely state-centered adhesion doctrine, the *Armendariz* holding is suspect. Not because of its substance, but because its substance is irrelevant if the arbitration clause is folded into a broader contract that deals with more than arbitration.²³¹ This case, by happenstance (as it was a stand-alone agreement), can be said to survive *Buckeye*.²³² This remains true only so long as the court hews to the very narrow view of a contract as the minimum substance needed to express a binding term. This seems completely fortuitous, unintended by the Supreme Court, and certainly not contemplated by Congress when enacting the FAA in 1925.

This view can be explored in the second case from California, *Discover Bank v. Superior Court*.²³³ Christopher Boehr first obtained a Discover Card in April 1986.²³⁴ Pursuant to the change-of-terms provision in the contract, Discover added an arbitration clause in July 1999.²³⁵ Built into

227. See generally *id.* at 695–99 (finding that the contract could not be severed because the agreement contained more than one unlawful provision, and unconscionability permeated the entire agreement).

228. See *id.* at 695–96 (observing that the court could find no “published cases in California that address directly . . . what it means for an agreement to be ‘permeated’ by unconscionability”).

229. *Id.* at 674.

230. *Id.* at 674, 695.

231. See *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210 (2006) (holding that challenges to the contract as a whole must go to the arbitrator).

232. See *id.* at 1210 (holding that stand-alone agreements can be considered by the court).

233. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). The Real Party in Interest was Christopher Boehr.

234. *Id.* at 1103.

235. *Id.* The arbitration clause read in part: “Notice of Amendment . . . We are adding a new arbitration section which provides that in the event you or we elect to resolve any claim or dispute between [us] by arbitration, neither you nor we shall have the right to litigate that claim in court or to have a jury trial on that claim. This arbitration section will not apply to lawsuits filed before the effective date.” *Id.* In addition, the arbitration clause read: “Your Account [sic] involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act (FAA).” *Id.* at 1104.

the clause was a waiver of any class-action arbitration: “[T]he arbitration clause precluded both sides from participating in classwide arbitration, consolidating claims, or arbitrating claims as a representative or in a private attorney general capacity”²³⁶ Acceptance of the new provision was not automatic.²³⁷ As Discover authored the addition, a cardmember was deemed to have accepted when the member (a) did not notify Discover in writing of an objection to the provision and (b) continued to use the Discover account.²³⁸

On August 15, 2001, Boehr filed a putative class-action complaint against Discover, alleging breach of contract and violation of the Delaware Consumer Fraud Act.²³⁹ Boehr contended that Discover breached the cardholder agreement by imposing a \$29 late fee for payments that were received on the due date but after an undisclosed cut-off of 1:00 p.m.²⁴⁰

Pursuant to the arbitration clause and the class action waiver, Discover moved to compel arbitration of Boehr’s individual claims and to dismiss the class action.²⁴¹ Boehr opposed the motion, claiming that the class-action waiver was unconscionable, and therefore unenforceable under California law.²⁴² The trial court concluded that Delaware law applied based on a choice-of-law analysis, and that enforcing the class-action waiver under Delaware law “would violate a fundamental public policy under California law as articulated in *Szetela*.”²⁴³ Ultimately, the trial court severed the offending class-action waiver from the cardholder agreement and enforced the rest.²⁴⁴ Discover appealed.²⁴⁵

This severance points the way to the *Buckeye* safe harbor but also confines California contract principles. The California Court of Appeal

236. *Id.* at 1103. The provision, as written and distributed to Discover’s customers, read: “Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other cardmembers with respect to other accounts, or arbitrate any claim as a representative or member of a class or in a private attorney general capacity.” *Id.*

237. *Id.* at 1104.

238. *Id.*

239. *Id.* The Delaware Consumer Fraud Act is codified at DEL. CODE ANN. tit. 6, §§ 2511–2527 (2005). The act prohibits, in part, misrepresentations “of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale, lease or advertisement of any merchandise.” *Discover Bank*, 113 P.3d at 1104 (quoting DEL. CODE ANN. tit. 6, § 2513 (2005)).

240. *Discover Bank*, 113 P.3d at 1104. Boehr also alleged that Discover imposed periodic finance charges on new purchases when the payment was received on the due date but after the phantom 1:00 p.m. deadline. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* (referring to *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 866–68 (Ct. App. 2002) (holding that an arbitration class-action waiver is unconscionable and unenforceable)).

244. *Id.* at 1104–05.

245. *Id.* at 1105.

reversed the trial court and held that section 2 of the FAA²⁴⁶ preempted *any* California courts from passing on the class action waiver's propriety.²⁴⁷ Its analysis progressed as follows: (1) A valid arbitration agreement was formed;²⁴⁸ (2) the FAA preempts states from refusing to enforce valid arbitration agreements;²⁴⁹ (3) California has a well-founded policy supporting class actions;²⁵⁰ (4) the FAA preempts that policy;²⁵¹ and (5) *Szetela*, failing to discuss federal preemption, is incomplete and not persuasive.²⁵²

The California Supreme Court disagreed and reversed.²⁵³ Its review of the FAA, the relevant federal case law, and the relevant California case law and policy led it to the conclusion that the class-action waiver was unconscionable and unenforceable under California's general contract law, which, in turn, did not offend the FAA.²⁵⁴ The court's discussion followed these steps: (1) discussion of California's policy on class actions and class action arbitration; (2) enforceability of class-action waivers; (3) FAA preemption; and (4) the choice-of-law issue.²⁵⁵ For present purposes, the focus will be on the first two steps to show that the court's approach was

246. Federal Arbitration Act (FAA), 9 U.S.C. § 2 (2000). Section 2 provides, in part, that a written arbitration provision in a contract "evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

247. *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393, 403 (Ct. App. 2003), *rev'd*, 113 P.3d 1100 (Cal. 2005) ("[W]here there is a valid arbitration agreement governed by the FAA, California's public policy regarding class action waivers has been preempted by section 2 of the FAA."). As will be discussed later, this result is puzzling since the FAA provides that arbitration provisions in contracts can be unenforceable for reasons of a state's general contract law. The Court of Appeal noted this. *Id.* at 401.

248. *Id.* at 401–03 ("[T]he trial court concluded a valid arbitration agreement had been formed.").

249. *Id.* at 403.

250. *Id.* at 403–04 ("[T]he right to seek class action relief in consumer cases has been extolled by California courts.") (quoting *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712 (Ct. App. 2001)).

251. *Id.* at 404–07. The Court of Appeal relied heavily on *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) and on *Volt Info. Scics., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989) to arrive at this conclusion.

252. *Discover Bank*, 129 Cal. Rptr. 2d at 405–06. In three paragraphs, *Szetela v. Discover Bank* laid out the federal policy of enforcing arbitration agreements. *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 866 (Ct. App. 2002). As that policy dictates, *Szetela* rested on the assumption that arbitration agreements, like any other contract, can be unenforceable for unconscionability. As such, there was no need, prior to the opinion in *Buckeye*, to discuss federal preemption because it would only apply if California targeted arbitration as a suspect class and discriminated accordingly. See, e.g., *Citizen's Bank v. Alafabco, Inc.*, 539 U.S. 52, 55, 58 (2003) (reversing an Alabama decision that took a narrow view of the FAA's reach and refused to enforce an arbitration agreement).

253. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1118 (Cal. 2005).

254. *Id.* at 1109–10.

255. *Id.* at 1105–18.

sound and its conclusion that the FAA did not preempt a finding of unconscionability was fully justified.

Before discussing the substantive issues, the California Supreme Court began with the state's public policy justifications for class actions.²⁵⁶ That policy is:

A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation. The problems which arise in the management of a class action involving numerous small claims do not justify a judicial policy that would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity.²⁵⁷

This is a powerful statement about the high stakes involved in large volume consumer transactions where the individual amounts are small. There is a great deal of profit to be made where the fee, though small, is collected from thousands or even millions of customers.

The problem is exacerbated where the transaction appears highly adhesive. The forms are standard terms prepared by the savvy business and offered to the public, which is generally unknowing of the implications. The fee amount is not relevant until the fee is imposed, and the customer is stung with its imposition. With this economic picture in mind, the California courts have devised "the hybrid procedure of classwide arbitration."²⁵⁸ Thus, California has a strong public policy supporting class actions and their arbitration analogue.²⁵⁹ Most importantly, the class action device serves to punish corporations whose damage to the individual is small but substantial when individual injuries are aggregated.²⁶⁰

256. *Id.* at 1105–06.

257. *Id.* at 1105 (quoting *Blue Chip Stamps v. Superior Court*, 556 P.2d 755, 759 (Cal. 1976)); see also *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971) (discussing the unfavorable position of consumers in modern society).

258. *Discover Bank*, 113 P.3d at 1106 (citing *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984) (creating class arbitration)).

259. This public policy, while important to the issue of the arbitration provision's enforceability, will be doubly vital to the court's choice-of-law analysis, as the California Supreme Court notes. See *Discover Bank*, 113 P.3d at 1117–18 (discussing the potential secondary conflict between the California public policy and the law of another state).

260. *Id.* at 1105–06; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action . . . is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action . . .") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

The court applied the California adhesion and unconscionability principles to the “bill stuffer” arbitration amendment.²⁶¹ The court concluded that, in this context, “an element of procedural unconscionability is present.”²⁶² Turning to the substantive component, the court noted that adhesion contracts are “generally enforced.”²⁶³ In isolation, the fact that one party has little opportunity or power to bargain does not require a finding of unconscionability. However, when the terms of the adhesion contract also violate public policy, a court may see the amalgam of procedural and substantive unfairness as offensive and decline to enforce the offending terms.²⁶⁴ The California Supreme Court used this reasoning to conclude that the class-action arbitration waiver violated a fundamental California public policy and was therefore unenforceable.²⁶⁵

The class-action waiver meant that there could be no aggregation of damages and that individual lawsuits or even arbitrations to challenge the fee were impracticable. By limiting cardholders to solitary suits, the agreement effectively excused Discover from any liability, as no individual would bring an action for his own paltry amount. Discover’s ingeniously drafted couplet of clauses amounted to a “‘get out of jail free’ card [that] compromis[ed] important consumer rights.”²⁶⁶

This surely was not what Congress intended with the FAA. Instead of an important alternative to traditionally more expensive litigation, arbitration was being used as part of a scheme to deny a hearing to the claimants. Even more troubling, to achieve this result, the court of appeal had managed to single out for special treatment a clause which effectively denied arbitration as a remedy to these plaintiffs. In doing so they had done what Congress sought to prohibit: the treatment of arbitration in a way

261. *Discover Bank*, 113 P.3d at 1108 (citing *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 866, 867 (Ct. App. 2002)). The *Szetela* opinion, for the curious, contains a more comprehensive discussion of California’s unconscionability doctrine. See *Szetela*, 118 Cal. Rptr. 2d at 867–68.

262. *Discover Bank*, 113 P.3d at 1108.

263. *Id.*

264. *Id.* The substantive component’s essence is being “unfairly one-sided.” *Id.* One variation, among many, is violating a fundamental public policy for one party’s gain at the expense of the other. *Id.* at 1108–09.

265. *Id.* at 1108–10. A class action waiver, in this context, operates “effectively as exculpatory contract clauses that are contrary to public policy. . . . All contracts ‘which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.’” *Id.* at 1108 (quoting CAL. CIV. CODE § 1668 (West 2005)).

266. *Discover Bank*, 113 P.3d at 1108 (quoting *Szetela*, 118 Cal. Rptr. 2d at 868). See *Discover Bank*, 113 P.3d at 1109 (“Although styled as a mutual prohibition . . . it is difficult to envision the circumstances under which the provision might negatively impact Discover . . .” (quoting *Szetela*, 118 Cal. Rptr. 2d at 867)).

inconsistent with the state's general law of contract.²⁶⁷

C. Federal Preemption of California Rules Against Class-Action Waivers

The California Supreme Court, as an initial matter, summarized the court of appeal's opinion below:

The Court of Appeal did not dispute the conclusion[] . . . that, at least under some circumstances, a class action waiver would be unconscionable The court concluded, however, that when class action waivers are contained in arbitration agreements, California law prohibiting such waivers is preempted by section 2 of the FAA.²⁶⁸

It then turned to general principles of enforcing arbitration agreements.²⁶⁹ Arbitration agreements, as a matter of California and federal policy, are generally enforced as "valid [and] irrevocable . . . save upon such grounds as exist at law or in equity for the revocation of any contract."²⁷⁰ The court noted that the FAA is silent on class-action waivers; therefore, conclusions on the issue of federal preemption must derive from U.S. Supreme Court opinions.²⁷¹

The court of appeal found that declining to enforce the arbitration agreement would undermine federal policy of "ensur[ing] that private agreements to arbitrate are enforced according to their terms."²⁷² The court of appeal, relying on U.S. Supreme Court statements taken out of context, extrapolated a faulty rule that private agreements should be enforced according to their terms, even if they violate public policy.²⁷³ The California Supreme Court, however, noted that "[n]othing in [U.S. Supreme Court opinions] suggests that state courts are obliged to enforce contractual

267. Federal Arbitration Act (FAA), 9 U.S.C. § 2 (2000).

268. *Discover Bank*, 113 P.3d at 1110 (citation omitted).

269. *Id.*

270. *Id.* (quoting *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000)).

271. *Id.* The Court of Appeal relied heavily on *Perry v. Thomas*, 482 U.S. 483, 491 (1987), where the U.S. Supreme Court held that section 2 (of the FAA) preempted a provision of the California Labor Code that authorized an action to collect wages despite any private arbitration agreement to the contrary. *Discover Bank*, 113 P.3d at 1110–11.

272. *Discover Bank*, 113 P.3d at 1112 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)).

273. *Id.* To have an idea of the degree to which the court of appeal missed the mark, consider how it structured its opinion. At its beginning, the opinion is flawed, for it presumes that a valid arbitration agreement was formed. *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393, 403 (Ct. App. 2003), *rev'd*, 113 P.3d 1100 (Cal. 2005).

terms even if those terms are found to be unconscionable or contrary to public policy.”²⁷⁴ And, as such, federal public policy is not offended by declining to enforce the class-action waiver.²⁷⁵

Now, by virtue of the holding in *Buckeye*, the California court cannot vindicate its policy favoring class actions.²⁷⁶ Nor can it police complex agreements for the basic fairness it demands in contracts, at least where the challenge is to the entire contract. Instead, it must defer to the arbitrator as the decision-maker of first instance because, ironically, there is more at stake than the arbitration procedure alone. The very breadth and scope of the agreement and its implications take it out of the hands of the common-law courts, which developed those concepts and (as demonstrated above in California, at least) has applied them in an even-handed manner. There has been no apparent or actual affront to the dignity or viability of arbitration.

To achieve a different result and thereby to vindicate these policies after *Buckeye*, all the court has to do is narrowly confine the challenge to the arbitration clause itself. The court becomes the decision-maker of first instance in this narrowly-tailored challenge. Notions of inclusiveness (defining all the parties' legal obligations as a single contract) will be the victims in this use of the *Buckeye* rule. While most courts might seek out its context and purpose to understand an individual term,²⁷⁷ this is to be avoided if the challenge is to a compulsory arbitration clause. This may be an unintended consequence of *Buckeye*. This is a real and very substantive change in contract law that may be afoot as courts struggle to apply the *Buckeye* rule in a manner consistent with classic doctrines.

274. *Discover Bank*, 113 P.3d at 1112.

275. *Id.* Discover also argued that section 4 of the FAA (requiring enforcement of agreements according to their terms) obliges the court to enforce the class-action waiver. *Id.* This is unpersuasive since section 4 is more about the procedural elements of the arbitration agreement, and there is nothing in the text itself or in case law, to suggest that section 4 overrides section 2. *Id.* Relying on two U.S. Supreme Court opinions, Discover continued to argue for federal preemption. Discover cited *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion). *Discover Bank*, 113 P.3d at 1113–14. In both instances, the reliance was misplaced. In *Gilmer*, the U.S. Supreme Court offered nothing to support “the proposition that the FAA categorically precludes states from enforcing arbitration-neutral rules that prohibit consumer class action waivers in some circumstances.” *Id.* *Bazzle* is more important for what the U.S. Supreme Court did not hold: “The court did not address whether a state court can, consistent with the FAA, hold a class action waiver appearing in a contract of adhesion for arbitration unconscionable or contrary to public policy, as part of an arbitration-neutral law that finds all such waivers unenforceable.” *Id.* at 1115.

276. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210 (2006).

277. See e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968) (requiring that the meaning of a term be interpreted in light of all of the circumstances of its use); *Frigalment Imp. Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (examining the intent of both parties upon agreeing to the word “chicken” in a sales contract).

D. The Montana Approach

John Iwen was a practicing attorney in Great Falls, Montana.²⁷⁸ In 1995, Iwen decided to acquire a toll-free number for his solo practice.²⁷⁹ Iwen got the number from U.S. West Direct and subsequently went about updating his practice's business identity and informing others of the change, ordering new letterhead.²⁸⁰ When the new directory was delivered, Iwen discovered that his numbers had been omitted.²⁸¹ He sent a letter to the customer relations manager for U.S. West Direct concerning the errors. He received an invoice, but no satisfaction.²⁸² Iwen continued his letter writing campaign.²⁸³ In response, Iwen received a disconnection notice.²⁸⁴ Iwen filed suit against U.S. West Direct on March 21, 1996 in Montana state court for damages for the negligent construction of the advertisement, infliction of emotional distress, and punitive damages.²⁸⁵ U.S. West Direct moved to stay litigation and compel arbitration pursuant to a clause in the advertising contract, which the district court granted.²⁸⁶ In its order, the trial court found the arbitration provision to be "valid."²⁸⁷ From that order, Iwen appealed to the Montana Supreme Court.²⁸⁸

The Montana Supreme Court determined that the sales order, containing the arbitration agreement, was adhesive. "The record clearly establishes that U.S. West Direct's directory advertising order is a standardized form agreement, the terms of which Iwen was unable to negotiate and for which his only choice was to accept or reject."²⁸⁹

The court concluded that the contract was invalid because it (1) lacked mutuality of obligation, (2) was one-sided, and (3) created terms

278. Iwen v. U.S. West Direct, 977 P.2d 989, 991 (Mont. 1999).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 992.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 995. The court offers this language: "[B]ecause this agreement is one of adhesion, we are justified in viewing this contract from the perspective of the consumer." *Id.* Although somewhat cryptic, this language is central to the court's ultimate analysis. By offering this language, the court made clear that Iwen's sophisticated status as a practicing attorney did not figure into the analysis whatsoever. Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 123 P.3d 237, 241-42 (Mont. 2005). And, therefore, although Iwen probably understood the import of the arbitration provision, the law assumes he is no different than the ordinary contracting party.

unreasonably favorable to the drafter.²⁹⁰ Despite previous reversals of its decisions in this area,²⁹¹ the court was undeterred:

Accordingly, our application of general principles that exist at law or in equity for the revocation of any contract leads us to conclude that the arbitration provision at issue in this case is unconscionable. Our application of Montana law regarding unconscionability does not undermine the right to arbitrate which is, by the very language of the Federal Arbitration Act, intended to encompass only those arbitration agreements that are not tainted by fraud, duress, or unconscionability.²⁹²

While this was a neat statement of the apparent policy of section 2 of the FAA, it now must pass the *Buckeye* test. This Montana approach seems unsound. Even though the court resisted opining about the agreement as a whole, it must conform to the new *Buckeye* statement that arbitration agreements can be declared unconscionable by the court of first instance only if the inquiry is limited to that arbitration provision. So long as the court confines its holding to the arbitration clause alone and holds that it specifically is adhesive, it may test the provision as it would test any other contract provision under Montana law. In sum, while the holding that a lawyer who reads and agrees to the arbitration provision may still claim it to be an adhesive and invalid contract seems a bit odd, it is sound *Buckeye* reasoning. That predicate question of who shall decide does not much impact the substantive doctrine of adhesion and unconscionability. This was also the stated intent of *Buckeye*.²⁹³

290. *Iwen*, 977 P.2d at 996. The court was, however, quick to note that “this does not mean arbitration agreements must contain mutual promises that give the parties identical rights and obligations, or that the parties must be bound in the exact same manner.” *Id.*

291. *E.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (reversing the Montana Supreme Court's holding that state law did undermine the FAA).

292. *Iwen*, 977 P.2d at 996. In order to comply with the U.S. Supreme Court's opinions on the FAA, a state court is required to recite this incantation, which is the legal version of a voodoo spell designed to keep evil spirits away. As the U.S. Supreme Court has said many times, a state court may decline to enforce an arbitration agreement so long as it does so under its contract law generally. *See Casarotto*, 517 U.S. at 686 (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of *any* contract.” (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (internal quotation marks omitted))). With such a loop hole, imagine what a court hostile to arbitration could do.

293. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006).

CONCLUSION

Commerce changes. Practices as well as products change as sellers seek the competitive advantage. When standard forms evolve they tend to evolve in ways that favor the seller-drafter as he continues to seek competitive advantage. When that evolution outstrips the pace of expectations brought to the transaction by the buyer-consumer, there is a dissonance. When that dissonance is pronounced, the gap between reasonable expectations and competitive advantage-taking grows wide, and the time-honored presumption of assent should fail.

What we can do is treat every contract clause in an even-handed manner, searching out unfairness with equal diligence in all agreements, but in no case singling out arbitration clauses for heightened scrutiny. What is grossly unfair, or what was imposed as a product of unfair surprise, still amounts to an absence of a genuine bargained-for exchange. This is as true for a term imposing arbitration as it is for any other term. Assuming the clause passes this muster, no distaste for arbitration can justify refusal to enforce the term in the face of the FAA. The FAA should be seen as preempting only those challenges that go to the entire contract rather than those that challenge the compulsory arbitration provision itself. While the California cases demonstrate the correct approach, both the Montana and Alabama approaches raise the risk of reversal. Other courts should not fear to tread where the California courts have blazed the trail. There is vast room in the common-law doctrines of adhesion and unconscionability to accommodate the public policy of any jurisdiction, so long as it is spurred by a genuine commitment to clean bargains and hews closely to the *Buckeye* requirement of considering only those challenges that reach out for the arbitration clause itself. Although we can expect dislocations in substantive contract law in the areas of severability and integration, this does not diminish the need to strive for the *Buckeye* safe harbor as it is far too late to hope for an overturning of *Southland Corp. v. Keating*. The state courts will have to make do.