ARTICLES

ARBITRATION OF CONSUMER CLAIMS: THE SAD CASE OF TWO-TIME VICTIM TERRY JOHNSON OR WHERE HAVE YOU GONE LEARNED HAND?

BY RICHARD B. CAPPALLI*

I. INTRODUCTION

This is a case study of consumer victimization by a federal appellate panel. Terry Johnson, a desperate borrower paying exorbitant interest, had what appears to be a solid class action claim for a truth-in-lending violation.[1] In an astoundingly bad decision, *Johnson v. West Suburban Bank*, [2] a distinguished panel of federal appellate judges[3] stripped Terry of his supportive class and sent him and his $500 claim[4] into arbitration. Only the insane would attempt that remedy, meaning that the panel's decision doomed Terry's cause and permitted the defendant's likely violation of federal disclosure law to continue unabated.

What this article will reveal is a slipshod judicial performance: misreading of precedents, inadequate research, incredibly naive views of "reality," and a sinister hidden agenda, all in an appeal involving a very important legal question. Backed by precedents like *Johnson*, sellers and lenders can avoid legislation protecting consumers by the simple expedient of inserting arbitration clauses into their

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Editor's Note: The Journal has honored the author's request for citations to the Truth-in-Lending Act which are fuller and varied from what the Bluebook requires.

[1] For a more complete statement of the case facts, see text accompanying notes 24-40.

[2] 225 F.3d 366 (3d Cir. 2000), cert. denied sub nom Johnson v.Tele-Cash, Inc., 121 S.Ct. 1081 (2001).

[3] The opinion was signed by Chief Judge Edward Becker and joined by Judges Dolores Sloviter and Richard Nygaard. *See* THE AMERICAN BENCH at 17-18 (Becker biography), 73 (Nygaard biography), 86 (Sloviter biography) (11th ed 2000-2001).

[4] Courts can award individual plaintiffs between $100 and $1000 for a disclosure violation. Truth in Lending Act, Pub. L. No. 90-321, §130(a)(1), 82 Stat. 146, 157 (1968) (codified as amended at 15 U.S.C. §1640(a)(2)(A)(i) (1994)).

adhesive contracts.

This article would seem, at first glance, a run-of-the-mill work product typical of the legal academy, and maybe it is no more than that. The article's focus , however, is not on substance but on form: methodological deficiencies which may have led to the indefensible result. It asks the question "How could a capable panel of federal appellate judges have reached a horrendous result?" and studies the panel's manner of consulting and using legal source materials in an effort to answer that question. I have worried before about the quality of judicial decisions in a legal world bereft of fundamental skills in case and statutory analysis.[5] The case under study suggests that bad results follow from bad method. Therefore, this is not the typical complaint about how a court weighed interests, or how it ignored the weight of authority, but how it understands and applies basic legal material.

For a century the federal appellate bench has been constantly and consistently lauded. The reputation of this group of judges was lifted to great heights by brilliant judges like Learned Hand and continues to be sustained by the likes of Richard Posner. Now, however, the thick reputational shield is being penetrated. A recent literature has appeared in which both judges[6] and academics[7] question the current competence of the federal appellate bench. This article, though modest in scope and pretending no scientific validity, falls within this current literature.

That federal appeals judges are losing luster is not surprising. It would be miraculous if the federal appeals judge were able to perform at levels of competence once attained by the Learned Hands. Their caseloads have grown enormously, [8] although for reasons which scholars have characterized as "silly"[9] the

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[5] Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393 (1997).

[6] *See* Stephen Reinhardt, *A Plea to Save the Federal Courts—Too Few Judges, Too Many Cases*, 79 A.B.A.J. 52 (1993).

[7] *See, e.g.*, Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411 (1987); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996) [hereinafter *Requiem*].

[8] In the 12-month period ending March 31, 2000, filings in the U.S. Courts of Appeal were 55,320. FEDERAL JUDICIAL CASELOAD STATISTICS (Admin. Office of U.S. Courts, 2000). This caseload was managed by 164 full-time judges for a ratio of 337 appeals per judge. *See* BNA'S DIRECTORY OF STATE AND FEDERAL COURTS, JUDGES AND CLERKS 2-6 (2001) [hereinafter DIRECTORY]. Because judges normally sit in panels of three, the ratio is more severe, 1011 cases annually per panel of three. Some help comes from senior judges, who "may continue to perform such judicial duties as [they are] willing and able to undertake. . . ." 28 U.S.C. § 294(b) (1994). The directory of judges lists 84 senior judges. *See* DIRECTORY, *supra*, at 2-6. In 1960, by comparison, 3,899 appeals were managed by 68 federal circuit judges, for a ratio of 57 appeals per judge and 172 per panel. *See Requiem*, *supra* note 7, at 274 n.3 In sum, in four decades the work of federal appeals panels has increased almost 600%. For additional data, see Carol Krafa, Joe S. Cecil & Patricia Lombard, STALKING THE INCREASE IN THE RATE OF CIVIL APPEALS 3 (figure 1) (1995)

appeals judges have fiercely fought against significant increases in the numbers of judges. Their pay is modest, much below what a senior law firm partner earns. Their clerks know little of legal fundamentals, coming out of "elite" law schools which teach little law and much esoteria.[10] The luxury of writing opinions by themselves is no longer available to the judges,[11] although the fact of ghostwriting is a well guarded secret. I suspect, although I will never know for sure, that the opinion written in the *Johnson* case was drafted by a clerk, cursorily reviewed by its "author," and minimally reviewed by the two concurring judges. After reviewing the "evidence" within, hopefully the reader will concur in my conjecture. Indeed, it would be even worse to think that the *Johnson* opinion was the product of considerable work and careful research and thought by the judges themselves.

The *Johnson* question is interesting, although method and not substance is this paper's focus. The Federal Arbitration Act permits, in its second section, an arbitration clause to be declared invalid.[12] One of the grounds for so doing is when a statutory right sought to be asserted in court cannot be effectively enforced in arbitration.[13] The question arose in *Johnson* whether a court should force Terry Johnson to arbitrate his $500 truth-in-lending cause of action when it was apparent to anyone with eyes open that arbitration would be an economically impossible forum for this type of claim.

II. FEDERAL ARBITRATION ACT

In 1925 Congress approved a law "to make valid and enforceable certain agreements for arbitration."[14] Known now as the Federal Arbitration Act, the statute had modest goals. Arbitration was a way to avoid the delay and expense of litigation, which appealed "to big business and little business alike, to corporate interests as well as to individuals."[15] Despite this attraction, arbitration was not prospering because courts throughout America had created doctrines which often blocked its use. A Senate committee explained:

(appellate caseload, 1958-1993); *Requiem*, *supra* note 7, at 274 n.3 (1240% increase in filings and 263% increase in judges). For a comprehensive study of the U.S. Courts of Appeal, see Thomas E. Baker, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994).

[9] *See* William L. Reynolds & William M. Richman, *Justice and More Judges*, 15 J. L. & POL. 559, 563 (1999).

[10] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

[11] *See Requiem*, *supra* note 7, at 274 n.14 ("Judge Medina is supposed to have said that Learned Hand 'wouldn't even let a law clerk write a sentence, not one sentence.'").

[12] 9 U.S.C. § 2 (1994).

[13] Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 637 (1985).

[14] Federal Arbitration Act, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1-16 (1994)).

[15] S. REP. NO.536, at 3 (1924).

> [I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award.[16]

Once a dispute arises, one of the parties to a contract with an arbitration clause is likely to find a litigation advantage, for example to use court delay to postpone payment of a legitimate debt. Under the common law doctrines summarized above that party could simply ignore its arbitration commitment and get away with it. One reason given for these anti-arbitration precedents was that courts feared a loss of business to arbitrators.[17] This, we will see, becomes a huge irony : today's courts seem to be lessening their workloads by the device of compelling any and all controversies to arbitration.

The 1925 law would counteract this anti-arbitration case law by making "valid, irrevocable, and enforceable" written agreements to arbitrate.[18] Courts would retain the power, however, to invalidate arbitration clauses "upon such grounds as exist at law or in equity for the revocation of any contract." [19] In this way, reported the Senate Judiciary Committee, "practical justice" would be achieved by enforcing arbitration "where written agreements for that purpose have been voluntarily and solemnly entered into."[20]

These somewhat humble origins do not seem to contemplate the use of arbitration clauses by big business to skirt the obligations of consumer protection laws. Yet three-quarters of a century later, with no relevant changes in the Act's language, the Federal Arbitration Act is being used precisely that way with the blessing and active promotion of the federal bench. Notice that the statutory language quoted above does not make arbitration clauses less revocable than other agreements nor does it burden in any way the party advancing grounds for such revocation. Indeed, the legislative history mentions placing arbitration agreements not upon better footing but "upon the same footing as other contracts." [21] When the Supreme Court finds law discriminating against arbitration agreements, it trots out the "same footing" language to justify its invalidation of that law.[22] Yet in the year 2000 a Third Circuit panel found within the law a "powerful presumption" favoring arbitration which then converted into a "heavy burden" on one challenging the validity of an arbitration clause.[23] While the Act hoped to balance the scales

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[16] *Id.* at 2.

[17] *Id.*

[18] 9 U.S.C. § 2 (1994)

[19] *Id.*

[20] S. REP. NO. 536, at 3.

[21] H.R. REP. NO. 96, at 1.

[22] *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996), *citing* Scherk v. Alberto-Culver Co., 417 U.S. 511 (1974)

[23] *Johnson*, 225 F.3d at 369.

between arbitration agreements and other contractual commitments, in the course of time the former came to get a huge judicial elbow on the scale.

III. TERRY JOHNSON AND LOAN DISCLOSURES

Terry Johnson was elbowed into arbitration as follows. He borrowed $250 from a Delaware bank. Two weeks later he was to repay the principal plus a finance charge of $88. That amounted to an annual rate of interest of 917%. How can these modern Shylocks charge such obscene interest in America? The answer is that hoping to attract the banking industry to their cities, several states have taken the usury lid off of interest rates.[24] Banks can charge whatever the traffic, even the economic underclass,[25] will bear. By becoming national banks, lenders can then impose their high interest rates on borrowers outside the boundaries of the bank's home state without being subject to any other state's usury laws.[26]

While substantive protections have been undermined, truthful disclosures of the rate and cost of interest are still required under federal law, such as the Truth-in-Lending Act.[27] The theory underlying disclosure, dubious in the case of desperately needy borrowers, is that potential customers will "shop" for the best interest rate and that competition among banks for their business will keep interest rates reasonable.[28] That theory seems to have made no impression on Terry Johnson's

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[24] *E.g.*, Illinois Financial Services Development Act, § 5, ILL. COMP. STAT. ANN. 205/675-5(West 2000) ("at such periodic percentage rate . . . as the agreement governing the [revolving credit] plan provides . . . ."); ARIZ. REV. STAT. ANN. § 44-1201 (A) (Supp. 1999) ("any rate of interest may be agreed to").

[25] *See generally* Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C.L. REV. 589 (2000).

[26] *See* 12 U.S.C. § 85 (1994) ("Any [national bank] may take . . . interest at the rate allowed by the laws of the State . . . where the bank is located. . . ."); Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978).
Many nationwide retailers are taking advantage of this legal opportunity by creating their own national banks which finance store purchases by cardholders. *E.g.*, National Bank of the Great Lakes (Saks Fifth Avenue); Nordstrom National Credit Bank (Nordstrom); Monogram Credit Card Bank of Georgia (JC Penney); GE Capital Consumer Card Co. (Macy's).

[27] Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1640 *et seq.*(1994)).

[28] *See, e.g.*, H.R. REP. NO.1040 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1963:

> Title I, the truth in lending and credit advertising title, neither regulates the credit industry, nor does it impose ceilings on credit charges. It provides for full disclosure of credit charges,rather than regulation of the terms and conditions under which credit may be extended. It is the view of your committee that such full disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed and further permit the consumer to "comparison shop" for credit. It is your committee's

avaricious Delaware lender.

Setting penalties is a difficult problem for disclosure laws. It is usually impossible for borrowers to prove actual damages caused by an imperfect disclosure, for instance that they would have borrowed elsewhere at lower interest.[29] And legislators are justifiably reluctant to strip lenders of principal or interest for a technical disclosure mistake. The solution in federal law has been to set a modest amount, $500 minimum, $1000 maximum, as a penalty turned over to the disclosure-enforcing borrower. Because lenders typically engage in mass transactions using identical forms, a disclosure violation for one borrower is a disclosure violation for many. For this reason disclosure lawsuits are typically class actions. This creates another dilemma. Should a lender make a technical disclosure mistake it is subject to a vast penalty as a class action defendant, a penalty disproportionate to its error. [30] Responding to this potential inequity, Congress quantitatively limited class action damages to the lesser of $500,000 or 1% of the defendant's net worth. [31] The legislature characterized this as a "civil penalty" which it considered a "chief enforcement tool" and a "workable structure for private enforcement."[32]

The essential legal structure emerges as an informational system. Accurate information enables money shoppers to know readily the cost of borrowing money which, across the field, will unleash competitive forces keeping lending terms reasonable (in theory). Lenders will conform to disclosure requirements because of the pressure of class actions sponsored by lawyers looking toward attorney fees and large civil penalties.

What happens to this structure when lenders draft "take-it-or-leave-it" (adhesive) contracts containing arbitration clauses? This was a matter of concern even in 1924. A witness, Mr. Cohen, representing the arbitration bill's drafter and chief advocate, the American Bar Association, said that one reason courts refused to enforce arbitration agreements was to protect the weak from powerful parties who forced them to "sign away their rights." [33] The Chair of the Joint Subcommittee holding the hearing observed that the problem of one-sided contracts still existed:

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view that full disclosure of the terms and conditions of credit charges will encourage a wiser and more judicious use of consumer credit.

[29] While there is no limit on actual damages, under theTruth in Lending Act, there are almost never any actual damages. How do we show damages on a disclosure violation? It is virtually impossible. 119 CONG. REC. 25418 (1973) (remarks of Sen.Proxmire).

[30] *See* Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972) (Frankel, J.).

[31] Truth in Lending Act, Pub. L. No. 90-321, § 130(a), 82 Stat. 146, 157 (1968) (codified as amended at 15 U.S.C. § 1640 (a) (1994)).

[32] S. REP. NO.94-590(1977), *reprinted in* 1976 U.S.C.C.A.N.431, 438.

[33] *See Arbitration of Interstate Commercial Disputes; Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. On the Judiciary*, , 68th Cong. (1924) (hereinafter *Joint Hearing*).

> There are certain contracts to-day between the railroads and the shippers in which there is an agreement to arbitrate, and the representation is made to the shipper, "You can take it or leave it, just as you please; but unless you sign you cannot ship."[34]

Cohen's response to the Chair's worry about railroad adhesive contracts stripping shippers of rights was that law and government would intervene to protect the weaker party:

> [W]e have the regulation of the Federal Government, through its regularly constituted bodies, and they protect everybody. Railroad contracts and express contracts and insurance contracts are provided for. You can not get a provision into an insurance contract to-day unless it is approved by the insurance department. In other words, people are protected to-day as never before.[35]

In sum, contracting parties could not skirt around legal obligations by switching dispute resolution from the courts to arbitrators. Terry Johnson's federal truth-in-lending rights would continue to be protected by law. Years later, in the leading *Mitsubishi* case, the U.S. Supreme Court echoed the same idea. The Court would accept contractually-imposed arbitration of statutory claims, federal antitrust claims in particular, when "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." [36] This would enable the statute to "continue to serve both its remedial and deterrent function."[37]

As the reader has suspected, Terry Johnson's one page loan agreement had an arbitration clause above the signature line which called for binding arbitration of "any claim, dispute, or controversy" between Johnson and his lender, County Bank of Rehoboth Beach.[38] In bigger print the contract notified Johnson that he was giving up his right to "litigate."[39]

Referring Johnson to arbitration under his contractual commitment would cost him his class action because arbitrators have no power, as do courts, to provide class relief. [40] The question then boils down to whether arbitration was likely to provide "effective relief" to Johnson if County Bank's disclosures violated federal law.

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[34] *Id.*

[35] *Id.*

[36] *Mitsubishi*, 473 U.S. at 637.

[37] *Id.*

[38] Johnson v. Tele-cash, Inc., 82 F. Supp. 2d 264, 267 (D. Del. 1999), *rev'd sub nom.* Johnson v. West Suburban Bank, 225 F.3d 366 (3rd Cir. 2000), cert denied, sub. nom Johnson v. Tele-Cash, Inc., 121 S.Ct. 1081 (2001).

[39] *Id.*

[40] *See, e.g.*, Champ v. Siegel Trading Co., 55 F.3d 269, 274-77 (7th Cir. 1995); *cf.* Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984) (district court may not consolidate arbitration proceedings if not provided in arbitration contract); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989) (same).

IV. THE PANEL DECISION

Losing the call of equity in the cacophony of pro-business amicus briefs, [41] the Third Circuit panel forced Terry Johnson to arbitrate, individually, his federal truth-in-lending claim. The court's opinion is stylish, with a law review patina. But its smart veneer fails to conceal the opinion's multiple flaws. Particularly disturbing is its brieflike quality; it tries to convince by hyperbole and distortion of legal sources. An overview of the panel's reasoning will prepare the way for a detailed study point by point.

The panel poses the basic question correctly: whether a plaintiff seeking class damage relief for a truth-in-lending violation can be held to to his signed agreement to arbitrate? Terry

Johnson's answer, however, is doomed from the outset because the panel places insurmountable barriers between the victim Johnson and the answer he wants. He must leap over a "powerful presumption" favoring arbitration and discharge a "heavy burden" to win over the court. The legal source of these barriers and their accompanying adjectives "powerful" and "heavy" is a mystery, as we shall see. The panel cites no authority to back them up. To pass these hurdles Terry Johnson had to demonstrate not merely a conflict between the arbitration forum and the truth-in-lending statute but an "irreconcilable" one. Again, the panel's choice of an adjective is unfounded in statutory or precedential law. This was a game Johnson could never win.

Continuing to stack the deck against plaintiff, the panel required not just a showing that no-class-action arbitration imposed on borrowers by lenders would undermine the truth-in-lending law's deterrence goals, but that Congress had included specific language in that statute or its legislative history barring waivers of class actions. Huge pro-arbitration leanings, themselves stitched from whole cloth, in turn create a burden on Congress to express its desires explicitly.[42] It is not enough for Congress to say, "We need class action civil penalties to deter lenders from violating our rules." Congress must go further and say "and lenders may not not make borrowers waive class action lawsuits."

This approach foresakes the normal judicial function of interpreting statutes in

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[41] *See infra* note 72 and accompanying text.

[42] *Cf.* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."), *discussed in* II RICHARD CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS § 10:10 (1982); Pennhurst State School & Hosp. v. Halderman, 469 U.S. 89, 99 (1984) ("[W]e have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'") *citing* Quern v. Jordan, 440 U.S. 332, 342 (1979); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1984) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

ways which maximize achievement of their separate and sometimes conflicting goals. Instead, it places upon the legislature the impossible task of anticipating and reconciling, in advance, by specific language all potential statutory clashes. Effectively, the panel wrote into the Federal Arbitration Act a clause which says "all statutory rights are arbitrable on a no-class-action basis unless specifically prohibited in the statute creating the right." And Congress had no way of knowing of this statutory drafting duty when it wrote the hundreds of statutes creating consumer and other rights.

I will challenge all of the above. But what is most disturbing to me is the panel's "head in the sand" conclusion that Johnson could get effective relief in arbitration. Nowhere does the panel explore *as a matter of fact* whether a $500 claim can be pursued in arbitration. Rather, it parses the truth-in-lending act for remedies and says to Johnson "here they are, go get them." The panel seems not at all concerned about whether Johnson can get a lawyer on a $500 claim or pursue his rights pro se in arbitration. It drops him at arbitration's doors without concern whether he can enter.

V. READING PRECEDENTS RIGHTLY

A. Moses H. Cone*: Birth of a Dictum*

Let's pretend that in a case involving the constitutionality of a death penalty Justice Brennan, assigned to write the majority opinion, decides to write an encomium about the great value of arbitration as a way to resolve civil disputes. Within the encomium he tells courts to have a "healthy regard for the federal policy favoring arbitration" and instructs them to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." The question is whether these words have legal effects in future cases before the Court itself and before lower courts.

This question would pose little difficulty to my first year legal method students. Justice Brennan's words would be denigrated as "dicta." The statements have nothing to do with the death penalty issues brought to the Court for resolution. The discussion exceeds the Court's authority to create law, an authority limited to legal issues needing resolution in order to decide controversies properly before the Court. This is the common law tradition. Also, because the discussion is so far removed from the death penalty issues being mooted, it is quite unlikely that the Court would have had the benefit of lawyers' advocacy or staff research. The dicta then becomes both unauthorized lawmaking and qualitatively fragile in itself. It deservedly earns the further epithets "naked" or "bald" or "weak."

No reader can doubt that the Court itself would feel free to disregard the gratuitous language when quoted in a future case involving arbitration issues. The classification of prior judicial talk as "dicta" is part of the Court's methodology, along with all other courts working within the common law tradition.

Does this language deserve a higher status when presented to lower federal or state courts? Can the U.S. Supreme Court "talk law" to these courts in a binding way regardless of the needs of the case that generated the talk?

The answer is, of course, "no." When legal propositions are dicta in the Supreme Court itself, they are dicta before all courts. This stems from the fundamental proposition that courts, including supreme courts, legitimately make law only as an incident to their dispute resolution function. When they engage in dicta-writing, they stray from that boundary and invade the province of the legislature, the authorized law-writing organ in our democracies. The duty of all courts below the dicta-writing one is to apply existing law in the resolution of disputes. In calculating what is and what is not law these courts must utilize appropriate methodology, which includes the distinctions between "holding" and "dictum." In sum, the job below is not to apply law talk from above blindly, but first to classify its authoritativeness and to discount, to a greater or lesser extent, any statements which lack binding force.

The hypothetical Brennan attempt to legislate should, in conclusion, be rejected by all courts.

Sadly, however, courts-without-method, or courts too pressed to think hard, lift these crumbs from high court opinions, elevate them to the status of "law," and resolve disputes based upon them. This reckless course is fueled by soulless lawyers who scavenge for helpful language in the precedents and present these tidbits in their briefs as if they were law. In appellate briefs one rarely finds sophisticated case analysis; rather, the style is "cut and paste."[43] Language thought helpful is cut from the precedents and stitched together to make an argument. This deluge of second class advocacy must infiltrate the techniques of all judges, even those who once were sound methodologists. And their clerks, having little education in legal method,[44] know no better.

The Brennan language, hyperbolized above, was suggested by his opinion in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation.*[45] In that case Justice Brennan said en passant that "Section 2 [of the Federal Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements,"[46] and also that "questions of arbitrability must be addressed with a

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[43] *See* Benjamin N. Cardozo, *Law and Literature,* in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 9 (1931):

> One marvels sometimes at the ingenuity with which texts the most remote are made to serve the ends of argument. . . . The dreary succession of quotations closes with a brief paragraph expressing a firm conviction that judgment for the plaintiff or for the defendant, as the case may be, follows as an inevitable conclusion.

Id. at 9. The computer has replaced Cardozo's "pastepot," *see id.* at 10, but the process is the same. This may be an example of modern technology disserving the cause of human advancement.

[44] *See generally* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393(1997).

[45] 460 U.S. 1, 24-25 (1983).

[46] *Id.* at 24.

healthy regard for the federal policy favoring arbitration." [47] But neither statement worked into the case's resolution because the matter before the Supreme Court did not include the question whether Mercury's construction claims were arbitrable; rather, the Court was faced with a *Colorado River*[48] abstention issue, namely, whether the federal district court should have stayed Mercury's action to compel arbitration while a state court litigated the hospital's declaratory judgment action. Whether the construction cost claims were arbitrable was not a question before the Court—it faced just the question whether the district court properly abstained under the *Colorado River* standard. And applying that standard did not require any discussion of arbitrability whatsoever. The Court only had to note that federal law provided the rule of decision on the question of arbitrability.[49] In consequence, Justice Brennan's comments favoring arbitrability were peripheral to any issue before the Court, played no role in deciding those issues, and, apart from citations to lower court opinions, [50] were unbacked.

Also worthy of note is that the Section 2 of the Arbitration Act in which Justice Brennan found a liberal pro-arbitration policy is also the section vesting power in courts to invalidate arbitration clauses "on grounds for the revocation of any contract." [51] Dicta is notoriously shaky because, on unlitigated matters, the dicta-writing court has not had the benefit of lawyers' argument or even internal discussion. The paradox thus arises that Justice Brennan extracted most favored status for arbitration agreements and clauses out of a statute which actually says "treat them no differently from other contracts."

When courts are under heavy docket pressure, any excuse to shift a litigation elsewhere is likely to appeal to the bench. Once the "healthy regard for the federal policy favoring arbitration" dictum and its "any doubts" companion were sprung loose, their suspect origins were lost and they quickly acquired momentum and a patina of legitimacy. The Brennan dicta in *Moses H. Cone* spawned its first progeny two years later in *Dean Witter Reynolds, Inc. v. Byrd*, [52] which, after citing the *Moses H. Cone* "any doubts" dictum, [53] created its own:

> The preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate.[54]

Even though Congress thought it was putting arbitration clauses on the "same footing" as other contract clauses, that is, equally enforceable, judicial enthusiasm

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[47] *Id.* at 24-25.

[48] Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976). An appealability question, not requiring or inviting a discussion of arbitrability, was also before the Court. *See Moses H. Cone,* 460 U.S. at 8-13.

[49] *See id.* at 23-24.

[50] *See id.* at 25 n. 31.

[51] 9 U.S.C. § 2 (1994).

[52] 470 U.S. 213 (1985).

[53] *Id.* at 221.

[54] *Id.*

for diverting cases to arbitration came to give them "most favored" status. Following *Byrd*, the *Mitsubishi* case repeated the *Moses H. Cone* dictums, [55] described them as "guidelines," [56] and saw them as requiring that "parties intentions [be] generously construed as to issues of arbitrability."[57]

Through repetition and blind application, a pure dictum—the elbow-on-the-scale boost to arbitration—became Supreme Court "doctrine" in the brief span of four years . Even the cautious and methodologically astute Justice O'Connor bowed to the weight of prior high court talk by starting her reasoning in *Shearson/American Express* with pro-arbitration quotes from the earlier opinions.[58] And these incantations naturally proved irresistible to judges looking upwards. In their hands the *Moses H. Cone* and later dicta became a "strong federal policy favoring arbitration" [59] and "the Supreme Court's current strong endorsement favoring arbitration as a method of dispute resolution." [60]

In the hands of the *Johnson* court, Justice Brennan's bald dicta in the *Moses H. Cone* case acquired not lesser weight because of its illegitimacy but, instead, compelling force. The panel transmogrified it not only into a "presumption in favor of arbitration" but also a "powerful" one at that.[61] This powerful presumption then created a "heavy burden" on Johnson to demonstrate the unsuitability of arbitration for his claim. [62] What the "powerful presumption" and "heavy burden" ended up meaning was that Johnson would fail in his assertion that his Truth in Lending Act class action was unsuited for arbitration unless he could show: 1) language in the Truth in Lending Act which expressly said exactly that; 2) language in a committee report which expressly said exactly that; or 3) a "conflict" between arbitration and the Act's class action remedy which was "irreconcilable," meaning the court's ample imagination could not calculate a way for the two dispute resolution methods to coexist. What began in *Moses H. Cone* as a unsupported naked dicta ended up 17 years later in the hands of the Third Circuit panel as an insurmountable barrier: Johnson had become Sisyphus.

B. Mitsubishi: *At the Top of the Slope*

The "slope" is, of course, legal method's famous "sliding slope." While justice

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[55] *Mitsubishi*, 473 U.S. at 626.

[56] *Id.*

[57] *Id.*

[58] Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987).

[59] Peoples Security Life Ins. Co. v. Monumental Life Ins. Co., 867 F. 2d 809, 813 (4th Cir. 1989) (compelling arbitration).

[60] Nemes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 741 F. Supp. 657, 660 (E.D. Mich. 1990) (compelling arbitration).

[61] *Johnson,* 225 F.3d at 369.

[62] *Id.*

and equity and public policy all call for a particular case result, great care must be taken that a precedent is not set which will cause later courts to slip, slide and crash, that is, extend the precedent in undesirable ways.[63] An antidote is the carefully constructed opinion which is narrowly written, sticking closely to the case's material facts, avoiding expressing broad principles which can lead to future mischief, and employing reasoning which is tailored to the case facts and subsumes only closely analogous future controversies.[64] Naturally, lawyers and courts, both zealously constructing reasons, the former in briefs, the latter in opinions, can later wrench out of context statements found within the most carefully and tightly constructed opinion. The tight appellate opinion is a palliative but not a cure.

Mitsubishi is one of the cases in which the U.S. Supreme Court permitted a claim of right under a federal statute to be sent to arbitration. Certain features of the case made it quite easy to reach that result. International transactions were involved: the sale of cars to a dealership in Puerto Rico by a Swiss-Japanese combine. Arbitration has become the preferred dispute resolution method for international business because the agreement to arbitrate and any resulting award is quite easy to enforce under a widely joined treaty.[65] For the Supreme Court to refuse arbitration would strike a blow to the practices of business, practices backed by common sense, and might even lead to retaliatory moves against U.S. companies by courts of other countries. An additional case feature was the size of the plaintiff's claim and the magnitude of the underlying transactions. This was big business. The Court had reason to believe that the parties could fully protect themselves before a Japanese arbitration panel. The Court stated: "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[66] The Court was surely aware that such would require plaintiff to pay for transcripts, translations and a reasoned decision after what promised to be an extensive series of hearings. Without discussion the Court further assumed that plaintiff, a large dealership, was in a position to make strategic judgments about the car distribution contracts it was signing, including clauses like the arbitration one, and had leverage to affect the terms of the deal.

Would the law's protections be recognized and extended by Johnson's arbitrator? One could answer these queries on a theoretical plane, saying, for example, that the arbitrator should apply the rights and remedies offered by the

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[63] *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 545, 64 N.E. 442, 443 (1902) (Parker, C.J.) ("If such a principle be incorporated into the body of the law . . ., the attempts to logically apply the principle will necessarily result . . . in litigation bordering upon the absurd.").

[64] *See generally* Michael C. Dorf, *Courts, Reasons, and Rules*, 19 QUINNIPIAC L. REV. 483 (2000)

[65] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C.§ 201 et seq. (1994)).

[66] *Mitsubishi*, 473 U.S. at 638.

federal truth-in-lending laws and regulations (a voluminous body of law)—the same way the Japanese arbitrators in *Mitsubishi* should recognize, understand and apply American antitrust laws. Should arbitrators fail in this regard, post-award relief would theoretically be available by proof of such failure in federal court. [67] This, the theoretical plane of "effective relief" and effective judicial review, is where the *Johnson* panel was positioned when it said "plaintiffs who sign valid arbitration agreements . . . retain the full range of rights created by the TILA." [68]

To invest the phrase "effective relief" with real meaning, however, courts would be obliged to dip below theory and ground their decisionmaking in reality. It is only theory actualized in practice that will make Terry Johnson whole. The question becomes: What relief is in fact available to Terry Johnson and the multitude like him subject to boilerplate arbitration clauses imposed by mass lenders and sellers? Could Terry Johnson, lacking the weight and promise of class relief, get a lawyer to take his $500 truth-in-lending claim before an arbitrator on the hope of ultimately recovering reasonable attorney fees? Could he afford, in pursuing his $500 claim, to create the written record (transcript and written, reasoned arbitrator's decision included) necessary to prove that the arbitrator disregarded federal law? Could he take his $500 claim into federal court in a proceeding to vacate an unfavorable award? [69]

Powerful evidence exists that American business has started utilizing classless arbitration precisely in order to thwart the law. Big firm "financial services lawyers" are promoting the insertion of arbitration clauses into adhesive form contracts for the very purpose of sidestepping class actions. [70][S]everal banks major banks mounted a counterattack. By adopting alternative dispute resolution

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[67] *See id.*

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.

Id. at 638.

[68] *Johnson,* 225 F.3d at 373 .

[69] *See* 9 U.S.C. § 10 (1994).

[70] *See* Edward Wood Dunham, *The Arbitration Clause As a Class Action Shield*, 16 FRANCHISE L.J. 141 (1997); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses As a Defense*, 7 BUS. L. TODAY 24 (May/June 1998); Alan S. Kaplinsky, *Arbitration and Class Actions—A Contradiction in Terms*, in 1 CONSUMER FINANCIAL SERVICES LITIGATION: 1999, 619 (Practicing Law Inst. 1999); Dwight Golann, *Consumer Financial Services Litigation: Major Judgments and ADR Responses*, 48 BUS. LAW. 1141 (1993):

> [S]everal banks major banks mounted a counterattack. By adopting alternative dispute resolution programs that featured binding arbitration as a final remedy, these banks reduced the attractiveness of class action litigation.

Golan, *supra*, at 1141.

programs that featured binding arbitration as a final remedy, these banks reduced the attractiveness of class action litigation. Banks and retailers take no risk upon themselves in the process. A bank, for instance, can ignore its arbitration commitment and get its default judgments en mass in court, because no debtor, at least no debtor who owes the money, is likely to hire a lawyer to divert the matter into arbitration or otherwise defend in court. From the bank's perspective as a claimant, the arbitration clause does not exist! For instance, if Terry Johnson failed to pay his $338 debt to County Bank, the Bank's lawyers could march into court with a complaint, affidavit of debt, and ready-to-sign order of default against Terry Johnson. The bank would likely get judgment against Terry and dozens of others, all in an afternoon. Even if a bank took its borrower defaults into arbitration instead of court, it could process them in large blocks in a single day before a single arbitrator, just as it does in a judicial forum.

On the other side of the arbitration commitment sits the consumer with a small claim, for whom the arbitration clause is fatal. Consumers will rarely be able to pursue their rights because of the unfavorable economics of arbitrating a small claim, like Terry Johnson's $500 disclosure matter. The likely costs even lock consumers out of small claims court, where banks and sellers are sure to show up and assert the arbitration clause as a defense. A court in Alabama apparently permitted discovery on these matters in a class action lawsuit with startling results. [71] In the two years following its imposition of arbitration on credit cardholders, First USA filed 51,622 arbitrations. Of those that reached the award stage, First USA won 99.6%. In contrast, only four complaints had been filed in arbitration against First USA by its cardholders.

The arbitration strategem is so important to American business that when a legal challenge is brought against one of these clauses, big business unites, through its associations, to defend them. Their associations appear in court with massive amicus curiae briefs prepared by big firm lawyers. [72]

The Third Circuit panel careened down *Mitsubishi's* slope by snatching its standards, ignoring its quite different material facts, and failing to match these standards to the Terry Johnson reality. Decent methodology would have required the panel to recognize *Mitsubishi's* quite different material facts and dismiss the precedent as off point. Instead, the panel grabbed the high court's statement about statutory claims being capable of effective resolution in the arbitral forum and noted that Johnson's lawyers did not claim that "arbitrators would be unable to afford [Johnson] any relief that he could individually obtain in a court proceeding, including injunctive relief or attorney's fees." [73] Johnson's Chicago class action

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[71] *See* Caroline E. Mayer, *Arbitration Rulings Called One-Sided*, Washington Post, Mar. 1, 2000, at E01.

[72] *See Johnson*, 225 F. 3d at 368 (amicus brief submitted by Delaware Retail Council, New Jersey Retail Merchants Ass'n, and Pennsylvania Retailers Ass'n; amicus brief submitted by American Bankers Ass'n, American Financial Services Ass'n, Consumer Bankers Ass'n and Delaware Bankers Ass'n).

[73] *Johnson*, 225 F.3d at 373-74.

lawyers in fact did not argue the practical ineffectiveness of go-it-alone arbitration for their client, focusing exclusively on the conflict between classless arbitration and TILA history, structure and goals. [74]What the panel likely meant here was that Johnson's lawyers did not argue against the *theoretical* availability of remedies in arbitration.

C. Shearson/American Express: *Reading a Precedent Lightly*

The panel drew sustenance from *Shearson/American Express, Inc. v. McMahon.*[75] This precedent provided the panel with the phrase "irreconcilable conflict,"[76] which it treated as if it were statutory language governing whether the statute creating plaintiff's right could not coexist with the arbitration obligations under the Federal Arbitration Act. The panel took the phrase to mean that if the arbitration duty undercut the substantive statute in a significant way, arbitration should not be ordered. But if the court could find harmony though reconciliation of the two statutory goals, it would have to order arbitration.

Shearson/American Express offered much more in the way of guidance, and when properly read strongly bolstered Johnson's case against arbitration. Treating "irreconcilable conflict" as law, apart from the factual setting which spawned it, violates Chief Justice John Marshall's wise admonition that general expressions in judicial opinions are always to be considered in light of case facts. [77]

The *Shearson/American Express* case involved customers of a stock brokerage, who, besides claiming individually, sued as trustees of various pension and profit-sharing plans.[78] They charged defendants with fraudulent and excessive trading on plaintiffs' accounts, as well as false statements and material omissions in advice given to plaintiffs. Violations of § 10 (b), Securities Exchange Act of 1934, [79] as well as "RICO," the Racketeer Influenced and Corrupt Organizations Act, [80] both giving rise to civil damage actions, were claimed.

At the outset one must notice the significant differences between these claims and Terry Johnson's. First, *Shearson/American Express* involved different statutes underlying plaintiffs' claimed right of action , and each statute carries its own

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[74] *See* Brief for Appellee, *Johnson*, 225 F.3d (No. 00-5047) *passim* (on file with author). Johnson's main counsel was a boutique firm specializing in consumer class actions. *See* Website, Edelman Combs & Latturner, *at*
http://www.edcombs.com. Naturally, this firm would seek the broadest pro-consumer ruling possible, eliminating with one stroke, for instance, the defense of arbitration from all TILA class actions. The fact that Johnson's lawyers did not prove or argue the ineffectiveness of arbitration in Johnson's particular situation should have counseled the court to avoid far-ranging dicta and, indeed, to avoid any discussion at all of an issue not raised by the parties.

[75] 482 U.S. 220 (1987).

[76] *See id.* at 242.

[77] Cohens v. Virginia, 19 U.S. (1 Wheat.) 264, 399 (1821).

[78] *Shearson/American Express*, 482 U.S. at 222.

[79] 15 U.S.C. § 78j(b) (1994).

[80] 18 U.S.C. § 1961 (1994).

distinct language, purpose, and structure. Second, this is major litigation, not a $500 claim. If sent into arbitration plaintiffs and their attorneys can be presumed to have the wherewithal to pursue their claims vigorously. In writing for the majority, Justice O'Connor observed that arbitrability decisions spring out of their particular circumstances and precedents have to be read in that particular light.[81]

While a precedential holding may be "off point" because of significantly different facts, reasoning within the precedent may carry future weight and may even preclude repetition of the forms of argument in later cases. This is not stare decisis because it concerns not the rules created by precedents but the reasoning undergirding these rules. Rather, it is a simple matter of expedience.[82] A court could freshly entertain an identical argument publicly rejected by a predecessor court, but such would insult the thinking of predecessor judges, would invite repetitive arguments, and would require constant infusions of judicial energy. In consequence, as a matter of practice courts quickly discard arguments raised and rejected in past judicial opinions.

Along these lines, parts of *Shearson/American Express* are relevant to Terry Johnson's effort to avoid arbitration of his truth-in-lending claim. Prior litigants had made generalized arguments against arbitration: that arbitrators were incapable of accurately judging matters concerning parties' purpose and knowledge; that arbitrators could not be trusted to understand and apply law correctly; that arbitration does not produce reasoned decisions or records of proceedings; that arbitrators cannot manage factual and legal complexity; that streamlined arbitration process does not offer fair methods for ascertaining the merits of substantive claims; and that post-award judicial review is not adequate to protect statutory rights. These arguments failed to impress both the *Shearson/American Express* [83] and *Mitsubishi* [84] courts and by now should surely be abandoned by litigants.

Still, advocates might be able to recast these arguments and still validly offer them. They might, for instance, descend from generalized forms of argument to the specifics of their particular arbitration panel and process. By offering particulars they might demonstrate the inadequacy of a particular dispute resolution forum to protect the statutory rights being advanced. An example might be a litigant showing that judicial review would be an impossibility given the small size of the claim and the high costs of producing a record of proceedings and a reasoned decision. Like stare decisis' inapplicability to new cases with materially different facts, litigants can avoid unsuccessful prior arguments by reshaping them into more convincing

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[81] *Shearson/American Express,* 482 U.S. at 229, *discussing* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974):

> The decision in *Scherk* thus turned on the Court's judgment that under the circumstances of that case, arbitration was an adequate substitute for adjudication as a means of enforcing the parties' statutory rights.

[82] *See* KARL LLEWELLYN, THE BRAMBLE BUSH 64-66 (Oceana Press 1951).

[83] *See Shearson/American Express,* 482 U.S. at 231-33.

[84] *See Mitsubishi,* 473 U.S. at 628, 633-34, 636-37.

forms.

An appellate court may also structure a method of analysis which litigants and lower courts would be well advised to utilize. Again, stare decisis does not compel this obedience, just common sense. When the high court has devised a technique for resolving a repeating question,[85] it is sure to employ it when the question again arises. This method, when applied to variations of the question in future lower court cases, is the one most likely to replicate a decision above should the matter arrive there. Thus, advocates and lower courts search precedents not only for precise holdings, but also for the modes of analyzing and resolving questions of law.

On the the question whether a statutory claim can be forced into arbitration because of a party's valid agreement to arbitrate, the mode of analysis starts with a burden allocation. Not surprisingly, the party seeking to sidestep arbitration holds the burden of persuasion. [86] When such parties bring a statutory claim to court, they ignore and ask the court to ignore two obligations: one is contractual, the party's agreement to arbitrate; the other is statutory, the Federal Arbitration Act, which orders judges to enforce valid arbitration agreements. With these two strong pushes towards arbitration, the Supreme Court has placed the burden on the party opposing arbitration to demonstrate the superior anti-arbitration force of the claim-creating statute.[87] This seems to be not a proof-of-fact burden, but rather a burden of argumentation, with unspecified parameters. The demonstration is made from the face of legal materials and would appear to be of the "more likely than not" variety.

While carrying a burden of unspecified weight, plaintiff can turn to one or more of three sources to demonstrate that Congress could not have wanted arbitration of the statutory claim: one is the text of the claim-creating statute; another is the legislative history behind that statute; and the third is a purpose of that statute which could be defeated by insisting on arbitration.[88] The party resisting arbitration need not point to a precise "this claim may not be arbitrated" clause in the claim-

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[85] *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (formula for making procedural due process determinations).

[86] Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (1994), is structured in a way which strongly suggests that invalidity is an affirmative defense. It starts by declaring written arbitration provisions to be valid and enforceable and then excepts some where grounds exist for the revocation of any contract. Typically, exception clauses are considered affirmative defenses upon which the party asserting them has the burden of pleading and proof.

[87] *Shearson/American Express*, 482 U.S. at 228, citing *Mitsubishi Motors Corp.*, 473 U.S. at 628. One cannot find a discussion of burdens on that page of *Mitsubishi.*

[88] *Shearson/American Express*, 482 U.S. at 227, *citing Mitsubishi Motors Corp.*, 473 U.S. at 632-37:

> If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent"will be deducible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purposes.

creating statute; indeed, should such a clause exist no one would challenge its authority to create an exception to the more general commands of the arbitration law. Instead, the party opposing arbitration may prove that Congress, despite its failure to speak explicitly, did not want arbitration of the particular statutory claim. This legislative desire may be "deducible" [89] or "discernible" [90] from any of the three sources—text, history, or purpose—which are, of course, the traditional sources for extracting statutory meaning. The quoted words require judgmental inferences, not plain readings, because Congress has not directed itself explicitly to the matter. Within we will work through each of these sources to determine whether Congress could have wanted class actionless arbitration of truth-in-lending claims and will examine the panel's disappointing performance on each.[91] Had the panel paid close attention to *Shearson/American Express's* instructions, it would have better appreciated the nature of its task in extracting statutory meaning from ambiguous text.

A further panel failure was its inability to see *Shearson/American Express's* bottom line: a statute bars arbitration of the rights and duties it creates when the arbitration forum does not afford them adequate protection.[92] This is an inquiry independent from the text, history and purpose inferences search. Even if the claim-creating statute does not provide reasonably strong inferences that arbitration should be barred, a court must still investigate whether the statutory claim can be vindicated in the arbitration forum. This investigation cannot be a feint; otherwise, arbitration would become a tactic of sellers, lenders and other mass dealers to nullify their statutory duties and their customers' statutory rights. Using whatever information it can gather, from the record or from its own independent inquiry, the court must calculate whether *this* claimant, pursuing *this* type of claim, can get real justice before *this* arbitrator using *this* process and whether post-award judicial review will actually be available to insure that *this* arbitration worked as it should. It is hardly enough to cite other cases in which courts believed justice was achievable in those particular contexts; that a panel of Japanese lawyers can fairly process in Japan a million dollar antitrust claim says nothing about whether arbitration serves truth-in-lending interests on an individual $500 claim brought to an undefined Delaware arbitration. Yet, we will learn, this was the panel's very approach.

Besides extracting from *Shearson/American Express* [93] a two-word phrase,

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[89] *Shearson/American Express*, 482 U.S. at 227.

[90] *Id.*

[91] *See infra* text accompanying notes 228-59..

[92] *Shearson/American Express*, 582 U.S. at 228-29, *interpreting* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) *and* Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); *Shearson/American Express*, 482 U.S. at 233-34 (Securities and Exchange Commission has expansive power to ensure the adequacy of securities arbitrations); *id.* at 242 ("The McMahons may effectively vindicate their RICO claims in an arbitral forum.").

[93] *Id.* at 242. The Court had earlier used the phrase "inherent conflict" to describe the

"irreconcilable conflict," which through the strength of the adjective seemed a helpful crutch for its decision, the panel paid scant attention to *Shearson/American Express*; indeed, one suspects that panel members did not read the precedent. While its facts were different from Terry Johnson's, *Shearson/American Express* offered clear paths of reasoning which, if understood and applied, would have secured a judicial forum for Terry Johnson and would have sheltered him from class actionless arbitration.

D. Gilmer: *Pushing a Precedent Beyond Its Limits*

Judge Dolores Sloviter's joining the majority in *Johnson* is a mystery. The Federal Arbitration Act and its interpretive case law were once familiar terrain to this judge. A decade before *Johnson* reached the Third Circuit, Judge Sloviter wrote a powerful, convincing opinion in *Nicholson*, [94] a case refusing arbitration of age discrimination claims. At that time her understanding of the *Shearson/American Express* and *Mitsubishi* precedents was deep and complete. Had the judge kept to her understandings, she had to have dissented in *Johnson*; no Third Circuit or Supreme Court precedent had intervened to belie those earlier, still accurate understandings. Yet in *Johnson* she seems to have abandoned each point of analysis she crafted, correctly, in *Nicholson*.

The high court decisions were a "line of cases enforcing arbitration agreements in the setting of business transactions." [95] Certainly Judge Sloviter could not classify Terry Johnson's $250 loan alongside *Mitsubishi* and *Shearson/American Express*'s major business transactions. She also understood that "[e]ach statutory scheme requires its own discrete analysis," [96] which simply means that judicial precedents may not be facilely transported into other statutory settings. With this idea in place it is inexplicable how Judge Sloviter could have failed to distinguish the very different truth-in-lending and age discrimination programs. The judge also correctly understood that when the Supreme Court directed bench and bar to examine statutory text to determine if Congress intended to preclude arbitration of statutory claims, it could not have meant to require a search for explicit language. [97] The Court's three-part test, discussed in the following section, is only relevant in the absence of clear statutory language directing or forbidding arbitration of statutory claims. Then how could Judge Sloviter have joined the *Johnson* opinion which required Terry Johnson to proffer explicit "no-arbitration" language in statutory text or legislative history?

An "inherent conflict" between arbitration and the claim-generating statute was a high court reason for refusing arbitration, and on this factor Judge Sloviter

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clash between arbitration and the claim-creating statute's goals. *Id.* at 227.

[94] Nicholson v. CPC Int'l Inc., 877 F.2d 221 (3d Cir. 1989), *overruled*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[95] *Nicholson*, 877 F.2d at 224.

[96] *Id.*

[97] *Id.* at 224 n.3.

powerfully reasoned to an anti-arbitration decision in *Nicholson*. She was an elder law expert, having taught the subject in her years as a law professor.[98] She saw several conflicts between arbitration and the anti-discrimination law. One was that Equal Employment Opportunity Commission investigations – an important method of eliminating employment discrimination in the United States – would diminish as employers learned to utilize arbitration clauses in their employment contracts. Victims of age discrimination would have little reason to file charges with the EEOC because they could not later pursue remediation action in court. In this way arbitration "would contribute[s] to employers' avoidance of . . . scrutiny . . . ." [99] Judge Sloviter had to have realized in the later *Johnson* case that lenders will similarly dodge truth-in-lending requirements by imposing arbitration on borrowers. Another incompatibility seen by Judge Sloviter in the age discrimination case was that arbitrators, with powers limited to those vested by the parties' arbitration contract, could not enjoin future acts of discrimination against others by that same employer. [100] Parallel reasoning in the later *Johnson* case should have led the judge to the idea that lenders will continue to use illegal contract forms without fear or sanction because of the arbitration shield. And, finally, arbitration would preclude the collective action contemplated by the age statute. [101] This argument came to be rejected by the high court, [102] but in judging *Johnson,* a decade later, Judge Sloviter should have seen that the two distinct statutory schemes lead to different results, class actions being pivotal in the enforcement of truth-in-lending rules [103] but not to stop age discrimination because of active EEOC enforcement.

In sum, arbitration would undercut age discrimination prevention and ultimate elimination as "many employers . . . prepare similar employment contracts, thereby shifting enforcement of the ADEA away from the courts to arbitration." [104] This conclusion was doubly true of truth-in-lending arbitration.

Judge Sloviter must have been shocked when several months later the Supreme Court in *Gilmer,* a parallel case, rejected her conclusion that arbitration and the anti-age-bias law were incompatible. But Judge Sloviter had read the law correctly and, indeed, had taken reasonable inferences from the age statute. It turned out, however, that the high court drew different, also not unreasonable, conclusions from the statutory evidence. Hopefully, Judge Sloviter's signing on to *Johnson* was not a product of a decade-long funk.

In *Gilmer* the high court did not abandon the forms of analysis created in

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[98] Judge Sloviter developed and taught a course named Social Legislation: Law and the Elderly. Telephone conversation with Angela Racciatti, Director of Academic Affairs, James E. Beasely School of Law, Temple University, Sept. 7, 2001.

[99] *Nicholson,* 877 F.2d at 227.

[100] *Id.* at 228.

[101] *Id.* at 228-29, citing 29 U.S.C. § 216(b)(1982).

[102] *See Gilmer*, 500 U.S. at 32.

[103] *See infra* text accompanying notes 228-59.

[104] *Nicholson*, 877 F.2d at 231.

Shearson/American Express and *Mitsubishi.* The questions remained the same: whether effective enforcement of the statutory claims would be available through arbitration, [105] and whether arbitration would undermine significant features of the statutory program creating plaintiff's right. [106]

"Conflict" was where Judge Sloviter had rested her conclusion in the earlier *Nicholson* case. But the higher court disagreed that arbitration would impact negatively on age discrimination enforcement. This was simply a different guess by different judges: "We . . . are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA." [107] Charges could still be filed by those contractually committed to arbitration, the agency was free to uncover and combat age discrimination using other information sources, the EEOC did not have to be involved in all disputes, and in prior cases under other statutes arbitration was not seen as inconsistent with agency enforcement. [108] While Judge Sloviter thought arbitration would deprive the EEOC of the chance of preventing future age discrimination through conciliation, the superior court thought the congressional use of informal methods of dispute resolution signaled Congress' willingness to allow non-judicial forums.[109]

Although Gilmer was not a class action, [110] the Court responded to the argument that arbitration would stifle enforcement efforts because employers could use arbitration clauses to avoid broad injunctions and class relief. Plaintiff Gilmer did not argue that he needed a class to get relief at all, a claim which could not be made because Gilmer, a high level executive, had enough at stake to get competent legal representation and to invest his personal resources in seeking arbitral relief. What the Court was thus considering was whether class and equitable relief might be critical in other kinds of cases. Its response, all dicta because no case facts required it, was interesting. The Court did not say that class actions were generally unnecessary. Rather, half-sticking to the case before it, the Court noted that the New York Stock Exchange permitted class proceedings,[111]an observation helpful only in future brokerage cases. It then noted that collective action did not preclude

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[105] *See Gilmer*, 500 U.S. at 26, citing *Mitsubishi,* 423 U.S. at 628, 637:

> [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. . . . So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

[106] *See Gilmer*, 500 U.S. at 26, citing *Shearson/American Express*, 482 U.S. at 27: "an 'inherent conflict' between arbitration and the ADEA's underlying purposes."

[107] *Gilmer*, 500 U.S. at 28.

[108] *Id.* at 28-29.

[109] *Id.* at 29.

[110] The title of the action does not state that Gilmer was suing in a representative capacity. *See* Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

[111] *Gilmer*, 500 U.S. at 32.

individualized attempts at relief.[112] This harked back to the Court's earlier conclusion that the ADEA did not require mega-enforcement but contemplated singular relief efforts too. Finally, the Court noted that the EEOC had authority to bring actions seeking class-wide and equitable relief.[113]

On the question of class actions the Court did not address the situation when a litigant needs the power of a class to attract an attorney and use the attorney's resources to pursue a tiny economic claim. Instead, the justices were willing to contemplate a universe in which employers ducked class actions and broad injunctions by sticking

no-class-action clauses in their adhesive employment contracts. In this universe the Court guessed that the EEOC would still have enough statutory power to attack and eliminate age discrimination.

Neither *Gilmer* nor *Nicholson* addressed the question whether plaintiff Gilmer or plaintiff Nicholson could himself get relief from an arbitral panel equivalent to that afforded by a court. This was likely not argued by either litigant because in each's particular circumstances the facts did not support such argument. Instead, *Gilmer* and the Third Circuit in *Nicholson* evaluated the impact of arbitration *en gross*, that is, the overall impact of arbitration on ADEA enforcement should employers move in this direction. The distinct question whether a particular employee could get effective arbitral relief was unaddressed; thus, *Gilmer* does not stand in the way of this argument in future cases.

Apart from a naked, unexplored conclusion that Johnson could get effective relief in arbitration, [114] the individualistic argument was not considered in *Johnson* despite its being a quintessential case where solo arbitration simply offers no chance for effective relief on a $500 claim. The Third Circuit panel considered only the generalized argument: that arbitration was incompatible with the achievement of truth-in-lending goals. [115] On this ground the court relied heavily on *Gilmer*, failing to acknowledge significant distinctions between age discrimination and truth-in-lending enforcement. Age discrimination can be fought and stopped arbitration by arbitration because employment is a significant asset and its loss can be meaningfully vindicated by arbitrators through back pay, reinstatement, and attorney fees. In contrast, without classes of plaintiffs, truth-in-lending policy, which depends on the threat of class relief to keep lenders in line, is toothless. It requires no genius and no pile of evidence to realize this. The panel's comment that "*Gilmer* . . . appears to foreclose much of Johnson's argument," [116] demonstrates either bravado or inadequate appreciation of distinctions between quite dissimilar cases.

A second major distinction from *Gilmer* is that EEOC, the anti-discrimination

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[112] *Id.*

[113] *Id.*

[114] *Johnson*, 225 F.3d at 373-74.

[115] "[I]f Johnson is to prevail, it must be on the basis of demonstrating an inherent conflict." *Johnson*, 225 F.3d at 371.

[116] *Id.* at 374.

agency, is an active force with considerable manpower.[117] This contrasts with the truth-in-lending enforcer, the Federal Trade Commission, which has confessed its inability to police lenders, [118] and as a matter of fact does little TILA enforcement.[119]

VI. THREE TESTS FOR STATUTORY CLAIMS

A. Text

Little can be said about this factor, the first in the tripartite test. Should a federal statute explicitly say that the rights and duties it creates can only be asserted in court, the matter ends and nothing further need be consulted. [120] "Text" can only mean clues and hints drawn from the words, sentences and sections in the right-creating statute which have only oblique relevance. Such inferential process, however, is notoriously indeterminate. From a provision for concurrent state court jurisdiction, for instance, the Court has deduced that Congress would not object to arbitration. [121] It is equally defensible, however, to deduce that only courts, whether federal or state, should be the dispute resolvers.

What is deducible from the text of TILA, once it is understood that the search is not for language specifically on point, militates against arbitration. The statute's enforcement sections, apart from the private class action remedy, are traditional. The enforcing agencies are empowered to issue cease and desist orders [122] and to order finance charge adjustments. [123] It cannot be argued that private arbitration is consistent with these administrative processes. Nor is arbitration consistent with criminal enforcement for willful and knowing violations, which has been part of the statute from the beginning. [124] Finally, one can scour the Act's "civil liability" provision, [125] and find no hint whatsoever that anything other than civil actions was

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[117] The EEOC achieved 14, 672 age discrimination resolutions in FY 2000. *See* "Age Discrimination in Employment Act (ADEA) Charges: FY 1992-FY2000," *available at* http://www.eeoc.gov/stats/adea.html. In FY 1999 EEOC brought 40 age bias lawsuits and intervened in 36 more. *See* "EEOC Litigation Statistics, FY 1992 through FY1999," in http://www.eeoc.gov/stats/litigation.html .

[118] *See infra* note 187 and accompanying text.

[119] *See infra* notes 240-41 and accompanying text.

[120] *See* notes 88-90, *supra,* and accompanying text.

[121] *Gilmer*, 500 U.S. at 29.

[122] Truth in Lending Act, Pub. L. No. 90-321, § 108(e)(4)(B), as added by Pub. L. No. 96-221, § 608(a), 94 Stat. 171, 173 (1980)(codified at 15 U.S.C. § 1607(e)(4)(B) (1994)).

[123] Truth in Lending Act, Pub. L. No. 90-321, § 108(e)(1), as added by Pub. L. No. 96-221, § 608(a), 94 Stat. 171, 173 (1980)(codified at 15 U.S.C. § 1607(e)(1) (1994)).

[124] Truth in Lending Act, Pub. L. No. 90-321, § 112 (codified at 15 U.S.C. § 1611 (1994).

[125] Truth in Lending Act, Pub. L. No. 90-321, § 130 (codified as amended at 15 U.S.C. § 1640 (1994)).

contemplated.

In sum, whatever tiny inference may be drawn from TILA's text points against arbitration as a permissible dispute resolution technique.

B. Legislative History: "Some legislative history"[126]

One of the sources for determining if Congress wanted to preclude arbitration of a statutory claim is the legislative history of the enactment creating that claim.[127] One would be very fortunate to find statements in committee reports or debates that the particular statutory claim cannot be arbitrated. Legal life is rarely so easy. More likely one might find some discussion of the scheme for enforcing the rights vested by the statute and the importance of each element in the scheme. Assume, for example, that Congress, speaking through its key committee representatives, said that permanent injunctions were critical to a statute's enforcement. Assume further that arbitrators do not have the power to issue and enforce permanent injunctions. One might readily conclude that this statutory action would be inappropriate for arbitration.

This is the case with class actions to enforce Truth in Lending claims. As the review below unfolds, we will learn that through its key players Congress spoke powerfully, clearly and at length about the need for private class actions to enforce lending disclosure requirements. Unless specifically provided in the agreement, class actions are not available in arbitration.[128] Consequently, an attempt by a lender to thwart class actions by the device of inserting an arbitration clause into its adhesive contracts would violate the congressional goal and be easily invalidated by judicial action. The panel, however, dismissed this history, calling it "some" legislative history [129] and denigrating one of its pieces as a "snippet of legislative history."[130] Let us review that history and evaluate the panel's response to it.

The original truth-in-lending law did not contain a class action civil penalty,[131] although federal rule 23 stood ready to aggregate the $100 individual minimums across all borrowers subject to the same contract language, as class action lawyers quickly learned.[132] The original intent was that agency enforcement of a single disclosure regulation, developed and promulgated by the Board of Governors of the Federal Reserve System, would be the main enforcement tool.[133]But the original

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[126] *Johnson,* 225 F.3d at 372.

[127] *See, e.g., Shearson/American Express,* 482 U.S. at 227.

[128] *See, e.g.,* Champ v. Siegel Trading Co., 55 F.3d 269, 274-77 (7th Cir. 1995).

[129] *Johnson,* 225 F.3d at 372.

[130] *Id.*

[131] *See* Truth in Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 146-59 (1968).

[132] *See, e.g.,* Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo.1971).

[133] *See* H.R. REP. NO. 1040 (1968), *reprinted in* 1968 U.S.C.C.A.N 1962, 1975:

Your committee believes that administrative enforcement of the credit disclosure features of the bill is fundamental to its legislative purpose. . . . For the relatively law also provided civil liability. A successful plaintiff could collect double the finance charge, with a minimum recovery of $100 and a maximum of $1000, plus costs and reasonable attorney's fees.[134] Creditors could defend, then[135] as now[136] on the ground that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." This civil penalty would only be a secondary enforcement technique.[137]

Six years later Congress added a limitation on class action recovery: up to the lesser of $100,000 or one per cent of the net worth of the defendant-creditor.[138] The court would set the amount at or below this ceiling taking into several factors including the frequency and persistence of failures of compliance by the creditor, its resources, the number of persons affected, and whether the failure was intentional.[139] This recommendation originally came from the Federal Reserve Board, the law's lead administrator, and was later modified in some details in the Senate.[140] The Board had noted a decreasing allowance[141] of class actions because

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unsophisticated consumer, particularly those of modest means, administrative protection will provide their only protection against unscrupulous merchants or lenders. Such consumers neither will have the means for instituting their own civil suits, nor adequate knowledge or experience to enable them to file a complaint through proper channels to obtain redress through the Attorney General in a criminal action. Administrative enforcement can provide the broad and effective application of the principle of disclosure called for in the bill.

[134] Truth in Lending Act, Pub. L. No. 90-321, § 130, 82 Stat. 146, 157 (1968).

[135] Truth in Lending Act, Pub. L. No. 90-321, § 130 (c), 82 Stat. 146, 157 (1968).

[136] Truth in Lending Act, Pub. L. No. 90-321, § 130(c), 82 Stat. 146, 157 (1986) (codified as amended at 15 U.S. C. § 1640 (c) (1994)).

[137] *See* H.R. REP. NO. 1040.

[138] Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat.1500, 1518 (1974), (amending Truth in Lending Act, Pub. L. No. 90-321, §130(a), 82 Stat. 146, 157 (1968) (codified at 15 U.S.C. §1640(a) (1994))). The proposals were approved by the Senate in 1973, but never made it through the House in that year. They were tacked on to an unrelated bill, H.R. 11221, as it was being considered by the Senate in the next session of Congress. *See* 120 CONG. REC. 19209-15 (1974) (amendment 1438 offered by Sen. Brock). The Senate Report on H.R. 11221 naturally contains no discussion of the matter, *see* S. REP. NO.93-902 (1974), *reprinted in* 1974 *U.S.C.C.A.N* 6119. The conference report merely states: "The Senate bill provided a series of basically technical amendments designed to improve the administration of the Truth-in-Lending Act. The House bill contained no comparable provisions. The conferees accept the Senate provisions." S. CONF. REP. NO. 93-1429 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6148, 6152.

[139] Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat.1500, 1518 (1974), amending Truth in Lending Act, Pub. L. No. 90-321, §130(a), 82 Stat. 146, 157 (1968) (codified at 15 U.S.C. §1640(a) (1994)).

[140] The portion of the Federal Reserve Board's 1972 report concerning truth-in-lending class actions is reprinted in 119 CONG. REC. 25415 (1973).

[141] Under FED. R. CIV. P. 23 a federal district court has discretion whether to certify a class action. *See, e.g.*, Boggs v. Alto Trailer Sales, Inc., 511 F.2d 114, 117 (5th Cir. 1975).

of the possibility of oversized recovery by a large class which could destroy a lender and be disproportionate to any conceivable injury suffered by consumers. This possibility was alerted by a highly publicized district court decision denying certification for that reason.[142] The Board was alarmed by this development because it saw great value in class action suits:

> [T]he Board . . . believes that potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure. . . . [I]mportant, in the Board's view, is the prophylactic effect of the threat of class action exposure. That threat elevates a possible Truth in Lending lawsuit from the ineffective "nuisance" category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance.[143]

The Board's 1972 recommendation was brought to Congress as section 208 of Senate Bill 914, the "Truth in Lending Act Amendments of 1973," a bill introduced on February 20, 1973, by Wisconsin's Senator William Proxmire, the second ranking majority member of the Senate Committee on Banking, Housing, and Urban Affairs.[144] That section followed the Board's proposal faithfully: the total class recovery could not exceed the greater of $50,000 or 1% of the creditor's net worth, the actual amount being set by the court after assessing the listed factors.[145] In a memorandum submitted to the Subcommittee on Consumer Credit of the Senate Banking, Housing, and Urban Affairs Committee at a May 21, 1973 hearing, the Federal Reserve Board repeated its 1972 position that the "prophylactic effect of the threat of class action exposure" would keep lenders on their toes.[146]

While the Federal Reserve Board was the "captain" of truth-in-lending, being obliged to develop comprehensive regulations, [147] the day-to-day enforcer would be the Federal Trade Commission ("FTC").[148] At the May 21, 1973, hearing, this

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[142] Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972). After *Ratner* district courts regularly found class action certification inappropriate. *See* 119 CONG. REC. 25416 (1973) (remarks of Sen. Bennett).

[143] 119 CONG. REC. 25415 (July 23, 1973).

[144] S. 914, 93d Cong., § 208 (1973), *reprinted in Inaccurate and Unfair Billing Practices: Hearings on S. 1630 and S. 914 Before the Subcommittee on Consumer Credit of the Senate Comm'n on Banking, Housing and Urban Affairs*, 93d Cong., 29 *et seq.* (1973)[hereinafter 1973 HEARINGS].

[145] *Id.* at § 208 (a)(3), (b) reprinted in 1973 HEARINGS, *supra* note 144,at 46-47. *See also National Comm'n on Consumer Finance: Hearings Before the Subcommittee on Consumer Credit of the Senate Comm'n on Banking, Housing and Urban Affairs, on the Report of the National Comm'n on Consumer Finance*, 93d Cong. 2, 67-69 (1973) (statement of Jeffrey M. Bucher, Member, Board of Governors, Federal Reserve System).

[146] 1973 HEARINGS, *supra* note, 144 at 54 (memorandum submitted by Arthur F. Burns, Chairman, Board of Governors, Federal Reserve System).

[147] Truth in Lending Act, Pub. L. No. 90-321 § 105, 82 Stat. 146, 148 (1968) (codified as amended at 15 U.S.C. § 1604(a)). *See* 12 C.F.R. pt. 226 (Jan. 1, 2000) ("Regulation Z").

[148] Truth in Lending Act, Pub. L. No. 90-321 § 108(c), 82 Stat. 146, 150 (1968) (codified

agency also strongly supported class actions as a disclosure enforcement tool. The agency's chairman, Lewis Engman, testified that the FTC considered section 208 as "one of the most important provisions contained in the legislation,"[149] because "[o]ur experience in enforcing Truth-in-Lending legislation persuades us that only a high degree of civil liability can provide the deterrence essential to achieving compliance with these provisions."[150] In his prepared statement, Chairman Engman noted that the one percent net worth ceiling would expose major creditors to liability in the millions, but thought only a "high level of civil liability can provide the necessary deterrent effect,"[151] and that judges, in assessing the actual sanction, could protect against excessive awards.[152]

Consumer groups naturally opposed any ceiling on class action liability, arguing that the record showed that frivolous suits, or those involving minor or technical mistakes, would not be certified for class treatment by federal judges.[153] On the other side, the testimony revealed that business was unsure of its best interests. A cap on class action recovery would protect against oversized damage awards, but it might also encourage more class action certifications by federal district judges and greater numbers of borrower suits and recoveries. The National Consumer Finance Association was "unalterably opposed to any amendment to the Truth in Lending Act which would directly or implicitly authorize, sanction or approve class actions for punitive money damages."[154] In apparent response to credit industry concerns, Senator Sparkman, chairman of the Senate Banking, Currency, and Urban Affairs Committee introduced Senate Bill 1630 with provision, section 213, which capped class action liability at $100,000. [155] But not even the Sparkman version satisfied the National Consumer Finance Association because it, like the Proxmire proposal, "would tend to constitute a concession that the class action device is appropriate for technical violations of the Truth in Lending Act in the absence of actual damages." [156] But no amendment would leave disclosure class actions where they were, namely, with no upper limit on liability. This puzzled Senator Proxmire who ferreted out that the Association's position was that the class action penalty, in cases of violations producing no actual damages, should be explicitly prohibited.[157] The legislative record does not reveal that this option ever received serious congressional attention. Nor did a proposal by various banker associations offering a system whereby a penalty could be assessed up to $50,000, with a maximum of

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at 15 U.S.C. § 1607 (c) (1994)).

[149] 1973 HEARINGS, *supra* note 144, at 90.

[150] *Id.*

[151] *Id.* at 122.

[152] *Id.*

[153] *Id.* at 124-25, 131-32, 135-37 (testimony of Consumer Federation of America).

[154] *Id.* at 188.

[155] S. REP. NO.1630, § 213(a) (1973), *reprinted in* 1973 HEARINGS, *supra* note 144, at 20-21.

[156] 1973 HEARINGS, *supra* note 144, at 188.

[157] *See id.* at 191-93, 195-98.

$2,500 being awarded to the plaintiff and the balance going into the U.S. Treasury.[158]

Out of this mix a compromise emerged from the committee. Its report demonstrates that its main concern was not whether a class action civil penalty should exist but rather its appropriate magnitude. The reader will recall that the Federal Reserve Board's proposal was a maximum of $50,000 or 1% of net worth, whichever was greater. Thus, the largest lenders could suffer a class action judgment over ten million dollars and other banks could face judgments in the millions.[159] Senator Proxmire, who ranked just below the committee chair Senator Sparkman, echoed the Federal Reserve Board's thinking. He believed such sanctions appropriate to deter potential violations, especially when courts could rachet down the sanction in cases where factors pointed favorably to the defendant.[160] The committee nonetheless converted the sanction to the *lesser* of $100,000 or one percent of net worth, apparently conceding to the wishes of its minority members who thought this lesser sanction "places a sufficient deterrent on large firms without placing in jeopardy the survival of small firms."[161] No one questioned the need for class actions.[162] The debate played out similarly on the Senate floor. The Senators debating the committee recommendation had different ideas about the appropriate size of the class action penalty, but not one speaker questioned the need for class actions to deter violations.[163]

It is worth mentioning that a strong committee motive was the disappearance of the class action as an effective enforcement tool. After *Ratner*, the district court opinion which brutally criticized class suits without damage limits, the committee noted,

> [T]he courts denied 21 Truth in Lending suits class action status while affirming only one and in that case, only after the plaintiffs amended their complaint to sue only for actual damages. . . . [I]t is clear that consumers have not obtained much relief because of the court's [sic] reluctance to impose the unreasonably large minimum penalties . . . .[164]

The committee wanted enforcement but was reluctant to erect "an extensive new bureaucracy" of disclosure officials; instead, the class action civil penalty was its way of "provid[ing] creditors with a meaningful incentive to comply with the law."[165] The committee further recommended extending the same civil liability technique to other consumer protections like credit billing rights[166] and borrowers' anti-

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[158] *See id.* at 211, 244-46.

[159] *See* 119 CONG. REC. 25416-17 (1973) (table).

[160] *See* S. REP. NO.93-278, 93d Cong., 1st Sess. 35-36 (1973) (additional views of Sens. Proxmire, Hathaway).

[161] *Id.* at 43 (additional views of Sens. Tower, Bennett, and Brock).

[162] *See* S. REP. NO.93-278, 93d Cong., 1st Sess. *passim* (1973).

[163] See 119 CONG. REC. 25415-19 (1973).

[164] S. REP. NO.93-278, at 14..

[165] *Id.*

[166] This was adopted. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1500,

discrimination rights.[167] Under these and the truth-in-lending law, the committee believed "a maximum class action liability of $100,000 [would be] sufficient to deter potential violations."[168]

The bill approved by the Senate, S. 2101, [169] never made it through the House Banking and Currency Committee in that 1973 session.[170] It reappeared in Congress in 1974 as an unrelated amendment to a bill which had passed the House and was on the Senate floor. [171] In arguing for the amendment Senator Proxmire stated that his Subcommittee on Consumer Credit had "worked long and hard" on the bill, that it included compromises, and that he was greatly disappointed that the House Banking Committee had not acted on it.[172] The manager of the bill on the floor, Senator McIntyre, agreed to the unrelated amendment and pledged to lobby for it in conference.[173]

The conferees accepted the class action cap but did not discuss its substance, stating only the following: "The Senate bill provided technical amendments designed to improve the administration of the Truth in Lending Act. The House bill contained no comparable provisions. The conferees accept the Senate provisions."[174]

Two years later[175] Congress increased the maximum liability from $100,000 to $500,000.[176] Again the class action remedy drew considerable interest in hearings held in 1975 by the Senate Consumer Affairs Subcommittee, [177] which Senator Biden of Delaware now chaired. [178] The consumer advocate Democrats in Congress were determined to restore the class action penalty in their original version – the *greater* of 1% of net worth or $50,000 – and had introduced legislation to this effect. [179] What was enacted in 1974 "seriously missed the mark," said Senator Biden in opening the hearing, because it "gutted the class action as a useful, meaningful, enforcement

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1518 (1974), (codified as amended at 15 U.S.C. §1640(a) (1994)).

[167] This was adopted. *See* Equal Credit Opportunity Act, Pub. L. No. 93-495, § 706(c), 88 Stat. 1500, 1524 (1974) (codified as amended at 15 U.S.C. § 1691(e)(b) (1991)).

[168] S. REP. NO.93-278, at 15 (1973).

[169] S. 2101, 93d Cong. (1973), *reprinted in* 119 CONG. REC. 25423-26 .

[170] *See* 120 CONG. REC. 19213 (1974) (remarks of Sen. Brock).

[171] *See id.* at 19208 [Amendment No. 1438, § 408, to H.R. 11221, 93d Cong., (1974)].

[172] 120 CONG. REC. 19214 (1974).

[173] *Id.*

[174] S. CONF. REP. NO. 93-1429 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6148, 6152.

[175] Not "[s]everal years later" as stated by the *Johnson* panel. *See Johnson*, 225 F.3d at 372.

[176] Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4, 90 Stat. 257, 260 (1976).

[177] *Equal Credit Opportunity Act Amendments and Consumer Leasing Act of 1975: Hearings on S. 1900, S. 1927, and S. 1961 Before the Senate Subcomm. On Consumer Affairs*, 94th Cong. (1975) [hereinafter 1975 HEARINGS].

[178] *See id.* at 1.

[179] *See id.* at 155.

tool."[180] One after another Democrats testified against the 1974 class action compromise, maligning it as a "slap on the wrist,"[181] "only a minor fine,"[182] and a "gnat's bite."[183] The objection that the Biden-Proxmire proposal, S. 1961, could lead to mammoth class action judgments was met by the observation that federal judges could be counted on to follow the TILA's limitations[184] based on the defendant's resources and the seriousness of the offense.[185]

The Democrats had powerful support from the Federal Trade Commission. Its representative at the hearing described TILA's civil liability sections as "very, very weak,"[186] and professed the agency's inability to do the job: "Government, being extremely limited with respect to available resources, has had a great deal of difficulty in enforcing it."[187] Although the Federal Reserve Board's prepared statement presented by Board member Jeffrey Bucher did not address the class action issue,[188] when questioned Mr. Bucher expressed his view that "a little more teeth would be
beneficial."[189] Business interests, which originally advocated no class action provision at all,[190] now opposed any change to the 1974 solution which "seem[ed] adequate and at worst untested."[191]

The report of the Senate Committee on Banking, Housing and Urban Affairs reversed the 1968 thinking[192] by describing the class action as the "chief enforcement tool," relegating agency enforcement to a secondary role.[193] But the committee felt that $100,000 was too low a ceiling for class actions to be an effective enforcement tool.[194] It noted that a ceiling set too low "acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized."[195] To make its intentions in raising

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[180] 1975 HEARINGS, *supra* note 177, at 2.

[181] *Id.* at 14 (testimony of Representative Leonor Sullivan). *See also id.* at 324 (testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice).

[182] *Id.* at 30 (testimony of Representative Bella Absug).

[183] *Id.* at 32 (testimony of Senator William Proxmire).

[184] *See supra* note 152 and accompanying text.

[185] *See* 1975 HEARINGS, *supra* note 177, at 17 (testimony of Representative Sullivan).

[186] *Id.* at 230 (testimony of Sheldon Feldman, Assistant Director for Special Statutes, Federal Trade Commission).

[187] *Id.*

[188] *See id.* at 188-03.

[189] *Id.* at 205.

[190] *See supra* notes 154-58 and accompanying text.

[191] 1975 HEARINGS, *supra* note 177, at 266 (testimony of Forrest T. Jones on behalf of American Bankers Association).

[192] S. REP. NO.94-590 (1976), *reprinted in* 1976 U.S.C.A.N. 431,438..

[193] *Id.*

[194] *Id.*

[195] *Id.*

the ceiling to $500,000 absolutely clear, the committee stated:

> The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor.[196]

The committee noted that procedural obstacles to class actions, such as the need to provide individual notice to each class member,[197] often posed more of an obstacle to class actions for civil penalties and punitive damages than a statutory ceiling on recoveries. For this reason alternative enforcement techniques would be explored.[198]

On the Senate floor the augmentation to $500,000 [199] was described by Senator Garn, a conferee, [200] as "[p]erhaps the most controversial issue that faced the committee."[201] He opposed the $500,000 ceiling as "excessive" [202] and called for "oversight hearings on the problems of compliance with the Truth in Lending Act and the enforcement of the act."[203]

The House version of equal credit opportunity amendments did not augment the penalty to $500,000 and proposed that violations be "willful" in order for punitive damages to be assessed. [204] In conference the House gave in to the Senate. [205] In reporting this success to his colleagues, Senator Proxmire was "particularly happy to report that the conferees accepted the stronger enforcement provisions from the Senate bill." [206]

Other events in the 94th Congress, Second Session, deserve mention. One is that

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[196] *Id.*

[197] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[198] S. REP. NO. 94-590.

[199] The civil penalty ceiling was raised both for truth-in-lending, *see* Consumer Leasing Act of 1976, Pub. L. 94-240, § 4(3), 90 Stat. 257, 260 (1976). For equal credit opportunity, see Equal Credit Opportunity Amendments of 1976, Pub. L. 94-239, § 6, 90 Stat. 251, 253 (1976).

[200] *See* H.R. CONF. REP. NO. 94-872, at 12 (1976), *reprinted in*1976 U.S.C.C.A.N. 442, 448.

[201] 122 CONG. REC. 1913 (1976).

[202] *Id.* Curiously, the $500,000 idea came from Senator Garn originally. *See* 1975 HEARINGS, *supra* note 177, at 231. ("Maybe it ought to be half a million").

[203] 122 CONG. REC. 1913 (1976).

[204] *See* H.R. CONF. REP. NO. 94-873, at 9-10 (1976), *reprinted in* 1976 U.S.C.C.A. 427, 429-30. Similarly, for consumer lease disclosures the House version capped class action liability at $100,000. *See* H.R. CONF. REP. NO. 94-872, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 442, 446.

[205] *See* H.R. CONF. REP. NO. 94-873.. Similarly, the House acceded to the cap of $500,000 for consumer lease disclosure failures. *See* H.R. CONF. REP. NO. 94-872..

[206] 122 CONG. REC. 5780 (1976).

the class action civil liability provision continued to be a congressional favorite. When Congress moved to protect consumers against inadequate and misleading lease information by enacting the Consumer Leasing Act of 1976, [207] it copied the $500,000/1% class action truth-in-lending penalty. [208] This passed over the strong opposition of Senator Helms who believed it inappropriate to "use . . . the civil law to provide an essentially criminal sanction." [209]

Another important event in the 94th Congress, Second Session, was that the class action civil liability provisions sparked debate in the House of Representatives. Until this point the penalty clause was mostly a Senate project, with the House concurring silently. Representative Wylie, ranking minority member of the House Subcommittee on Consumer Affairs, [210] spoke against the provisions on the floor. He "feared that such attractive civil liability recoveries might be an inducement for bounty-hunting lawyers to use innocent consumers as a vehicle for reaping large attorney fees."[211] He also bemoaned the loss of the House's "willful" idea.[212] In contrast, Mr. Annunzio, chair of the House Committee on Consumer Affairs, [213] supported the stronger enforcement language in the House-Senate compromise, saying "This increased liability will not adversely affect small businessmen, but will insure that creditors cannot disobey this legislation with impunity." [214] He was joined by conferee[215] Leonor Sullivan who stated;

> In the bill now before us . . . we go a long distance toward restoring the effectiveness of class action penalties in deterring violations of the Truth in Lending Act by major creditors. . . . [A] very large national creditor, with millions of credit customers, would face [under existing law] a maximum judgment of no more than $500,000 in a class action, which is hardly more than a slap in the face. . . . The prospects of a large class action penalty is an extremely effective tool for assuring compliance. I hope that . . . the danger of legitimate class action cases will once again stand as an incentive to large national creditors to obey the law scrupulously . . . . [216]

Similarly, Representative Bella Absug, speaking of the equal credit opportunity

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[207] Pub. L. 94-240, 90 Stat. 257-61, 15 U.S.C. §§ 1667-1667f (1994).

[208] Truth in Lending Act, § 185, *as added by* Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 3, 90 Stat. 257-260 (1976) (codified at 15 U.S.C. § 1667d (a) (1994)).

[209] 122 CONG. REC. 1919 (1976).

[210] *See id.* at 5834 (remarks of Rep. Annunzio).

[211] 122 CONG. REC. 5836 (1976).

[212] *Id.* at 5837 (1976). This was opposed on the ground that it "would have introduced the necessity for the kind of proof normally required in criminal prosecutions . . ." *Id.* at 5839 (remarks of Rep. Sullivan).

[213] *See id.* at 5834 (remarks of Rep. Wylie).

[214] *Id.* at 5836.

[215] *See* H.R. CONF. REP. NO. 94-873, 94th Cong., 2d Sess.10 (1976) *reprinted in,* 1976 U.S.C.C.A.N. 427, 430.

[216] 122 Cong. Rec. 5837 (1976).

amendments, supported the stronger enforcement provision:

> Raising the ceiling on punitive damages in class action suits . . . is more equitable than the penalty provision in the original bill. Currently, large creditors can escape with what to them is only a minor fine. . . .[W]e must enact legislation such as this, which will provide a real deterrent to discriminatory practices on the part of lenders. [217]

The House of Representatives overwhelmingly accepted the House-Senate compromise. [218] In the following 24 years, the class action provision has remained substantially the same.

This detailed review of the legislative history behind the truth-in-lending class action provision demonstrates in many ways that Congress could not have wanted creditors to slip around this civil liability by means of arbitration clauses. This potential liability came to be considered the principal means of enforcing disclosure rules and the chief prophylaxis and deterrent. Congress imposed a limit on the maximum creditor liability not by virtue of disinterest in or distrust of the civil penalty mechanism. To the contrary, the diminution in truth-in-lending class action certifications by federal courts sparked renewed interest in the Senate and the consequent development of a limit which would revitalize, not enervate, the clause by making courts more willing to certify class actions. [219]creditors.

The financial business community wanted no civil penalty whatsoever, but this proposal had no realistic chance before pro-consumer advocates like Senator Proxmire and Representative Annunzio. Allies of the lenders like Senator Helms and Representative Wylie were too few in number to advance the "no civil penalty" alternative. In Congress the heart of the debate was not whether to have a penalty but, rather, how much of one. The idea that business could avoid the threat of class actions by the simple expedient of inserting a non-negotiable arbitration clause into their form agreements would have been anathema to the enacting 93d and 94th Congresses.

The legislative record is not only strikingly clear in purpose but it is also rich in quantity and quality. While the penalty clauses are but a few words amidst voluminous consumer protection provisions, the foregoing review shows that they attracted considerable attention at hearings, in committee reports, and on both

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[217] *Id.* at 5840.

[218] *See id.* at 5840-41 (1976) (384 ayes, 3 nays).

[219] *See* Watkins v. Simmons & Clark, Inc., 618 F.2d 398, 400 (6th Cir. 1980) (footnote omitted):

> The legislative history of the 1974 amendment reveals that Congress acted to counter the manifest judicial unwillingness to impose class liability under the Act. Indeed, it appears that Congress felt constrained to encourage class actions because of the apparent inadequacy of the Federal Trade Commission's enforcement resources and because of a continuing problem of minimal voluntary compliance with the Act on the part of creditors.

floors of Congress. This was a hotly debated topic and the subject, one naturally suspects, of fierce consumer and business lobbying. Oftentimes the conclusion of judges and academics that the legislature "intended" or "wanted" a particular result is supported by a sparse legislative record. Here, in contradistinction, the record is long, deep and loud that Congress very much wanted the class action penalty as a deterrent to disclosure illegalities.

Congress expressed its will between 1973 and 1976, long before lenders and sellers to consumers began inserting arbitration clauses into their mass contracts. It would have been remarkably prescient of the legislators to have written "no arbitration" into the statute. They did what was possible at the time. They wrote a provision into the statute with a clear and important purpose and did so after long and heated debate. One easily may "discern" and "deduce" that the enacting Congresses, had they considered the question, would have banned class actionless arbitration of disclosure violations.

How could the panel dismiss (what seems so clear to me and hopefully to the reader) as "some" unconvincing legislative history, calling it "language favorable to Johnson"? [220] One possibility is that the panel had before it only a few pieces of the record: the committee reports.[221] The court does not cite and discuss the hearings or the floor debates. Should such be the case it raises the question of an appellate court's duty to supplement litigants' research with its own. The *Johnson* precedent will rule in future truth-in-lending cases and stare decisis does not allow it to be sidestepped in lower courts by future advocates on the ground that the *Johnson* panel was inadequately briefed. [222] Like it or not, future Third Circuit panels are stuck with *Johnson.* [223] And inadequate briefing not a likely ground for the Third Circuit to grant en banc reconsideration in a future case with indistinguishable facts. Because of these precedential forces of an appellate decision, the rendering courts should not and do not rest their decisions only upon the research and arguments presented by the parties.

Yet the second possibility is equally disturbing: that the panel had the research before it and chose not to discuss and rebut it in its opinion. In their justificatory

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[220] *Johnson,* 235 F.3d at 372.

[221] *Id.* at 372-73, quoting from S. REP. NO.93-278, 93d Cong., 1st Sess. (1973), H.R. CONF. REP. NO. 93-1429, 93d Cong., 2d Sess. (1974), and S. REP. NO. 94-590.

[222] *See* Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law By Pennsylvania's Appellate Courts,* 72 TEMP. L. REV. 303, 331-38 (1999) (absolute binding effect of higher court precedents on lower courts).

[223] *See* Third Circuit Internal Operating Procedures (1997):

> It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court en banc consideration is required to do so.

Id. at 9.1; Kaplan v. First Options of Chicago, Inc., 19 F. 3d 1503, 1509 (3d Cir. 1994), *aff'd,* 514 U.S. 938 (1995).

opinions, appellate courts have been known simply to ignore solid contrary arguments and damning pieces of information in their zealous march to their preferred solution. Naturally, hiding behind a seemingly complete and irrefutable rationale, constructed just from favorable precedent "bites", avoids the queasy feeling that the court got it wrong but its price is letting poor decisions march into the world of binding precedent. If there is no convincing answer to contrary argument or information, perhaps the court's initial vote was wrong and should have been reconsidered.

Another possibility is that the panel scanned legislative history through the wrong looking glass. After quoting large pieces of committee reports, the court says merely that "Congress did not address the role of arbitration in the legislative history."[224] Ah! The panel thought it had to be presented with the word "arbitration" for the story behind truth-in-lending to count. Not enough for the court were the words of a critical congressional committee that the civil action penalty was the "chief enforcement tool" [225] or that private enforcement would avoid the creation of "an extensive new bureaucracy" [226] or that potential class action liability "is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure." [227] No mind-reader is needed to discern and deduce from these comments that the legislators, including, as we earlier learned, those outside the Senate Committee on Banking, Currency and Urban Affairs, would not have tolerated the disappearance of the class action enforcement technique.

C. Statutory Purpose: "Irreconcilable Conflict"

Instead of deducing a congressional disinclination to permit arbitration by carefully reading its heavy historical footprints, the *Johnson* panel immediately turned to the question whether truth-in-lending goals could be met without class actions. The reader must understand that such is a highly speculative intellectual venture. Hundreds of class actions have been filed against lenders for real and alleged disclosure violations. And thousands of class actions did not have to be filed because many lenders, through fear of them, have studiously adhered to disclosure rules. The question becomes, in the absence of all this enforcement and deterrence, would lenders disclose correctly? Would bankers, fearing no civil liability, follow the law?

In this speculation the panel failed to understand its task. We shall see that what it did was ask whether arbitration law could be satisfied without too much loss to truth-in-lending law. The proper approach, I submit, was to balance the respective harms to each of the laws.

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224 *Johnson*, 235 F.3d at 373.

225 *See id.* at 372, *quoting* S. REP. NO.94-590.

226 *See Johnson*, 225 F.3d at 375, *quoting* S. REP. NO.93-278.

227 *Id.*

Should the panel send Johnson into arbitration, its decision would cut into the scheme of the Truth-in-Lending Act because class actions, not permitted in arbitration absent agreement,[228] could no longer put economic pressure on lenders to comply with their obligations under federal law. One could safely assume that American banks would jump at this opportunity and insert classless arbitration clauses into all of their "take-it-or-leave-it" loan agreements. As one appellate judge wisely commented, "I doubt that class certification is something that corporate defendants who draft these agreements for their clients to sign would ever consent to in writing; they typically have far more to gain by forcing unhappy customers to bear the expense of arbitrating individually." [229] The panel precedent would be the wedge and its impact would drive a deep and wide hole into the disclosure statute.

The importance of the class action deterrent was emphasized on the floor of the United States Senate :

> The actual damages resulting from abuses of disclosure . . . are usually negligible or extremely difficult to prove. For that reason, we set up a minimum award of $100 for an individual action in our original act. But lawyers' fees and the costs of suits are such that the only truly effective means of enforcing the sound provisions of this act is by class suits. . . . All the . . . laudatory provisions of the Truth-in-Lending Act . . . will be lost without a sanction. This amendment [increasing the size of the class action civil penalty] may seem technical at first glance, but in my view it represents the very heart of our whole endeavor to correct credit abuses in this country. [230]

On the other side, should the panel dishonor the arbitration clause, the Federal Arbitration Act would suffer but little. A class of arbitration clauses, those within lending agreements, would lose some effectiveness—unenforceability when asserted in truth-in-lending lawsuits. The remainder of arbitration clauses in contracts throughout the nation would continue to do service, including those within lending agreements when a party chooses to go into arbitration in spite of a legitimate claim of invalidity.

The panel thus had to pick between two losses, making the method of choice critical. The normal judicial response when faced with a choice among evils is to maximize statutory goals.[231] Absent special circumstances, both statutes are treated

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[228] *See supra* note 128 and accompanying text.

[229] *Champ*, 55 F. 3d at 277 (Rovner, J., concurring).

[230] 119 CONG. REC. 25419 (1973) (remarks of Sen. Moss).

[231] *See, e.g.,* County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251(1992):

> Judges "are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

Id. at 265-66, quoting Morton v. Mancari, 417 U.S. 535, 551 (1974); Burlington Truck Lines, Inc v. United States, 371 U.S. 156, 172 (1962) ("The policies of the Interstate with equal dignity. If a decision can be reached which will allow one statute to function maximally with only a small negative impact on the other, this is the proper choice.[232] A decision which hurts one statute badly while advancing the other only marginally is an improper choice.

The panel made the improper choice. It believed that truth-in-lending goals could be met by means other than class actions. It pointed to individual damage actions propelled by lawyers seeking attorney fees and administrative enforcement actions as suitable means for enforcing disclosure requirements. Having placed a heavy burden of demonstration on Johnson, the judges could smoothly conclude that he failed to persuade the panel that deterrence of illegal conduct and remediation of harm would not occur in the absence of class actions. This conclusion is remarkably ill-advised for several reasons.

One is that the conclusion was flatly contrary to that reached, after careful consideration, by a panel from a sister court of appeals, in the *Watkins* case.[233] After studying the truth-in-lending legislative history, the Sixth Circuit concluded that class actions were imperative "because of the apparent inadequacy of the Federal Trade Commission's enforcement resources and because of a continuing problem of minimum compliance with the Act on the part of creditors."[234] Although in the "extreme case"[235] before it the court affirmed as non-abuse of discretion the trial court's refusal to certify a class after defendant modified its installment sales form to conform to disclosure requirements, the judges worried about losing the "prophlactic effect of class liability exposure" by a defendant's tactic of agreeing to modify its form prior to class certification.[236] Although *Watkins* did not consider the impact of classless arbitration, the thrust of the opinion is clearly contrary to that of the *Johnson* panel. The *Watkins* panel would never have permitted a bank's strategy of avoiding statutory obligations and class actions by the simple device of an arbitration clause.

Another reason to doubt the validity of *Johnson* is that the panel drew its main conclusion —that individual suits and agency enforcement were protective enough— without offering a single datum to back its predictions. It reviewed the statute's provisions for agency enforcement without offering a single statistic as to

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Commerce Act and the labor act necessarily must be accommodated, one to the other.").

232 *See, e.g.*, Ely v. Velde, 451 F.2d 1130, 1136 (4th Cir. 1971):

> [I]n the absence of unmistakable language to the contrary, we should hesitate to read the congressional solution to one problem – protection of local police autonomy – so broadly as unnecessarily to undercut solutions adopted by Congress to preserve and protect other societal values, such as the natural and cultural environment. It is not to be assumed lightly that Congress intended to cancel out two highly important statutes without a word to that effect.

233 Watkins v. Simmons & Clark, Inc., 618 F.2d 398 (6th Cir. 1980).

234 *Id.* at 400, *citing* S. REP. NO.93-278.

235 *Watkins*, 618 F.2d at 404.

236 *Id.* at 403 n.8.

whether these actions, which it characterized as "meaningful deterrents,"[237] were in fact being brought by enforcement agencies like the Federal Trade Commission. Remarkably, it drew the factual conclusion that agency enforcement would do the job without considering that the agencies themselves thought class action deterrence was critically necessary.[238] It was the FTC and the Federal Reserve Board which brought the class action civil penalty proposal to Congress and strongly supported it.[239] Data shows that the chief truth-in-lending enforcer, the FTC, does little supervision of lending disclosure. Its 1997 annual report reveals five truth-in-lending interventions,[240] while its 1998 annual report reveals only two, and each of these is but a part of an investigation focusing on lease and credit advertisements.[241] If the *Johnson* precedent were to hold up, the FTC would have to either divert resources from its other missions or create the "extensive new bureaucracy" that Congress expressly wanted to avoid.

In contrast, the year 1997 brought 10 *reported* class actions for truth-in-lending violations ,[242] and the following year brought 13 more *reported* cases.[243] It is impossible to know the number of actions which did not produce a reported decision, or the number of truth-in-lending violations which were deterred because of the threat of class liability. But one can readily see that the *Johnson* decision stripped away a critical component of truth-in-lending enforcement.

Similarly, the panel felt comfortable because Johnson retained "the full range of [truth-in-lending] rights"[244] in arbitration. The panel did not bother to examine the details of this bald conclusion. Lacking a class, Johnson and his lawyers would have no incentive to pursue the declaratory and injunctive relief theoretically available under the truth-in-lending law. Punitive damages would be allowable only for wanton or malicious conduct,[245] a rare case. Lacking the backing and incentives of a class, Johnson would take into arbitration a single claim of inadequate disclosure with a payoff of as little as $100 and only as much as $1000.[246] Thus the

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[237] *Johnson*, 225 F.3d at 375.

[238] The panel, which did not discuss hearings or debates, may not have known this.

[239] *See supra* notes 143, 146-52, 186-87, 189 and accompanying text.

[240] The latest FTC annual reports are online *at* http://www.ftc.gov. The five truth-in-lending interventions can be found at:
http://www.ftc.gov/os/ar97/bcppart2.htm. (General Motors Corp. *et al*), (Herb Gordon Auto World) (Huling Bros. Chevrolet, Inc.) (The Money Tree, Inc.) (Progressive Mortgage Corp.).

[241] U.S. Federal Trade Commission, 1998 Annual Report at p. 59 (Beuckman Ford, Inc., *et al.*), and at p. 61 (Foote, Cone & Belding Advertising, Inc. *et al.*). The report is online at: http://www/ftc.gov/os/2000/01/98annualreport.pdf.

[242] Westlaw database "allfeds" and "allstates" and query: "sy(truth-in-lending /p "class action") & da(1997).

[243] Westlaw database "allfeds" and query: "sy(truth-in-lending /p "class action") & da(1998).

[244] *Johnson*, 225 F.3d at 373.

[245] *See, e.g.*, Smith v. Capital Roofing Co. of Jackson, Inc., 622 F. Supp. 191, 195-96 (S.D. Miss. 1985) (proof of wanton, malicious, or oppressive conduct lacking).

[246] *See* notes 4, 134, *supra*. Borrowers rarely suffer actual damages from a disclosure

"full range" ends up being only academic. Johnson could, again in theory, be represented in arbitration by a lawyer suing on a contingency, but what lawyer cannot multiply 30% times $100 to determine an unacceptably low fee of $30, if successful? Again in theory, the truth-in-lending law provides for a "reasonable attorney's fee" in cases of "successful action," but when the victory cannot exceed three figures, how much time can an attorney "reasonably" expended in pursuing it? Courts and likely arbitrators have to be guided by the amount at stake when they calculate a reasonable attorney's fee and the stake, lacking a class recovery, will be minimal in a truth-in-lending suit. The reality is that few if any lawyers would choose to represent Johnson in an arbitration, sure to be fiercely defended by bank lawyers asserting the absolute defense of bona fide error[247], in the hope of being rewarded attorney fees, in an amount which an arbitrator would have to determine to be reasonable, if successful. In the actual case, Terry Johnson was brought to his Delaware local counsel by a Chicago class action firm.[248] That counsel would never take this matter individually into arbitration because he "has to pay the rent." [249] And, certainly, lacking a class, a class action firm would never pursue the matter further.

A further barrier to relief for Johnson would be the up-front costs of pursuing an arbitration. All arbitrators would insist on an initial deposit of an amount to cover their fees, an amount likely to be substantial in a case as complex as truth-in-lending. [250] The defendant bank, not being contractually bound to do more, would be unlikely to participate in more than half of that advance. Where would Terry Johnson's share come from? One might safely presume that anyone who would pay 917% interest to get his hands on $250 for two weeks does not have much in the way of spare cash. Further, should Johnson lose, an arbitrator could impose all costs on his side, [251] and might grant the bank's request that Johnson, obviously a poor credit risk, put the bank's share in escrow in advance. While a lawyer could theoretically advance these funds to Johnson, he or she would have to be financially frivolous to do so.

In this part of its opinion the panel cites *Mitsubishi* for the proposition that if effective relief can be given by the arbitrators, the remedial and deterrence functions of the statute will be served. In this methodless legal world[252] the panel fails to consider whether *Mitsubishi*, a case involving an international transaction generating a million dollar antitrust claim to be arbitrated in Japan before three professionals can have anything to say relevant to Johnson's $250 Delaware loan

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failure, leading to the need for a civil penalty. *See* 119 CONG. REC. 25418 (1973) (remarks of Sen Proxmire).

[247] *See supra* notes 135-36 and accompanying text.

[248] Telephone conversation, Oct. 4, 2000, with William O'Day, Jr.

[249] *Id.*

[250] *See supra* note 268.

[251] *See infra* notes 269-270 and accompanying text.

[252] *See* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393 (1997).

generating a $500 disclosure issue. But even if it has become common to carve judicial words out of their context, judges utilizing them must at least pay attention to the words themselves. It is *effective* relief which is critical, imposing a duty upon the court to examine whether Johnson can, *in fact*, get from arbitrators the relief contemplated by the statute. Apart from mouthing the statutory provisions, the panel fails to cut beneath the superficies and examine whether Johnson, deprived of the class's muscle, can proceed further at all. The panel states that "Johnson does not argue" that arbitration would not work for him.[253] This raises the possibility that the panel decision is based upon the shaky foundation of waivers or defects in appellant's argumentation, which would undercut its precedential value and opening the door for the next litigant to prove ineffectiveness of arbitration and in this way sidestep the *Johnson* precedent.

Let me recapitulate *Johnson*'s analysis of the question whether the purpose of the truth-in-lending law would be significantly undercut by insisting on class actionless arbitration. The panel finds no "right" vested in Johnson by the truth-in-lending statute to bring a class action.[254] This is a meaningless conclusion because it answers the wrong question. The proper question is whether the *court* must vest in Terry Johnson, by means of purposive statutory interpretation, a nonwaivable right to bring a class action in order to effectuate the disclosure goals of the Truth in Lending Act. The court's job is not to punish Congress for not having dotted every "i," but rather to act as a responsible junior partner by filling in the inevitable statutory gaps in a joint partnership to achieve legislative goals. [255]

Instead, mesmerized by snippets from off-point Supreme Court precedents, the *Johnson* panel did not pause to wonder about the real world effects of its decision. It would surely debilitate the truth-in-lending law by removing a means of remediation and deterrence described by a Senate committee as the program's "chief enforcement tool," [256] and by running against the congressional desire to avoid a large enforcement bureaucracy. [257] But equally puzzling is the panel's failure to measure the gain offsetting the lending disclosure loss. Surely the panel had to be comforted by a significant gain in arbitration policy. Yet one finds not a single word about such matters. The panel may have shied away from any such discussion because only a moment's thought is needed to realize that scant arbitration policy was at stake. Had the panel refused to require arbitration to proceed, the Federal Arbitration Act would suffer little: a small cluster of cases

[253] *Johnson*, 225 F.3d at 373.

[254] *Id.* Accord: Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1338 (11th Cir. 2000) ("Our holding goes no further than the [right to bring a class action] issue.").

[255] *See* PAUL J. MISHKIN & CLARENCE MORRIS, ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW 342 (1965) ("Isn't it rather the function of courts to effectuate the product of the legislature, and the objects of that product, to the best of their ability—to cooperate with the legislative operation, whatever its mode, rather than to instruct or police it?").

[256] *See supra* note 193 and accompanying text.

[257] *See sura* notes 165,226 and accompanying text.

withdrawn from the hundreds of thousands continuing to be arbitrable. That Act itself contemplates inroads in its scope. Courts can police arbitration and withdraw from its reach matters too important to be arbitrable ("public policy")[258] or improperly submitted (arbitration clause invalidity).[259] By failing to do a cost-benefit analysis, the panel treated the arbitration law as sacrosanct and the disclosure law as expendable.

VII. THE QUESTION OF PROOF

A party who has agreed to arbitrate may assert federal statutory rights in court if those rights cannot be effectively asserted in arbitration.[260] The question of "effective" assertion of rights is a complicated factual matter. It typically arises when the party claiming a violation of his statutory rights files a complaint in court in disregard of his arbitration commitment. Defendant moves to compel arbitration and plaintiff seeks to argue that arbitration would be an ineffective process for the resolution of his claim. Notice that the question is posed hypothetically – *if* I went to arbitration, it would be ineffective. Up to now courts have been sensible enough not to require claimants to put their necks through the wringer in order to prove that it hurts.[261]

How, then, does plaintiff go about demonstrating that arbitration will not work? Terry Johnson's one-page loan contract, executed in Delaware, merely required "binding arbitration" without details.[262] It would appear, at first blush, that a fact hearing would be necessary to answer the legal question of effectiveness—facts which would help the judge gauge whether arbitration would likely be effective or not. Someone, Terry or an attorney, would have to launch the arbitration process. One question a judge might want answered is whether Terry has enough money to finance the proceeding.[263] This, however, would be a legitimate question only in a case in which the potential economic return to the plaintiff is high enough to justify the investment in arbitration. In a diversity case based on fraud, where the judge wanted this information, he took plaintiff's "over $75,000" damages request at face value,[264] which in the judge's mind justified financial outlays by the claimant if she had the resources, something the record did not show.

In the small claim consumer case, the cost of arbitration might overwhelm the

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[258] *See, e.g., Mitsubishi*, 473 U.S. at 638.

[259] 9 U.S.C. § 2 (1994).

[260] Green Tree Fin. Corp. v. Randolph, 121 S. Ct. 513, 521 (2000), citing *Gilmer*, 500 U.S. at 28.

[261] *See, e.g.*, Cole v. Burns Int'l Security Servs., 105 F. 3d 1465 (D.C. Cir. 1997).

[262] *See* Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264, 267 (D. Del 1999), *rev'd sub nom.*, Johnson v. West Suburban Bank, 225 F. 3d 366 (3d Cir. 2000), cert. denied, Johnson v. Tele-Bank, Inc., 121 S.Ct. 1081 (2001).

[263] *See, e.g.*, Rollins, Inc. v. Foster, 991 F. Supp. 1426, 1438 (M.D. Ala. 1998) ("Foster has not presented a full picture of her financial condition such that the court could evaluate her ability to pay the costs of arbitration.").

[264] *Id.* at 1438 n.29.

potential recovery, so much so that no sensible claimant would pursue the matter. And if the exact costs cannot be calculated in advance, the question becomes one of risk: would a sensible individual pursue this claim in light of the cost risks? [265] Thus, a fact hearing might focus on the potential for costs which might be imposed on Terry during the process or at the end of the line.

Potential costs include attorney fees, but perhaps Terry could enter arbitration by himself and in that way reduce his exposure to this cost. A court might want to consider this option, but a moment's reflection reveals its impossibility. In order to enforce his contractual arbitration right by himself, Terry would have to understand and apply correctly the Delaware Arbitration Act [266] and its interpretive case law. Would Terry's court attorney have to put him on the stand at the effectiveness hearing to profess his ignorance of law in general and arbitration law in particular? It would seem ludicrous to require fact proof of this nature because every lawyer and judge in the courthouse and in the State of Delaware knows that a layperson could not successfully prosecute an arbitration by himself. Hopefully, judicial notice of an "adjudicative fact" under Federal Rule of Evidence 201(b) would come to the rescue: "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (1) generally known within the territorial jurisdiction of the trial court . . . ."

Should Terry pass that hurdle, the next question is whether he can get an attorney to represent him in his $500 arbitration. Paying an attorney an hourly rate would be economically insane, so the question becomes whether a contingency lawyer or a free lawyer can be found. How does Terry go about proving that, as a matter of adjudicative fact, no Delaware lawyer would take a matter this small on a contingency, or that the legal aid office is too busy with criminal defenses and other important matters to take this tiny civil claim? Is Terry required to go to one law office after another and testify at the effectiveness hearing that he was turned away by all? Would he be required to hire and pay an expert witness, assuming that "lawyer availability" is a subject of expertise, to testify that lawyers do not accept these small matters? Should this be the required step, Terry's costs would already exceed his potential recovery. Perhaps a cost saver might be Terry's court attorney testifying , perhaps by affidavit, that he was unable to get a volunteer expert (assuming expertise exists), but this creates the sticky dilemma of an attorney becoming a witness in his client's case. Who then defends the lawyer when the opposition cross-examines? Again, should these representation barriers have to be crossed, the only realistic hope for claimant is that his trial judge would be willing to base a finding of fact on the common knowledge that Delaware lawyers are not available for this type of controversy.

What about arbitration costs? First, an arbitrator would have to be appointed by

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[265] *See* Armendariz v. Foundation Health Psychcare Servs., Inc., 99 Cal. Rep. 2d 745, 764, 6 P.3d 669 , 688 (2000) ("[I]f it is possible that the employee will be charged substantial forum costs, it is an insufficient judicial response to hold that he or she may be able to cancel these costs at the end of the process . . . .").

[266] DEL. CODE ANN. tit. 10, §§ 5701-5725 (1999).

the Delaware Court of Chancery. [267] Would a Delaware Chancery judge have to be subpoenaed to testify, at the federal court effectiveness hearing, about the appointment process so that the federal district judge could determine whether an arbitrator would be appointed, the probable arbitrator's fee, and whether that fee would have to be advanced? Is there an expertise about arbitration in Delaware so that an expert could testify about the normal hourly fee of Delaware arbitrators and their practices on fee advances? [268] Also, the Delaware statute provides that the arbitration award will allocate arbitrators' fees and expenses.[269] If Terry loses will he have to pay the full costs and is there a witness who can answer this question? What chance would Terry have to convince a Delaware judge to disallow such award, the statute permitting such "as justice requires," [270] and can a witness be found who could and would be allowed to answer this question?

Enough said. The same types of questions can be posed about post-award possibilities – for instance, the possibility of judicial relief should the arbitrator "manifestly disregard" the law. [271]While such relief exists in theory, plaintiff would have to create a record of what occurred during the arbitration in order to present acceptable proof in later judicial proceedings. This would include at a minimum a transcript and a written arbitrator's opinion, both involving considerable expense.

To what extent should courts be requiring plaintiffs to make such proof showings in order to avoid their arbitration commitment? The question is critical because only lawyers bringing "blue ribbon" class actions would be willing to risk the up-front costs and to invest the necessary resources – direct examination, cross-examination, witness preparation, expert fees, oral argument, legal research, briefs – to jump this preliminary hurdle for getting into court.

The Supreme Court seems to have given a definitive answer requiring such proof showings in *Green Tree Financial Corporation v. Randolph*.[272] Like Terry Johnson, Larketta Randolph brought a class action to remedy a truth-in-lending violation. The loan was to finance the acquisition of a mobile home and she, like Terry, was pursuing $500 in court , on her own behalf and on behalf of class members, after signing an agreement with an arbitration clause. Her clause was short on arbitration details, like Terry's, saying only "binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s)." [273] But in contrast to Terry's pursuit of the general argument that arbitration was inconsistent with truth-in-lending policy, Larketta made the individualistic one – that under her circumstances, and those of her fellow class members, arbitration would not

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[267] *See* DEL. CODE ANN. tit. 10, § 5704 (1999).

[268] Because of past experiences, the author would never arbitrate without an advance of fees in a non-pro bono case.

[269] DEL. CODE ANN. tit. 10, § 5712 (1999).

[270] *Id.* at § 5712.

[271] *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

[272] 121 S. Ct. 513 (2000).

[273] *Id.* at 518 n1.

provide effective relief. [274] The Supreme Court described her argument in this way:

> Nor does Randolph contend that the TILA evinces an intention to preclude a waiver of judicial remedies. She contends instead that the arbitration agreement's silence with respect to costs and fees creates a "risk" that she will be required to bear prohibitive arbitration costs if she pursues her claim in an arbitral forum, and thereby forces her to forgo any claims she may have against petitioners. Therefore, she argues, she is unable to vindicate her statutory rights in arbitration. [275]

Noting that the parties had not appointed an arbitrator, [276] the Court described Larketta's argument about prohibitive costs as "too speculative" [277] and faulted the record for not showing the "actual costs" [278] and whether Larketta would have to bear such costs if she went to arbitration. [279] On the questions of the amount of costs and who would bear them, the Court gave no guidance as to the quantity of proof necessary to prove that arbitration was ineffective. [280] For her absolute failure of proof on these issues, [281] Larketta perhaps lost her class action.[282]

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[274] The argument that class actions are needed to effectuate the Truth-in-Lending Act was not considered by the lower court of appeals and the Supreme Court explicitly refused to judge it. *Id.* at 523 n.7.

[275] *Id.* at 522.

[276] *Id.* at n.6.

[277] *Id.* at 522.

[278] *Id.* at 522 n.6.

[279] *Id.* at 522.

[280] *Id.* at 522-23 ("How detailed the showing of prohibitive expense must be . . . is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.")

[281] Information about arbitration costs taken from pamphlets, magazines and articles was insufficient for the Court's majority. *See id.* at 522 n.6.

[282] The "perhaps" is necessary because those who dissented on this issue, Justices Ginsburg, Stevens, Souter and Breyer, thought the case was far from over. The district court had decided against Larketta on the class action question. *See* Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410 (M.D. Ala. 1998), *rev'd*, 178 F.3d 1149 (11th Cir. 1999), *rev'd*, 121 S.Ct. 513 (2000). The Eleventh Circuit did not address this question, but instead affirmed on the ground, reversed above, that prohibitive costs precluded arbitration. *See* Randolph v. Green Tree Fin. Corp., 178 F. 3d 1149, 1157-59 (11th Cir. 1999), *rev'd* 121 S. Ct. 513 (2000). For this reason the Randolph dissenters believed the court of appeals could revisit the class action issue on remand. *Randolph,* 121 S. Ct. at 525 n.4. This happened but the Eleventh Circuit, apparently stung by the high court reversal, rejected Randolph's claim that class actions were essential to truth-in-lending enforcement. Randolph v. Green Tree Fin. Corp., 244 F.3d. 814, 818-19 (11th Cir. 2001) ("According to the Supreme Court, the last time this case was before us we made the mistake of giving too little weight to the [Federal Arbitration Act's] pro-arbitration policy. We decline to make the same mistake again.").

Additionally, the dissenters thought Larketta could proceed into arbitration and file in court again once it became factually clear that she would have to bear considerable costs. *Id.* This

This is the top court and, right or wrong, its precedents must be respected. Fortunately, routes exist for avoiding Larketta's unhappy fate.

One route is for the class action lawyer to commence arbitration in the ways contemplated by the arbitration clause and the relevant state arbitration statute. Once the arbitrator or arbitration panel is selected, by letter or motion the claimant's lawyer can inquire into the arbitrators' fees and whether they must be advanced. [283] He may also serve a demand on the lender to pay the arbitrators' costs and any administrative expenses. The lender's response or non-response will help clarify the claimant's cost risks in arbitration. Citing *Cole v. Burns International Security Services*,[284] the lawyer may further move the panel or single arbitrator to impose arbitration fees and costs on the company that forced arbitration upon him in an adhesive contract. For good measure and expecting defeat, [285] the arbitrators should be asked to permit claimant to proceed on a class basis, just in case a court might later demand proof that arbitration effectively deprived claimant of a class action.

Having gathered proof of the obvious – that seeking a $500 claim in arbitration is economically infeasible – claimant's attorney may now file the consumer class action in court, may move the arbitrators to suspend the arbitration while the duty to arbitrate is being ventilated in court, and may request a court hearing on the "effectiveness of arbitration" issue. Because the Supreme Court demanded such proof in *Randolph*, it would be clear error for a trial judge to deny the hearing request. At the hearing claimant's attorney can present the proof gathered during arbitration preliminaries. Proof now cements the Supreme Court's speculation that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in arbitration." [286], the motion to compel arbitration should be denied, and the arbitrators can be dismissed.[287]

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is where the case is now, with the parties jockeying over the appointment of an arbitrator. Telephone conversation with C. Knox McLaney, III, attorney for Larketta Randolph, July 9, 2001.

[283] During oral argument in *Randolph*, Justice Kennedy suggested that after appointing an arbitrator, he be asked what fees will be charged at the outset. *See* Transcript of Oral Argument, Green Tree Fin. Corp. v. Randolph, U.S. Sup. Ct, Dkt. No. 99-1235, Oct. 3, 2000, 2000 WL 1513141 at p. 42. The response was that if the claimant gave up arbitration after getting her answer, she would still have to pay the arbitrator for a day's work and whatever filing fees she had to advance, *see id.* at 42, all in a case involving $15 in damages. *See id.* at 39.

[284] 105 F.3d 1465 (D.C.Cir. 1997) (court read employer payment of arbitrators' fees into adhesive arbitration clause silent on the matter).

[285] *See supra* note 40 and accompanying text.

[286] *Randolph*, 121 S.Ct. at 522.

[287] This pathway was successfully pursued by a terminated low-level worker asserting various discrimination claims. Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999). He entered arbitration, only to discover the arbitrator would charge $250 per hour and required a $6000 deposit. *Id.* at 1232. He cancelled arbitration, brought his discrimination claims to court, and convinced the Tenth Circuit that the splitting-

A different route is to utilize the trial court's power to take judicial notice of facts generally known within the court's territorial jurisdiction. [288] As part of his opposition to defendant's motion to compel arbitration, plaintiff might herself move the trial judge to judicially notice as adjudicative fact that plaintiff could not successfully prosecute an arbitration pro se, that an attorney would not be available for a claim of such small economic value, that arbitrators' and arbitration fees would be too high for arbitration to be feasible, and so forth. [289]Should such motion be successful, on appeal the *Randolph* absence-of-proof issue would not longer be mooted, judicially noticed facts being proof, but instead whether the trial judge abused his discretion in officially noticing the obvious, an easy point for plaintiff to win. Even an appellate court might be willing to judicially notice the notorious facts about attorney costs and availability, providing the affected party is given some opportunity to be heard on the issue [290], perhaps in the form of supplemental briefs.

Yet another possibility is to convince the trial court, and later the appellate court, that plaintiff is proposing a new rule of law, one which provides an operational rule for a category of cases falling under the general "effectiveness of arbitration" standard. [291] What seems to cause confusion and inconsistency among judges is that they are unclear about the judicial function they are performing. Some are creating judicial precedents, turning to general information sources for the "policy" or "legislative" facts they need to form sound law. A panel of the U.S. Court of Appeals for the District of Columbia decided that for arbitration to be an effective remedy when imposed upon a low-level worker it was necessary for the employer to pay the arbitrators' fees.[292] This court had no hesitation in consulting extra-record sources to ascertain the likely costs of arbitration and other information to guide the court in its rule formation. [293] In contrast, in *Randolph* the U.S. Supreme Court treated the matter as one merely asserting a right under the law – no need to arbitrate if that forum would be ineffective for adjudicating statutory claims – and needing proof of facts in the record, by testimony or party stipulation, to demonstrate the applicability of the protective rule in the particular case. This is a court which believed it was merely applying law to fact in the classic legal

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of-arbitrator's fees clause caused the arbitration to be an ineffective forum and arbitration therefore unenforceable.

[288] Fed. R. Evid. 201(b).

[289] *See* In re Olsen, 884 F.2d 1415, 1423 n.14 (D.C. Cir. 1989) (judicial notice of reasonableness of attorney's hourly fee).

[290] CLIFFORD S. FISHMAN, I JONES ON EVIDENCE §§ 2:23, 2:25 (7th ed. 1992).

[291] *Cf.* Bush v. Gore, 121 S. Ct. 525, 530 (2000) (per curiam) ("clear intent of voter" standard too general; "specific rules designed to ensure uniform treatment" needed).

[292] Cole v. Burns Int'l Security Servs., 105 F. 3d 1465 (D.C. Cir. 1997).

[293] *Id.* at 1481 n. 8. *See also* Armendariz v. Foundation Health Psychcare Servs., Inc., 99 Cal. Rep. 2d 745, 762-66, 6 P.3d 669 , 685-89 (2000) (citing cost data from precedents to conclude that arbitration of employee wrongful termination and unlawful discrimination claims so one-sided as to be unconscionable).

syllogism and found a fatal absence of required material fact in the record.

This then points the way to the third route for avoiding arbitration: making sure the court understands that plaintiff is asking for a rule of law and not a decision under a preexisting rule. Of course one may run across a quaint trial judge who denies he has any lawmaking power, [294] but this can be corrected on appeal.

VIII. ON THE DARK SIDE: A CONFLICT OF INTERESTS

Trial judges can immediately reduce their caseloads by mandating arbitration. Even when the matter technically remains on a judges's docket, the adjudication job is transferred outside the courthouse with no remaining tasks for the judge. Trial judges with considerable inventories of pending cases, which includes most trial judges in urban centers, [295] might find docket-clearing motions to compel arbitration attractive, especially when they encounter broad pro-arbitration dicta in Supreme Court opinions. Because no opinion-writing duty attends the granting of a motion to compel arbitration, the trial judge, freed from inspection, may blithely grant the motion with scant attention to what the law, properly consulted and understood, requires.

At the level above, appellate judges may remove from the federal agenda whole blocks of cases by affirming with opinion trial orders compelling arbitration. A horizontal ripple effect will be produced by sister federal courts of appeal and state appeal courts locking into the precedential caboose. [296] Each such appellate opinion has a vertical ripple effect too. Company lawyers are encouraged to insert arbitration clauses into their form contracts. In this way, then, thousands of disputes under federal law will be shifted to arbitration. For example, should *Johnson*'s specious, superficial competence attract a following in other courts of appeal, truth-in-lending class actions will simply disappear. Little by little federal statutory protections [297] will become the responsibility of unsupervised private individuals called arbitrators, instead of life tenured public officials called judges. [298]

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[294] *See* Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1426 (M.D. Ala. 1998), *rev'd*, 178 F.3d 1149 (11th Cir. 1999), *rev'd*, 121 S.Ct. 513 (2000) ("this court finds and does not make law").

[295] *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR, table X-1A at pp. 386-88 (filings per authorized judgeship in U.S. District Courts; weighted average of 472 per judge) (*available at* http://www.uscourts.gov/judbus1999).

[296] *See* Gregory S. Sisk, et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U.L. REV. 1377, 1499 (1998) "[I]n one vital particular – the attention of judges to precedent, even when not obliged to do so – our study demonstrates that legal factors remain vital in the process of judging.").

[297] In fiscal year 1999, actions under federal statutes brought in federal court totaled 159, 185, 61% of the civil cases filed. See JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR, table C-2A at pp. 139-41 (available at http://www.uscourts.gov/judbus1999).

[298] *See, e.g.*, Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995); (arbitration of

While federal judges are not likely to let the improper docket-easing motive overtly enter their calculations, it is an ever-present, subtle, subconscious motivation. The Federal Arbitration Act imposes the duty of choice, arbitration or not, upon the federal bench, [299] a duty which no judge can decline to execute. Judges deciding whether to compel arbitration, after significant showings why they should not, must be aware of the imbedded conflict. The conflict is inevitable because only judges can decide whether arbitration clauses are valid or whether statutory protections must be asserted in court and not in arbitration. Still, the imbedded conflict should signal caution and argues that each decision compelling arbitration be accompanied by a fully reasoned, published opinion.

IX. CONCLUSION

I apologize to the conscientious reader for the abundance of detail in the preceding pages. Asserting superficiality against a court of appeals requires one to develop counter-arguments in depth. A further reason for considerable detail is that the *Johnson* precedent has the appearance of competence, and I worry that other courts of appeal will think "the job has been done."[300] This article offers consumer advocates the information and analysis they need to combat *Johnson* in other circuits. Although, the Supreme Court declined certiorari jurisdiction to *Johnson*,[301] it is sure to revisit the issue of consumer arbitration in the near future.[302] By then the weight of authority will hopefully have swung decisively against *Johnson* and will rebuff the efforts of the business sector to use arbitration as a shield against consumer's statutory claims and class actions.

It is time to bring this one-case odyssey to a close. Proper consultation of relevant legal sources leads inevitably to the conclusion that the arbitration clause imposed upon Terry Johnson should not have been invocable against his TILA class action. Apart from some Supreme Court presumptions favoring arbitration, of dubious parentage and small relevance on the validity-of-arbitration question, the

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termite prevention contract dispute); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) (arbitration of dispute between investor and brokerage house); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 24 (1991) (arbitration of age discrimination claim); Pinkis v. Network Cinema Corp., 9 Wash. App. 337, 512 P.2d 751 (App. Div. 1973) (arbitration of franchise dispute).

[299] 9 U.S.C. § 3 (1994) ("stay the trial of the action until such arbitration has been had"); 9 U.S.C. § 4 (1994) ("court shall make an order directing the parties to proceed to arbitration").

[300] Indeed the Eleventh Circuit parroted the *Johnson* conclusions with little independent analysis of the issues. *See* Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 818 (11th Cir. 2001). *See also* Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1338-39 (11th Cir. 2000)(using *Johnson* to find no right to bring class action under Equal Credit Opportunity Act).

[301] Johnson v. Tele-cash, Inc., 121 S.Ct. 1081 (2001).

[302] *Randolph,* 121 S.Ct. 513, having decided on failure of proof grounds, is a case of no precedential value on the validity of arbitration clauses stuck not consumer contracts.

legal markers all point strongly against the panel's conclusion. No Supreme Court precedent compelled the panel's result; indeed, within the Court's arbitration precedents one encounters analytical frameworks which lead to a result contrary to the panel's. While willing to give arbitration, the private alternative to public litigation, a chance at protecting statutory rights, the Court has been careful to insist that such protection be effective. In none of the cases before the Court was the claimant as resourceless as Terry Johnson, and in the one factually comparable case, *Randolph,* the Court was merely unhappy with the proof showing on the effectiveness-of-arbitration question. The panel was further mistaken on the legislative record, whether owing to its own or counsel's research failings. That record demonstrates beyond doubt the falsity of the panel's surmise that agency enforcement would protect consumers, and it also belies the panel's cavalier dismissal of Congress's desires. Over four years the legislators with principal truth-in-lending responsibility spoke often and vigorously about the great need for deterrent class actions. On yet another front the panel failed: the search, not undertaken, for a reasonable accommodation of the goals of two federal statutes. The panel's action effectively killed truth-in-lending protections, while only minutely advancing the goals of the Federal Arbitration Act. And, finally, the panel's seeming naiveté about real life possibilities for Terry Johnson to obtain relief in arbitration and in the federal government's ability to enforce truth-in-lending without the help of private actors is especially condemnable. A simple probe beneath the superficies of legal propositions to gauge their true impact and effect reveals their inappositeness.

What justifies, then, the harsh evaluations in this writing is the realization that these judges likely knew better but did not care. Terry Johnson was brushed aside in favor of business interests.