Consumer Arbitration: The Destruction of the Common Law

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> The division of powers among three branches of government is perhaps the most fundamental feature of American government. It is also the feature most distinctly American.[1]
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> But it was the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected, and for life, . . . that Adams made one of his greatest contributions not only to Massachusetts but to the country, as time would tell.[2]

I. INTRODUCTION

From a contemporary discussion of civil justice and tort reform, to a best selling biography of a founding father, praise for the American court system and our common law tradition is not difficult to obtain. Recently,

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1. CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 45 (N.Y. Univ. Press ed., 2001).

2. DAVID MCCULLOUGH, JOHN ADAMS 222 (Simon & Schuster eds., 2001).

consumers have benefited greatly from our Anglo-American legal culture. The American civil justice system has spawned judicial reform dealing with everything from a wide range of product safety issues,[3] to the establishment of premises liability, and the creation of performance standards in service contracts. Courts have become increasingly receptive to claims by consumers of overreaching terms in industry practices, and have liberally construed our many consumer protection laws to provide increased protection from false, misleading, and deceptive acts.[4]

The recent movement to impose mandatory predispute arbitration[5] in an increasingly large number of consumer contracts, however, threatens to eliminate this "fundamental" branch of government, substituting a system of private, often secret, justice, not bound by precedent and unable to create it.[6] In one commentator's opinion, the "threat" posed by the privatization of law may already be real.[7] In a recent article discussing the effect of arbitration on the development of contract law, Professor Charles L. Knapp noted the diminishing number of decisions discussing contract issues.[8] He argued, "Far and away the most pervasive contract-related issue litigated during this period, [2002], has been this: Will the court enforce an arbitration contract in the parties' written agreement?"[9] This Essay will consider how consumers' rights might be impacted by the gradual elimination of the common law, which will inevitably result from widespread use of predispute mandatory arbitration.[10]

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3. *See* BOGUS, *supra* note 1, at 137 ("The single greatest development of the common law during the twentieth century has been the creation of a new area of law known as products liability.").

4. *See, e.g.*, Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667e (2000).

5. I have chosen to use the term "pre-dispute mandatory arbitration" to emphasize that the practice under consideration is the use of arbitration agreements contained in a contract entered into prior to the existence of a dispute. As others have recognized, pre-dispute arbitration itself is often referred to as "mandatory arbitration." *See, e.g.*, Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1069 (1998). This Essay uses the phrases "pre-dispute mandatory arbitration" and "mandatory arbitration" synonymously.

6. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 763 (2002); *see* Chris A. Carr & Michael R. Jenks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183 (1999).

7. Knapp, *supra* note 6, at 763.

8. *Id.*

9. *Id.*

10. I recognize that others have discussed the effects of the privatization of law through arbitration agreements. See Knapp, *supra* note 6, at 798, wherein the author concluded with a question and answer:

II. THE ROLE OF THE COURTS IN PROTECTING CONSUMER RIGHTS

As a "movement," consumer protection is relatively young. It began in earnest in the 1960s under former President Johnson's Great Society plan, where federal legislation, such as the Truth in Lending Act,[11] attempted to level the playing field through meaningful disclosures and standardization.[12] In response to this movement, numerous other state and federal laws were enacted to deal specifically with false, misleading, and deceptive practices and warranties. For example, at the federal level the Magnuson-Moss Warranty Act[13] attempted to establish minimum warranty standards, while the states enacted lemon laws and deceptive trade practice acts of varying scope and applicability. Even the Uniform "Commercial" Code provided some special protections for consumers, creating implied warranties, making it more difficult to limit damages and easier to sue remote parties.[14]

At the same time federal and state legislatures were addressing consumer problems, federal and state courts found themselves faced with new issues and concerns that these recently enacted laws created. Additionally, because these laws did not address every contingency, the courts often filled these gaps left by the legislatures. Many courts, finding that the issues they were facing often dealt with the exploitation of loopholes, began to find ways to avoid the harshness to a consumer of an unfair one-sided bargain presented by big business.

> Can powerful private interests with the ability to control most of the terms of most of the contracts they make, deprive large segments of American society of their access to the courts for which all of us pay, and to which all of us have historically had access? The answer, until now, sadly, to some of us—they apparently can. And do. And will.

Id.; *see also* Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999) (asserting that arbitration does not produce a uniform or consistent law). As will be discussed in this Essay, however, I believe that the impact of arbitration on consumer law is of particular concern because of the increasingly widespread use of mandatory arbitration in consumer cases, and consumers' inability to meaningfully bargain for an alternative.

11. 15 U.S.C. §§ 1601-1667e (2000). Although there was some pre-1960s consumer protection legislation, it was directed primarily at attempts to increase competition or eliminate a very specific health or safety problem.

12. TILA was enacted "as part of former President Lyndon B. Johnson's Great Society plan providing federal consumer protection," and is the "first five chapters of the Federal Consumer Protection Act." Johanna Harrington, Comment, *To Litigate or Arbitrate? No Matter—The Credit Card Industry Is Deciding for You*, 2001 J. DISP. RESOL. 101, 113 (2001) (internal citations omitted).

13. Manguson-Moss Warranty-Federal Trade Commission Improvement Act of 1975 (MMWA), 15 U.S.C. §§ 2301-2311 (2000). For a general discussion of the MMWA, see C. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT (2d ed. 1987).

14. U.C.C. §§ 2-312-316, 2-318, 2-719 (2001).

In our system of government, it is not unusual for the courts to create legal rights through their decisions. While the legislature enacts laws to govern society, courts "legislate" through the common law. As every first-year law student comes to know, precedent and stare decisis are the foundations of the common law. Courts are bound by precedent and must follow decisions of higher courts, and all courts should give serious consideration to the rationale of others, including other state and federal courts. In discussing the importance of the common law, Justice Harlan F. Stone noted almost seventy years ago:

> Distinguishing characteristics are its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of supremacy of the law—that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts.[15]

Through this process of judicial precedent, courts create and mold legal rights, coexistent with, and supplemental to, those created by statute. The need for common law to supplement legislation has been described as follows:

> Our society has an enormous demand for legal rules that actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited, and much of that capacity must be allocated to the production of rules concerning governmental matters, such as spending, taxes, and administration; rules that are regarded as beyond the courts' competence, such as the definition of crimes; and rules that are best administered by a bureaucratic machinery, such as the principles for setting the rates charged by regulated industries. Furthermore, our legislatures are normally not staffed in a manner that would enable them to perform comprehensively the function of establishing law to govern action in the private sector. Finally, in many areas the flexible form of a judicial rule is preferable to the canonical form of a legislative rule. Accordingly, it is socially desirable that the courts should act to enrich that supply of legal rules that govern . . . [business] conduct—not by taking on lawmaking as a free-standing function, but by attaching much greater emphasis to the establishment of

15. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 5 (1936). Justice Stone further stated that by studying past adjudications of rights, "their true significance for us now and for the future is the indication they give of the capacity of the common-law system to perform its appointed task of affording suitable protection and control of the varying interests which a dynamic society creates." *Id.*

legal rules than would be necessary if the courts' sole function was the resolution of disputes.[16]

Although the current consumer protection movement is relatively young, courts have attempted to deal with the problems presented by marketplace deception and product defects since the turn of the twentieth century. Both traditional tort and contract theories have been used as methods of providing consumers redress. The development of these theories to deal with consumer issues demonstrates the application of our common law tradition. For example, contract law, particularly warranty, offered consumers a cause of action that was often easier to establish than tort; however, these contract claims required privity and were easily limited or disclaimed through the terms of the contract. Tort liability, on the other hand, was available without privity; however, it was often more difficult to establish because of culpability requirements inherent in the concept of negligence or scienter requirements of fraud or misrepresentation. Gradually, both contract and tort requirements were judicially relaxed to permit liability for personal injury without regard to fault or privity, and provide a claim for false representations without regard to knowledge or intent.[17]

More recently, courts have found less need for major doctrinal pronouncement, and a much greater demand for review of more specific scenarios. Decisions such as *Williams v. Walker-Thomas Furniture Co.*[18] from the United States Court of Appeals for the District of Columbia and *Unico v. Owen*[19] and *Henningsen v. Bloomfield Motors, Inc.*[20] from the New Jersey Supreme Court have refused to put form over substance and provided relief to consumers by recognizing the disparate bargaining position most consumers occupy. Today, courts are often called on to deal with individual claims of overreaching, and must regularly deal with

16. Carr & Jenks, *supra* note 6, at 193 (internal quotations omitted).

17. *See, e.g.*, McPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (eliminating the requirement of privity); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963) (imposing strict products liability). *See generally* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791-94 (1966) (arguing that the advent of strict liability in the context of products liability would be a great legal crisis); Warren A. Seavey, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439, 440 (1960) (discussing how an agent would be held liable to people who he had reasonably should have foreseen would be injured by his misrepresentations); Stephen L. Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831 (1968) (noting that express warranties cannot be disclaimed).

18. 350 F.2d 445 (D.C. Cir. 1965).

19. 232 A.2d 405 (N.J. 1967).

20. 161 A.2d 69 (N.J. 1960).

the application of traditional principles to newly developed technology, such as the Internet.[21]

The courts also provide a significant "gap-filling" role, dealing with transactions that either slip through the cracks of legislation or simply were not addressed.[22] One of the most significant roles of the common law is maintaining consistency between similar rights in the absence of legislative action. For example, the Uniform Commercial Code comprehensively governs contracts for the sale of goods. Until the enactment of article 2A, lease agreements were treated in a similar manner by common law analogy to article 2.[23] Today, article 2 and 2A inclusively regulate the creation of warranties, as well as disclaimers and damage limitations, in the sale or lease of goods. There is no similar statute, however, governing the service contracts. As a result, the courts leave the area of service contracts to common law development.[24]

The decisions from Texas state courts provide a good example of how this area of law has been developed, and also illustrate the importance of the courts to the creation of consumer rights. For example, until 1987, the Texas Supreme Court had not recognized an implied warranty in a service contract. In *Melody Home Manufacturing Co. v. Barnes*, the court recognized that the United States had shifted from a goods oriented to a service oriented economy.[25] The court found that because "consumers do not have the protection of a statutory or

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21. This is not to imply that recent decisions uniformly recognize the lack of bargaining in the typical consumer contract of adhesion. In fact, most courts use a traditional contract analysis to find assent and a valid contract. *See* Jennifer Femminella, Note, *Online Terms & Conditions Agreements: Bound by the Web*, 17 ST. JOHN'S J. LEGAL COMMENT. 87, 91-100 (2000) (discussing how courts have been analyzing traditional contract law with "shrink-wrap," "click-wrap," and "web-wrap" forms of online contracts); Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 595-96 (S.D. N.Y. 2001) (indicating that online agreements are enforceable agreements as long as they induce customers to indicate specifically that they are assenting to the terms).

22. *See* Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 633 (2002) (criticizing the courts' and legislatures' ability to write gap-filling terms that serve the interests of both contracting parties).

23. *See, e.g.*, KLPR TV, Inc. v. Visual Elec. Corp., 327 F. Supp. 315 (W.D. Ark. 1971) (interpreting article 2 to find an express warranty in leased equipment); Sarafanti v. M.A. Hittner & Sons, 318 N.Y.S.2d 352 (N.Y. App. Div. 1970) (interpreting Article 2 to find an implied warranty in lease of automobile). *See generally* William D. Hawkland, *Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 ILL. L.F. 446 (1972); Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV. 575 (1988); Edwin E. Huddlesin, III, *Old Wine in New Bottles: UCC Article 2A—Leases*, 39 ALA. L. REV. 615 (1988).

24. For a general discussion of the development of the law with respect to the sale of goods and service transactions, see Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231 (1996).

25. 741 S.W.2d 349, 353 (Tex. 1987)

common law implied warranty scheme," if public policy mandates, "[a]n implied warranty [will] arise by operation of law."[26] Based on this "public policy mandate," the court imposed an implied warranty of good and workmanlike performance in any contract to repair or modify existing tangible goods or chattels, and found that all service providers will be held strictly liable for its breach.[27] The court reiterated a previous decision in which it recognized the importance of a court's role in creating relief such as this for litigants. It stated:

> That Court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which disregards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society . . . .[28]

The court also defined the warranty as "the quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[29] Additionally, the court held that "the implied warranty that repair or modification services of existing tangible goods or property will be performed in a good and workmanlike manner may not be waived or disclaimed."[30] The court reasoned that because most of the contracts "offered to consumers of goods and services" are adhesionary and standardized forms, the "stronger party" usually limits its duties and responsibilities to the consumer.[31] Thus, if it allowed a party to disclaim this warranty, the service provider would be permitted to circumvent the expectation that a service will be provided in a good and workmanlike manner.[32]

As with the development of any judicially created rule, *Melody Home* has been refined, modified, expanded and limited in the fifteen years since it was decided.[33] The Texas Supreme Court has cited the

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26. *Id.*
27. *Id.* at 354.
28. *Id.* (quoting Humber v. Morton, 426 S.W.2d 554, 561-62 (Tex. 1968)).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *See, e.g.*, Dallas Power & Light Co. v. Westinghouse Elec., 855 F.2d 203, 208 (5th Cir. 1988) (holding that *Melody Home* rule on implied warranties should be interpreted narrowly); White Budd Van Ness P'ship v. Major-Gladys Joint Venture, 798 S.W.2d 805, 812-13 (Tex. App. 1990) (finding that an implied warranty arose under Texas law from the rendition of professional services); Chapman v. Wilson, 826 S.W.2d 214, 217 (Tex. App. 1992) (holding that implied warranty of good and workmanlike services does not apply to all service transactions).

opinion no less than a dozen times, initially broadening its scope and recently sharply limiting it. For example, after some question,[34] the Texas Supreme Court held the warranty does not apply to professionals,[35] and recently the court expanded this to exclude certain "incidental services."[36] Meanwhile, more than 130 other Texas courts have cited *Melody Home* in their opinions. This is the life of the common law—a deliberate process of molding doctrine to the times. However, it is also a process that probably would not have occurred if the problem that gave rise to the decision in *Melody Home* arose today. The *Melody Home* ruling involved a manufactured home purchased by a couple in 1979. The likelihood is that today, the contract that the couple and the manufacturer signed in *Melody Home* would have contained a clause mandating arbitration of their claim. Thus, the ruling may never have seen the light of day.

III. CONSUMER ARBITRATION AND THE COMMON LAW

A. Traditional Notions of Consumer Arbitration

For some time now, arbitration has been heralded as a panacea for the ills of the American judicial system. It has been widely touted as a voluntary system of alternative dispute resolution, more efficient, less expensive, and more flexible than our clogged and congested courts.[37] Arbitration clauses have been received with open arms by the courts, which have uniformly adopted a pro-arbitration stance.[38]

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34. *See* Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988) (suggesting that the warranty could be applied to professional services).

35. Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1998) (holding that there is no implied warranty for professional services).

36. Rocky Mountain Helicopter, Inc. v. Lubbock County Hosp. Dist., 987 S.W.2d 50 (Tex. 1999) (finding no implied warranty for services incidental to helicopter maintenance).

37. *See* Cameron L. Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1343 (2002) (stating that proponents claims that "arbitration is more efficient and cost effective than traditional dispute resolution methods").

38. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (holding that the provisions of the Federal Arbitration Act (FAA) manifest a "liberal federal policy favoring arbitrations agreements"). This pro-arbitration stance of the United States Supreme Court began in earnest with the decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Subsequent Supreme Court cases all evidence a strong pro-arbitration position. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-23 (2001) (stating that the FAA's employee exception should be narrowly construed); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (holding that the possibility of excessive costs is insufficient to defeat arbitration clause); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (holding that the FAA preempts state statute restricting arbitration); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (asserting that courts should "rigorously enforce agreements to arbitrate").

Recently, however, arbitration, particularly predispute consumer arbitration, has come under attack by consumer advocates and others who have found fault with both the manner in which arbitration is agreed to and the process itself.[39] For example, the adhesory nature of the contracts upon which arbitration is based is often cited as a reason to not impose arbitration on the consumer because it does not allow the consumer to bargain for the arbitration clause.[40] As one commentator stated:

> These asymmetrical agreements are form contracts that generally favor the entity over individuals, and individuals, without leverage, have no alternative to signing an order to obtain employment or services. As such, mandatory arbitration agreements raise concerns that individuals are involuntarily forfeiting individual rights, particularly the right to a jury trial.[41]

Additionally, courts and commentators alike have noted the often-excessive costs of arbitration should be enough to challenge the validity

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39. *See* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUSTON L. REV. 1237 (2001); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary*, 21 J. CORP. L. 331 (1996); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*, 78 MICH. B.J. 302 (1999); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Speidel, *supra* note 5, at 1069; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

40. One of the few challenges to arbitration provisions that has met with limited success is unconscionability. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (holding that the employer's "Dispute Resolution Agreement" is unconscionable and unenforceable); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997) (declining to enforce an employment arbitration agreement in the absence of consideration); Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985) (holding that "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims" and, absent such an exchange, an arbitration provision in an employment agreement is invalid and unenforceable); Ting v. AT&T, 182 F. Supp. 2d 902, 930-31 (N.D. Cal. 2002) (holding that an agreement is unconscionable where consumer had no meaningful choice); Kloss v. Edward D. Jones, 54 P.3d 1, 8 (Mont. 2002) (holding an arbitration agreement in contract of adhesion not enforceable); Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000) (refusing to enforce an agreement to arbitrate employment disputes and finding the agreement unconscionable because it only required arbitration for claims brought by employees but did not require arbitration of claims brought by the employer); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 158–59 (Cal. Ct. App. 1997) (declaring an arbitration clause in an employment agreement unenforceable, unconscionable, and against public policy because the contract was adhesive, the duty to arbitrate was unilateral, and the terms unfairly benefited the employer).

41. Sabin, *supra* note 37, at 1341.

of an arbitration clause, especially in a consumer's adhesionary contract.[42] As Justice Ginsburg wrote in her dissent in *GreenTree Financial Corp. v. Randolph*, as the business requiring arbitration "in its form contract, Green Tree has superior information about the cost to consumers of pursuing arbitration . . . [i]t is hardly clear that Randolph should . . . be required to submit to arbitration without knowing how much it will cost her."[43] Another issue is the fact that arbitration clauses, by virtue of their broad application, often preclude class actions suits that are provided for by statute.[44] Lastly, a common argument against arbitration is that it may result in an unfair advantage for the repeat player because these repeat players are usually big businesses that are able to avoid costly jury trials and public scrutiny by requiring their employees or clients to arbitrate claims.[45] However, none of these arguments will be discussed here.

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42. The United States Supreme Court recently had an opportunity to rule on this point in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). The court side-stepped the issue, however, noting that although "[i]t may well be that . . . large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights, . . . [t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 90. For examples of cases that have considered the effect of excessive costs, see *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002); and *Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669, 694 (Cal. 2000).

Although most small claims courts provide a judge and jury for less than $100, the costs of arbitration far exceed this amount. A recent study by Public Citizen concludes that the costs of arbitration almost always exceed the courts of litigation. Public Citizen, *The Costs of Arbitration* (Apr. 26, 2002), *at* http://www.citizen.org (last visited Mar. 14, 2003). For example, American Arbitration Association cites $700 per day as the average arbitrator's fee in 1996. Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, 31 Daily Lab. Rep. (BNA), at A-12 (Feb. 15, 1996). Judicial Arbitration and Mediation Services arbitrators charge an average of $400 *per hour*. *See* Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381, 410 n.189 (1996). However, fees up to $600 per hour are not uncommon. *See* Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1; David Segal, *Have Name Recognition, Will Mediate Disputes*, WASH. BUS., Dec. 16, 1996, at 5. The CPR Institute for Dispute Resolution estimates arbitrators' fees of $250-$350 per hour and 15-40 hours of arbitrator time in a typical employment case, for total arbitrators' fees of $3,750 to $14,000 in an "average" case. CPR INST. FOR DISPUTE RESOLUTION, EMPLOYMENT ADR: A PROGRAM TO RESOLVE EMPLOYMENT DISPUTES § 3 (1995).

43. *Randolph*, 531 U.S. at 96 (Ginsburg, J., dissenting).

44. The United States Supreme Court recently decided to hear a case that raises this issue. *See* Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002), *cert. granted*, 123 S. Ct. 817 (2003). For an excellent discussion of class actions in arbitration, see Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

45. This theory is based on the seminal work by Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter's thesis was rather simple: repeat-players with substantial assets can use the legal system to their advantage. This conclusion was based on his observations concerning the ability of the

Suffice it to say that all of these arguments may contain some degree of validity. But even if all of these perceived problems inherent in arbitration are eliminated, its expanded use still threatens the core of our justice system.

For purposes of this discussion, it will be assumed that arbitrators are fair and consistently follow the law to the best of their ability. Even assuming an arbitrator is committed to following the law, however, he or she cannot make it.[46] Therein lies the problem. The development of the common law and the courts' ability to continually establish and refine legal rights depends upon litigants. Arbitration eliminates litigation in a public forum, precedent-establishing decisions, and stare decisis.[47]

Unlike court opinions, which are published, most decisions of arbitrators are kept secret, often not even accompanied by a written opinion. Even when published and made available to the public, the decision of one arbitrator, or a panel of arbitrators, is in no way binding on any other arbitrator or panel.[48] As one commentator put it, "once the case is decided by the arbitrators, it will furnish no precedent by which

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"Haves" as repeat-players to manipulate the legal system to optimize long-term results. Those with a greater stake in the outcome of future litigation will attempt to optimize long-term results. *See also* Susan S. Silbey, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 799, 799 (1999) ("Since its publication in 1974, Galanter's paper has been cited more often than any other piece of sociolegal scholarship, and it stands among the most well cited law review articles of all time." (citing Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 766 (1996), which ranks Galanter's article as thirteenth on the list of most cited law review articles)).

Whether the "haves" come out ahead in consumer arbitration is impossible to prove or disprove. In the consumer context, there is almost no data available. Even in the employment area, where there is the most data available, it is hard to come to any meaningful conclusions. This is due, in part, to the fact that the most meaningful statistic would be one that compared not only arbitration numbers, but also similar cases in the courts. *See, e.g.*, *Cole*, 105 F.3d at 1485 n.17 ("It is hard to know what to make of these studies without assessing the relative *merits* of the cases in the surveys."). It must be assumed, however, that if businesses are increasingly imposing mandatory arbitration provisions on consumers, they see some benefit in precluding resort to the courts.

46. Knapp, *supra* note 6, at 785 ("[A]rbitrators neither follow the law, nor contribute to it."); Reynolds Holding, *Private Justice; Millions Are Losing Their Legal Rights; Supreme Court Forces Disputes from Court to Arbitration—A System with No Laws*, S.F. CHRON., Oct. 7, 2001, at A1 (noting how arbitrators are not required to issue formal opinions detailing the results and reasoning behind their decisions).

47. As one author discussing arbitration has stated, "A private civil justice system is evolving, one that is relatively unconstrained by law and relatively uninformed by systematic empirical research." Using what is described as "Dispute Resolution Darwinism," the author concludes that, "We may already be witnessing the first mass extinction as large institutional organisms move in to occupy entire habitats in the civil justice ecosystem." Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002).

48. Knapp, *supra* note 6, at 785.

future decision-makers—*whether judges or other arbitrators*—will be guided."[49] Further, "[p]ast decisions in arbitration furnish no reliable guide to the present and present decisions serve as no reliable guide to the future."[50] Precedent and stare decisis do not exist in arbitration. In fact, arbitrators generally are not compelled to follow the law, and their decisions are not appealable.[51] The consequence is that arbitration lacks the ability to formulate policy or change existing law. Most would argue, and I concur, that this is the way it should be. Arbitrators are not elected judges; they do nothing more than decide the single dispute before them.[52] The problem, however, is that our beliefs regarding the value of arbitration are based on the underlying assumption that arbitration is an "alternate" method of dispute resolution. In other words, many disputes will remain within our civil justice system and our courts will continue to actively mold the common law. Consider the possible effect if this alternative system of justice becomes the norm.

B. The "What If" Question: A Look Back to Melody Home Manufacturing Co. v. Barnes

Return to the development of the implied warranty of good and workmanlike performance that the Texas Supreme Court established in *Melody Home*, discussed in Part II.[53] *Melody Home* involved a dispute over services performed on a manufactured home.[54] The likelihood today is that the contract for the sale of that home would include an arbitration provision that would govern any disputes arising out of the sale of the

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49. *Id.*

50. *Id.*

51. As a general rule, decisions of arbitrators are not appealable. Under the FAA, a court has very limited authority to vacate an arbitrator's award. 9 U.S.C. § 10 (2000) (indicating that an arbitral award can be vacated only on narrow grounds including arbitrator corruption, fraud, partiality, and misconduct). In most cases, an award may not be appealed based on the incorrect application of law or an improper factual finding. *See, e.g.*, Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement."); Universidad Interamericana v. Dean Witter Reynolds, Inc., 208 F. Supp. 2d 151 (D.P.R. 2002) (holding that courts do not sit to hear claims of factual or legal error by an arbitrator). For a general discussion of the grounds for vacating an arbitrator's award, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

52. Not only are arbitrators without authority to develop the law, they also have little incentive to do so. Because their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public. Moohr, *supra* note 10, at 436.

53. 741 S.W.2d 349 (Tex. 1987).

54. *Id.* at 351.

mobile home.[55] The Barnes family, the purchasers of the mobile home, would likely be forced to submit their claim to resolution in an arbitration proceeding, not in court. The arbitrators would apply the law, not create it, and implied warranties in service contracts would still not exist. Even if a rare "non-arbitration" case were to make it to the Texas Supreme Court, few others would. It is extremely doubtful that the courts of Texas today would have more than 130 opportunities to discuss the issues considered in *Melody Home*. With only the occasional opportunity for creating law, the process of reformulating that law as times change would be gone.

In theory, the consequence of precluding access to the courts favors neither side to a dispute. It is neither pro-consumer nor pro-business. Although the common law allows the courts to create the law, it also allows them to change it.[56] In *Melody Home*, the Texas Supreme Court created an implied warranty apparently broadly applicable to all service contracts. Recent decisions, however, have limited its scope and thrown into question its continued validity.[57] Mandatory arbitration could preclude the court from hearing the decision that created the warranty, or it could preclude those subsequent decisions that limited it. In other words, arbitrators could find themselves applying law that the court, if given the opportunity, might modify or even reverse. Arbitration has the potential to "freeze" the common law in the form that exists at the time universal arbitration is imposed, creating a "time warp" of consumer protection, unable to accommodate change.

But this analysis ignores an important fact: arbitration in consumer contracts is imposed almost a matter of right by the business.[58] Consumers have no choice but to agree to arbitrate, while businesses

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55. *See* Davis v. S. Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002) (upholding the arbitrability of written warranties under the MMWA).

56. Knapp, *supra* note 6, at 785.

> There is another characteristic of litigation in the Anglo-American system, however, much less frequently manifested but perhaps of equal importance: the ability to *depart* from precedent .... This inherent power in a court to overrule its own prior decisions is by convention exercised sparingly, but all courts up to and including the United States Supreme Court can, and on occasion do, change course in this manner, fashioning in the process a new rule to be applied in similar future cases.

Id.

57. *See, e.g.*, Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist., 987 S.W.2d 50 (Tex. 1998) (finding no implied warranty).

58. *See* Carrie Menkel-Meadow, *Do the 'Haves' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 32-33 (1999) (explaining how a "corporation, employer, health care provider, bank, educational institution, securities broker ... [all] requir[e] as a condition of service, employment, or sale of a product that the customer, consumer, employee, or client to submit to mandatory arbitration").

have the choice to leave out an arbitration provision whenever they wish to pursue litigation. Through the sophisticated use of mandatory arbitration provisions, the business sector may engage in a form of selective creation of the common law—selecting which disputes, if any, our courts will be allowed to deal with. In other words, consumer arbitration may stall the development of the common law, or even worse, it may control common law development to accommodate the needs of business.

IV. CONSUMER ARBITRATION IS DIFFERENT

I recognize that most of the above discussion applies to all forms of arbitration, not just consumer arbitration. For example, employment or commercial arbitration also has the potential to preclude individuals from finding relief in the courts.[59] I suggest, however, that consumer arbitration presents a unique situation that exacerbates the problems inherent in arbitration. What is special about consumer arbitration and why does it present problems different from those presented in other contexts, such as commercial agreements or employment contracts? First, arbitration is not used with the same frequency in nonconsumer contexts. Commercial parties can actually bargain for an arbitration provision, and many commercial contracts do not include such provisions. In the employment context, many employees do not work subject to a written arbitration provision.[60] Further, even a valid arbitration clause in an employment contract does not prevent litigation from being brought by a federal agency on behalf of the employee.[61] In the consumer context, by contrast, there is no bargain, and arbitration provisions are becoming ubiquitous. For example, all of the major credit card companies currently include an arbitration provision in their agreements. As businesses realize the advantages of arbitration, more include such provisions. Based solely on my own experiences and

59. This fact has been noted and discussed elsewhere. *See* Knapp, *supra* note 6, at 780; Moohr, *supra* note 10; Carr & Jencks, *supra* note 6, at 446-47.

60. Section 2 of the FAA requires that the arbitration provision be contained in a written contract. 9 U.S.C. § 2 (2000). It is also interesting to note that some have argued that employers are better off not including an arbitration provision. *See* Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 470 (2000) ("The increasing use of mandatory arbitration by some employers has constituted an ill-advised departure from the overwhelmingly successful experience of employers in the court system.").

61. *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (holding that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as back pay, reinstatement, and damages, in an ADA enforcement action).

anecdotal stories from friends and colleagues, it appears that most written consumer agreements now contain an arbitration provision.

Second, commercial parties have the resources to influence legislators and government agencies to deal with problems through statutes or administrative rulings. Similarly, employees have labor organizations, as well as federal regulatory agencies such as the Equal Employment Opportunity Commission, to represent their interests within the legislative and regulatory spheres. Consumers, on the other hand, have few, if any, effective lobbying groups, and little in the way of support from regulatory agencies such as the Federal Trade Commission. Consumers have historically relied upon litigation and the courts to provide relief from false, misleading, deceptive, and unconscionable practices.

Finally, consumer law is a newer body of law and consequently is evolving more rapidly than the law in other areas. Until thirty-five years ago, there were few consumer protections statutes and *caveat emptor* reigned. Federal and state consumer law is still being actively interpreted by the courts and common law doctrines of fraud, deceit, misrepresentation and warranty continue to undergo substantial change.

In other words, although mandatory predispute arbitration may present problems in the context of commercial or employment agreements, consumer arbitration poses the greatest threat to our common law tradition. Individual consumers must rely upon the courts to establish and refine rights. Because of arbitration, consumers are being denied access to the courts with greater and greater frequency.

V. CONCLUSION

Predispute mandatory arbitration clauses are quickly becoming the norm in consumer contracts, and soon may be universally included. All major credit card companies already include such a clause,[62] and other industries may soon follow suit.[63] As many have noted, mandatory arbitration is often imposed on individual consumers who lack the knowledge or bargaining position to knowingly agree to waive the individual's right to access the courts; furthermore, these waivers take place in a manner that imposes on the consumer significant increased

62. *See* Harrington, *supra* note 12, at 102 (stating that "American Express, Discover, MBNA America Bank, and Bank One have all amended their credit card agreements to include arbitration provisions").

63. *Id.* (stating that "some department store cards, such as J.C. Penney, Best Buy, and Sam's Club Credit Card, have added arbitration clauses").

costs and substantial deterioration of substantive rights.[64] For these reasons alone, steps should be taken to slow down or stop the advancement of predispute mandatory arbitration clauses in consumer contracts. But there is an additional and perhaps more serious reason that business should not be allowed to unilaterally preclude consumer access to the courts.

Every school child learns about the three constituent elements of government, and the concepts of separation of powers and checks and balances between them. The common law is the system we have developed over the centuries to ensure that the law stays current despite rapidly changing social and economic conditions. As Justice Harlan F. Stone has noted, "If one were to attempt to write a history of the law in the United States, it would largely be an account of the means by which the common-law system has been able to make progress through a period of rapid social and economic change."[65] Our judiciary is much more than just a check on the legislative and executive branches of government. It is an independent branch of government, often looking out for the rights of those who lack the power or influence to gain the attention of elected officials. Our common law tradition is an essential part of the development and continuation of consumer protections.[66]

Predispute mandatory arbitration must not be allowed to pre-empt the common law and eliminate consumer access to the courts. As things currently stand, it is extremely unlikely that any of the legal issues surrounding the use of credit cards and credit card agreements will again see the inside of a courtroom.[67] As I have noted elsewhere,[68] the only way to prevent the continued growth of arbitration, and the further degeneration of consumers' rights, is a change in federal law, namely amending the Federal Arbitration Act. Current law presumes the validity of arbitration provisions and makes it extremely difficult to avoid enforcement. Exceptions to the current law, designed to insure arbitration is voluntary and providing meaningful choice, must be enacted. The simplest change is to preclude predispute arbitration clauses in consumer contracts, while permitting parties to agree to

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64. *See* sources cited *supra* note 39.

65. Stone, *supra* note 15, at 11.

66. Our common law tradition, while not perfect, generally insures that parties to a dispute can rely on the fact that similar cases will be dealt with in a similar manner. The consistency and predictability of the common law is lost in arbitration.

67. *See* Harrington, *supra* note 12, at 116-17 (discussing that the only way to protect consumers would be for Congress to amend the FAA).

68. *See* Alderman, *supra* note 39, at 1264-67 (proposing amendments to the Federal Arbitration Act).

arbitration after a dispute has arisen. This would protect consumers by allowing them to make a voluntary agreement to have the dispute resolved by arbitration and maintain arbitration as a viable form of dispute resolution. Alternative dispute resolution should be just that, an alternative. The law must insure that consumers retain the right to resolve disputes through our civil justice system, and that our common law tradition continues to be a viable part of our system of justice.