TOGETHER WE'LL GO FAR . . . AWAY FROM COURT: THE WELLS FARGO SCANDAL AND THE LIMITS OF ITS MANDATORY ARBITRATION AGREEMENTS

JULIA E. CLASS*

Abstract

The Federal Arbitration Act and the United State Supreme Court's decisions upholding the Act against state's efforts to invalidate arbitration agreements have allowed arbitration provisions in consumer agreements to flourish. In the banking industry alone, nearly every consumer banking agreement contains a provision restricting consumers' ability to resolve disputes in court. Despite the fact that arbitration provisions have been common in consumer agreements over the past decade, the sheer scope of such provisions was brought to consumers' full attention when, in September 2016, regulators learned that Wells Fargo employees had opened millions of unauthorized customer accounts in a company-wide scandal dating back as early as 2002. While the scandal itself was shocking to consumers and the banking industry given Wells Fargo's previously shining reputation, the real shock came from Wells Fargo's use of the arbitration provisions in the valid customer account agreements to force victims of the scandal to resolve disputes in arbitration.

In September 2015, before the scandal broke, Wells Fargo successfully convinced U.S. District Court Judge Vince Chhabria for the Northern District of California to compel arbitration on the grounds that the arbitration provisions in the validly executed customer account agreements were sufficiently broad to encompass the disputes related to the fraudulent account scandal. While the arbitration provisions in the customer account agreements are undoubtedly broad, with the obvious goal of sweeping in as many disputes as possible, the court's decision issued by Judge Chhabria failed to view the arbitration provisions in light of the FAA and the Supreme Court's decisions upholding the FAA, both of which rely on the existence of a valid contract to arbitrate. Although the agreements upon which Wells Fargo relied were validly executed, the agreements related to the new accounts were not.

---

* Boston University School of Law (J.D. 2018); Mount Holyoke College (A.B. 2013). The author would like to thank Professor Mark Pettit for his assistance as well as the editors and staff of the *Review of Banking & Financial Law* who helped make this publication possible.

This note argues that the arbitration provisions in the valid account agreements only mandate arbitration for disputes related to the valid accounts in light of the fact that an entirely new account agreement or authorization is required to open a new account. While the FAA mandates that valid arbitration agreements must be honored, Wells Fargo's attempts to capture disputes related to invalid customer accounts governed by separate account agreements or authorizations goes too far. This note also suggests that mandating arbitration of disputes related to the fraudulent account scandal would violate public policy and be beyond the scope of the FAA.

The Wells Fargo scandal is just one example of how arbitration provisions in consumer agreements may be used to avoid liability. While Congress aimed to protect arbitration provisions through the enactment of the FAA, it is unlikely that Congress envisioned that such provisions would be used to wholly insulate a company from fraudulent activity, no matter how vast. In light of the issues brought to attention by the Wells Fargo scandal, some states have attempted to rein in arbitration as it relates to fraudulent activity. Despite the possibility that such statutes might be struck down on grounds of preemption under the FAA, such state action is an important step to bringing these questions to the courts and creating an opportunity to revisit the FAA and the limits of arbitration agreements.

Table of Contents

I. Introduction

As one of the few financial institutions to have successfully weathered the 2008 financial crisis, in part due to its conservative lending policies, Wells Fargo & Company's reputation soared, leaving it one of the world's largest and most successful banks.[1] In addition to its notable performance in the wake the financial crisis, Wells Fargo has also received praise for its efficient banking procedures, such as "opening an account."[2] In September 2013, *The Economist* published an article

[1] *See Riding High: The Big Winner from the Financial Crisis*, ECONOMIST (Sept. 14, 2013), http://www.economist.com/news/finance-and-economics/21 586295-big-winner-financial-crisis-riding-high.
[2] *Id.*

highlighting Wells Fargo's performance and practices.[3] The article quoted Dick Bove, an analyst at Rafferty Capital, who stated Wells Fargo really excels at "managing its employees well, providing the right incentives to enthuse them about pushing what the bank has to offer . . . ."[4]

Given Wells Fargo's shining reputation, it came as a shock to the world when, in September 2016, news broke about Wells Fargo's fraudulent account scandal whereby Wells Fargo employees opened millions of unauthorized accounts for customers in an attempt to meet sales quotas imposed by the bank.[5] Wells Fargo's pressure on employees to push products and open new accounts was a driving force behind the fraudulent account scandal.[6] "Spurred by sales targets and compensation incentives, employees boosted sales figures by covertly opening accounts and funding them by transferring funds from consumers' authorized accounts without their knowledge or consent, often racking up fees or other charges."[7] With each new account opened, employees received credit for meeting or exceeding sales quotas, thereby allowing them to earn additional compensation.[8] In addition to opening roughly 3.5 million unauthorized accounts (a figure that is "a nearly 70 percent increase over the bank's initial estimate"),[9] "Wells Fargo employees applied for

---

[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, Matt Egan, *5,300 Wells Fargo Employees Fired Over 2 Million Phony Accounts*, CNN MONEY (Sept. 9, 2016), http://money.cnn.com/2016/09/08/investing/wells-fargo-created-phony-accounts-bank-fees/ [https://perma.cc/2R7L-X3HM].

[6] *See* Michael Hiltzik, Column, *How Wells Fargo Exploited a Binding Arbitration Clause to Deflect Customers' Fraud Allegations*, L.A. TIMES (Sept. 26, 2016, 11:55 AM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-wells-arbitration-20160926-snap-story.html (stating employees were motivated by the need to "meet relentless sales quotas imposed by the bank's brass").

[7] *Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CONSUMER FIN. PROTECTION BUREAU (Sept. 8, 2016) [hereinafter CFPB Fines Wells Fargo], https://www.consumerfinance.gov/about-us/newsroom/ consumer-financial-protection-bureau-fines-wells-fargo-100-million-wide spread-illegal-practice-secretly-opening-unauthorized-accounts/ [https:// perma.cc/CR25-SE62].

[8] *Id.*

[9] Stacy Cowley, *Wells Fargo Review Finds 1.4 Million More Suspect Accounts*, N.Y. TIMES: DEALBOOK (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/business/dealbook/wells-fargo-accounts.html?mcubz=0.

roughly 565,000 credit card accounts that may not have been authorized by consumers," resulting in consumers incurring annual fees and interest charges.[10] Worse yet, Wells Fargo was aware fraudulent accounts were being created as early as 2002 when employees first began coming forward to alert Wells Fargo executives about the fraudulent activity.[11]

On September 20, 2016, Wells Fargo's CEO John Stumpf appeared before the Senate Banking Committee where he was grilled by senators, Republican and Democrat alike, who criticized Stumpf for failing to address the problem sooner.[12] Stumpf apologized for Well Fargo's actions stating, "I am deeply sorry that we failed to fulfill our responsibility to our customers, to our team members, and to the American public."[13] As victims of the fraudulent account scandal began filing lawsuits against Wells Fargo, the bank has added insult to injury by forcing aggrieved customers into mandatory arbitration.[14] Despite customers' disgust with the bank's attempts to force them to arbitrate claims over accounts the customers never agreed to open in the first place,[15] the bank has maintained that "[t]he arbitration clauses included in the legitimate contracts customers signed to open bank accounts also cover disputes related to the false ones set up in their names."[16] When pressed on whether Wells Fargo would "cease enforcing mandatory arbitration for customer accounts that were not authorized," Stumpf stated that he would "talk to [his] legal team."[17]

Arbitration is an extra-judicial process to resolve disputes between parties pursuant to a contractual agreement to arbitrate.[18] "Such

---

[10] CFPB Fines Wells Fargo, *supra* note 7.
[11] *See* Cowley, *supra* note 9.
[12] Renae Merle, *Wells Fargo CEO Pummeled on Capitol Hill Over Multiyear Scam*, WASH. POST (Sept. 20, 2016), www.washingtonpost.com/news/get-there/wp/2016/09/20/wells-fargo-ceo-to-accept-full-responsibility-before-congress/?utm_term=.866a8485855f.
[13] *Id.*
[14] Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES: DEALBOOK (Dec. 6, 2016), https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html?ref=business&_r=0.
[15] *See id.* A plaintiff in the class action stated, "It is ridiculous . . . This is an issue of identity theft—my identity was used so employees could meet sales goals. This is something that needs to be litigated in a public form." *Id.*
[16] *Id.*
[17] Hiltzik, *supra* note 6.
[18] *See* Frances T. Freeman Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L. REV. 519, 521 (1960).

clauses require customers to settle disagreements through a private arbitration process, rather than in a court."[19] Arbitration offers an expedited, customizable procedure for resolving disputes that is particularly desirable for large companies that would otherwise be subject to expensive, time-consuming litigation.[20]

> In arbitration, consumers often find the odds are stacked against them. The arbitration clauses prevent consumers from banding together to file a lawsuit as a class, forcing them instead to hash out their disputes one by one and blunting one of most [sic] powerful tools that Americans have in challenging harmful and deceitful practices by big companies.[21]

Between this common sentiment and customers' outrage over the scandal, Wells Fargo has received significant backlash for mandating arbitration of customers' claims related to the opening of fraudulent accounts.[22] "Yet even as the bank reels in the court of public opinion, Wells Fargo has been winning its legal battles to kill off lawsuits."[23]

Despite Wells Fargo's successful reliance on its broad arbitration provisions in customers' account agreements, neither the Federal Arbitration Act (FAA), which governs contractual agreements to arbitrate,[24] nor the Supreme Court's rulings upholding the FAA, support Wells Fargo's position that it can force its customers into arbitration based on arbitration provisions in customers' validly executed contracts with the bank. This note seeks to rebut the 2015 decision of the U.S. District Court for the District of Northern California granting Wells Fargo's Motion to Compel Arbitration by analyzing the validity of Wells Fargo's arbitration

---

[19] Ann Carrns, *More Big Banks Are Using Arbitration to Bar Customer Lawsuits*, N.Y. TIMES (Aug. 17, 2016), https://www.nytimes.com/2016/08/18/ your-money/arbitration-bank-checking-accounts.html.

[20] *See, e.g.*, Miles B. Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2353 (2012) (quoting Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1711 (2005)).

[21] Corkery & Cowley, *supra* note 14.

[22] *See, e.g.*, *id.*

[23] *Id.*

[24] 9 U.S.C. § 2 (2012); *see, e.g.*, Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) (discussing the FAA and its mandate to enforce agreements to arbitrate subject to a contrary congressional command).

provisions as they relate to arbitrating disputes based on the creation of fraudulent accounts. In determining such provisions do not extend to the fraudulent accounts, this note considers the plain language of the FAA, the Supreme Court's interpretation of the FAA, customers' agreements to arbitrate pursuant to customers' account agreements with Wells Fargo, and the public policy argument against mandating arbitration of claims related to the creation of fraudulent accounts. Although the Supreme Court will likely not have the opportunity to rule on this issue given Wells Fargo's decision to settle pending lawsuits,[25] Wells Fargo's attempts to force arbitration of these claims demonstrates the overwhelming expansion of arbitration provisions in consumer contracts[26] and the necessity for consumer protection given the use of arbitration as a means of avoiding liability.[27] Section II discusses the two primary lawsuits that have challenged Wells Fargo's use of its mandatory arbitration provisions to force customers to arbitrate claims related to the fraudulent accounts and Wells Fargo's recent settlements. Section III discusses the FAA and the Supreme Court's interpretation of the FAA. Section IV analyzes the validity of the Wells Fargo arbitration agreements in the context of the FAA and the Supreme Court cases upholding arbitration. Finally, Section V discusses the need for reform to address the abuse of arbitration, as demonstrated by the Wells Fargo scandal, and the need for additional consumer protection.

II. The Wells Fargo Scandal and Mandatory Arbitration of Fraudulent Account Claims

A. Jabbari v. Wells Fargo & Company

In September 2015, U.S. District Court Judge Vince Chhabria for the Northern District of California granted Wells Fargo's motion to

---

[25] Emily Glazer, *Wells Fargo to Pay $185 Million Fine over Account Openings*, WALL ST. J. (Sept. 8, 2016, 7:47 PM), https://www.wsj.com/articles/ wells-fargo-to-pay-185-million-fine-over-account-openings-1473352548 (discussing a $185 million settlement of the Wells Fargo fraudulent account claims).

[26] *See* Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1082 (2009) ("In the years since [the FAA's] passage, the type and number of arbitrations have increased exponentially. In part, this increase is due to the fact . . . arbitration agreements are now widely used for consumer contracts . . . .").

[27] *See id.* at 1084 ("Because those employers and corporations that use [arbitration agreements] do so for the majority of their employees and consumers . . . predispute arbitration may favor these repeat players.").

compel arbitration, holding "the arbitration provisions in the plaintiffs' customer agreements with Wells Fargo are broad" and reach disputes that "bear some relationship to [the plaintiffs'] banking with Wells Fargo."[28] In their Consolidated Amended Complaint, plaintiffs Shahriar Jabbari and Kaylee Heffelfinger (Plaintiffs) alleged Wells Fargo opened several unauthorized accounts in their names, resulting in many unauthorized fees and damage to Plaintiffs' credit.[29] Plaintiffs allege that Wells Fargo employees forged the authorization signature or left it blank.[30] Plaintiffs also alleged the widespread, illegal practices of Wells Fargo and its employees.[31] Despite Plaintiff's assertion that Wells Fargo employees forged Plaintiffs' signatures in order to open several unauthorized, fraudulent accounts,[32] the court held "[t]he misuse of information and funds associated with [Plaintiffs'] accounts may 'relate' to the legitimate accounts, so Wells Fargo's assertion of arbitrability is not wholly groundless."[33] To support the court's decision, Judge Chhabria looked to the broad language of the arbitration provisions in the valid customer agreements.[34] Plaintiff Jabbari's arbitration provision covered "any unresolved disagreement between or among [him] and the Bank . . . includ[ing] any dispute relating in any way to [his] Accounts and Services . . . ."[35] Plaintiff Heffelfinger's arbitration provision covered "any unresolved disagreement between [her] and the Bank . . . includ[ing] any disagreement relating in any way to services, accounts or matters . . . ."[36]

---

[28] Order Granting Defendants' Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, slip op. at 2 (N.D. Cal. Sept. 23, 2015).

[29] Consolidated Amended Complaint ¶¶ 52–78, *Jabbari*, No. 15-cv-02159-VC (N.D. Cal. Sept. 23, 2015) (No. 37) [hereinafter *Jabbari* Consolidated Amended Complaint].

[30] *See id.* (including images of the "TIN Certification Signature" for numerous of the allegedly fraudulent account authorizations, which demonstrate vastly different signatures for the same customer).

[31] *See id.* ¶¶ 1–13 (explaining the practice whereby Wells Fargo employees "routinely open[] customer accounts and issue[] credit cards *without the customer's authorization or knowledge*" to meet sales quotas and maximize profits).

[32] *Id.* ¶¶ 52–59, 64–66 (alleging Wells Fargo employees forged plaintiffs' signatures to open various unauthorized accounts).

[33] Order Granting Defendants' Motions to Compel Arbitration*, Jabbari,* slip op. at 2.

[34] *See id*.

[35] *Id.*

[36] *Id.*

In Wells Fargo's Memorandum of Law in Support of its Motion to Compel Arbitration for Plaintiff Heffelfinger, Wells Fargo recounted the instances when Heffelfinger allegedly agreed to arbitrate claims with the bank pursuant to the broad arbitration provision in the consumer account agreement that was executed upon opening her account with the bank.[37] It is worth noting "[e]ach time a Wells Fargo customer opens a new account," the customer receives a customer account agreement "which provides the terms that govern the account."[38] Put differently, the act of *opening* a new account is when customers agree to arbitrate disputes with the bank with respect to that new account, given that a separate customer account agreement is provided each time.[39] What the court in Judge Chhabria's decision failed to recognize is the implicit assumption underlying these broad provisions, which is that they were agreed to pursuant to a validly executed underlying contract or customer authorization. Accordingly, there is an implicit assumption that mandatory arbitration of "any dispute relating in any way to your Accounts and Services"[40] applies only to Accounts and Services actually consented to and that customers actually knew about.[41] While, on its face, Plaintiffs' claims are an "unresolved disagreement" between Plaintiffs and the bank,[42] such disagreement is not based upon the valid accounts, regardless of the fact that employees used Plaintiffs' validly obtained

---

[37] *See* Defendants' Motion to Compel Arbitration of Plaintiff Heffelfinger's Claims at 1–6, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. Sept. 23, 2015) [hereinafter *Jabbari* Motion to Compel Arbitration] (explaining Heffelfinger "signed an account application form certifying that she would arbitrate all disputes with the bank" upon opening her Wells Fargo bank accounts in March 2012 as well as a customer account agreement where she again agreed to arbitrate all disputes with the bank).

[38] *Id.* at 3.

[39] *See id.*

[40] Order Granting Defendants' Motions to Compel Arbitration, *Jabbari,* slip op. at 2.

[41] Wells Fargo also stated "Heffelfinger's use of Wells Fargo's banking services after being informed of the arbitration agreement constitutes her acceptance, by conduct, of the terms of the agreement." *Jabbari* Motion to Compel Arbitration, *supra* note 37, at 1. However, it seems unlikely Heffelfinger used banking services she did not even know about such that, on that basis, Wells Fargo could only compel arbitration with respect to disputes specifically related to the banking services Heffelfinger actually used.

[42] Order Granting Defendants' Motions to Compel Arbitration, *Jabbari*, slip op. at 2 (referencing plaintiffs' arbitration provisions allegedly covering "any unresolved disagreement" with the bank).

information to open the fraudulent accounts.[43] In response to Wells Fargo's Motion to Compel Arbitration, Plaintiffs' attorneys argued consumers "could not reasonably have believed that Wells Fargo would engage in unrelated, unlawful activity, and then shamelessly attempt to extend the arbitration provision to such activity."[44] Since an entirely separate authorization is required each time a customer opens a new account,[45] and since the signing of the account application form is when the customer certifies to arbitrate disputes with the bank,[46] thereby subjecting the customer to a new set of contractual promises and obligations, Plaintiffs should not be compelled to arbitrate claims related to the fraudulent accounts when such accounts are not based on validly executed contracts or customer authorizations.[47] In accordance with Judge Chhabria's ruling, the broad language of the arbitration provision under the customer agreements could theoretically be interpreted to encompass disputes related to fraudulent accounts given that the fraudulent accounts were funded by the customers' valid accounts.[48] However, such a conclusion as to the interpretation of the provisions is not supported in light of the plaint text of the FAA, the Supreme Court's interpretation of the FAA, and basic contract defenses.

---

[43] *See Jabbari* Consolidated Amended Complaint, *supra* note 29, ¶ 110 (alleging Wells Fargo violated Civil Code section 1798.82 when it failed to notify affected customers "their personal information had been misused by unauthorized persons to open unauthorized accounts").

[44] James Rufus Koren, *Even in Fraud Cases, Wells Fargo Customers are Locked into Arbitration*, L.A. TIMES (Dec. 5, 2015), http://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html (quoting plaintiff Jabbari and Heffelfinger's attorneys).

[45] *Jabbari* Motion to Compel Arbitration, *supra* note 37, at 3.

[46] *Id.* at 1.

[47] *See* Koren, *supra* note 44 (stating "plaintiffs' attorneys have argued that arbitration clauses signed by customers when they opened genuine accounts should not prevent them from suing over fake accounts").

[48] Order Granting Defendants' Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, slip op. at 2 (N.D. Cal. Sept. 23, 2015) ("[D]efendants plausibly assert that the plaintiffs' claims bear some relationship to their banking with Wells Fargo . . . . The misuse of information and funds associated with [Plaintiffs'] accounts may 'relate' to the legitimate accounts . . . .").

B. Mitchell v. Wells Fargo Bank NA

In September 2016, customers filed a class action in the U.S. District Court for the District of Utah, Central Division.[49] Plaintiffs' Class Action Complaint, like the complaint in *Jabbari*, alleged Wells Fargo employees opened over 1.5 million unauthorized deposit accounts[50] and engaged in widespread fraudulent activity in order to meet sales quotas imposed by the bank.[51] In Wells Fargo's Memorandum of Law in support of its Motion to Compel Arbitration, filed November 23, 2016, the bank relied on the Northern District of California's 2015 decision issued by Judge Chhabria and the broad language of the arbitration provisions contained in the valid agreements underlying the authorized accounts.[52] Wells Fargo argued the arbitration provisions contained in these contracts "explicitly contemplate disputes related to [unauthorized transactions], . . . which include 'a missing signature, an unauthorized signature . . . or otherwise a transaction that was not authorized by [the customer]."[53] In

---

[49] Mitchell v. Wells Fargo Bank NA, No. 2:16-cv-00966-CW (D. Utah Sept. 16, 2016).

[50] Plaintiffs' Class Action Complaint ¶ 30, *Mitchell*, No. 2:16-cv-00966-CW (D. Utah Sept. 16, 2016) [hereinafter *Mitchell* Class Action Complaint] ("Upon information and belief, Wells Fargo employees opened over 1,534,280 deposit accounts that may not have been authorized and that may have been funded through simulated funding, or transferring funds from consumers' existing accounts without their knowledge or consent.").

[51] *Id.* ¶¶ 7–8 (alleging Wells Fargo imposed a strict sales quota system, which encouraged employees to engage in "gaming," which consists of "opening and manipulating fee generating customer accounts through . . . fraudulent, and unlawful means, such as omitting signatures and adding unwanted secondary accounts to primary accounts without permission").

[52] Defendants' Motion and Memorandum in Support of Motion to Compel Arbitration at 11, Mitchell v. Wells Fargo Bank NA, No. 2:16-cv-00966 (D. Utah Sept. 16, 2016) [hereinafter *Mitchell* Motion to Compel Arbitration] ("Judge Chhabria in the Northern District considered identical or nearly identical language from some of the very same account agreements . . . . Judge Chhabria held that '[t]hese provisions clearly assign arbitrability determinations to the arbitrator,' and the agreements did not 'contain other language that would create doubt about whether the parties intended to delegate the arbitrability determinations.'").

[53] *Id.* at 14. It is worth noting the language upon which Wells Fargo relies refers to an unauthorized *transaction*, which Plaintiffs concede may be arbitrated, the point being that the opening of an entirely separate account without the customer's permission is likely beyond what would be considered an unauthorized *transaction*.

Plaintiffs' Objection to Defendants' Motion to Compel Arbitration, the plaintiffs argued "the arbitration clause extended solely to the agreement entered into between the parties, *to wit*, if there were disputes as to banking issues (overdraft fees, fees on credit cards, fees associated with savings and/or checking accounts), those would ostensibly be arbitrable . . . ."[54] Further, the plaintiffs argued the FAA "does not extend to criminal activity, identity theft, and contractual issues" where there was no "actual, and obvious, meeting of the minds."[55] Relying on the saving clause of FAA § 2, the plaintiffs also argued the arbitration provision is void as it relates to arbitrating the fraudulent activity at issue because there was no mutual assent to arbitrate "the kinds of illegal actions that Wells Fargo committed."[56] In support of this argument, the plaintiffs claimed "[c]lass members intended to agree to arbitrate things generally associated with bank accounts: things such as account balances, ATM fees, overdraft fees, or simply put—disputes that a consumer would expect to be associated with a bank account."[57] The plaintiffs went on to state "Wells Fargo's illegal activities were completely beyond the scope of the intended coverage by this agreement. Clearly there is a limit to how far this arbitration agreement extends."[58] The plaintiffs also point out, citing Wells Fargo's Motion to Compel Arbitration, "each new account opened with Wells Fargo is governed by a new account agreement" and that it would be "incomprehensible for Wells Fargo to claim that a new account is governed by a prior account agreement."[59] With the ammunition of former Wells Fargo CEO John Stumpf's testimony from his Congressional hearing in September 2016 where he admitted to having known about the widespread fraudulent activity,[60] the plaintiffs set the framework for a strong public policy argument against compelling arbitration in this

---

[54] Plaintiffs' Objection to Defendants' Motion to Compel Arbitration at vi, *Mitchell*, No. 2:16-cv-00966-CW (D. Utah Sept. 16, 2016) [hereinafter *Mitchell* Objection to Motion to Compel Arbitration].
[55] *Id.*
[56] *See id.* at 11.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 30 ("[T]he prior account agreements would only govern those accounts and a new contract was never formed. There was no meeting of the minds, as the consumers were surprised by these actions. There was no consideration exchanged because this was a unilateral movement by one side of the party. A basic understanding of contracts underlies that a party cannot be bound if he did not agree to the contract and there was no consideration exchanged.").
[60] *See id.* at i–ii.

instance in their Opposition to Wells Fargo's Motion to Compel Arbitration.[61]

C. Wells Fargo Settlements

In September 2016, Wells Fargo paid a fine totaling $185 million to the Consumer Financial Protection Bureau (CFPB), Office of the Comptroller of the Currency, and City of Los Angeles.[62] CFPB Director Richard Cordray stated the CFPB fine against Wells Fargo of $100 million is the largest penalty ever imposed by the CFPB.[63] "As part of the [CFPB] settlement, the bank must pay an additional $5 million in customer remediation, which includes at least $2.5 million the bank has already refunded customers, averaging $25 per account, and hire an independent consultant for review."[64] Following the 2008 financial crisis and the enactment of Dodd-Frank, banking regulators have sought to increase regulation and ensure greater consumer protection.[65] In an article discussing the CFPB's penalty, the *Wall Street Journal* quoted Cordray, who said, "It is quite clear that these are unfair and abusive practices. Wells Fargo built an incentive-compensation program that made it possible for its employees to pursue underhanded sales practices, and it appears that the bank did not monitor the program carefully."[66]

In March 2017, Wells Fargo reached a $110 million preliminary settlement to cover the *Jabbari* class action, which was pending on remand in the Northern District of California, as well as ten other pending class actions, including the *Mitchell* class action.[67] In April 2017, Wells Fargo

---

[61] *See id.* at v ("Wells Fargo is attempting to, as they have successfully done in numerous other courts, deflect the real issues before the court from the identify theft, illegal conduct, collecting illegal fees, sending fake accounts to collection, illegally making false and fraudulent reports to credit reporting agencies, and other specific violations of law, and prior breaches of the arbitration clause by Wells Fargo, and instead focus on why the Court should compel arbitration.").
[62] CFPB Fines Wells Fargo, *supra* note 7.
[63] *Id.*
[64] Glazer, *supra* note 25.
[65] *See* Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES: DEALBOOK (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html.
[66] Glazer, *supra* note 25.
[67] *See* Kartikay Mehrota, Laura J. Keller & Edvard Pettersson, *Wells Fargo Reaches $110 Million Fake Accounts Settlement*, BLOOMBERG (Mar. 28, 2017), https://www.bloomberg.com/news/articles/2017-03-28/wells-fargo-reaches-110-

agreed to increase the settlement to $142 million following a showing that "bank officials knew about unethical sales practices—including the creation of debit cards without customers' authorization—as early as 2002."[68] The additional $32 million was added to cover customers "affected by [the opening of unauthorized accounts] going back to May 2002."[69] Wells Fargo's new CEO, Tim Sloan, stated "the expansion of the agreement was 'an important step to make things right for our customers.'"[70] On May 24, 2017, Judge Chhabria issued an order granting the motion for preliminary approval of the settlement subject to certain requirements by the parties.[71] On July 8, 2017, the court approved the revised settlement,[72] which included "a simpler opt-out process, a more comprehensive class notification procedure and an expanded anticipated scope of credit-impact damages, according to the judge's order."[73] Even though Wells Fargo has agreed to settle, it is still unclear whether other courts would follow the Northern District of California's 2015 ruling issued by Judge Chhabria and compel arbitration of customers' claims based on the broad arbitration provisions in the valid customer account agreements.

III. FAA Preemption

A. A Brief Overview of the FAA

The FAA was passed in 1925 "to abolish the ouster and revocability doctrines—principles that reflected 'longstanding judicial

---

million-settlement-over-fake-accounts [https://perma.cc/SRA5-58D7]; David Ng, *Judge Approves $142-Million Class-Action Settlement in Wells Fargo Sham Accounts Scandal* (July 9, 2017), http://www.latimes. com/business/la-fi-wells-fargo-settlement-20170709-story.html.

[68] James Rufus Koren, *Wells Fargo Ups Sham-Account Settlement to $142 million, Making More Customers Eligible*, L.A. TIMES (Apr. 21, 2017, 12:10 PM), http://www.latimes.com/business/la-fi-wells-settlement-plan-20170421-story.html.

[69] *Id.*

[70] *Id.*

[71] Order Re Preliminary Approval, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N. D. Cal. Sept. 23, 2016) (No. 155).

[72] Order Granting Motion for Preliminary Approval, Denying Motions to Intervene, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC (N.D. Cal. Sept. 23, 2016) (No.75).

[73] Jon Hill, *Wells Fargo's $142M Revised Settlement Gets Judge's 1st OK*, LAW360 (July 10, 2017, 6:51 PM), https://www.law360.com/articles/942590/wells-fargo-s-142m-revised-settlement-gets-judge-s-1st-ok.

hostility to arbitration' and made agreements to arbitrate unenforceable.'"[74] "Under the ouster doctrine, courts refused to enforce arbitration clauses on the grounds that they improperly ousted courts of their jurisdiction."[75] "[T]he revocability doctrine allowed either party to retract their assent to arbitrate until the arbitrator ruled."[76] Through the enactment of the FAA, Congress sought "to ensure the validity and enforcement of arbitration agreements" despite these doctrines, thereby evidencing "a national policy favoring arbitration."[77] The FAA § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[78]

Pursuant to the doctrine of preemption, the Supreme Court has consistently upheld the FAA against state efforts to alter it to accommodate consumer concerns.[79] While some commentators may view the Supreme Court's decisions to interpret the FAA as a statute favoring arbitration,[80] others have credited the Court's arbitration decisions to

---

[74] David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1219 (2013) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

[75] David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 445 n.34 (2011) (citing Kill v. Hollister (1746) 95 Eng. Rep. 532 (KB)).

[76] Horton, *supra* note 74, at 1225.

[77] JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 1 (2003), www.classactionlitigation.com/crs_arbreport2002.pdf [https://perma.cc/F4VH-35JV].

[78] Federal Arbitration Act, 9 U.S.C. § 2 (2012).

[79] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding the FAA preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts).

[80] *See* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 335

issues of federalism.[81] The preemption theory articulated in Supreme Court cases also promotes the purpose of the FAA.[82]

> Arguably, giving states authority over the validity of arbitration clauses would create a loophole the size of the statute itself. Under the guise of the public policy defense, state lawmakers could pass regulations that resurrect the very hostility to arbitration that the FAA eradicated. For these reasons, judges, scholars, and litigants often contend that the FAA "bar[s] the states from imposing public policy limits on arbitration" and trumps "all state public-policy grounds for finding [an] agreement to arbitrate unenforceable."[83]

Ultimately, the FAA protects parties' ability to contract to arbitrate and promotes freedom of contract.[84] The Supreme Court stated in *AT&T Mobility LLC v. Concepcion*, "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[85] By invalidating state-imposed restrictions on arbitration, the Supreme Court has sought to uphold the Congressional intent behind the FAA.[86]

(1996) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (stating the FAA expresses an intent to favor arbitration)) (referencing Supreme Court cases interpreting the FAA that have demonstrated the Court's view that the FAA favors arbitration).

[81] *See* Horton, *supra* note 74, at 1220 (explaining the FAA "total-preemption theory" is intended to close the "loophole" created by "giving states authority over the validity of arbitration clauses," which would permit state lawmakers to "pass regulations that resurrect the very hostility to arbitration that the FAA eradicated").

[82] *See id.*

[83] G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 459 (1993) (quoting *In re* Poly-America, L.P., 262 S.W.3d 337, 347 (Tex. 2008)).

[84] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 360 (2011).

[85] *Id.* at 344.

[86] *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

B. The Supreme Court's Interpretation of the FAA

Following the enactment of the FAA, the Supreme Court has rigorously defended the FAA and the contractual right of individuals to agree to alternate dispute resolution arising therefrom.[87] In *Concepcion*, the Supreme Court upheld class arbitration waivers under the FAA on the grounds that "liberal federal policy favor[s] arbitration" and the "fundamental principle that arbitration is a matter of contract."[88] In *Concepcion*, Justice Scalia, writing for the Court, held Section 2 of the FAA preempted a California common law rule deeming class arbitration waivers unconscionable.[89] In support of its holding, the Supreme Court looked to the Section 2 "saving clause" which "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[90] "Justice Scalia's majority opinion acknowledged that unconscionability is a 'ground[]. . . for the revocation of any contract' and thus falls squarely within section 2's saving clause."[91] Nonetheless, Scalia clarified that "nothing in [Section 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[92] In light of this ruling, state law could not prohibit mandatory arbitration clauses that "prevent the customer from bringing a lawsuit through the legal system" and refer the matter to private arbitration, or class arbitration waivers, which "prohibit similarly wronged customers from joining their complaints into a single class action."[93]

In *American Exp. Co. v. Italian Colors Restaurant*, the Supreme Court held the FAA does not permit courts to invalidate a contractual

---

[87] *See* Horton, *supra* note 74, at 1221 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)) ("Again and again, the Court has defended the FAA's long shadow over the civil justice system by declaring that '[b]y agreeing to arbitrate . . . a party does not forgo [any] substantive rights.'").

[88] *Concepcion*, 563 U.S. at 339.

[89] *Id.* at 343.

[90] *Id.* at 339.

[91] Horton, *supra* note 74, at 1222.

[92] *Concepcion*, 563 U.S. at 343.

[93] Chris Morran, *Wells Fargo Already Playing Its 'Get Out of Jail Free' Card to Avoid Lawsuits over Fake Accounts*, CONSUMERIST (Dec. 7, 2016, 3:27 PM), https://consumerist.com/2016/12/07/wells-fargo-already-playing-its-get-out-of-jail-free-card-to-avoid-lawsuits-over-fake-accounts/ [https://perma.cc/ W2PP-FPPQ].

waiver of class arbitration "when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[94] In *Italian Colors,* the plaintiff, a merchant who accepted American Express credit cards, brought a class action against American Express alleging violations of the federal antitrust laws based on American Express's use of its "monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards."[95] American Express moved to compel individual arbitration under the FAA pursuant to the merchant agreement between the plaintiff and American Express.[96] In its decision, the Supreme Court stated the text of the FAA "reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted.'"[97] The Court went on to state "[n]o contrary congressional command requires [the Court] to reject the waiver of class arbitration."[98] Although *Concepcion* recognized an agreement to arbitrate may be invalidated by proving fraud or duress,[99] Justice Thomas noted in his concurring opinion that, because Italian Colors had not furnished "'grounds . . . for the revocation of any contract,' the arbitration agreement must be enforced."[100] Justice Thomas went on to note "Italian Colors voluntarily entered into a contract containing a bilateral arbitration provision" and "[i]t cannot now escape its obligations merely because the claim it wishes to bring might be economically infeasible."[101] Like *Concepcion*, the Supreme Court's decision in *Italian Colors* further supports the preemption scheme inherent in the FAA that States cannot invalidate parties' valid contractual agreements to arbitrate.[102]

---

[94] Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2306 (2013).
[95] *Id.* at 2308.
[96] *Id.*
[97] *Id.* at 2309.
[98] *Id.*
[99] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) ("This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability' . . . .").
[100] Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 239 (2013) (Thomas, J., concurring) (quoting 9 U.S.C. § 2 (2012).
[101] *Id.*
[102] *See id.* (stating "[n]o contrary congressional command requires us to reject the waiver of class arbitration here").

C. Revisiting the FAA

The Supreme Court will have another opportunity to review the expansiveness of the FAA in the October 2017 term.[103] The question presented by three cases—one each out of the fifth, seventh, and ninth circuits—is whether class arbitration waivers in employment agreements violate the collective action protections afforded under the National Labor Relations Act (NLRA).[104] Although this question is not posed by the Wells Fargo mandatory arbitration cases, the Supreme Court's decision may further illuminate how far the FAA goes in protecting and permitting arbitration provisions, especially when in conflict with another federal law.[105] However, unlike the Wells Fargo claims, the NLRA claims all relate to a validly executed contract whereby employees actually consented to employment and to individually arbitrate claims arising therefrom.[106] The question, therefore, is whether the class arbitration

---

[103] *See* Lewis v. Epic Systems Corp., 2015 U.S. Dist. LEXIS 121137 (W.D. Wash. 2015), *aff'd*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); Editorial, *Consumers Should Have the Right to Go to Court When They're Defrauded*, L.A. TIMES (Oct. 5, 2017, 4:00 AM) [hereinafter L.A. TIMES, *Consumers Should Have the Right to Go to Court*], http://www.latimes.com/opinion/editorials/la-ed-forced-arbitration-sb-33-20171005-story.html ("[T]he U.S. Supreme Court began its term Monday by hearing three cases that all concerned employers' power to force employees to resolve disputes one by one through arbitration, rather than filing joint claims. Early signs suggested that the court's conservative majority would side with employers, further amplifying the advantages companies already hold in disputes with their employees.").

[104] *See* Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

[105] *See* Amy Howe, *Argument Preview: Reconciling Class Waivers and the National Labor Relations Act*, SCOTUSBLOG (Sept. 25, 2017, 10:56 AM), http://www.scotusblog.com/2017/09/argument-preview-reconciling-class-waivers-national-labor-relations-act/ [https://perma.cc/D7A7-FP5E] (explaining the employers' argument that the FAA is "unequivocal" and must be enforced in light of the fact there is no congressional command that the NLRA trump agreements to arbitrate, while the NLRB and employees, on the other hand, argue that, because the NLRA has long referred "to the right of employees to engage in 'concerted activities' for 'mutual aid or protection' . . . class waivers like the ones at issue in this case are illegal and unenforceable" and therefore not protected under the FAA).

[106] *See Morris*, 834 F.3d at 975; *Lewis*, 823 F.3d at 1147; *Murphy Oil*, 808 F.3d at 1013.

waiver itself is legal given that "concerted activities" are protected by the NLRA.[107] In consideration of this distinction, even if the Supreme Court upholds the class arbitration waiver provisions and issues a ruling consistent with its prior decisions enforcing arbitration agreements under the FAA, the question presented in the Wells Fargo fraudulent account cases will remain unanswered.

IV. Distinguishing the Wells Fargo Scandal

Even though the Supreme Court has consistently upheld parties' ability to contract to arbitrate pursuant to the FAA,[108] those past decisions are not indicative of how the Supreme Court would rule were the question presented in *Jabbari* and *Mitchell* to come before the Supreme Court. There are several arguments to suggest the Supreme Court would not extend the protection of the FAA to customer claims arising from the creation of fraudulent accounts. First, the FAA and the Supreme Court's interpretation of the FAA does not support enforcing arbitration of claims arising from the creation of fraudulent customer account agreements. Second, Wells Fargo's arbitration provisions in the validly executed contracts do not extend to claims regarding the fraudulent accounts. Third, mandating arbitration of the claims against Wells Fargo in light of the bank's company-wide fraud over the course of approximately 14 years would be against public policy and the Congressional purpose of the FAA.

A. The FAA does not Support Mandatory Arbitration of Disputes Related to the Fraudulent Accounts

Looking again to Section 2 of the FAA, the so called "saving clause" creates an exception whereby courts may invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[109] In order for a contract to be enforceable in the first place, the parties to the contract must have manifested mutual assent[110] by written words or other conduct.[111] However, such conduct "is

---

[107] *See* Howe, *supra* note 105 (explaining the NLRB's position that class action waivers in employment contracts are "illegal and unenforceable").
[108] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).
[109] Federal Arbitration Act, 9 U.S.C. § 2 (2012).
[110] RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981).

not effective as a manifestation of [a party's] assent unless [such party] *intends* to engage in the conduct . . . ."[112] This concept is referred to as the "meeting of the minds," and there can be no meeting of minds if only one party intends to create the contract.[113] Accordingly, a contract may be invalidated for such lack of mutual assent.[114] As explained in the Restatement (Second) of Contracts, "[t]ypical instances of voidable contracts are those . . . where the contract was induced by fraud . . . ."[115] Other contract defenses, such as forgery, may also render an agreement invalid.[116]

Applying these principles to the arbitration agreements between Wells Fargo and its customers, the parties must have manifested their mutual assent to arbitrate pursuant to the terms of such agreement for it to be valid. In the case of customers affected by Wells Fargo's fraudulent activity, although customers agreed to arbitrate disputes related to their valid, authorized accounts, no such agreement was made to disputes related to invalid, unauthorized accounts.[117] As alleged in *Jabbari*, Wells Fargo employees forged customers' signatures on the customer account applications in order to open the fraudulent accounts without customers' consent or knowledge.[118] The fact that a separate account application and corresponding customer authorization is required in order to open a new account[119] supports the proposition that disputes related to such new account cannot be subject to arbitration without the customer's authorized consent to open such new account. It follows, for the provisions of the customer account agreement to be effective with respect to new accounts

---

[111] *Id.* at § 19(1).
[112] *Id.* at §19(2) (emphasis added).
[113] *See* 3 KEVIN O'MALLEY ET AL., FED. JURY PRACTICE AND INSTRUCTIONS § 126:01 (6th ed. 2017).
[114] Molina v. Scandinavian Designs, Inc., 2014 WL 1615177, at *3 (N.D. Cal. Apr. 21, 2014).
[115] RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b (AM. LAW INST. 1981).
[116] *See, e.g.*, Cooper v. MRM Inv. Co., 367 F.3d 493, 498 (6th Cir. 2004) ("[G]enerally applicable state-law contract defenses like fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability, may invalidate arbitration agreements.").
[117] *See* L.A. TIMES, *Consumers Should Have the Right to Go to Court*, *supra* note 103 ("It's ridiculous to argue that consumers consented to arbitrate disputes over a contract they never saw or signed.").
[118] *Jabbari* Consolidated Amended Complaint, *supra* note 29, ¶¶ 52–78.
[119] *Mitchell* Motion to Compel Arbitration, *supra* note 52, ¶ 92 ("Each time a Wells Fargo customer opens a new account, he or she receives a Consumer Account Agreement, which provides the terms that govern the account.").

as Wells Fargo argues, the customer must provide a separate customer authorization or execute a new customer account agreement corresponding to that new account. Accordingly, a forged customer authorization signature with respect to new accounts could not bind the customer to arbitration with respect to that new account because the customer has not manifested its assent to incorporate the new account in its original customer account agreement. [120] In effect, by providing a signature in order to authorize the creation of a new account, assuming a separate customer account agreement is not executed, the customer and Wells Fargo are amending the bounds of the original customer account agreement (and arbitration provision therein) to cover the new account. While the FAA undoubtedly supports this arrangement, the saving clause is designed to invalidate unenforceable arbitration agreements under generally applicable contract defenses,[121] which directly speaks to the arbitration agreements at issue here. By construing the customer authorization associated with the new account as an agreement to incorporate the new account under the terms of the original customer account agreement, forgery of such customer authorization (or customer account agreement, for that matter) renders the agreement invalid[122] and within the exception contemplated by the saving clause.[123]

---

[120] *See* James Rufus Koren, *California Lawmakers Want to Rein in Wells Fargo's Arbitration Clause. But Can They?*, L.A. TIMES (May 16, 2017, 3:00 AM), www.latimes.com/business/la-fi-wells-fargo-arbitration-20170515-htmlstory.html (quoting Brian Brian Kabateck, a Los Angeles plaintiffs' attorney who helped write California Senate Bill 33, "It's basic contract law: There has to be mutual consent . . . . [W[hen a phony relationship is set up, you can't use some other arbitration agreement—one where the parties had a meeting of the minds—and bootstrap it onto a relationship the customer never knew existed").

[121] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (explaining the saving clause permitting agreements to arbitrate to be invalidated by "generally applicable contract defenses").

[122] *See* Brooks v. Robert Larson Auto. Grp., No. C09-5016, 2009 WL 2853452, at *3 (W.D. Wash. Sept. 1, 2009) (citing Matter of Arbitration Between Nuclear Elec. Ins. Ltd. & Cent. Power & Light Co., 926 F. Supp. 428, 434 (S.D.N.Y.1996) (finding that where a party claims it never actually manifested assent to a contract containing an agreement to arbitrate, for example because its signature was forged on the contract, that party cannot be forced to arbitrate until a court establishes the party willingly manifested assent to the underlying contract)).

[123] *See id.* (citing 9 U.S.C. § 2 (2012)) ("State-law contract defenses like fraud or forgery may invalidate arbitration agreements.").

Although Wells Fargo relies on the arbitration provisions in the valid customer agreements to force customers to arbitrate claims related to the invalid accounts,[124] the broad language of the valid arbitration provisions should not be construed to circumvent an essential element under the FAA—that there be an actual agreement to arbitrate. As previously argued, the subsequent customer authorization or customer account agreement required to open the new account suggest the valid arbitration provisions relate only to validly authorized accounts. Certainly, no such valid authorization can be given if made through forgery.[125] It is undisputed that Wells Fargo employees engaged in fraud when they forged customers' signatures to open accounts without customers' consent.[126] While customers could reasonably be expected to arbitrate disputes related to their *valid* accounts, as conceded by the *Mitchell* plaintiffs,[127] it is unconscionable to require customers to arbitrate disputes, pursuant to the arbitration provision under their valid customer credit agreements, which relate to fraudulent accounts governed by a separate customer credit agreement or authorization.

The Supreme Court has relied on the FAA's plain text, which provides for the enforceability of contractually agreed upon arbitration in an agreement involving commerce, to uphold arbitration agreements and reject state statutes to the contrary.[128] As evidenced by the Supreme Court's discussion of the legislative purpose behind the FAA, parties' independent ability to contract to arbitrate disputes is a key component to upholding arbitration agreements.[129] The sanctity of contract law and the enforcement of such contracts by the FAA provide for the existence of such agreements.[130] An individual's choice to contract "to settle by

---

[124] *See, e.g.*, *Jabbari* Motion to Compel Arbitration, *supra* note 37, at 8.
[125] *See Brooks*, 2009 WL 2853452, at *3.
[126] *See, e.g.,* Bob Bryan, *Wells Fargo's CEO Just Got Grilled by the Senate*, BUS. INSIDER (Sept. 20, 2016, 9:41 AM), http://www.businessinsider.com/ wells-fargo-ceo-john-stumpf-senate-baking-committee-hearing-scandal-2016-9 (summarizing the Senate Banking Committee hearing in which CEO John Stumpf apologized for the fraudulent activity of its employees).
[127] *See Mitchell* Objection to Motion to Compel Arbitration, *supra* note 54, at 30.
[128] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[129] *See id.* at 339 (citations omitted) ("We have described this provision as reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.'").
[130] *See id.* (citations omitted) ("In line with these principles, courts must place arbitration provisions on an equal footing with other contracts and enforce them according to their terms.").

arbitration a controversy thereafter arising out of such contract"[131] is what compels that individual to submit to arbitration in the event there is a later controversy arising from the contract.[132] If one does not agree to enter into a particular agreement, how can one possibly be compelled to arbitrate disputes relating to that agreement? As Justice Scalia recognized in *Concepcion*, the "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'"[133] Given that customers' authorization are required to open new accounts made by forgery, a recognized contract defense,[134] the saving clause should apply to invalidate any concurrent agreement to arbitrate made pursuant to such authorization. Ultimately, the FAA's expansive protection of arbitration agreements is not without limits, limits which exist to benefit individuals like the victims of the Wells Fargo scandal.

B. Wells Fargo's Arbitration Provision Does Not Extend to Arbitrating Claims Arising under a Fraudulent Account

In the case of Wells Fargo's arbitration provisions in its customer account agreements, customers agreed to arbitrate disputes related to the valid accounts.[135] Wells Fargo has argued customers' complaints regarding these fraudulent accounts constitute an "unresolved disagreement . . . tied to the accounts which [customers] admit to opening."[136] Because the information the employees used to open the fraudulent accounts was obtained as a result of valid, already existing relationships customers had with Wells Fargo, Wells Fargo maintains the information is the nexus tying the fraudulent accounts to the valid ones, thereby binding customers to arbitrate disputes related to the fraudulent accounts.[137] Although Wells Fargo has invoked a creative legal argument to compel arbitration, the possibility that Wells Fargo's lawyers drafting

---

[131] 9 U.S.C. § 2 (2012).
[132] *Id.* § 4 (requiring courts to compel arbitration in accordance with the terms of the agreement upon a motion of either party to the agreement).
[133] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).
[134] *See, e.g.*, Brooks v. Robert Larson Auto. Grp., Inc., No. C09-5016, 2009 WL 2853452, at *3 (W.D. Wash. Sept. 1, 2009).
[135] *See Mitchell* Objection to Motion to Compel Arbitration, *supra* note 54, at 11 ("Class members intended to agree to arbitrate things generally associated with bank accounts . . . .").
[136] *Mitchell* Motion to Compel Arbitration, *supra* note 52, at 13.
[137] *Id.*

its arbitration provisions contemplated relying on such an attenuated "tie" to enforce its arbitration provisions against 2.1 million defrauded customers[138] is unlikely at best. Similarly, it is unlikely customers would ever have anticipated being forced to arbitrate disputes so seemingly unrelated to their valid accounts, which were likely beyond any possible dispute customers could reasonably have contemplated.[139] Even when considering the broad language of the arbitration provisions in the validly executed contracts, there is a reasonable assumption that the disputes with the bank, such as wrongful overdraft fees,[140] would at least be reasonably related to the valid accounts. Construing the agreement against the drafter, in accordance with the principle of *contra proferentem*,[141] customers' interpretation of the arbitration provisions—that such provisions fail to encompass arbitrating disputes relating to the widespread fraudulent activity engaged in by Wells Fargo employees[142]—would likely prevail. Therefore, if Wells Fargo intended its arbitration provision to reach as far as Wells Fargo now claims it does, it should have drafted the provision to cover any unresolved disagreement between the customer and the bank, including any dispute relating in any way to the customer's Accounts and Services, *authorized or otherwise*, or something to this effect. By referring solely to the customer's "Accounts

---

[138] *See More Wells Fargo Customers May be Affected by Sales Scandal, According to Filing*, CNBC (Mar. 1, 2017), https://www.cnbc.com/2017/03/01/more-wells-fargo-customers-may-be-affected-by-sales-scandal-according-to-filing.html [https://perma.cc/F3NG-XMYA].

[139] *See Mitchell* Objection to Motion to Compel Arbitration, *supra* note 54, at 24 ("The court must ask whether each consumer reasonably believed that when they entered into a contract for a new checking account, they were agreeing to arbitrate civil claims for criminal conduct. Even the most meticulous and exceptionally careful consumer would have no reason to suspect he was agreeing to arbitrate such matters.").

[140] *Id.* at vi.

[141] *See, e.g.*, Kellogg v. Metro. Life Ins. Co., 549 F.3d 818, 830 (10th Cir. 2008).

[142] *See Mitchell* Objection to Motion to Compel Arbitration, *supra* note 54, at 26–27 ("Defendants provided a boilerplate, take it or leave it document, which included an ambiguous "any dispute" provision within the arbitration agreement clause . . . . While the word "any is a broad word, if it was intended to cover these kinds of actions, it should have been clearly and unambiguously stated that civil remedies for criminal actions by the bank must be arbitrated. As stated throughout this objection, Plaintiffs never believed that the misconduct by Defendants was covered in the Arbitration Agreement . . . . As there is ambiguity, the resulting dispute should be construed in favor of the Plaintiffs pursuant to *contra proferentem*.").

and Services," there is an implicit assumption the Accounts and Services refer to those the customer authorized.[143] Construing such ambiguity against Wells Fargo is all the more important given that its customer account agreements not subject to negotiation by the customers.[144]

C. Upholding Wells Fargo's Arbitration Provision for Fraudulent Account Claims Is Against Public Policy

In addition to the argument that the valid customer account agreements cannot bind customers to arbitrate disputes related to the fraudulent accounts, there is also a compelling public policy argument against permitting arbitration of disputes related to fraudulent activity. This is particularly true in Wells Fargo's case where the fraudulent activity affected millions of customers and was known by Wells Fargo executives for years before the fraud became publicly known in September 2016. A crucial distinction of the Wells Fargo scandal is the plaintiffs were not suing over an isolated incident.[145] Rather, the plaintiffs alleged widespread fraudulent activity among many Wells Fargo employees of whom the bank had knowledge, and even encouraged, yet systematically failed to address.[146] Had this been an isolated incident of a small number of employees that Wells Fargo immediately sought to correct in good faith, arbitration of the plaintiffs' claims under the broad arbitration provisions would be more understandable. Yet, the opening of millions of fraudulent accounts was by no means an isolated incident and was reflective of a company-wide problem for which Wells Fargo clearly hoped to avoid liability by standing behind the shield of a broad arbitration provision,[147] which, fortunately for Wells Fargo, was upheld by the Northern District of California.[148] Although the broad arbitration

---

[143] *See id.* at 25 ("The words within the CAA point the objective view . . . fake accounts are not an account intended to be governed by a real contract.").

[144] *See* David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 436 (2009).

[145] *See, e.g.*, *Mitchell* Objection to Motion to Compel Arbitration, *supra* note 54, at 11.

[146] *Jabbari* Consolidated Amended Complaint, *supra* note 29, ¶¶ 1–12.

[147] Morran, *supra* note 93 (citing a letter sent from Senators Leahy, Brown, Durbin, Franken, Blumenthal and Warren to Timothy Sloan, the CEO of Wells Fargo saying that "[f]orced arbitration . . . shields companies from accountability—both from the courts and the public eye").

[148] *See* Order Granting Defendants' Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, slip op. (N. D. Cal. Sept. 23, 2015).

provisions covered "unauthorized transactions," as Wells Fargo claimed in its Motion to Compel Arbitration in the *Mitchell* class action,[149] the scope of this fraud was astonishingly vast and was likely beyond the fraudulent activity that was ever contemplated by customers upon execution of the customer account agreement.

The Northern District of California's decision granting Wells Fargo's motion to compel arbitration begs the question of whether the FAA really permits a company to mandate arbitration for disputes related to fraud, no matter how attenuated or vast, so long as the arbitration agreement contemplates such disputes. To permit an arbitration provision to go so far would wholly insulate a company from any judicial accountability, no matter how attenuated the connection was between the fraud and the consumer's contractual relationship with the company. Permitting arbitration in that instance would be a total abuse of arbitration as it was originally contemplated by Congress when the FAA was enacted in 1925.[150] Arbitration already severely limits a consumer's legal remedies, and consumers are faced with arbitration provisions in nearly every consumer contract.[151] At the very least, the consumer should only be bound to arbitrate reasonably foreseeable disputes relating to the consumer's contractual relationship with the company, which would not include Wells Fargo's attenuated fraudulent activity at issue here. The Wells Fargo scandal is a perfect example of how arbitration provisions can be manipulated to shield companies from liability and used as a mechanism to avoid accountability.[152] Permitting Wells Fargo's broadly worded (and interpreted) arbitration provisions to extend to disputes

---

[149] *Mitchell* Motion to Compel Arbitration, *supra* note 52, at 14.

[150] *See* Horton, *supra* note 74, at 1219 (explaining the original purpose of the FAA to abolish judicial hostility to arbitration).

[151] Press Release, Consumer Fin. Prot. Bureau, CFPB Issues Rule to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/ [https://perma.cc/3XRU-PEL8].

[152] *See* L.A. TIMES, *Consumers Should Have the Right to Go to Court*, *supra* note 103 ("Wells' disgraceful efforts to steer these disputes into its preferred venue is just one illustration (albeit an egregious one) of how companies stack the deck against their customers. By requiring each victim to bring a separate complaint to arbitration rather than allowing a few of them to seek relief for the entire group, companies reduce the potential penalty for their bad behavior, because some victims won't bother to file claims and the ones who do may have trouble finding lawyers for such small stakes. Arbitrators also have a history of siding far more often with companies than consumers.").

related to fraudulent accounts, where the authorization for such accounts was made via forgery and where such fraudulent activity affected millions of accounts, is in clear violation of public policy. In fact, as pointed out by Professor David Horton, "the FAA's context and legislative record reveals that violation of public policy falls within the plain language of the savings clause."[153] The benefits provided by arbitration are not furthered by permitting arbitration that, in the case of Wells Fargo, is used purely as a device to avoid liability for widespread fraudulent activity.

V. The Call for Reform

The Wells Fargo scandal has enraged customers and lawmakers alike.[154] The prevalence of mandatory arbitration clauses in nearly every consumer contract,[155] and the Supreme Court's pro-arbitration interpretation of the FAA[156] often closes the door to resolving disputes in court. Even in light of a growing consensus that mandatory arbitration has gone too far,[157] there is still a distinction between arbitrating disputes arising in the ordinary course of business where the company has acted in good faith, versus forcing arbitration where the company has acted in bad faith and engaged in undoubtedly fraudulent activity. Recognizing this

---

[153] Horton, *supra* note 74, at 1224 (arguing Congress did not intend for the FAA to preempt state public policy in its entirety, but rather, "Congress debated and passed the statute during the golden age of the public policy doctrine—a time when courts held that a contract violated state public policy more frequently").

[154] Kevin Dugan, *Customers Still Hate Wells Fargo Following Fake-Accounts Scandal*, N.Y. POST (Mar. 20, 2017), http://nypost.com/2017/03/20/ customers-still-hate-wells-fargo-following-fake-accounts-scandal/ [https:// perma.cc/K8HG-JPUT] ("It's official: Bank customers still hate Wells Fargo . . . . Applications for credit cards in February were off a whopping 55 percent from the year before . . . .").

[155] *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,211 (July 19, 2017) (codified at 12 C.F.R. § 1040) ("In the last few decades, companies have begun inserting arbitration agreements in a wide variety of standard-form contracts, such as in contracts between companies and consumers, employees, and investors.").

[156] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (describing FAA § 2 as "liberal federal policy favoring arbitration").

[157] *See* L.A. TIMES, *Consumers Should Have the Right to Go to Court*, *supra* note 103.

distinction, some lawmakers hope to rein in arbitration in spite of the Supreme Court's broad interpretation of the FAA.[158]

On December 2, 2016, Congressman Brad Sherman (D-Cal.) and Senator Sherrod Brown (D-Ohio) introduced the Justice for Victims of Fraud Act of 2016, which would prohibit mandating arbitration for disputes arising under fraudulent accounts and would specifically address the "arbitration loophole" utilized by Wells Fargo through its reliance on its broad arbitration provisions in customers' legitimate customer account agreements.[159] In his press release announcing the proposed legislation, Senator Sherman stated, "If a customer never authorized the opening of a credit card or checking account, that same customer should not be bound by an arbitration agreement for a separate, legitimate account . . . . Cheated customers should have the choice to opt out of phony contractual arbitration provisions and seek justice in court."[160] By requiring a judge to make a determination "whether an account was fraudulently opened, rather than a determination being made by an arbitration panel behind closed doors, . . . deceptive and fraudulent practices" would be brought to light in a public forum.[161] Unfortunately, the legislation has had no traction in the Republican-controlled Congress.[162]

Another similar piece of legislation has been introduced in California. California Senator Bill Dodd is the lead author of a California bill aimed at ending mandatory arbitration of claims against a bank that opens fraudulent accounts, just as Wells Fargo has done.[163] "Senate Bill 33, written with Wells Fargo in mind, would allow California courts to invalidate arbitration agreements in cases in which consumers allege financial institutions created fraudulent accounts in their names."[164] Before granting a motion to compel arbitration, the bill would require the court to make a determination as to whether the financial institution "seek[s] to apply a written agreement to arbitrate, contained in a contract

---

[158] *See, e.g.*, Koren, *supra* note 120 (discussing California lawmaker's attempt to carve out exceptions to the enforceability of arbitration provisions).

[159] H.R. 6423, 114th Cong. (2016); Press Release, Office of Congressman Brad Sherman, Sherman and Brown Introduce Bill to Provide Justice to Wells Fargo Victims (Dec. 2, 2016), https://sherman.house.gov/media-center/press-releases/sherman-and-brown-introduce-bill-to-provide-justice-to-wells-fargo [https://perma.cc/CD38-8MUB].

[160] Press Release, Office of Congressman Brad Sherman, *supra* note 159.

[161] *Id.*

[162] *See* L.A. TIMES, *Consumers Should Have the Right to Go to Court*, *supra* note 103.

[163] S. 33, 2017–2018 Reg. Sess. (Cal. 2017).

[164] *See* Koren, *supra* note 120.

consented to by a respondent consumer, to a *purported contractual* relationship with that consumer that was created by the petitioner fraudulently without the consumer's consent and by unlawfully using the consumer's personal identifying information . . . ."[165] While still enforcing arbitration provisions as required under the FAA and in accordance with the Supreme Court's decisions, the California bill attempts to carve out exceptions where arbitration is inappropriate given the non-consensual nature of the particular agreement in question.[166] Senate Bill 33 was enrolled by the California Senate and presented to the Governor on September 11, 2017.[167] On October 4, 2017, California Governor Jerry Brown signed the bill into law,[168] effective January 1, 2018.[169] Despite the possibility that a state law, like Senate Bill 33, may be struck down by the Supreme Court as being in violation of the Supremacy Clause,[170] the enactment of such state laws is an important step to push Congress to amend the FAA.[171]

To this very point, Representative Henry Johnson, Jr. (D-GA) introduced the Arbitration Fairness Act on March 7, 2017, where it has since remained in review by the Subcommittee on Regulatory Reform, Commercial and Antitrust Law since March 17, 2017.[172] The Arbitration Fairness Act would "prohibit[] a predispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute."[173] Accordingly, the Arbitration Fairness Act would apply to consumer financial agreements

---

[165] S. 33, 2017–2018 Reg. Sess.
[166] Koren, *supra* note 120.
[167] S. 33, 2017–2018 Reg. Sess.
[168] *Id.*; *see* Laurence Darmiento, *Governor Jerry Brown Signs Bill Allowing Consumers to Sue Banks Over Bogus Accounts*, L.A. TIMES (Oct. 4, 2017, 5:40 PM), http://www.latimes.com/business/la-fi-wells-fargo-arbitration-bill-20171004-story.html.
[169] CAL. CODE OF CIV. PROC. § 1281.2 (WEST 2018).
[170] *See, e.g.*, Koren, *supra* note 120 (discussing a potential supremacy challenge given that "[t]he Supreme Court has ruled that states cannot make rules that treat arbitration agreements unfavorably or differently from other contract terms").
[171] *See id.* ("[Senator] Dodd said he understands this is a risk and knows businesses will try to get his bill overturned if it becomes law. Still, he said Congress isn't likely to rein in federal arbitration rules, so it behooves state lawmakers to at least try.").
[172] Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).
[173] *Id.*

like that between Wells Fargo and its customers.[174] Pointing to the original intent of the FAA, "to apply to disputes between commercial entities of generally similar sophistication and bargaining power," the Arbitration Fairness Act aims to rein in the sweeping application of the FAA as interpreted by the Supreme Court.[175] While the Act would eliminate *mandatory* arbitration, the Act maintains "[a]rbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises."[176] Although the bill will likely die in committee, the Arbitration Fairness Act is another key step towards addressing the problem of expansive use of arbitration provisions.

A. Arbitration Clauses in Banking Customer Agreements

Like with so many other consumer agreements, banks frequently use mandatory arbitration provisions and class action waivers to force customers to individually arbitrate disputes.[177] The Pew Charitable Trusts has conducted numerous studies into arbitration provisions in consumer credit agreements and the latest study found the following:

> [A]lmost three-quarters of the banks' account agreements include clauses that mandate pre-dispute arbitration . . . and prohibit consumers from seeking remedy in a court of law . . . . Overall, more than 90 percent of [the 50 largest retail banks in the U.S.] include at least one provision restricting consumers' dispute resolution options.[178]

---

[174] *See id.* ("This bill prohibits a predispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute.").

[175] *See id.* ("A series of decisions by the Supreme Court of United States has interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.").

[176] *Id.*

[177] *See* Carrns, *supra* note 19; *see also* Nicole F. Munro & Peter L. Cockrell, *Drafting Arbitration Agreements: A Practitioner's Guide for Consumer Credit Contracts*, 8 J. BUS. & TECH. L. 363, 363 (2013).

[178] THE PEW CHARITABLE TRS., CONSUMERS WANT THE RIGHT TO RESOLVE BANK DISPUTES IN COURT (2016), www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court [https://perma.cc/8WMN-YBWB].

Both Pew and the CFPB have concluded from various studies that consumers want access to the legal system and "the right to pursue a class-action lawsuit."[179] Unfortunately, credit agreements between banks and their customers are not individually negotiated,[180] and where major financial institutions all have similar form contracts and arbitration provisions,[181] consumers have essentially no choice but to the accept such provisions in order to access the credit market, thereby allowing banks to avoid liability.[182]

Although arbitration provisions and class arbitration waivers are prevalent in many consumer agreements,[183] arbitration in the banking industry is particularly ripe for abuse.[184] Customers may incur unauthorized fees and charges, as in the Wells Fargo scandal, which, though meaningful for each customer, are not enough to warrant an individual lawsuit or arbitration action.[185] In the aggregate, however, such

---

[179] *Id.* ("Pew's study, and similar research from the [CFPB] on credit cards, indicates that although cost and time constraints would preclude most consumers from taking independent legal action if an issue arose, they want the right to pursue a class-action lawsuit.").

[180] *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,215 (July 19, 2017) (codified at 12 C.F.R. § 1040).

[181] Press Release, Consumer Fin. Prot. Bureau, *supra* note 151.

[182] *Id.* ("Many consumer financial products like credit cards and bank accounts have arbitration clauses in their contracts that prevent consumers from joining together to sue their bank or financial company for wrongdoing. By forcing consumers to give up or go it alone—usually over small amounts —companies can sidestep the court system, avoid big refunds, and continue harmful practices.").

[183] Arbitration Agreements, 82 Fed. Reg. 33,210, 33,215 (July 19, 2017) (codified at 12 C.F.R. § 1040).

[184] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everwhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("Some of the lawsuits involved small banking fees, including one brought by Citibank customers who said they were duped into buying insurance they were never eligible to use. Fees like this, multiplied over millions of customers, amount to billions of dollars in profits for companies.").

[185] *See* Editorial, *Closing the Courthouse Door*, N.Y. TIMES (Aug. 10, 2017), https://www.nytimes.com/2017/08/10/opinion/republicans-class-action-sue-banks.html [hereinafter *Closing the Courthouse Door*] ("Class-action lawsuits are often the only way to hold corporations to account for wrongdoing in which thousands or millions of customers lose amounts that may be meaningful for

unauthorized fees could total into the millions.[186] When customers are prohibited from bringing a class-action in court or in arbitration, it is incredibly difficult to hold a company, like Wells Fargo, accountable and, because arbitration "is so clearly stacked against customers," many customers may not even bother bringing an individual action in arbitration.[187] In contrast, "group lawsuits succeed in bringing hundreds of millions of dollars in relief to millions of consumers each year," even if the individual amounts at stake are relatively negligible.[188] Although individuals may recover individual losses through arbitration, individual actions often do not hold the monetary significance required to punish companies that engaged in harmful activity and to prevent that same activity from happening again.[189] Class actions, on the other hand, provide a cost-efficient mechanism to successfully address harmful corporate conduct and hold companies accountable.[190] "Without group lawsuits, private citizens have almost no way, on their own, to stop companies from pursuing profitable practices that may violate the law."[191]

As was made clear by the 2008 financial crisis, the top financial institutions in the United States play a major role in the lives of American consumers and the health of the economy.[192] As such, it is imperative such institutions are held accountable for their practices in order to protect consumers from harmful practices. Where a keystone of the U.S. economy is consumer choice,[193] an important avenue for regulating these institutions is through private consumer action. Although arbitration can benefit consumers by minimizing costs (which in turn keeps prices

---

each customer, though not enough to warrant an individual fighting a corporation.").

[186] Silver-Greenberg & Gebeloff, *supra* note 184.

[187] *See Closing the Courthouse Door*, *supra* note 185.

[188] Press Release, Consumer Fin. Prot. Bureau, *supra* note 151.

[189] *Id.* ("Individual actions might recoup previous individual losses, but they do nothing to stop the harm from happening again or to others.").

[190] *Id.* ("Resolving group lawsuits often requires companies to not only pay everyone back, but also change their conduct moving forward.").

[191] *Id.*

[192] *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011), www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

[193] *See* Hale Stewart, *Consumer Spending and the Economy*, N.Y. TIMES: FIVETHIRTYEIGHT (Sept. 19, 2010, 2:22 PM), https://fivethirtyeight.blogs.nytimes.com/2010/09/19/consumer-spending-and-the-economy/ (stating "consumer spending . . . accounts for approximately 70 percent of all economic growth").

low),[194] arbitration agreements have evolved to insulate companies from liability, essentially eliminating consumers' ability to hold companies accountable through the judicial system.[195] In order to keep financial institutions in-check via private consumer action, consumers must be able to act collectively in court.[196] While arbitration is a valuable tool to rein in costly litigation and quickly resolve disputes, widespread fraudulent activity is best addressed by consumers through class-action lawsuits.[197]

B. CFPB Arbitration Rule

On July 10, 2017, the CFPB announced a new rule to ban banks, credit card companies, payday lenders, and other financial services companies from including class action waivers in the arbitration provisions of their customer agreements.[198]

> First, the final rule prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service. Second the final rule requires covered providers that are involved in an arbitration pursuant to a pre-dispute arbitration agreement to

---

[194] *See* L.A. TIMES, *Consumers Should Have the Right to Go to Court*, *supra* note 103 ("Arbitration can be a useful way to cut costs . . . .").

[195] *See* Silver-Greenberg & Gebeloff, *supra* note 184 (quoting Judge Young, a federal judge in Boston, who stated "[Banning class actions] is among the most profound shifts in our legal history . . . . Ominously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach").

[196] *See* Ian McKendry, *Senate Votes to Repeal CFPB Arbitration Rule in Win for Financial Institutions*, AM. BANKER (Oct. 24, 2017, 10:21 PM), https://www.americanbanker.com/news/senate-repeals-cfpb-arbitration-rule-in-win-for-financial-institutions ("Democrats, on the other hand, say that class-action lawsuits were more effective at holding big businesses accountable and offer a viable path for restitution when it comes to smaller claims.").

[197] *See Closing the Courthouse Door*, *supra* note 185 ("Class-action lawsuits are often the only way to hold corporations to account for wrongdoing . . . .").

[198] *See* Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (codified at 12 C.F.R. § 1040).

> submit specified arbitral records to the Bureau and also to submit specified court records.[199]

In his announcement of the final rule, CFPB Director Richard Cordray said the following:

> A cherished tenet of our justice system is that no one, no matter how big or how powerful, should escape accountability if they break the law. But right now, many contracts for consumer financial products like bank accounts and credit cards come with a mandatory arbitration clause that makes it virtually impossible for people to sue the company as a group if things go wrong. On paper, these clauses simply say that either party can opt to have disputes resolved by private individuals known as arbitrators rather than by the court system. In practice, companies use these clauses to bar groups of consumers from joining together to seek justice by vindicating their legal rights.[200]

This sentiment, shared among many consumer activist groups, such as Americans for Financial Reform, has only been fueled by the Wells Fargo scandal.[201] "We've definitely pointed to Wells Fargo as pretty much the poster child for why we need this rule," said Amanda Werner, a campaign manager at Americans for Financial Reform and Public Citizen.[202] The arbitration rule, initially proposed on May 24, 2016,[203] was undoubtedly bolstered by the breaking of the Wells Fargo scandal in September 2016. Unfortunately, on July 25, 2017, the House of

---

[199] *Id.*

[200] Press Release, Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Richard Cordray on the Arbitration Rule Announcement (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-arbitration-rule-announcement/ [https://perma.cc/3736-9KGE].

[201] *See, e.g.*, Sara Merken, *Wells Fargo Scandal Helps Consumer Advocates in CFPB Rule Fight*, BLOOMBERG BNA (Aug. 14, 2017), https://bol.bna.com/wells-fargo-scandal-helps-consumer-advocates-in-cfpb-rule-fight/ [https://perma.cc/FF2D-GVUJ] ("Consumer groups are invoking Wells Fargo as they seek to persuade a handful of Republican senators to help defeat a potential September vote on a resolution blocking the arbitration rule.").

[202] *Id.*

[203] Arbitration Agreements, 81 Fed. Reg. at 32,830.

Representatives voted to repeal the CFPB's final rule pursuant to the Congressional Review Act (CRA). The CRA gives Congress the power to disapprove of and block rules by a joint resolution[204] that were enacted in the previous 60 legislative days.[205] As of August 2017, "Senator Lindsey Graham of South Carolina [was] . . . the only Republican who [had] spoken out about opposing the resolution, telling the Wall Street Journal that arbitration is a 'windfall for the companies in terms of how you settle their cheating.'"[206] On October 24, 2017 in a 51-50 vote, with Vice President Mike Pence casting the tie-breaking vote, the Senate voted to repeal the CFPB arbitration rule in a win for financial institutions.[207] Not only did the vote repeal this CFPB arbitration rule,[208] "but [it] also prevent[ed] the CFPB from writing a 'substantially similar' rule down the road without congressional action."[209]

C. Amending the FAA

Carving out exceptions to the enforceability of mandatory arbitration in the presence of fraud, as California is attempting to do with its arbitration statute, is precisely what federal legislators should do to amend the FAA. As Wells Fargo has proved, mandatory arbitration is no longer solely being used as a mechanism to eliminate the costs of litigation and resolve disputes quickly and efficiently. Wells Fargo has relied on its broad arbitration provisions to force customers to arbitrate *any* possible dispute they may have with the bank,[210] even if such dispute does not arise from the validly executed customer account agreement. Surely, such abuse of arbitration is not what the FAA was originally envisioned to accomplish.

Arbitration provisions have become pervasive in consumer contracts, leaving customers with essentially no ability to choose an alternate product without being subject to such provision.[211] The lack of consumer choice, given the widespread use of adhesion contracts and the near guarantee a consumer will be forced to arbitrate disputes,[212] requires

---

[204] 5 U.S.C. § 801(a)(3)(B) (1996).
[205] *Id.* § 802(a).
[206] Merken, *supra* note 201.
[207] McKendry, *supra* note 196.
[208] H.R.J. Res. 111, 115th Cong. (2017).
[209] McKendry, *supra* note 196.
[210] *See Mitchell* Motion to Compel Arbitration, *supra* note 52, at 14.
[211] *See* Koren, *supra* note 44.
[212] Carrns, *supra* note 19.

additional consumer protection and carve-outs not afforded by the FAA in its present form. Looking to the Wells Fargo scandal for guidance, one exception to mandatory arbitration could be for claims alleging fraud. In the Wells Fargo scandal, much of the public outrage stemmed from the fact that Wells Fargo was forcing customers to individually arbitrate disputes despite the fact that Wells Fargo had undisputedly committed *fraudulent* activity.[213] In direct response to the Wells Fargo scandal, one possible reform would be to amend the FAA to permit lawsuits to continue, despite the existence of a valid arbitration provision, if a plaintiff can make out a prima facie case for fraud. When a company is permitted to compel arbitration for the resolution of disputes related to such company's fraudulent behavior, there is a greater risk the fraudulent behavior will go unpunished.[214] Furthermore, there is a greater risk such fraudulent behavior will persist given that arbitration may not adequately deter the company from ceasing such fraudulent behavior.[215] Where the dispute stems from fraudulent activity, the benefits of mandating arbitration are outweighed by the public need to punish and deter such activity in a judicial forum. Accordingly, such balancing of interests should be incorporated in the FAA to address not only the issues presented by the Wells Fargo scandal, but also to preserve arbitration as a mechanism to quickly and efficiently resolve disputes rather than as an artifice to insulate companies from accountability to consumers.

As presented in the Arbitration Fairness Act discussed above, another, more extreme avenue of reform would be to prohibit mandatory arbitration provisions in any consumer agreements where the parties do not have equal bargaining power.[216] While such a limitation on the enforceability of arbitration provisions would certainly help to prevent the type of fraudulent activity engaged in by Wells Fargo by exposing the bank to the potential for significant liability in the form of monetary damages, such reform fails to capture the business incentive for mandating arbitration. Accordingly, a more temperate reform, like that of

---

[213] *See, e.g.*, Hiltzik, *supra* note 6.

[214] *See CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to Their Customers*, CONSUMER FIN. PROTECTION BUREAU (Oct. 7, 2015), https://www.consumerfinance.gov/ about-us/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/ [https://perma. cc/X6DJ-8P9R].

[215] *See id.*

[216] *See* Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Brafford, *supra* note 80, at 335.

the California arbitration statute discussed above, may be the better solution.

VI. Conclusion

Despite Wells Fargo's successful attempt in *Jabbari* to compel arbitration of customers' disputes regarding fraudulent accounts under the broad arbitration provisions in the bank's customer account agreements, the ruling by Judge Chhabria of the Northern District of California fails to recognize the applicability of the FAA saving clause to the fraudulent accounts and the importance of the lack of validity of the underlying contract. The fact that a separate customer authorization was necessary to open the fraudulent accounts indicates separate authorization is required for the original customer account agreement to bind customers to the provisions therein with respect to the new account. The court failed to make this distinction in the *Jabbari* decision, and the court did not even contemplate contract defenses against the enforcement of the arbitration provisions with respect to the fraudulent accounts. Even despite the broad language of the arbitration provisions, Wells Fargo customers affected by the fraudulent account scandal could only reasonably expect to arbitrate disputes related to "services, accounts or matters"[217] to which customers actually consented. Were this issue to come before the Supreme Court, it is unlikely the Supreme Court would follow the *Jabbari* court's decision in light of the FAA saving clause and the fact that enforceable arbitration provisions must stem from valid consumer agreements.[218] Even if the Supreme Court reached a different conclusion than the court in *Jabbari*, problems presented by arbitration will persist if consumers are unable to hold banks accountable through civil actions in at least some circumstances, particularly when fraud is present. The Wells Fargo scandal may fade from public memory. Nonetheless, regulators must keep in mind the Wells Fargo scandal as they craft new legislation to strike the balance between preserving arbitration as a beneficial mechanism and preserving consumers' ability to hold financial institutions accountable through the judicial system.

---

[217] Order Granting Defendants' Motions to Compel Arbitration, Jabbari v. Wells Fargo & Co., No. 15-cv-02159-VC, slip op. at 2 (N.D. Cal. Sept. 23, 2015) (referencing the arbitration provision in the plaintiffs' customer agreements with Wells Fargo).

[218] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).