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Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers

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MANDATORY ARBITRATION OF CONSUMER DISPUTES:

A PROPOSAL TO EASE THE FINANCIAL BURDEN ON LOW-INCOME CONSUMERS

JULIA A. SCARPINO*

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INTRODUCTION

Members of the legal community have long heralded alternative dispute resolution (“ADR”)¹ as a method superior to litigation for resolving contractual disputes.² Pre-dispute arbitration is a type of ADR³ in which parties who enter into a contract waive all rights to sue in favor of a single hearing with a private judge.⁴ Advocates argue arbitration is a more expedient process than litigation.⁵ Arbitration has simpler procedural and evidentiary rules than litigation,⁶ and arguably provides feuding parties with a less hostile method of resolving their differences.⁷ In fact, arbitration can be a very effective method of resolving disputes, especially between parties with equal bargaining power, such as businesses.⁸

Today, many consumer contracts, those between a consumer and a business entity for the sale or lease of goods and services, contain an arbitration clause.⁹ However, when consumers enter into a contract with a business entity, they are often unaware that their contracts

1. See Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727, 729 (2001) (including negotiation, mediation and arbitration as alternatives to litigation).

2. See Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 120 n.9 (1993) (noting that former Chief Justice Warren Burger was among the leading advocates of arbitration).

3. See Anthony Michael Sabino, *Ruling Promotes Arbitration, Warns of Costs*, N.Y. L.J., Jan. 5, 2001, at 1 (defining arbitration as the most developed and well-accepted branch of ADR).

4. See Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 198 (1998) (describing a pre-dispute arbitration agreement as a contract clause that obligates the parties to arbitrate, rather than litigate, any disputes, claims or controversies that may arise out of the contract).

5. See generally H.R. REP. NO. 97-542, at 13 (1982) (stating that one of the advantages of arbitration is that it is usually faster than litigation).

6. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (conceding that the rules governing arbitration are not as extensive or complex as those followed by federal courts).

7. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (noting that arbitration normally minimizes hostility and is less disruptive of business dealings between the parties).

8. See Green, *supra* note 2, at 119 (asserting that arbitration is a strong and effective dispute resolution tool when both sides knowingly and voluntarily agree to it); see also Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us'; Arbitration Clauses Block Consumers From Taking Companies to Court*, WASH. POST, May 22, 1999, at A1 (reporting that even the most ardent critics of mandatory arbitration acknowledge it can be effective when properly employed and structured).

9. See Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 302 (1999) (observing that arbitration clauses are fast becoming a standard part of consumer contracts).

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contain an arbitration clause.¹⁰ The clause may be included on one of many forms shipped with a product ordered by mail¹¹ or printed on the reverse side of a service agreement.¹² The consumer of average sophistication may not even understand the language of an arbitration clause, let alone its implications.¹³

One implication of mandatory arbitration is that generally, a consumer must pay substantially more to arbitrate than to litigate a dispute arising out of a contract for goods or services.¹⁴ In arbitration, a consumer must contribute to the cost of the arbitrator, hearing room, reporter and clerk.¹⁵ In some cases, arbitration can be cost prohibitive for a consumer seeking to resolve a dispute with a business.¹⁶ Courts have addressed this issue in employment disputes by ruling that arbitration agreements in employment contracts are unconscionable when they require an employee, forced to arbitrate, to also pay the arbitration fees.¹⁷ For example, in *Cole v. Burns*

10. See Mary Flood, *Arbitration Not Always Fair, Cheap for Parties in Dispute*, HOUS. CHRON., Apr. 11, 2001, at 21 (commenting that most adults with a credit card, long distance phone service or car insurance have signed away their rights to sue in an arbitration clause, whether or not they realize it).

11. See, e.g., *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 570 (N.Y. App. Div. 1998) (discussing a disputed arbitration clause a computer company included with warranty documents shipped to consumers with the merchandise they had purchased).

12. See, e.g., *Rollins v. Foster*, 991 F. Supp. 1426, 1429 (M.D. Ala. 1998) (describing the arbitration clause at issue as found in the "General Terms and Conditions" section on the back side of a contract for extermination services).

13. See *Brower*, 676 N.Y.S.2d at 571 (noting that computer purchasers claimed that the arbitration clause at issue was obscure, and a customer could not reasonably be expected to appreciate or investigate its meaning and effect); see generally Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 922 (1996) (observing that even if consumers read an arbitration agreement, they likely may not understand it).

14. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (finding that the total cost of arbitration is unlike anything a person would be required to pay in court).

15. See S. Leonard Scheff, *Cave Arbitration*, 30 ARIZ. ATT'Y 11, 11 (1994) (concluding that arbitration is much more expensive than litigation because in addition to a steeper filing fee, the parties must pay for many items provided at no cost to parties litigating in a courtroom).

16. See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (acknowledging that high arbitration costs could preclude a low-income consumer from resolving his or her claims arising out of a contract for goods or services).

17. See, e.g., *Cole*, 105 F.3d at 1469 (finding that an employer cannot require an employee to arbitrate all disputes and also require the employee to pay all or even part of the arbitrators' fees); see also *Shankle v. B-G Maint. Mgmt. of Colo.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (following *Cole* in finding unenforceable an arbitration agreement that prohibited the use of the judicial forum and required the employee to pay the arbitrator's fees); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., concurring) (finding an arbitration agreement that imposed costs of great magnitude on the employee out of step with statutory policy on arbitration).

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International Security Services,¹⁸ the Court of Appeals for the District of Columbia held that requiring an employee to pay excessive arbitration fees would make that employee unable to pursue any claims against his or her employer.¹⁹ Yet the courts have stopped short of making such a finding in consumer contracts by continuing to enforce those that require a consumer to arbitrate all claims and pay large arbitration fees, whether or not that consumer is financially able to do so.²⁰

This Comment argues that the result reached in *Cole* should apply equally to consumer contracts.²¹ Like mandatory arbitration for employees, mandatory arbitration is unfair to consumers who cannot afford to arbitrate because it locks them out of the judicial process altogether.²² Because the Supreme Court has routinely enforced the arbitration of consumer contracts even in situations of adhesion and unequal bargaining power,²³ this Comment will examine how the excessive cost of arbitration could bar consumers from vindicating their claims against businesses, a phenomenon the Supreme Court recently acknowledged in *Green Tree Financial Corp. v. Randolph*.²⁴

While at least one federal court has distinguished the argument that arbitration is cost prohibitive from the argument that arbitration is merely too expensive,²⁵ this Comment argues that the holding in *Cole* should apply to all consumer contracts, not just those in which

18. 105 F.3d 1465 (D.C. Cir. 1997).

19. See *id.* at 1484 (holding it unacceptable to require Cole, who had lost his job, to pay arbitrator's fees ranging from \$500 to \$1,000 per day or more in addition to administrative and attorneys' fees, because doing so would leave him unable to pursue his claims against his employer).

20. See, e.g., *Green Tree*, 531 U.S. at 91 (2000) (holding that the consumer seeking to invalidate the arbitration agreement in her contract with a mortgage lender failed to meet the burden of showing that arbitration would be prohibitively expensive); see also *Rollins v. Foster*, 991 F. Supp. 1426, 1438 (1998) (holding that the consumer challenging the arbitration clause in her contract for exterminating services had failed to prove that she was without recourse merely because she could not afford to arbitrate).

21. See *infra* part IV.

22. See *infra* part IV.B.

23. See, e.g., *Green Tree*, 531 U.S. at 84 (enforcing the arbitration agreement a low-income consumer was required to sign in order to receive financing for her mobile home); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (holding valid an arbitration agreement a consumer inherited, but did not sign himself, when he purchased a home from previous owners who had signed a lifetime "Termite Protection Plan" that contained the arbitration clause).

24. 531 U.S. 79 (2000); see *infra* part III.C.

25. See *Rollins*, 991 F. Supp. at 1437-38 (noting that a consumer complaining that arbitration fees are excessive can likely still access the arbitral forum, while a consumer arguing that he or she cannot afford to arbitrate will be locked out of any forum in which to resolve his or her dispute).

arbitration is cost prohibitive, so all consumers have equal access to arbitration and justice. Part II of this Comment explores the history of the Supreme Court's enforcement of mandatory arbitration, considers criticisms of the Court's policy on arbitration, and examines the actual costs involved in arbitration.²⁶ Part III analyzes three consumer cases in which courts have confronted the prohibitively high cost of arbitration in consumer contracts, but have failed to resolve the conflict in favor of low-income consumers.²⁷ Part IV analyzes the *Cole* employment contract dispute, in which the court resolved the issue of arbitration costs in favor of the low-income employee.²⁸ Part IV proposes requiring businesses to pay most arbitration expenses, as the *Cole* court required employers to do when they forced their employees to arbitrate, and considers other recommendations for low-income consumers faced with mandatory arbitration costs.²⁹ Finally, Part V concludes that a court-created rule applying *Cole* to consumer arbitration disputes offers the best solution for consumers forced to arbitrate.³⁰

II. HISTORICAL PERSPECTIVE: BACKGROUND ON ARBITRATION

A. Legislative and Judicial Interpretation

In 1925, Congress enacted the Federal Arbitration Act ("FAA")³¹ in response to the reluctance of American courts to enforce commercial arbitration agreements.³² Congress sought to hold arbitration agreements in the same esteem as other contracts, thus overturning common law decisions holding arbitration clauses revocable at will by either party to a transaction.³³ The FAA provides that a written agreement to arbitrate, in any contract involving commerce, shall be

26. See *infra* notes 31-93 and accompanying text.

27. See *infra* notes 94-181 and accompanying text.

28. See *infra* notes 182-204 and accompanying text.

29. See *infra* notes 205-38 and accompanying text.

30. See *infra* notes 239-45 and accompanying text.

31. 9 U.S.C.A. §§ 1-16 (2001).

32. See *Circuit City v. Adams*, 532 U.S. 105, 111 (2001) (noting that courts' hostility to arbitration agreements was a judicial disposition inherited from long-standing English practice); see also Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 351 (1996) (asserting that American courts disfavored arbitration clauses because they viewed them as devices implemented by businesses to deprive weaker parties of their rights).

33. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995) (explaining that, in enacting the FAA, Congress intended the courts to strictly enforce arbitration agreements and to place such agreements on the same footing as other contracts).

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“valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁴ The Supreme Court interprets the FAA to require that a challenge to the entire contract be made in arbitration.³⁵ However, the Court allows for a challenge to only the arbitration clause to be made in federal court.³⁶ Because the FAA makes enforceable a written arbitration provision in a contract involving commerce, the courts have interpreted the FAA to cover almost all consumer contracts.³⁷

In the last few decades, the Supreme Court reinterpreted the FAA evenly more broadly, adopting a pro-arbitration stance.³⁸ In the landmark case *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*,³⁹ the Supreme Court announced its “liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary”⁴⁰ and affirmed a Court of Appeals decision compelling the arbitration of a contractual dispute regarding the construction of a hospital addition.⁴¹ However, in a more recent case involving the arbitration of a termite prevention contract, *Allied-Bruce Terminix Companies v. Dobson*,⁴² the Supreme Court effectively erased any state protection of consumers from mandatory arbitration by declaring that the FAA preempted all

34. 9 U.S.C.A. § 2 (2001); see also Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1262 (1999) (noting that generally, legally recognized grounds for revoking a contract include such doctrines as mistake, duress, unconscionability and impossibility). But see Miller, *supra* note 9, at 305 (commenting that the Supreme Court has yet to define a specific situation where an exception to the FAA § 2 exists).

35. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (finding that challenges to the validity of the contract as a whole must be presented to an arbitrator).

36. See *id.* (holding that the FAA § 4 permits a federal court to hear only challenges to the validity of the arbitration clause itself).

37. See *Allied-Bruce Terminix Cos.*, 513 U.S. at 277 (interpreting the “involving commerce” provision of the FAA to signal an intent to exercise the full extent of Congress’ commerce power).

38. See *Circuit City v. Adams*, 532 U.S. 105, 111 (2001) (“To give effect to [its] purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements.”). But see *id.* at 1318 (Stevens, J., dissenting) (remarking that the Court’s interpretation of the FAA has given it a scope far beyond the expectations of Congress).

39. 460 U.S. 1 (1983).

40. *Id.* at 24. *Contra* *Rollins v. Foster*, 991 F. Supp. 1426, 1437 (M.D. Ala. 1998) (finding the Supreme Court’s jurisprudence favoring arbitration inapplicable to a case in which a consumer cannot afford to arbitrate because it assumes the aggrieved party can avail him or herself of the arbitral forum).

41. See *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 29 (affirming the circuit court’s order to arbitrate).

42. 513 U.S. 265 (1995).

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state laws disfavoring arbitration.⁴³ Finally, in 2000, in *Green Tree Financial Corp. v. Randolph*,⁴⁴ the Supreme Court enforced the arbitration agreement in a contract for the financing of a mobile home, over the consumer's protests that she could not afford to arbitrate.⁴⁵

B. Criticisms of the Supreme Court's Policy on Arbitration

The Supreme Court's increased willingness to endorse arbitration in so many areas of contract law has been greatly criticized, even by some members of the Court.⁴⁶ Many critics of arbitration feel the drafters of the FAA intended it to apply only to contracts between business people, and that its extension to consumer contracts is well beyond its intended scope.⁴⁷ Other critics are concerned with the Court's encouragement of arbitration because of the numerous inequities between the arbitral and judicial processes.⁴⁸ Such inequities not only limit a consumer's important rights, but contradict the very notion of freedom of contract.⁴⁹

When a consumer is forced to arbitrate, rather than litigate a claim against a business entity, that consumer almost always loses the right to a judge and a jury.⁵⁰ In addition, arbitration proceedings allow for limited discovery and give the parties limited, if any, right to appeal.⁵¹ Further, arbitration rules bar the public from accessing the proceeding and provide for little or no precedential value because the results of arbitration are generally sealed.⁵² One of the most

43. See *id.* at 281 (holding state anti-arbitration policy in direct contradiction to the language of the FAA and congressional intent).

44. 531 U.S. 79 (2000).

45. See *id.* at 90 (finding it too speculative that the consumer would face prohibitive costs if forced to arbitrate).

46. See, e.g., *Circuit City v. Adams*, 532 U.S. 105, 131-32 (2001) (Stevens, J., dissenting) (criticizing the Court for pushing the pendulum far beyond a neutral attitude of arbitration by endorsing a policy that strongly favors arbitration).

47. See *Carrington & Haagen*, *supra* note 32, at 386 (asserting that the drafters of the FAA envisioned it to apply only to commercial agreements between businesses).

48. See *id.* at 332 (suggesting that the Court's encouragement of private dispute resolution "disregard[s] [the] serious risks of injustice and lawlessness [that attend] the enforcement of [arbitration] provisions.").

49. See *generally* *Threedy*, *supra* note 34, at 1259 (proclaiming that a fundamental notion of modern freedom of contract doctrine is that competent, autonomous individuals are entitled to enter into freely chosen obligations).

50. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1469 (D.C. Cir. 1997) (observing that an arbitration agreement's waiver of a jury trial is absolute).

51. See *Miller*, *supra* note 9, at 303 (noting that in addition to limited right to appeal, arbitration rules provide such limited discovery that under expedited procedures parties exchange exhibits merely two days before the arbitral hearing).

52. See *id.* (arguing that because arbitration proceedings are typically private,

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troubling aspects of arbitration is that arbitrators are not necessarily bound to follow judicial precedent when making a binding, non-appealable decision whether for or against a consumer.⁵³

Because there is no jury to sympathize with consumers who have fallen victim to a business entity, many commentators argue that consumers who are forced to arbitrate may be far less likely to win their cases in arbitration than in court.⁵⁴ One consumer lawyer warns consumers forced to arbitrate that their chances of winning in arbitration are far less than their chances of winning in court.⁵⁵ In fact, arbitrators need not have a law degree,⁵⁶ and because many arbitrators have a business background,⁵⁷ they may be more likely to favor a business entity over a consumer.⁵⁸ In addition, arbitrators may not be able to properly and justly decide complex legal issues.⁵⁹ As a result, fewer lawyers are willing to take consumer disputes to arbitration.⁶⁰ Finally, because arbitration precludes litigation and can cost significantly more than litigation, it may be financially impossible

they fail to provide a warning to consumers of bad business practices).

53. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 678 (1986) (remarking that arbitrators need not follow legislative nor agency-mandated standards, and are not required to explain why they may have strayed from the rule of law).

54. See Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1616 (1994) (noting that access to a jury may be the difference between winning and losing a case). *But see* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 358 (1996) (arguing that arbitration awards are fairly similar to identical verdicts rendered in court, but admitting that lack of data has hampered attempts to accurately compare the two processes).

55. See Mayer, *supra* note 8, at A1 (reporting that one consumer lawyer who usually wins consumer disputes in court has never won one in arbitration and now advises clients that their chances of winning in arbitration are no better than 50-50).

56. See AM. ARBITRATION ASS'N, QUALIFICATION CRITERIA FOR ADMITTANCE TO THE AMERICAN ARBITRATION ASSOCIATION'S NATIONAL ROSTER OF ARBITRATORS AND MEDIATORS (2000) (requiring that an arbitrator only have an "educational degree(s) and/or professional license(s) appropriate to [his or her] field of expertise"), available at <http://www.adr.org/roster/qualifications.html>.

57. See AM. ARBITRATION ASS'N, NATIONAL ROSTER OF ARBITRATORS AND MEDIATORS (2001) (proclaiming that the Association's roster of arbitrators includes the most accomplished and respected experts from the business community), at http://www.adr.org/roster/roster_info.html.

58. See Miller, *supra* note 9, at 303 (remarking that because a far larger percentage of arbitrators have business backgrounds than do the typical juror, an arbitrator is more likely than a jury to favor a business defendant).

59. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997) (questioning an arbitrator's competence to analyze and decide legal issues without legal training).

60. See Mayer, *supra* note 8, at A1 (noting that because of a consumer's poor chances of winning, many consumer lawyers are no longer willing to take consumer arbitration cases on a contingency-fee basis).

for some consumers to seek relief.⁶¹

Despite the fact that consumers arguably lose significant rights when forced to arbitrate, courts have consistently enforced mandatory arbitration clauses in consumer and other contracts.⁶² In doing so, courts have consistently discounted arguments such as potential bias of arbitrators, deficient discovery provisions and lack of publicity surrounding arbitration proceedings, holding that such arguments contradict the courts' pro-arbitration policy.⁶³ The courts' rationale for enforcing arbitration is that every party has a duty to read the contract into which he or she enters, regardless of whether he or she actually read or understood its terms.⁶⁴ Therefore, instead of helping reach ADR's goal of "providing equal justice to all,"⁶⁵ the courts' enforcement of mandatory arbitration leaves low-income consumers unable to file complaints in court or participate in arbitration and insulates businesses from claims by low-income consumers.⁶⁶ Following the Supreme Court's pro-arbitration policy, lower courts have shown their reluctance to void an arbitration agreement even where a consumer could not afford to pay the arbitration fees.⁶⁷ As a result, many consumer protection groups and

61. See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (conceding that high costs of arbitration may preclude low-income litigants from vindicating their claims in the arbitral forum); see also Miller, *supra* note 9, at 305 (arguing that cost alone may make mandatory arbitration substantively unconscionable).

62. See *infra* Part II.A.

63. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-31 (1991) (rejecting challenges to the adequacy of arbitration); see also *Green Tree*, 531 U.S. at 80-81 (enforcing the *Gilmer* standard that federal statutory claims can be appropriately resolved through arbitration); *Rollins v. Foster*, 991 F. Supp. 1426, 1435-36 (M.D. Ala. 1998) (rejecting consumer's argument that arbitration would result in the loss of important rights because such an argument, since *Gilmer*, had been "routinely rejected by federal courts as grounds for invalidating an arbitration clause").

64. See *A.P. Brown Co. v. Superior Court*, 490 P.2d 867, 869 (Ariz. Ct. App. 1971) (holding that a party cannot escape a contractual obligation to arbitrate by claiming he or she had not read the arbitration clause); see also *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001) (upholding parties' duty to read documents they sign over a party's claim of ignorance of the arbitration clause). See generally *Carrington & Haagen*, *supra* note 32, at 341 (asserting that while most consumers realize that the small print in a contract is binding, they seldom read it).

65. See Edwards, *supra* note 53, at 684 ("[W]e must remember that the overarching goal of alternative dispute resolution is to provide equal justice to all.").

66. See Mayer, *supra* note 8, at A1 (arguing that consumers who cannot file in court and cannot afford arbitration are "priced out" of arbitration).

67. See, e.g., *N. Am. Van Lines v. Collyer*, 616 So. 2d 177, 178-79 (Fla. Dist. Ct. App. 1993) (holding that the consumers' inability to pay for arbitration did not excuse them from the terms of their contract, including the agreement to arbitrate); see also *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (directing parties to substitute an overseas arbitration forum for a less expensive domestic forum rather than invalidate the arbitration clause completely).

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government agencies have spoken out against mandatory arbitration for consumer conflicts.⁶⁸ Some critics of arbitration even argue that arbitration infringes upon the civil liberties of low-income consumers and other disadvantaged groups.⁶⁹

C. *The Rules and Costs of Arbitration*

Today, two prominent, private arbitration groups, the American Arbitration Association (“AAA”) and the National Arbitration Forum (“NAF”), promulgate the rules of the majority of arbitration agreements the courts enforce under the FAA.⁷⁰ As the use of arbitration for consumer disputes increases,⁷¹ the number of claims filed at each of the two major arbitration organizations rises.⁷² Both the AAA and NAF have procedural rules governing every aspect of their arbitration proceedings, including the payment of administrative and other fees.⁷³ The typical arbitration clause in a consumer contract may merely reference the rules of the AAA or NAF, but may not include any information on the costs of arbitration, or how those costs are apportioned between the parties.⁷⁴ Thus, the average consumer may not be on notice that he or she will be responsible for a substantial portion of the arbitration fees if he or she wishes to bring a claim relating to his or her contract.⁷⁵

68. See, e.g., Mayer, *supra* note 8, at A1 (noting that Trial Lawyers for Public Justice launched a campaign against mandatory arbitration in 1999 and regulators at both the Federal Reserve Board and the Federal Trade Commission have begun looking at arbitration clauses because they fear consumers lose significant rights when forced to arbitrate).

69. See Edwards, *supra* note 53, at 668-69 (suggesting that arbitration limits the work of the courts in areas affecting minority interests, civil rights and civil liberties).

70. See Mayer, *supra* note 8, at A1 (noting that the AAA is the nation’s largest and oldest arbitration organization, while the Minneapolis-based NAF is another major arbitration provider).

71. See Flood, *supra* note 10, at 21 (reporting that the use of arbitration in business-to-consumer contracts has burgeoned in the last decade).

72. See generally Mayer, *supra* note 8, at A1 (noting that more than 95,000 arbitration claims were filed at the AAA in 1998, up twenty percent since 1997).

73. See generally AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES (2000) [hereinafter AAA COMMERCIAL RULES] (setting forth the AAA’s fifty-six rules governing commercial arbitration, from initiation of the procedure to suspension for nonpayment), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>; see also NAT’L ARBITRATION FORUM, CODE OF PROCEDURE (2001) [hereinafter NAF RULES] (listing the NAF’s forty-eight rules for arbitration), available at <http://www.arbitration-forum.com>.

74. See generally Rollins v. Foster, 991 F. Supp. 1426, 1430 (M.D. Ala. 1998) (discussing an arbitration clause that incorporated the AAA rules, but did not explain them).

75. See, e.g., Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000) (enforcing an arbitration clause despite the fact that it was silent with respect to the costs associated with arbitration and did not articulate which group’s arbitration

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Both the AAA's and the NAF's arbitration fees include administrative filing fees, compensation for the arbitrator, and general expenses for the arbitration, which may include the arbitrator's travel expenses and the cost of renting a hearing room.⁷⁶ The initial fee for filing a claim of \$10,000 to \$75,000 is \$750, with additional filing fees required by any party subsequently filing a counterclaim or an additional claim.⁷⁷ The greater the consumer's claim against a business entity, the more he or she must pay to file the claim.⁷⁸ In addition to filing fees, the parties must advance their share of the arbitrator's fees,⁷⁹ which can be as much as \$1,600 a day for one arbitrator,⁸⁰ and much more for a panel of three arbitrators.⁸¹ Parties may not have any control over the number of arbitrators appointed to oversee their case or the corresponding amount they are required to pay for the arbitrators.⁸² Finally, arbitrators only award the prevailing party attorneys' fees if specifically allowed for in the parties' contract.⁸³

rules would govern the arbitration proceeding).

76. See AAA, COMMERCIAL RULES, R. 51-53 (listing expected arbitration costs, including administrative fees, expenses and arbitrator compensation), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>; see also NAF RULES, FEE SCHEDULE (2001) (requiring parties to pay filing fees, administrative fees, document request fees, and hearing fees, including arbitrator compensation), at <http://www.arbitration-forum.com>.

77. See AAA, COMMERCIAL RULES (requiring an administrative fee of \$1,250 for claims of \$75,000-150,000 in addition to a "case service" fee of \$750), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>; see also NAF RULES (noting that for claims above \$15,000, parties must pay a filing fee of \$150 plus one percent of excess over \$15,000), at <http://www.arbitration-forum.com>. But see AAA, ARBITRATION RULES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES (2001) [hereinafter AAA, CONSUMER RULES] (noting that, per the AAA's new consumer rules, which govern only claims under \$10,000 for goods or services intended for personal, familial, or household use, the business, whether or not it initiates arbitration, is responsible for the \$500 filing fee), at http://www.adr.org/rules/commercial/consumer_disputes.html.

78. See AAA, COMMERCIAL RULES (recording the filing and case service fees for claims of \$150,000-300,000 as \$3,750, while fees for claims of \$1,000,000-7,000,000 increase to \$11,000), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>.

79. See AAA, COMMERCIAL RULES, R. 54 (requiring parties to deposit in advance the money the AAA deems necessary to cover the expense of arbitration, including the arbitrator's fee), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>.

80. See Mayer, *supra* note 8, at A1 (reporting that, in 1999, arbitrator's fees ranged from \$600 to \$1,600 a day).

81. See Flood, *supra* note 10, at 21 (recounting an international arbitration case in which a consumer had to pay a panel of three arbitrators \$500 an hour each).

82. See AAA, COMMERCIAL RULES, R. 17 (explaining that the AAA may, in its discretion, direct and appoint a panel of three arbitrators to oversee any dispute), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>.

83. See Miller, *supra* note 9, at 304 (indicating that the AAA advises its arbitrators

In comparison to the high cost of arbitration, the current cost of filing a complaint in a federal district court is \$150.⁸⁴ Although a low-income consumer litigating a claim would be able to file in *forma pauperis* to waive a court's filing fees,⁸⁵ a consumer forced to arbitrate may have a more difficult time obtaining a waiver of arbitration fees, as there is no clear-cut procedure for doing so.⁸⁶ In a typical civil suit, litigants are never asked to pay the judge's salary or expenses.⁸⁷

The AAA and the NAF have minimal provisions for the waiver of certain, but not all, arbitration fees.⁸⁸ A problem therefore arises when consumers who do not necessarily qualify as indigent nonetheless are unable to afford the large filing and other fees associated with mandatory arbitration.⁸⁹ While arbitrator's fees are generally paid by the employer in an employment arbitration case, the same is not true of a business in the consumer arbitration forum.⁹⁰

The high cost of mandatory arbitration, because it weighs significantly against the average consumer, is unconscionable for

that they cannot award attorneys' fees unless the parties agreed to as much in their contract).

84. See Federal Judiciary Homepage (stating that the filing fee for a party initiating a civil action in a district court is \$150), available at <http://www.uscourts.gov/faq.html> (last visited Jan. 1, 2002).

85. See *id.* (noting that complaints filed in federal court may be accompanied by an application to proceed in *forma pauperis* if the plaintiff is incapable of paying the filing fee).

86. See *Rollins v. Foster*, 991 F. Supp. 1426, 1439 (M.D. Ala. 1998) (noting that the AAA's rules do not contain any procedure for a claimant seeking a reduction in fees, nor the criteria the AAA employs to determine the extent of such a reduction); see also Carrington & Haagen, *supra* note 32, at 384 (noting that a low-income consumer is not invited to proceed in *forma pauperis* in AAA arbitration).

87. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) ("[W]e are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case.").

88. See AAA, COMMERCIAL RULES, R. 51 (noting that the AAA may, in the event of extreme hardship on the part of either party, defer or reduce the administrative fees, but not the arbitrator's fees or other expenses), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>; see also NAF RULES, R. 44 (allowing an indigent party to request a waiver of certain fees, through an affidavit of indigency stating the party's family size, income, property, assets, expenses, liabilities and debts, and "all other relevant information"), available at <http://www.arbitration-forum.com>.

89. See *Rosmarin*, *supra* note 54, at 1617 (commenting that even if arbitration programs had fee waivers for indigent consumers, the issue of cost would still arise for consumers who may not qualify as indigent, but could not afford the fees).

90. Compare *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (finding that where arbitration is imposed by the employer, arbitrator's fees should be borne solely by the employer), with AAA, COMMERCIAL RULES, R. 52 (requiring parties in a commercial dispute to equally share the costs), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>.

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consumers who cannot afford it because of the lack of choice, terms unreasonably favorable to the business, unequal bargaining power and unfair terms.⁹¹ Assuming that a party who would qualify in *forma pauperis* in federal court would qualify for a fee waiver in arbitration, if courts required consumers forced to arbitrate to pay only the administrative fees involved in arbitration, the financial burden on low-income consumers would be substantially lifted.⁹² One court has concluded that the arbitrator's fees are the "crucial difference" between arbitration and litigation.⁹³ The following section examines three consumer cases in which the court refused to find that the cost of arbitration made an arbitration clause unconscionable.

III. CASE STUDIES: THE LOW-INCOME CONSUMER'S STRUGGLE AGAINST MANDATORY ARBITRATION

Taken together, the three consumer cases discussed in this section provide an excellent overview of the enforcement of mandatory arbitration of consumer disputes at the state, federal and Supreme Court levels. In the 1993 case *North American Van Lines v. Collyer*,⁹⁴ the Florida District Court of Appeal denied outright the consumers' claim that they could not afford to arbitrate.⁹⁵ In the 1998 case *Rollins v. Foster*,⁹⁶ the federal District Court for the Middle District of Alabama acknowledged that cost might preclude low-income consumers from vindicating their claims against businesses.⁹⁷ Finally, in 2000, in *Green Tree Financial Services Corp. v. Randolph*,⁹⁸ the Supreme Court determined that arbitration could be cost prohibitive to low-income consumers.⁹⁹ Yet in all three cases, the courts required

91. See generally *Rollins v. Foster*, 991 F. Supp. 1426, 1434 (M.D. Ala. 1998) (describing the four factors used to determine whether a contract provision, such as an arbitration clause, is unconscionable).

92. See generally *Cole*, 105 F.3d at 1484 (noting that if the party requiring arbitration paid the arbitrator's salary and other fees, the party forced to arbitrate would only have to pay the filing fee).

93. See *Rollins*, 991 F. Supp. at 1439 (explaining that a litigant in state or federal court is not accountable for the presiding judge's salary).

94. 616 So. 2d 177 (Fla. Dist. Ct. App. 1993).

95. See *id.* at 178 (requiring consumers to arbitrate, despite their claim that they could not afford to pay).

96. 991 F. Supp. 1426 (M.D. Ala. 1998).

97. See *id.* at 1436 (finding unconscionable a contract that required the consumer, as a party in an inferior bargaining position, to assert her claims in arbitration rather than in the less expensive judicial arena).

98. 531 U.S. 79 (2000).

99. See *id.* at 522 (concluding that large arbitration costs could preclude a low-income litigant from effectively resolving his or her claims in arbitration).

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the consumer to arbitrate.¹⁰⁰

A. North American Van Lines v. Collyer

In 1988, James and Patricia Collyer entered into a contract with a local moving company for the storage of their household items.¹⁰¹ About a year and a half after they signed the initial contract, the Collyers moved from Florida.¹⁰² After the Collyers called to inquire about the cost of shipping the goods to their new home, they received a letter demanding immediate payment for delinquent storage charges.¹⁰³ The letter threatened that if the Collyers did not pay the fees within two weeks, the moving company would sell the Collyers' belongings.¹⁰⁴ Shortly thereafter, the moving company sold the Collyers' belongings at a public auction to satisfy late storage charges.¹⁰⁵

The Collyers filed suit for "damages arising from the contract," including the disputed storage charges and the sale of the Collyers' household items.¹⁰⁶ However, unbeknownst to the Collyers, their contract with the moving company contained a clause requiring that any disputes arising out of the contract be resolved by binding arbitration through the AAA.¹⁰⁷ On motion by the defendants, the trial court referred the case to arbitration.¹⁰⁸ After the Collyers filed a motion opposing arbitration because they could not afford to advance the required \$2,500 in arbitration fees,¹⁰⁹ the trial court rescinded its order to arbitrate.¹¹⁰ In so holding, the trial court found

100. See *N. Am. Van Lines v. Collyer*, 616 So. 2d 177, 178 (Fla. Dist. Ct. App. 1993) (enforcing the arbitration clause in a contract for the storage of goods); *Rollins v. Foster*, 991 F. Supp. 1426, 1439 (M.D. Ala. 1998) (holding the arbitration clause in a contract for exterminating services valid and enforceable); *Green Tree*, 531 U.S. at 90 (compelling arbitration of a dispute arising out of a contract for home financing).

101. *N. Am. Van Lines*, 616 So. 2d at 179.

102. See *id.* (recounting that the Collyers moved to England in 1990).

103. See *id.* (noting that while the Collyers received monthly bills for the storage charges, they typically paid them only quarterly).

104. See *id.* at 179-80 (stating that in addition to the threat, the letter contained a summary of various charges the Collyers owed, several of which the Collyers claimed were erroneous).

105. See *id.* at 179 (noting that the moving and storage companies sold the Collyers' belongings on May 7, 1990).

106. *N. Am. Van Lines v. Collyer*, 616 So. 2d 177, 177 (Fla. Dist. Ct. App. 1993).

107. See *id.* at 178 (observing that the contract required the parties to settle all disputes through arbitration governed by the rules of the AAA).

108. *Id.* at 177.

109. See *id.* at 178 (indicating that the Collyers asserted that they could not pay, and the arbitrator would not waive, neither the required filing fee nor the arbitrator's fee). The fees totaled over \$2,500. See *id.* at 180 (Griffin, J., concurring).

110. See *N. Am. Van Lines*, 616 So. 2d at 178 (Fla. Dist. Ct. App. 1993) (noting that

that while the judicial proceeding was precluded by the contract's mandatory arbitration clause, the arbitration proceeding was "precluded by [the Collyers'] inability to pay the deposit required."¹¹¹

On appeal, the Florida District Court of Appeal reversed the trial court's finding that the Collyers' inability to pay the costs excused them from arbitration.¹¹² Citing *American Jurisprudence on Contracts*,¹¹³ the appellate court flatly denied the Collyers' claim of inability to pay as a valid defense to mandatory arbitration and contrary to judicial policy favoring arbitration.¹¹⁴ By using a general treatise on contracts rather than judicial precedent as the basis for its decision,¹¹⁵ the court ignored the fact that standard-form consumer contracts are not contracts that both parties have made or negotiated.¹¹⁶ The court also overlooked the fact that even *American Jurisprudence* specifies that parties must do things that are "possible",¹¹⁷ and the Collyers asserted that arbitration was not possible for them because they could neither afford nor obtain waiver of the arbitration fees.¹¹⁸ Their contract, like most consumer contracts, was an adhesion contract that gave them no choice, and no warning, of the costs of arbitration.¹¹⁹ By rejecting

the trial court held the combined effect of the arbitration provision and the AAA's fee requirement was to deprive the Collyers of any avenue of redress).

111. *Id.*

112. *See id.* at 178-79 (holding that the trial court impermissibly rewrote the contract, given the Collyers' "clear and unambiguous agreement to arbitrate," and inappropriately attempted to make an otherwise valid contract more reasonable for the Collyers).

113. *See id.* at 179.

Inconvenience or cost, though they might make compliance [of a contract] a hardship, cannot excuse a party from performing an absolute and unqualified undertaking to do a thing that is possible and lawful [and required by the contract]. . . The rights of the parties must be measured by the contract which they themselves made.

Id. (citing 12 AM. JUR., *Contracts* § 362).

114. *See N. Am. Van Lines v. Collyer*, 616 So. 2d 177, 179 (Fla. Dist. Ct. App. 1993) (holding that the trial court's result "defies well-established contract law, and is inherently unfair to other contracting parties").

115. *See id.* (quoting 12 AM. JUR., *Contracts* § 362). *But see Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997) (suggesting that courts should not rely on even widely respected treatises as the basis for their decisions).

116. *See 17 C.J.S. Contracts* § 12 (1999) (defining a standard-form contract as a contract of adhesion, prepared by the party of superior bargaining strength and often involving high-pressure tactics).

117. *See 12 AM. JUR., Contracts* § 362 (stating hardship cannot excuse a party from performing a thing that is possible).

118. *See N. Am. Van Lines*, 616 So. 2d at 178 (noting that the Collyers challenged arbitration because they could not pay or obtain waiver of the arbitration fees).

119. *See id.* at 178 (stating that the arbitration clause required the party initiating arbitration to advance the fee that the AAA deemed necessary, without giving any indication as to how great that fee may be, or what level of discretion the AAA would

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the trial court's findings in favor of a standard treatise on contracts, the court failed to adequately consider the implications of its decision on low-income consumers forced to arbitrate.¹²⁰

In a concurring opinion, Judge Griffin expressed just such concerns.¹²¹ Judge Griffin asserted that if the moving company was indeed responsible for the loss of the Collyers' personal items, the Collyers were simply without remedy because they could not afford the only available forum.¹²² Judge Griffin further warned that if the courts enforced such arbitration clauses, they would force unsuspecting consumers—even those aware of the agreement, but unaware of the cost—to pay thousands of dollars in front-end fees required by the AAA.¹²³ Judge Griffin finally noted that by blindly enforcing arbitration clauses, courts would be failing to truly consider whether a consumer is even able to pay the arbitration fees.¹²⁴

Despite Judge Griffin's criticism of the court's analysis and suggestion that the court locked the Collyers out of the only forum available to them, Judge Griffin did not pose any alternative solutions, even as dicta, for low-income consumers forced to arbitrate.¹²⁵ In fact, Judge Griffin did not dissent from the majority opinion requiring the Collyers to arbitrate their claims.¹²⁶ By failing to dissent from the majority holding enforcing the arbitration clause, Judge Griffin failed to take advantage of an available opportunity to provide either a true warning to low-income consumers, or a red flag

use in determining the fee); see generally Green, *supra* note 2, at 113 (asserting that consumers generally do not appreciate the ramifications of an arbitration clause because they have not had the option to bargain over the terms of the agreement).

120. See, e.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997) (commenting that arbitrators are less competent than judges to decide legal issues because arbitrators are more likely to cite to and rely on treatises).

121. See *N. Am. Van Lines*, 616 So. 2d at 179 (Griffin, J., concurring) (writing separately to emphasize the danger to the unwary consumer illustrated by the court's enforcement of the arbitration clause).

122. See *id.* at 180 (noting that by entering into the storage contract, the Collyers contractually relinquished their right of access to the courts in favor of a method of ADR that they could not afford to access).

123. See *id.* at 180 (observing that the Collyer's claim, for \$90,000, required a deposit of \$2,350, on top of the \$300 filing fee); see generally Carrington & Haagen, *supra* note 32, at 384-86 (asserting that consumers are often without warning that arbitration administrative fees are higher than court filing fees, and that arbitration costs include the arbitrator's "handsome" hourly rates).

124. See *N. Am. Van Lines*, 616 So. 2d at 180 (arguing that it did not seem to matter to the court at all that the Collyers, unable to pay the arbitration fees, were locked out of the only forum available to them).

125. See *id.* at 179 (stating the danger of the case to low-income consumers, yet failing to offer any alternative findings).

126. See *id.* (Griffin, J., concurring) (agreeing with the result reached by the majority, but writing a special concurrence).

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to other courts considering mandatory arbitration agreements in consumer contracts.¹²⁷

B. Rollins v. Foster

The district court's decision in *Rollins v. Foster*¹²⁸ illustrates another denial of a consumer's argument that inability to pay for arbitration would leave her unable to resolve her claims against a business.¹²⁹ Yet the *Rollins* court went one step further than the *North American Van Lines* court by acknowledging that there may actually be circumstances in which such an argument would preclude a court from enforcing an arbitration clause against a low-income consumer.¹³⁰

The *Rollins* case began when Judy Foster contacted the Orkin Exterminating Company to inquire about the cost of spraying her trailer home for cockroaches.¹³¹ When the inspector informed Foster that her home required treatment that would cost about \$38 per month, she ordered three months of service.¹³² The inspector then prepared a number of forms for Foster's signature, but did not explain them to her and did not point out to her that the forms had writing on both sides.¹³³ In fact, the actual contract Foster signed was drastically different from the terms she had requested and thought she had agreed to.¹³⁴ Rather than a three-month service agreement, the contract established a two-year service relationship for a total cost of \$2,200.¹³⁵

Because Foster had limited reading ability, she was unable to

127. See generally Miller, *supra* note 9, at 303 (noting that judicial decisions can help warn consumers of bad business practices and discourage businesses from continuing abuses).

128. 991 F. Supp. 1426 (M.D. Ala. 1998).

129. See *id.* at 1438 (finding that the consumer failed to prove that forcing her to pay for arbitration would leave her unable to pursue her claims in either the arbitral forum or the judicial arena).

130. See *id.* at 1438-39 (finding that the costs of arbitration may render an arbitration clause unconscionable in some circumstances).

131. See *id.* at 1428 (noting that Orkin responded to Foster's call by sending an inspector to her home).

132. *Id.*

133. See *Rollins v. Foster*, 991 F. Supp. 1426, 1428 (M.D. Ala. 1998) (recounting that the inspector gave Foster a clipboard upon which he had placed the terms of their contract).

134. See *id.* (maintaining that Foster had agreed to three months of service at less than \$40 per month).

135. See *id.* at 1429 (noting that in addition to the \$2,200 service agreement, the contract established a credit agreement which required Foster to pay interest on the cost of services in advance of receiving them).

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understand much of the contract she signed with Orkin.¹³⁶ Foster was unaware that the contract contained a mandatory arbitration clause, which, like the arbitration clauses in many consumer contracts, was printed on the reverse side of the contract.¹³⁷ When Foster realized the extent of the service agreement she had signed,¹³⁸ she filed suit against Orkin and Rollins, Inc. for punitive and compensatory damages arising from the contract.¹³⁹ Shortly thereafter, Orkin and Rollins filed a petition to remove the case to arbitration, and the court granted their request.¹⁴⁰ Foster contested the court's order compelling her to arbitrate, and, like many consumers challenging mandatory arbitration, claimed the arbitration clause was cost prohibitive and therefore unconscionable.¹⁴¹

The court found Foster's claim had merit, and acknowledged that arbitration could be cost prohibitive to any consumer, like Foster, in an inferior bargaining position.¹⁴² The court also realized that if it allowed a business to force its customers to arbitrate and pay the costs of arbitration, the court would effectively be allowing that business to insulate itself from complaints brought by low-income consumers.¹⁴³

136. *See id.* at 1428 (stating that Foster had only a ninth grade education).

137. *See id.* at 1430 (explaining that the arbitration agreement stated that the parties agreed that all disputes would be resolved by arbitration administered by the AAA in accordance with its commercial arbitration rules and pursuant to the FAA); *see also* Mayer, *supra* note 8, at A1 (reporting that often, an arbitration clause is buried in a pile of documents the consumer is asked to sign quickly, or printed on the back side of a receipt).

138. *See* Rollins v. Foster, 991 F. Supp. 1426, 1430 (M.D. Ala. 1998) (noting that two weeks after her home was inspected, Foster received a payment book from Orkin). Foster contacted Orkin to question the charges, and attempted to make monthly payments after Orkin threatened to garnish her wages and damage her credit report if she didn't comply with the contract terms. *See id.*

139. *See id.* (explaining that after Foster filed her complaint in Alabama state court, Orkin and Rollins removed the proceeding to the Northern District Court of Alabama).

140. *Id.*

141. *See id.* at 1436-37 (noting that Foster essentially contended that because she could not afford to pay the costs of the arbitration proceeding, she would be left without a remedy if forced to arbitrate her claims); *see also* Jean R. Sternlight, *Major Ways of Challenging Arbitration Agreements in the Consumer Setting: Drafting a "Bulletproof" Consumer Arbitration Agreement: Is it Possible?*, 1102 PRACTICING L. INST. 763, 772-73 (1998) (noting that many consumers have challenged an arbitration agreement on the grounds of unconscionability with varying degrees of success).

142. *See* Rollins v. Foster, 991 F. Supp. 1426, 1436 (M.D. Ala. 1998).

When a party who is in such an inferior bargaining position, as was Foster, is compelled to assert her claims in arbitration, thus precluding a remedy in the less expensive public fora, and the costs of the arbitral forum render the party unable to pursue her claim, the clause is oppressive and one-sided and therefore unconscionable.

Id.

143. *See id.* (stating that to force a consumer to arbitrate and pay the costs of

By answering the “novel question of whether an arbitration clause is unconscionable, and therefore unenforceable, because of a party’s inability to pay for the costs of the arbitration proceeding,”¹⁴⁴ in the affirmative, the *Rollins* court granted a potentially huge victory for low-income consumers throughout Alabama and elsewhere.¹⁴⁵ At the same time, the potential for victory was completely squashed when the court, after acknowledging that forcing Foster to arbitrate would be unconscionable, actually proceeded to compel arbitration.¹⁴⁶ Although the court found that “the costs associated with arbitration may, in certain circumstances, render an arbitration clause unconscionable,”¹⁴⁷ it held that Foster had not sufficiently demonstrated that such circumstances existed to preclude arbitration of her claims.¹⁴⁸

The type of showing a consumer would have to make in order to sufficiently demonstrate that his or her financial circumstances would make arbitration impossible remain unclear.¹⁴⁹ After all, the *Rollins* court was well aware that Foster was unemployed and had been on disability for twenty-two years.¹⁵⁰ The court contended that because she received Social Security and other benefits and owned the trailer home in which she lived, Foster might have had “other sources of income or own[ed] other assets besides her trailer home” that may have allowed her to pay the costs of arbitration.¹⁵¹ Despite the court’s

arbitration would permit sophisticated business entities to circumvent not only judicial, but also arbitral proceedings).

144. *Id.* at 1428.

145. See generally *Arbitration Clause Unconscionable if Arbitral Costs are Prohibitive and “Lock-Out” Party Forum*, 9 WORLD ARB. & MEDIATION REP. 197, 198 (1998) (describing *Rollins* as a decision of interest because it acknowledged that an arbitration clause that left a party without relief for financial reasons would be unconscionable and invalid).

146. See *Rollins v. Foster*, 991 F. Supp. 1426, 1439 (M.D. Ala. 1998) (holding the arbitration clause valid and enforceable, and compelling arbitration); see also Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers’ Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 294-95 (1999) (citing *Rollins* as a clear example of the federal court’s policy favoring arbitration because the court required Foster to submit to arbitration despite the fact that the conduct of the exterminating company was unconscionable).

147. *Rollins*, 991 F. Supp. at 1439.

148. See *id.* (holding that Foster did not sufficiently demonstrate that she was locked out of arbitration).

149. See *id.* (stating only that there may exist “certain circumstances” in which the costs of arbitration may make arbitration unconscionable to low-income consumers, without specifying what those circumstances may be).

150. See *id.* at 1438 (conceding that “admittedly, Foster has been unemployed for the past twenty-two years.”).

151. *Id.*

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knowledge of Foster's meager financial resources, the court contended that it did not have a full enough picture of her finances to properly evaluate her ability to pay the costs of arbitration.¹⁵²

Rollins left low-income consumers who face high arbitration costs with an enormously high threshold of proving they cannot afford arbitration.¹⁵³ After all, if an unemployed person who lives in a trailer home and subsists on disability and Social Security benefits is compelled to arbitrate, who would the court not send to arbitration?¹⁵⁴ Additionally, because the results of Foster's arbitration are sealed—if she indeed went through with arbitration—the outcome of her ordeal will remain unknown.¹⁵⁵

C. Green Tree Financial Corporation v. Randolph

In December 2000, in a case strikingly similar to *Rollins v. Foster*, the U.S. Supreme Court confronted the legal problem of a consumer unable to afford the arbitration process mandated by her service contract.¹⁵⁶ *Green Tree* was the first consumer arbitration case in which the Supreme Court considered whether arbitration is cost prohibitive to low-income consumers.¹⁵⁷

In 1997, Larketta Randolph entered into a contract with Green Tree Financial Corporation to finance the purchase of her mobile home.¹⁵⁸ In addition to requiring that Randolph buy insurance to protect Green Tree from the cost of a potential default, the contract, like many financing agreements, also required that all disputes be

152. See *Rollins v. Foster*, 991 F. Supp. 1426, 1438-39 (M.D. Ala. 1998) (adding that in addition to insufficient information about Foster's financial condition, the court did not have enough information about the cost of arbitrator's fees). The court suggested that if Foster had shown that she could not find an attorney to represent her because of the expense of the arbitration proceedings, her unconscionability claim would have been substantially bolstered. See *id.* at 1439.

153. See *id.* at 1438 (finding that the disclosure of Foster's employment and living situations provided insufficient information as to her ability to afford arbitration).

154. See *id.* at 1438 (noting that Foster had been unemployed for twenty-two years and survived on government benefits, but contending nonetheless that she had not provided sufficient proof that she could not afford to arbitrate).

155. See AAA, COMMERCIAL RULES, R. 49 (allowing the release of certain arbitration documents to the parties only in specific instances), available at <http://www.adr.org/rules/commercial/AAA235-0900.htm>.

156. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 82 (2000) (addressing the question of "whether an arbitration agreement that does not mention costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs").

157. See generally Sabino, *supra* note 3, at 1 (noting that because the Supreme Court considered the *Green Tree* case, the issue of arbitration's inaccessibility to low-income consumers now looms on the horizon).

158. *Green Tree*, 531 U.S. at 82-83.

resolved by binding arbitration.¹⁵⁹ Randolph later sued Green Tree under the Truth in Lending Act for failing to disclose the insurance requirement, and for requiring her to arbitrate.¹⁶⁰ The district court granted Green Tree's motion to compel arbitration and denied Randolph's request for reconsideration, in which she argued that she was unable to afford arbitration.¹⁶¹ The Court of Appeals for the Eleventh Circuit reversed, holding the arbitration agreement unenforceable because of its silence with respect to the costs involved in arbitration.¹⁶²

In a 5-4 decision delivered by Chief Justice Rehnquist,¹⁶³ the Supreme Court overturned the Eleventh Circuit's decision, and ruled that an arbitration agreement's silence on the costs of arbitration did not render it unlawful.¹⁶⁴ In addressing Randolph's claims that the excessive cost of arbitration would require her to forego her claims against Green Tree, the Supreme Court stated, "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."¹⁶⁵ However, the Court continued by stating that the risk that Randolph would be bombarded with prohibitive costs was just "too speculative" to justify invalidating the arbitration agreement.¹⁶⁶

Like the federal district court in *Rollins*, the Supreme Court acknowledged that arbitration costs could be prohibitive to low-

159. *See id.* (stating that the contract required that all disputes arising under case law, statutory law, contract, tort or property law be resolved by arbitration); *see also* Shelly Smith, Comment, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1192 (2001) (reporting that arbitration clauses commonly appear in loan, mortgage or other financing agreements).

160. *See Green Tree*, 531 U.S. at 83 (noting that Randolph originally sued Green Tree under the Truth in Lending Act, but later added a claim under the Equal Credit Opportunity Act, which she claimed Green Tree violated by requiring her to arbitrate).

161. *See id.* (noting that, in addition to compelling arbitration and denying Randolph's request for reconsideration, the district court also dismissed Randolph's claims with prejudice and denied her request for class certification).

162. *See id.* at 84 (holding the agreement unenforceable because it posed a risk that Randolph's ability to vindicate her statutory rights would be precluded by high arbitration costs).

163. *See id.* at 81 (noting that Justices O'Connor, Scalia, Kennedy and Thomas joined in the denial of Randolph's claim).

164. *See id.* at 91 (holding that the arbitration agreement's silence as to cost was "plainly insufficient to render it unenforceable").

165. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

166. *See id.* at 92 (concluding that Randolph's claim that she did not have the resources to arbitrate did not provide the Court with a sufficient basis for finding that arbitration would be cost prohibitive to her).

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income consumers, yet it still required the consumer seeking to invalidate the agreement to arbitrate.¹⁶⁷ In addition, the *Green Tree* court, like the court in *Rollins*, provided little insight into what kind of showing a consumer would have to make to prove that mandatory arbitration would lock him or her out of the judicial process.¹⁶⁸

Justice Ginsburg, writing for the dissent,¹⁶⁹ more closely addressed the issue of accessibility of the arbitral forum to low-income consumers.¹⁷⁰ In an opinion that criticized the Court for combining the issues of adequacy and accessibility of the arbitral forum,¹⁷¹ Justice Ginsburg questioned the Court's pronouncement that the burden of proving arbitration inaccessible should lie with Randolph.¹⁷² Justice Ginsburg argued that, because the contract was silent on the costs and type of arbitration mandated,¹⁷³ Randolph should not have been required to arbitrate without knowing how much it would cost her.¹⁷⁴

Further, Justice Ginsburg asserted that even requiring Randolph to pay the costs of arbitration gave Green Tree an unfair advantage in the arbitration process.¹⁷⁵ She also suggested that if Green Tree were

167. See *id.* (ordering arbitration over Randolph's claim that it would be prohibitively expensive); see also *Rollins v. Foster*, 991 F. Supp. 1426, 1439 (M.D. Ala. 1998) (granting Rollins and Orkin's petition to compel arbitration despite Foster's argument that she could not afford arbitration).

168. See *Green Tree*, 531 U.S. at 92 (requiring that a party seeking to invalidate an arbitration agreement on grounds of cost bear the burden of proving the likelihood of incurring such costs, without discussing "how detailed a showing of prohibitive expense must be before a party seeking arbitration must come forward with contrary evidence"). But see Smith, *supra* note 159, at 1242 (arguing that as a result of *Green Tree*, a consumer should be able to successfully raise prohibitive cost as a reason to invalidate an arbitration clause so long as he or she can prove which arbitration forum will be used, and the actual costs of that forum).

169. See *Green Tree*, 531 U.S. at 92 (stating that Justices Stevens, Souter, and in part, Justice Breyer, joined in Justice Ginsburg's dissent).

170. See *id.* (Ginsburg, J., dissenting) (stating that she would "vacate the Eleventh Circuit's decision, which declared the arbitration clause unenforceable, and remand the case for closer consideration of the arbitral forum's accessibility").

171. See *id.* (criticizing the Court for blending two discrete inquiries: the adequacy of the forum to adjudicate the claims at issue, and the forum's accessibility to Randolph).

172. See *id.* at 94 (arguing that it does not follow that the party resisting arbitration should also bear the burden of showing that the arbitral forum would be financially inaccessible).

173. See *id.* at 94 (noting that Randolph's form contract provided no indication of the rules under which arbitration would proceed, or the costs she would likely incur). Justice Ginsburg suggested that Green Tree could have filled that void merely by specifying that arbitration would be governed by the AAA. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 94 (2000).

174. See *id.* at 96 (stating that "it is hardly clear that Randolph should bear the burden of demonstrating up front the arbitral forum's inaccessibility, or that she should be required to submit to arbitration without knowing how much it will cost her").

175. See *id.* (asserting that "as a repeat player in the arbitration required by its

required to cover the costs of arbitration, as employers are in employment disputes in arbitration, Randolph would have been insulated from prohibitive costs.¹⁷⁶ By merely bringing the issue of cost to the forefront, the *Green Tree* decision seems to have potential as the basis for future consumer disputes, despite its disagreeable result for the consumer involved.¹⁷⁷ Because the majority explicitly stated that large arbitration costs could preclude low-income consumers from litigating their claims¹⁷⁸—even though it found that Randolph had not individually proved as much in her situation¹⁷⁹—it left the issue open for future consumer disputes. If the Court were confronted with the issue in a situation where the consumer made a detailed showing of the administrative, hearing, arbitrator’s fees and other costs involved in the arbitral forum that are not generally waived, as well as a detailed personal financial record reflecting his or her inability to pay those costs—none of which Randolph did¹⁸⁰—the Court would likely find that such a consumer would be precluded from vindicating his or her rights.¹⁸¹

IV. PROPOSAL: MAKING ARBITRATION MORE ACCESSIBLE TO LOW-INCOME CONSUMERS

The three cases previously discussed strongly contrast the employment case *Cole v. Burns Int’l Security Services*,¹⁸² in which the Circuit Court for the District of Columbia found it unfair to require

form contract, *Green Tree* has superior information about the cost to consumers of pursuing arbitration”).

176. *See id.* at 96 (stating that if *Green Tree*’s practice under the form contract resembled that of the employment contract in *Gilmer*, in which the employer covered the costs of arbitration, the arbitral forum would have been accessible to Randolph); *see also* *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (finding that the cost of arbitration was not in dispute in *Gilmer*, because in the securities industry, employers routinely paid all arbitrator’s fees).

177. *See* Sabino, *supra* note 3, at 1 (describing Justice Ginsburg’s dissent as a “harbinger of the future” for its discussion of the issue of financial inaccessibility of arbitration).

178. *Green Tree*, 531 U.S. at 90.

179. *See id.* (finding that the record did not show that Randolph would bear prohibitive costs if forced to arbitrate).

180. *See id.* (noting that Randolph failed to support her assertion that “arbitration costs are high” with any factual proof). Instead, Randolph merely attached informational material from the AAA that did not discuss filing fees, and quoted a news article which cited \$700 per day as the average arbitral fee. *See id.*

181. *See* Smith, *supra* note 159, at 1242 (suggesting that because of *Green Tree*, a consumer could successfully show arbitration is cost-prohibitive so long as he or she can prove the actual costs involved in the arbitral forum).

182. 105 F.3d 1465 (D.C. Cir. 1997).

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an employee forced to arbitrate to also pay the costs of arbitration.¹⁸³ The *Cole* court's analysis of arbitration costs is directly applicable to *North American Van Lines, Rollins* and *Green Tree*, and should become the court-imposed standard for the arbitration of all consumer arbitration disputes.¹⁸⁴

A. *Cole v. Burns International Security Services*

Clinton Cole worked as a security guard at Union Station in Washington, D.C.¹⁸⁵ His employer, Burns International Security Services ("Burns Security"), required all employees to sign a pre-dispute arbitration agreement as a condition of employment.¹⁸⁶ The agreement stated that in the event that Cole sought relief from a dispute arising out of his employment contract, he would be required to file a claim in arbitration.¹⁸⁷ Two years after he signed the arbitration agreement, Burns Security fired Cole.¹⁸⁸ Cole filed a complaint against Burns Security, alleging, in part, racial discrimination, racial harassment and intentional infliction of emotional distress.¹⁸⁹ Burns Security moved to both dismiss Cole's complaint and compel arbitration pursuant to the terms of Cole's employment contract.¹⁹⁰ The district court found the arbitration agreement covered Cole's claims, and compelled the parties to arbitrate.¹⁹¹ Cole appealed the district court's ruling enforcing the arbitration agreement.¹⁹²

The U.S. Court of Appeals for the District of Columbia found that

183. *See id.* at 1485 (holding that an employer could not require an employee to arbitrate any future claims against his or her employer as a condition of employment, when the agreement required the employee to pay all or part of the arbitration expenses).

184. *See infra* Parts IV.B and IV.C.

185. *See Cole*, 105 F.3d at 1469 (noting that the security company Cole initially worked for at Union Station was LaSalle and Partners).

186. *See id.* (stating that Burns Security took over LaSalle's contract to provide security at Union Station, and required all LaSalle employees, including Cole, to sign an arbitration agreement in order to obtain employment with Burns Security).

187. *See id.* at 1469 (noting that the agreement required Cole, in the event of a dispute, to waive his right to trial by jury in favor of arbitration governed by the AAA).

188. *See id.* (recounting that Cole signed the arbitration agreement in August 1991, and Burns Security fired Cole in October 1993).

189. *See id.* at 1469-70 (noting that after filing charges at the Equal Employment Opportunity Commission, Cole filed a complaint at the U.S. District Court for the District of Columbia).

190. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470 (D.C. Cir. 1997).

191. *See id.* (noting that, in compelling arbitration, the district court rejected Cole's claim that the agreement was an unenforceable contract of adhesion).

192. *Id.* at 1467.

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the disputed arbitration agreement was valid and enforceable, but reserved one major caveat.¹⁹³ The court found the cost distribution required by the arbitration agreement was unfair to Cole, and required Burns Security to pay the full amount of the arbitrator's fees and expenses.¹⁹⁴ More generally, the court held that an employer could not condition the acceptance of employment on the signing of an arbitration agreement that required the employee to pay all or even part of the arbitrator's fees.¹⁹⁵

Noting that the AAA's employment rules gave no indication of whether an arbitrator's fees would be reduced or waived in the event of financial hardship,¹⁹⁶ the court found that Cole, if required to pay the fees, would be unlikely to pursue his claims against Burns Security.¹⁹⁷ The court acknowledged that an arbitrator's fees would be a prohibitive expense for Cole, especially after losing his job, and concluded that it would be "unacceptable" to require Cole to pay the arbitrator's fees¹⁹⁸ because they were "unlike anything he would have to pay to pursue his statutory claims in court."¹⁹⁹ The Circuit Court of Appeals for the District of Columbia recounted that "arbitration is supposed to be a reasonable substitute for a judicial forum,"²⁰⁰ but

193. *See id.* at 1483 ("Although we find that the disputed arbitration agreement is legally valid, there is one point that requires amplification.").

194. *See id.* at 1485 (holding that regardless of whether the rules required Cole to pay all or even half of the arbitrator's fees, an arbitrator's compensation and expenses must be paid by the employer alone).

195. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (answering the question "can an employer require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrator's fees?," with the statement "We hold that it cannot").

196. *See id.* at 1484 (stating that the AAA's rules were silent on waivers for the arbitrator's fees).

197. *See id.* (stating that if an employee like Cole were required to pay arbitrator's fees ranging from \$500-\$1,000 per day or more in addition to administrative and attorneys' fees, he would unlikely be unable to pursue his claims); *see also* AAA, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, R. 38 (2001) (noting that the AAA, in the event of extreme hardship, may defer or reduce administrative fees, without noting whether the AAA would defer or reduce other arbitration fees), available at http://www.adr.org/rules/employment/employment_rules2.html.

198. *See Cole*, 105 F.3d at 1484 (noting that because Cole did not challenge the administrative fees charged by the AAA, the Court would not address whether the AAA's refusal to waive filing and other administrative fees could preclude enforcement of the arbitration agreement). Rather, the court assumed, for purposes of the case, that employees who would qualify in *forma pauperis* status in a federal court would similarly qualify for a waiver of administrative fees under the AAA's rules. *See id.*

199. *See id.* (finding that arbitration under the AAA would require Cole to pay a \$500 filing fee, compared to the \$120 filing fee required by the district court). In addition, arbitration would require the parties to compensate the arbitrator, whereas they would "never be required to pay for a judge in court." *Id.*

200. *Id.*

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recognized that requiring an employee to pay the excessive costs of arbitration would undermine that idea.²⁰¹

In enforcing the arbitration agreement, the *Cole* court denied that requiring only the employer to pay the arbitrator's fees would be unfair to the employer.²⁰² On the contrary, the court noted that requiring the employer to pay the arbitrator's fees was only fair, since it was the employer, Burns Security, who mandated arbitration as a condition of Cole's employment.²⁰³ In addition, the court pointed with approval to several circumstances in which an employer is either required to pay the arbitrator's fees, or voluntarily agrees to bear the costs.²⁰⁴

B. Applying *Cole* To Consumer Arbitration Cases

The arguments the court set forth in *Cole*²⁰⁵ apply equally to consumer disputes, and the Supreme Court's decision in *Green Tree* does not change this.²⁰⁶ The *Cole* court found that mandatory arbitration agreements in individual employees' contracts are often presented on a "take-it-or-leave-it" basis, and must be signed as a condition of employment.²⁰⁷ The same is true of mandatory arbitration agreements in consumer contracts, which a consumer often must sign as a condition for the receipt of goods or services at

201. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997) (stating that it would undermine Congress's intent in enacting the FAA if employees who were seeking to vindicate their rights were shut out from the judicial forum and required to pay for the services of an arbitrator).

202. See *id.* at 1484 (rejecting concerns that it would be "perversion of the arbitration process" to have only one party pay the arbitrator's fees).

203. See *id.* (noting that absent the required arbitration clause, Cole would have been free to pursue his claims in court without having to pay for the services of a judge).

204. See *id.* at 1484 (noting that arbitrator's fees are never an issue in securities cases, because under NYSE and NASD Rules, it is standard practice for employers to pay all of the arbitrator's fees). For additional support, the *Cole* Court quoted a director of industrial relations at a major defense firm who explained that his company bears the cost of the arbitrator's fees for the practical reason that most of the employees who seek arbitration of their grievances simply could not afford to arbitrate if the company did not. See *id.* at 1484-85.

205. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467 (D.C. Cir. 1997) (deciding whether and to what extent a person can be required, as a condition of employment, to waive all rights to a trial by jury in the event of a dispute, and sign an arbitration agreement requiring him or her to pay arbitration costs).

206. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (finding that the consumer challenging arbitration had not sufficiently proven it was cost prohibitive, but acknowledging that the existence of large arbitration costs could preclude low-income litigants from vindicating their rights in the arbitral forum).

207. See *Cole*, 105 F.3d at 1477 (finding that employees often have no choice but to sign an employment contract that contains a clause requiring arbitration).

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issue.²⁰⁸ While it was not discussed in *North American Van Lines*, *Rollins* or *Green Tree*, there is little doubt that the consumers in those cases would not have received the services they desired had they not signed the contracts that included the arbitration clauses.²⁰⁹ Therefore, the two situations are similar.

Additionally, the *Cole* court found that, because there is often no union to negotiate the terms of an individual employee's arbitration agreement, employers are able to structure arbitration in a way that disadvantages employees.²¹⁰ Similarly, because there is no union to negotiate the terms of an arbitration agreement for a consumer seeking to store some furniture,²¹¹ obtain extermination services,²¹² or arrange for financing on the purchase of a home,²¹³ businesses, too, are able to structure arbitration in a way that significantly disadvantages consumers.²¹⁴ Because the *Collyers*, *Foster* and *Randolph* all needed the services for which they signed contracts, and were unaware that the arbitration clause was present in their contracts, it is unlikely that any of them could or would have negotiated—or hired a lawyer or consumer protection group to negotiate—the arbitration clause.²¹⁵

The *Cole* court concluded that it would be unacceptable to require an employee to pay an arbitrator's fees because there were no such

208. See generally *Smith*, *supra* note 159, at 1192 (reporting that companies often require consumers to agree to an arbitration clause before the company will conduct business with them).

209. See *N. Am. Van Lines v. Collyer*, 616 So. 2d 177, 179 (Fla. Dist. Ct. App. 1993) (describing the contract at issue as a form contract with a standard provision requiring arbitration of future disputes, thereby inferring that there was little or no room for negotiation); *Rollins v. Foster*, 991 F. Supp. 1426, 1429 (M.D. Ala. 1998) (observing that the arbitration clause was pre-printed on the contract in controversy, which required a signature in exchange for the requested services); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 82-83 (stating that the contract in dispute required the consumer to sign the arbitration agreement in order to receive financing).

210. See *Cole*, 105 F.3d at 1477 (citing Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 254-55 (1983)) (arguing that because "the employer and its lawyers have a comparatively free hand in drafting the details of an arbitration clause . . . some employers may seek to unfairly narrow the legal rights of employees in the arbitration clause.").

211. See generally *N. Am. Van Lines*, 616 So. 2d at 179 (describing a contract for the transportation and storage of a family's household items).

212. See generally *Rollins*, 991 F. Supp. at 1428 (involving a contract for exterminating services).

213. See generally *Green Tree*, 531 U.S. at 82-83 (discussing a contract for financing the purchase of a mobile home).

214. See *Smith*, *supra* note 159, at 1192 (asserting that arbitration clauses are typically drafted by sophisticated attorneys employed by large companies, and imposed without notice to the consumers who sign the contracts).

215. See *id.* (observing that normally consumers do not seek legal advice before entering contracts for basic goods or services).

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comparable fees required in litigation.²¹⁶ Similarly, it is unacceptable to require a consumer to pay an arbitrator's fees; because, like employment or any other type of dispute, no such fees are required for a consumer to pursue his or her claims in court.²¹⁷ If neither an employee nor a consumer is responsible for paying for the room in which to hold the hearing or trial, the court reporter, the clerk and the judge's salary when litigating,²¹⁸ neither should be required to do so when arbitrating. After all, as the *Cole* court noted, requiring an employee to pay excessive arbitration fees undermines the idea that arbitration is a reasonable substitute for litigation.²¹⁹ Additionally, as the *Rollins* court noted, those extra fees represent the "crucial difference" between arbitration and litigation.²²⁰

Rather than set an arbitrary threshold or standard of proof for a consumer to prove he or she cannot afford to arbitrate,²²¹ the courts should create a rule applying the *Cole* holding and make it standard practice for businesses to pay for arbitration fees other than administrative fees, which low-income consumers, if they cannot pay, can apply for waiver, as they would in court. A court-created rule would not undermine the holding in *Green Tree* requiring arbitration; rather, it would continue the courts' pro-arbitration policy but clarify the implications for both businesses and consumers.

C. Other Recommendations for Consumer Arbitration

While some commentators may argue that consumer and employment contracts are too different to have the same result

216. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997) (invalidating the AAA's rule requiring parties to share the expenses of arbitration, including the arbitrator's fees, and finding instead that the employer must cover all such costs).

217. See *Rollins*, 991 F. Supp. at 1439 (noting that a litigant in state or federal court is not accountable for the presiding judge's salary).

218. See Scheff, *supra* note 15, at 11 (stating that litigating parties are not required to pay any of these items, while arbitrating parties must cover the cost of all of them).

219. See *Cole*, 105 F.3d at 1484 (finding that it would undermine Congressional intent to prevent employees from gaining access to a judicial forum and then require them to pay for services they would never be required to pay in court).

220. See *Rollins*, 991 F. Supp. at 1439 (finding that arbitrator's fees represent the crucial difference between arbitration and litigation, because a litigant is not accountable for the judge's salary, while a party arbitrating must compensate the arbitrator).

221. See *generally id.* (noting that there may be circumstances in which a party could prove he or she could not afford to arbitrate, without setting forth what those circumstances would be); see also *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (declining to discuss how detailed a showing a party would have to make to show that arbitration was cost prohibitive).

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apply,²²² such arguments disregard the numerous similarities between the two types of contracts, like the unequal footing of the parties and corresponding lack of bargaining power of both the consumer and the employee.²²³ The idea that employees may have more bargaining power in negotiating their employment contracts than consumers negotiating the purchase of goods or services²²⁴ disregards the idea that both the employer and the business draft the contract and can therefore condition acceptance of the offer on the agreement of all of the contract terms, without room for negotiation.²²⁵ To suggest that an employee has more choice than a consumer is to ignore the fact that increasing numbers of employers and businesses are including arbitration agreements in their contracts.²²⁶

Such an argument also discounts the reality of the situation: that neither employees nor consumers are likely to begin a relationship with their employer or a local business by discussing the possibility of future disputes.²²⁷ In addition, neither an employee nor a consumer is likely to challenge an arbitration clause if he or she does not understand what it entails.²²⁸ Similarly, arguments that it is unfair to

222. See, e.g., Mclaughlin, *supra* note 13, at 916-22 (analyzing separately employment and consumer arbitration agreements, because consumer claims present a “special problem in arbitrability”).

223. See, e.g., Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1052 (1998) (commenting that the traditional reasons for parties agreeing to arbitrate—such as common interest, equal bargaining power, and ongoing relationships—are absent in both employee and consumer arbitration cases); see also Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 601 (2001) (noting that mandatory arbitration agreements in both employment and consumer contracts are not the product of true negotiation but are presented on an adhesion basis by the party in a position of economic power).

224. See, e.g., Senderowicz, *supra* note 146, at 283-84 (commenting that, under *Gilmer*, while courts may find that contracts between consumers and businesses involve greater inequality of bargaining power than contracts between employers and employees, most courts do not).

225. See, e.g., Green, *supra* note 2, at 117 (arguing that parties to an arbitration agreement, whether employer/employee or business/consumer, only have truly equal bargaining power when they can both freely negotiate terms, seek legal advice and specify how their legal rights will be enforced if a dispute occurs).

226. See, e.g., Mclaughlin, *supra* note 13, at 916 (asserting that there are fewer and fewer employment contracts not subject to arbitration); see also Senderowicz, *supra* note 146, at 276 (commenting that arbitration provisions are an increasingly common feature of many consumer contracts).

227. See Senderowicz, *supra* note 146, at 303 (conceding that it is not only unrealistic to ask a business to begin a relationship with its customers by discussing potential lawsuits, but unlikely that a business drafting an arbitration clause would point out the negative aspects of arbitration to a customer it is hoping to have to sign the agreement).

228. See generally *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 95-96 (2000) (Ginsburg, J., dissenting) (suggesting that businesses have more knowledge than

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require one party to a contract to pay the majority of the arbitration fees²²⁹ must be rejected.²³⁰ The *Cole* court rejected that argument outright, stating that it was doubtful that “arbitrators care about who pays them, so long as they are paid for their services.”²³¹ Additionally, the *Cole* court found that if an arbitrator were likely to favor an employer over an employee, it would be because the employer would be a source of future business, not because the employer was paying the fees.²³² The same is true of consumer to business contracts.

Numerous commentators have posed suggestions to bolster a consumer’s status in commercial arbitration²³³ or protect consumers from commercial arbitration altogether.²³⁴ However, because the Supreme Court has invalidated state regulations requiring disclosure or notice to consumers of the arbitration agreement and its consequences,²³⁵ courts may find many of these “solutions” invalid under the FAA.²³⁶ One advocate of informed consent for consumers has suggested amending the FAA to require it.²³⁷ But even if

consumers about arbitration); see also Miller, *supra* note 9, at 303 (asserting that consumers do not and cannot negotiate the terms of the contracts they sign, regardless of whether they understand the terms).

229. See, e.g., Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 (arguing that requiring a business to “subsidize” a consumer’s arbitration claim would cause the business to raise prices by making arbitration more expensive to the business). In addition, Ware argues that if the business were required to pay all the arbitration fees, it would increase the number of cases the business would have to pay for, since more consumers would bring claims if the financial barrier were lowered. See *id.*

230. See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (rejecting the argument that it would be “perversion” of the arbitration process to have the arbitrator paid by only one party); see also *Green Tree*, 531 U.S. at 96 (Ginsburg, J., dissenting) (asserting that businesses, as “repeat players” in arbitration, have more knowledge about the process and its costs).

231. *Cole*, 105 F.3d at 1485.

232. See *id.* n.17 (suggesting that since employers are more likely to be repeat players in arbitration, arbitrators are more likely to rule in the employer’s favor in order to increase the chances of the employer selecting that arbitration provider to arbitrate future claims).

233. See, e.g., Senderowicz, *supra* note 146, at 279 (proposing adjustments to the FAA to improve informed consent by consumers while still preserving the benefits of arbitration to both parties).

234. See generally Sternlight, *supra* note 141, at 766 (outlining arguments a consumer could make to challenge an arbitration clause and evaluating their effectiveness).

235. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (finding that the FAA pre-empts state regulations that attempt to protect consumers from arbitration clauses).

236. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (invalidating a Montana statute requiring notice to consumers of the arbitration clauses in their commercial contracts).

237. See Senderowicz, *supra* note 146, at 302 (proposing to amend section 2 of the FAA so that it would apply to consumer contracts only if the business provided

disclosure requirements were narrowly tailored to avoid federal preemption, full disclosure or even explanation of the arbitration clause by a business is unrealistic.²³⁸ Therefore, a court-created rule requiring businesses to pay the costs of arbitration is the most feasible solution for low-income consumers forced to arbitrate because it does not require congressional amendment of the FAA or a large overhaul of the current method of business-to-consumer transactions.

CONCLUSION

Critics have long complained about mandatory arbitration for consumers.²³⁹ Arbitration can be substantially more expensive for consumers than judicial litigation.²⁴⁰ Yet despite arguments against the arbitration of consumer contracts, the Supreme Court has enforced such agreements²⁴¹ and even articulated a policy favoring mandatory arbitration.²⁴²

This Comment has proposed that one way to ease the financial burden of mandatory arbitration on low-income consumers and to make arbitration a more equal method of dispute resolution is to require businesses to pay the costs of arbitration. A court-created rule requiring businesses to pay is not inconsistent with the Supreme Court's latest pronouncement on consumer arbitration in *Green Tree*²⁴³ because it does not weaken the Court's enforcement of arbitration, but merely changes the division of costs for the

additional consideration for the consumer agreeing to the arbitration clause, and the business provided realistic information to the consumer regarding the procedural differences between arbitration and litigation).

238. See *id.* at 303 (suggesting that a business that was required to point out or explain an arbitration clause would likely accentuate the positive aspects of arbitration to induce the customers to sign the agreement).

239. See, e.g., Carrington & Haagen, *supra* note 32, at 333 (arguing that consumers have been prejudiced by the Supreme Court's pro-arbitration policy); see also Smith, *supra* note 159, at 1222 (asserting that mandatory arbitration "effectively strips consumers of their rights to protect themselves from large corporations and jeopardizes the American judicial process.").

240. See Smith, *supra* note 159, at 1242 (noting that arbitration may be financially detrimental to low-income consumers, since it is more costly than litigation for individual consumer claims).

241. See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (enforcing the mandatory arbitration of a financing agreement, despite the consumer's claims that it would be prohibitively expensive).

242. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (articulating the Supreme Court's liberal policy toward arbitration); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (finding that attacks on the adequacy of the arbitral forum are "far out of step" with the Supreme Court's strong endorsement of arbitration as a method of resolving disputes).

243. See *Green Tree*, 531 U.S. at 90 (refusing to invalidate the arbitration agreement because it would undermine the Court's pro-arbitration policy).

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procedure, which would ultimately be implemented by the providers of arbitration, and enforced by the courts. In fact, requiring businesses to pay would ensure that no consumer was ever precluded from vindicating his or her claims in arbitration, a situation the *Green Tree* majority recognized could be a problem for low-income consumers.²⁴⁴ Since several lower courts have required an employer to pay the arbitration fees when forcing an employee to arbitrate,²⁴⁵ courts should similarly require businesses forcing consumers to arbitrate to pay the costs involved in mandatory arbitration. A court-created rule would allow low-income consumers to pursue their claims against businesses in arbitration as easily as they can pursue such claims in court.

244. See *id.* (finding that large arbitration costs could preclude a litigant from effectively vindicating his or her rights in the arbitral forum).

245. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (holding that an employee cannot be required to arbitrate his or her claims as a condition of employment if the arbitration agreement requires the employee to pay all or part of the arbitrator's fees and expenses).