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Kristian v. Comcast: Another Drop in the Bucket, or the Achilles Heel of Arbitration Agreements Banning Class Mechanisms?

Falon M. Wrigley
fwrigley@slu.edu

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**KRISTIAN v. COMCAST: ANOTHER DROP IN THE BUCKET, OR
THE ACHILLES HEEL OF ARBITRATION AGREEMENTS
BANNING CLASS MECHANISMS?**

I. INTRODUCTION

The average American routinely becomes a party to contracts. Frequently, these are standard form contracts between an individual consumer and a corporation, which are drafted by the corporation. More often than not consumers barely read, let alone comprehend, the implications and consequences of contracts they enter into. Over the last few decades as the practicality of and deference to arbitration has risen and as corporations have faced an ever-growing need to avoid major litigation, arbitration clauses have been included in contracts between the ordinary consumer and the corporate seller. Now, within the last decade, the trend has gone from the mere inclusion of an arbitration clause to also include a ban on class mechanisms in the arbitral forum. The result for claimants is that they must arbitrate their claims, and must do so on an individual basis. Far too often, consumers are unaware of such class action waivers or are unable to understand them until a dispute arises.

As illustrated by a recent decision in the Fourth Circuit where parties signed a contract with a mandatory arbitration clause and a ban on class mechanisms, great injustice and difficulty can result for consumers subject to such provisions.¹ In *Davis v. ECPI College of Technology*, forty-seven different individuals had claims against ECPI. In order to arbitrate, and not consolidate the claims, there would have to be “47 different hearings with 47 different arbitrators.”² This would result in:

An expert [on the case being required] to testify 47 [different] times. Other witnesses, such as former teachers and staff at ECPI, would need to appear to testify 47 separate times (likely resulting in a loss of current employment). Due to the commonality of issues and evidence in all 47 cases, each of the 47

1. *Davis v. ECPI Coll. of Tech., L.C.*, 227 F. App'x 250 (4th Cir. 2007).

2. Brief of Appellee at 6–8, *Davis v. ECPI Coll. of Tech., L.C.*, No. 05-2122 (4th Cir. Jun. 12, 2006). The court noted that this is “precisely the reason why consolidation of cases should be and typically is ordered.” *Id.* The issue before the court was how claims should be arbitrated. *Id.* The district court held that “absent consolidation, the ability of the Plaintiffs to obtain any relief by way of arbitration is severely compromised.” *Id.* See generally FED. R. CIV. P. 42(a) (allowing courts to consolidate actions where there is a “common question of law or fact”).

original Claimants is a witness in all 47 cases (resulting in 47 testimonies in 47 hearings or, collectively, 2,209 testimonies). [There are further multiplicities] with individual arbitrators conducting many hours of telephone conferences in each separate case, with multiple briefs requested, and multiple dates for submissions, all to be conducted and heard separately, 47 times.³

Due to the conflict between the complications claimants face when forced to arbitrate small claims individually and corporate interests in dealing with disputes privately and in a cost and time-efficient manner, the inclusion of class action waivers has created confusion among and within the federal circuits, and among and within state courts.⁴ Under the Federal Arbitration Act (“FAA”), courts are supposed to enforce arbitration agreements as they are written.⁵ Where a contract is silent on whether or not arbitration can proceed as a class, all federal circuit courts have held there can be no class arbitration.⁶ However, there are discrepancies among lower federal courts and among state courts.⁷ Moreover, when arbitration agreements explicitly prohibit class mechanisms, federal circuit courts, as well as state courts, are split on whether arbitration is then a valid form of dispute resolution at all.⁸

On April 20, 2006, the First Circuit, in *Kristian v. Comcast*, held that a ban on class mechanisms in a mandatory arbitration clause was unenforceable and severable where plaintiffs’ claims were based on state and federal antitrust law because plaintiffs would be unable to vindicate their statutory rights under Federal Rule of Civil Procedure 23.⁹ The Court’s decision is novel in that it is

3. Brief of Appellee, *supra* note 2, at 8–9. The district court, in support of its finding that consolidating arbitration in this case was the only way to allow Plaintiffs to vindicate their rights, recognized that “[i]t can be predicted without fear of contradiction that ECPI’s lawyers intend to make these 47 separate proceedings as costly and as difficult as possible for the Plaintiffs.” Therefore, it seems this also played a role in the court’s decision. *Id.* at 9.

4. See Cari K. Dawson, *Arbitration Agreements: No Longer Defendants’ Silver Bullet to Defeat Class Actions*, 22 ANDREWS CORP. OFFICERS AND DIR. LIAB. LITIG. REP. 13 (2007).

5. See Alan S. Kaplinsky, *Arbitration and Class Actions: A Contradiction in Terms*, in PRACTISING LAW INST., 11TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 117 (2006). At the time Kaplinsky wrote his article “[t]hree federal courts of appeals and several federal district courts [had] considered whether an arbitration may proceed on a class-wide basis, and they [all] unanimously concluded that it may not absent a provision in the arbitration agreement or the applicable arbitration rules specifically authorizing class arbitration.” *Id.* at 101. See also Joshua S. Lipshutz, *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, 1679 (2005) (noting that since the 1980s “[p]redispute arbitration agreements are enforceable bilateral contracts binding the parties as any other contract would, and the Federal Arbitration Act [FAA] ensures that courts will treat such contracts on equal footing with all other contracts”).

6. Lipshutz, *supra* note 5, at 1682.

7. *Id.*

8. *Id.*

9. *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006).

only the second federal circuit court, out of the six to consider the issue, to find such an agreement unenforceable.¹⁰ More importantly, it is the first circuit court to base its decision on a vindication of statutory rights theory. The purpose of this Note is to explore this decision and to determine its role in resolving confusion among the courts.

This Note first reviews the history and policy behind arbitration in the United States. Second, it reviews the policy and history behind class actions. Third, it provides a summary of cases upholding arbitration agreements. Fourth, it addresses the conflict created among courts due to the growing trend of banning class mechanisms in mandatory arbitration agreements. Fifth, it analyzes the decision in *Kristian v. Comcast* and the unenforceability of class action waivers under Federal Rule of Civil Procedure 23. Finally, this Note examines the affects of *Kristian v. Comcast* on this unclear area of law and predicts how future courts will utilize the decision.

II. A BRIEF HISTORY OF ARBITRATION IN THE UNITED STATES

The use of arbitration, the process by which the parties to a dispute submit their differences to the judgment of an impartial person or group of persons appointed by the mutual consent of the parties, only arose as a common and accepted method of dispute resolution in the United States in the last fifty years.¹¹ Even though its widespread usage in the United States is recent, arbitration dates back to Greek mythology¹² and “was an established method of dispute resolution among merchants and in the maritime industry in pre-colonial England.”¹³ While there are traces of arbitration in America’s early history, its wide-spread appeal, popularity, and application are recent.¹⁴

A. Arbitration Policy and the Federal Arbitration Act of 1925

When America was first settled, arbitration concepts borrowed from English common law were used to resolve disputes quickly, efficiently, and with little cost to the parties.¹⁵ While arbitration was used with some level of frequency, its enforcement was entirely voluntary.¹⁶ Moreover, it was initially

10. See *infra* Part V.B.

11. PRACTICING LAW INSTITUTE, ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS 3 (Alan I. Widiss ed., Practicing Law Institute 1979).

12. STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 9 (2002).

13. *Id.*

14. See Lipshutz, *supra* note 5, at 1678 (“In the 1980s, the U.S. Supreme Court changed its outlook on arbitration agreements, ushering a new era in which arbitration agreements between companies and consumers would be not only allowed but ‘favored.’”). See generally *id.*; PRACTICING LAW INSTITUTE, *supra* note 11, at 3.

15. BENNETT, *supra* note 12, at 9.

16. *Id.*

used only by commercial or trade groups.¹⁷ The very essence of arbitration was that it was voluntarily agreed to by both parties as a means of resolving disputes quickly and cost efficiently.¹⁸ During America's formative years, the enforcement of arbitration agreements and arbitration itself "depended on community ties and pressures for its effectiveness."¹⁹ Trade groups created their own rules of dispute resolution which were enforced by elders and the community as a whole.²⁰

As America grew and emerged as an industrial nation, these community ties weakened, and the trust inherent in arbitration lessened.²¹ As a result, arbitration became even less appealing to parties.²² Where parties did arbitrate, which was normally between businesses or sophisticated, business-minded people contracting, agreements to arbitrate went from informal oral agreements to written agreements or contracts to arbitrate.²³ Still, inherent in these formal written documents was the equal standing of the parties and their voluntary choice to submit their disputes to arbitration.²⁴ Throughout this period, arbitration was not a favored method of dispute resolution and was largely frowned upon by the courts.²⁵ In fact, "under the common law rule, a party to an arbitration agreement could revoke the agreement at any time, up to the point that the arbitrator rendered a decision."²⁶

However, into the twentieth century, and with the rise of labor unions, "both unions and management increasingly recognized that all parties needed a speedy, inexpensive and fair method to resolve the numerous disputes that arose in the context of modern industrial operations."²⁷ Also, with the growth of the country, there was a growing dissatisfaction with the justice system due to "excessive delay, expense, inflexibility, and judicial gridlock."²⁸ A need for

17. KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 308 (2000).

18. *See id.* at 309–10; *see also* Lipshutz, *supra* note 5, at 1678. Before 1980, arbitration normally occurred between two businesses, not individual people or an individual and a company. *Id.* Also, public policy tended to disfavor arbitration and it was not considered mandatory or binding unless the parties agreed to it. *See id.* at 1678–79. Public policy was strongly opposed to enforcing mandatory arbitration between a corporation and an individual consumer. *Id.* at 1678.

19. BENNETT, *supra* note 12, at 9.

20. STONE, *supra* note 17, at 10.

21. BENNETT, *supra* note 12, at 9.

22. *Id.*; *see also* STONE, *supra* note 17, at 4.

23. BENNETT, *supra* note 12, at 9.

24. *See* STONE, *supra* note 17, at 378.

25. BENNETT, *supra* note 12, at 10.

26. *Id.*

27. *Id.*

28. STONE, *supra* note 17, at 2.

another body, other than the courts, to preside over cases and render decisions was growing.²⁹

Shortly thereafter, in 1925, the FAA, 9 U.S.C. §§1–14, was enacted by the United States Congress.³⁰ In spite of the FAA’s recognition of the validity and enforceability of arbitration agreements, courts and legislatures continued to be skeptical of arbitration.³¹ In fact, throughout the 1920’s, and even into later decades, several states restricted arbitration to present disputes.³² It was not until several decades after implementation of the FAA that state legislatures began allowing parties to contract to arbitrate their future disputes.³³ The courts, as well as state legislatures, did not really begin accepting arbitration as a legitimate course of dispute resolution until arbitration agreements in the area of international law arose.³⁴ Gradually, as the Supreme Court saw the usefulness of arbitration in international agreements, it grew more and more sympathetic toward arbitration in the domestic sphere as well.³⁵

B. *Federal Arbitration Act and Its Expanding Scope*

When the FAA was adopted in 1925, “it provide[d] for arbitration agreements in contracts involving maritime transactions and contracts evidencing transactions involving interstate or foreign commerce.”³⁶ The FAA essentially made agreements to arbitrate enforceable and gave them the same rights as any other contract.³⁷ After several landmark decisions, the FAA became applicable to seemingly intra-state transactions as well.³⁸ Under the FAA, “[a] written provision . . . in an agreement . . . shall be ‘valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”³⁹ In essence, the implementation of the FAA and its current translation “wipe away decades of judicial hostility toward arbitration.”⁴⁰ Now, agreements to arbitrate, even between major

29. BENNETT, *supra* note 12, at 10.

30. STONE, *supra* note 17, at 313.

31. BENNETT, *supra* note 12, at 11.

32. PRACTICING LAW INSTITUTE, *supra* note 11, at 3.

33. *Id.*

34. BENNETT, *supra* note 12, at 11.

35. *Id.*

36. PRACTICING LAW INSTITUTE, *supra* note 11, at 4–5; *see also* STONE, *supra* note 17, at 313; William M. Howard, Annotation, *Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R. 6TH 145 (2006) (“The Federal Arbitration Act . . . provides for the enforcement of agreements to arbitrate in contracts involving interstate commerce or maritime transactions, which it deems valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

37. BENNETT, *supra* note 12, at 17.

38. *See generally id.* at 17–18.

39. *Id.* at 18–19; *see also* Federal Arbitration Act of 1925, 9 U.S.C. § 2 (2000).

40. BENNETT, *supra* note 12, at 19.

conglomerates and the common consumer, are “as enforceable as any other contract.”⁴¹ Consumers are constantly faced with mandatory arbitration clauses in connection with their landline and cellular telephones, credit cards, cable services, health care providers, and commercial and residential leases.⁴² Also, under the FAA, courts have the power to stay litigation and require parties to arbitrate if they have so contracted.⁴³

C. Arbitration Policy Today

Since the 1980s, federal policy has been very much in favor of arbitration.⁴⁴ Throughout the years, the Supreme Court has held that arbitration agreements are enforceable in both federal and state courts.⁴⁵ Arbitration can now be used as a form of dispute resolution in nearly every case with a contractual element.⁴⁶ Where consumers have attacked alternative dispute resolution mechanisms contained in standard form contracts of adhesion, courts have regularly upheld the contracts on the ground the parties were able to choose their dispute settlement procedure.⁴⁷ Under this theory, courts say the parties are not giving up any substantive rights, and for that reason, arbitration can be upheld.⁴⁸

Arbitration agreements in contracts of adhesion between corporations and the average consumer are now commonplace and enforceable.⁴⁹ However, as this Note will address, forcing consumers to arbitrate claims pursuant to an agreement in a standard form contract can sometimes cause injustice and preclude consumers from being able to vindicate their statutory rights.⁵⁰ It is in such cases that the courts are in conflict.⁵¹

41. *Id.*; see also STONE, *supra* note 17, at 378; Lipshutz, *supra* note 5, at 1678.

42. STONE, *supra* note 17, at iii; Lipshutz, *supra* note 5, at 1678–79.

43. BENNETT, *supra* note 12, at 20; see also Lipshutz, *supra* note 5, at 1679 (“[E]ven when such contracts are deemed ‘adhesive’ by courts, meaning that the consumer was essentially forced to either accept the contract along with the product or service he was purchasing or reject both together, mandatory arbitration agreements have been deemed to be enforceable.”).

44. Lipshutz, *supra* note 5, at 1678.

45. BENNETT, *supra* note 12, at 11.

46. STONE, *supra* note 17, at 378.

47. See Lipshutz, *supra* note 5, at 1678–79.

48. *Id.* at 1680.

49. *Id.* at 1678.

50. See generally Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

51. See generally Kaplinsky, *supra* note 5; Lipshutz, *supra* note 5. See also *infra* Part IV.

III. HISTORY AND POLICY OF CLASS ACTIONS

Because class actions and arbitration seem to be “contradiction[s] in terms,” the history and policy behind class actions is of great relevance.⁵² Class actions, unlike arbitration, have been incorporated into the American legal system with little controversy.⁵³ Class action mechanisms were first adopted by American courts in the nineteenth century, and in 1983, Rule 23, the rule regulating class actions, was added to the Federal Rules of Civil Procedure.⁵⁴ The original draft of the rule was uncontroversial but proved to be unworkable.⁵⁵ Rule 23 was entirely rewritten by the Advisory Committee in 1966 and is followed by federal courts today.⁵⁶

There are three main purposes of Rule 23.⁵⁷ First, it is intended to promote judicial economy by preventing multiple suits on the same subject matter, which would slow judicial processes.⁵⁸ Under 23(b)(1) a class action may be maintained where requiring individuals to bring separate claims would create a risk of “inconsistent or varying adjudications. . . which would establish incompatible standards of conduct for the party opposing the class.”⁵⁹ Second, Rule 23 is meant to provide relief to those who would not otherwise be able to bring a suit individually where common relief is sought.⁶⁰ For example, an individual generally will not bring a suit, absent class mechanisms, where his claim is very small or where the costs of litigation would outweigh the possible recovery.⁶¹ Third, Rule 23 was amended so that where multiple suits would be brought on the same claim or issue, class actions can ensure uniformity of decisions.⁶² Under Rule 23(c), notice of a lawsuit is to be given to all potential

52. See generally Kaplinsky, *supra* note 5, at 99.

53. *Defense News: Class Action Reform Gets a Shot in the Arm*, 69 DEF. COUNS. J. 263, 264 (2002) [hereinafter *Defense News*] (“In 1938, Rule 23 was included in the new Federal Rules of Civil Procedure. The rule was adopted with little fanfare or discussion.”).

54. *Id.*

55. *Id.* The original version of Rule 23, which was drafted in 1938 “divided class actions into three categories: the ‘true,’ the ‘hybrid’ and the ‘spurious.’ These categories, with their infelicitous names and formalistic attributes, proved difficult to apply.” *Id.*

56. *Id.*

57. *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 345 (S.D. Ga. 1996).

58. *Id.* (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974) (“Class actions serve three essential purposes: (1) to facilitate judicial economy by the avoidance of multiple suits on the same subject matter.”)).

59. FED. R. CIV. P. 23(b)(1); see also *Defense News*, *supra* note 53, at 264.

60. FED. R. CIV. P. 23(b)(2); see also *Buford*, 168 F.R.D. at 345–46 (citing *Phillips Petroleum Co. v. Shutt*, 472 U.S. 797, 809 (1985) (noting that a second essential purpose of class actions is “to provide a feasible means for asserting the rights of those who ‘would have no realistic day in court if a class action were not available’”).

61. *Defense News*, *supra* note 53, at 264.

62. FED. R. CIV. P. 23(b)(3); see also *Buford*, 168 F.R.D. at 346 (citing *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989)).

class members as well as notice of possible settlement.⁶³ The rule also provides that “class members could be bound if they [do] not affirmatively opt out of (b)(3) damage class actions.”⁶⁴

Rule 23 was initially envisioned as a way to facilitate civil rights class actions under subsection (b)(2).⁶⁵ While this purpose was served, law makers were unable to foresee the massive expansion of class action litigation that followed due to the opt-out provision under subsection (b)(3).⁶⁶ Initially, class actions were not perceived as encompassing, for example, mass tort litigation, as they regularly do today.⁶⁷ The advisory committee even noted that “[a] ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.”⁶⁸ This committee note suggests that Rule 23, while intended to facilitate class actions, was never intended to have the scope, in terms of the number of class actions and members joining classes, that it has today.

In fact, the advisory committee sought to limit the broad scope of Rule 23 on several occasions. Most notably, in 1992, the committee sought to change the “opt-out” provision of Rule 23(b)(3), which is the provision of the rule most often used by those seeking class status.⁶⁹ The draft would give courts the ability to certify a class as “opt-in” or as “opt-out.”⁷⁰ In this way, courts could limit the number of class members to a suit who may not have ordinarily filed suit on their own or were too indifferent to opt out.

One negative aspect of the “opt out” provisions is that even those who have no interest in the litigation can be joined to a lawsuit if they do not affirmatively “opt out.” It does not follow, however, that those who are joined because they failed to take any action would have chosen to “opt in.” First, class members who have genuine claims but wish to join as a class will see their rewards reduced if they have to be split amongst everyone in a class, even those who were not interested in bringing a claim. Second, by not opting out

63. FED. R. CIV. P. 23(c); *see also Defense News*, *supra* note 53, at 264.

64. FED. R. CIV. P. 23(c); *see also Defense News*, *supra* note 53, at 264.

65. *Defense News*, *supra* note 53, at 264 (“It is probably fair to say that the 1966 committee was most interested in facilitating civil rights class actions for injunctive relief under b(2), and in this respect the committee’s intentions were fully realized.”).

66. *Id.* at 264–65 (“[I]n adopting the ‘opt-out’ approach, the committee apparently had in mind small claim, consumer class actions in which no one class member would have a sufficient interest to litigate an individual claim and in which the forces of inertia might be greater than a potential class member’s desire to participate, given the small stakes involved.”).

67. *Id.* at 265.

68. *Id.*

69. *Id.*

70. *Id.*

of a class action suit, an individual is then barred from bringing an independent action and is bound by the decision given in the class action case.

In sum, while class actions have generally been approved by society and have not met with controversy as arbitration provisions have, their scope is greater than originally intended and has produced negative results for both those needing or wishing to join as a class and those who wish to bring claims individually.⁷¹ As this Note will address, questions over this broadened scope of class actions, coupled with expansion of mandatory arbitration provisions, has created a rift among and between state and federal courts.

IV. CLASS ACTIONS AND ARBITRATION: A CONTRADICTION IN TERMS?⁷²

The debate over class arbitration has resulted in “a kaleidoscope of conflicting decisions [which continue] to emerge across state and federal courts nationwide, and [which produce] seemingly inconsistent rulings within a single jurisdiction.”⁷³ While *Kristian* is novel in that a circuit court has never refused to enforce a mandatory arbitration provision banning class mechanisms on a theory of vindication of statutory rights, the split between the courts is not. To shed more light on the context in which *Kristian* was decided, this Note will now discuss case law preceding the First Circuit’s decision.

A. Arbitration v. Class Actions

While the majority of courts uphold arbitration agreements explicitly as they are written, there is some confusion among state courts where the agreements are vague or silent on the issue of class arbitration.⁷⁴ Moreover, both federal and state courts are in discord where arbitration agreements explicitly ban class mechanisms. Most frequently, where arbitration has been held enforceable, courts have relied on state unconscionability statutes.⁷⁵

Until the First Circuit’s decision in *Kristian*, all other federal courts that considered whether arbitration may proceed on a class-wide basis, including three federal circuit courts and multiple federal district courts, held that it cannot where the arbitration agreement does not specifically authorize class arbitration.⁷⁶ Therefore, if a contract was silent as to whether claims could be arbitrated as a class, the default rule was that they could not. In reaching this

71. See *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 345 (S.D. Ga. 1996); see also *supra* text accompanying notes 65–68. See generally *Defense News*, *supra* note 53.

72. See generally *Kaplinsky*, *supra* note 5.

73. *Dawson*, *supra* note 4, at 2.

74. *Lipshutz*, *supra* note 5, at 1682.

75. *Id.*

76. *Kaplinsky*, *supra* note 5, at 117. See also *Lipshutz*, *supra* note 5, at 1682.

holding, federal courts relied on Section 4 of the FAA.⁷⁷ Rule 4 of the FAA states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed *in the manner provided for in such agreement*. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*.⁷⁸

Based on Rule 4 of the FAA, courts will generally look to the agreement between the parties to determine if they intended to arbitrate, and intended to do so on a class-wide basis.⁷⁹ As held by the first federal courts to consider the issue, courts may only direct parties to arbitrate, and to do so on a class-wide basis, if the parties so agreed.⁸⁰ Moreover, Supreme Court precedent dictates that the national policy in favor of arbitration is so strong that arbitration should be enforced even if multiple individual suits must be brought.⁸¹

Even where a statute provides for class action litigation, such as the Truth in Lending Act (“TILA”), the Supreme Court has held there is no statutory right to join as a class.⁸² This is because there is “no congressional intent to preclude the enforcement of arbitration clauses in [the TILA’s] text, legislative history, or purpose,” and therefore arbitration clauses are still enforceable even if class action litigation is unavailable.⁸³ While these decisions clearly conflict with the policy of Federal Rule of Civil Procedure 23, which allows class actions to be maintained for judicial economy, common injunctive relief and uniformity of decisions, there is ultimately not a right to class actions, and “[n]othing prevents [p]laintiffs from contracting away their right to a class action.”⁸⁴

77. Kaplinsky, *supra* note 5, at 117.

78. *Id.* (emphasis added) (citing The Federal Arbitration Act of 1925, § 4).

79. *Id.* (because parties did not agree to arbitrate on a class-wide basis, the court is powerless to require it).

80. *Gammaro v. Thorp Consumer Disc. Co.*, 828 F.Supp. 673, 674 (D. Minn. 1993) (holding that the “[c]ourt must give effect to the agreement of the parties and this arbitration agreement makes no provision for class treatment or disputes”). The court ultimately held it was without the power to order arbitration. *Id.* See also Kaplinsky, *supra* note 5, at 118–21 (citing *McCarthy v. Providential Corp.*, 1994 WL 387852 (N.D. Cal. July 19, 1994); *Howard v. Klynveld Peat Marwick Goerderler*, 977 F.Supp. 654, 665 (S.D.N.Y. 1997); *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995); *Coleman v. Nat’l Movie-Dine, Inc.* 449 F.Supp. 945, 947–48 (E.D. Pa. 1978)).

81. *Randolph v. Green Tree Fin. Corp.*, 991 F.Supp. 1410, 1414 (M.D. Ala. 1997).

82. *Id.* at 1418 (“[TILA] does not create a ‘statutory right to pursue class actions.’”).

83. *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

84. Kaplinsky, *supra* note 5, at 120 (citing *Zawikowski v. Beneficial Nat. Bank*, 1999 WL 35304, *2 (N.D.Ill. 1999)); see also *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 271 (7th Cir.

Federal court decisions in favor of arbitration at all costs have even gone so far as to limit the seemingly all-encompassing legal power of arbitrators. Even though arbitrators are to “have all powers provided by law, including all legal and equitable remedies,” federal courts have held that they do not have the power to require or permit class action litigation unless the agreement specifically provides.⁸⁵ Under the FAA, an agreement to arbitrate is supposed to be on equal footing with any other contract.⁸⁶ For this reason, all federal courts and most state courts hold that arbitrators must view the language of arbitration agreements strictly and cannot imply class treatment was intended where the agreement was vague or silent on the issue of class mechanisms.⁸⁷

Even so, while federal courts have concluded that arbitration provisions, absent express language to the contrary, are to be performed on an individual basis, they have not been unanimous in reaching that result.⁸⁸ For example, the Third Circuit required strict enforcement of arbitration agreements in 2000, but in 1999, that same court held that “the inability to obtain class-wide relief ‘seems contrary to the underlying purpose of the TILA.’”⁸⁹ In fact, most federal court decisions upholding arbitration were made by appellate courts overturning the decisions of federal district courts. The conflict is not exclusive to the federal courts as state courts are also at odds on issues involving arbitration and the common consumer.⁹⁰ Because there is discord among courts as to class treatment when agreements to arbitrate are vague or silent, many corporations began including explicit bans on class mechanisms in their arbitration agreements.⁹¹ In this effort to end confusion, they “opened a new can of worms.”⁹²

1995). In *Champ*, the plaintiff brought a class action complaint against the defendant under RICO and state laws. *Id.* The plaintiff claimed that she had a right to proceed as a class even if she had to arbitrate because the FAA is silent on the issue of class action litigation and Federal Rule of Civil Procedure 81(a)(3) “provides that in proceedings under the FAA, the federal rules apply to the extent not provided for in the FAA.” *Id.* The 7th Circuit rejected this argument, noting that the FAA requires that arbitration agreements be enforced according to their express terms, whereas Rule 81 applies only to judicial proceedings. *Id.* at 276. Basically, Rule 81 is only meant to be a gap filler and through its “express terms” the FAA has already covered class actions by saying arbitration agreements must be strictly enforced according to their terms.

85. Kaplinsky, *supra* note 5, at 120 (citing *Green Tree Fin. Servicing Corp. v. Corrin*, Civil Action No. 97-74729 (E.D. Mich. Mar. 25, 1998)).

86. *See generally* Lipshutz, *supra* note 5, at 1679.

87. Kaplinsky, *supra* note 5, at 119.

88. *See generally* Lipshutz, *supra* note 5.

89. Kaplinsky, *supra* note 5, at 119 (citing *Johnson v. Tele-Cash, Inc.*, 82 F.Supp. 2d 264 (D. Del. 1999)).

90. Lipshutz, *supra* note 5, at 1682.

91. *Id.*

92. *Id.*

While most courts still enforce arbitration where there is an explicit ban on class mechanisms, several courts, most notably in California and the Ninth Circuit, have held that in these cases arbitration agreements are unenforceable. The California Supreme Court and the Ninth Circuit based their decisions on state unconscionability statutes.⁹³ While the First Circuit's holding in *Kristian* was not based on unconscionability, the court found it persuasive and somewhat analogous to a vindication of statutory rights theory.⁹⁴

Generally, there are two prongs to unconscionability, and both must be proved.⁹⁵ First, a contract must be *substantively unconscionable*.⁹⁶ This means the terms of the contract must unfairly burden one party and unfairly favor another such that no reasonable person would agree to the terms and no honest person would accept them.⁹⁷ Second, a contract must be *procedurally unconscionable*.⁹⁸ This determination "focuses on the bargaining conditions under which the parties agreed to the contract."⁹⁹ This is based in part on the sophistication and bargaining power of the parties.¹⁰⁰ Unconscionability statutes are used in the context of arbitration "to achieve [a] state's public policy goal of ensuring that plaintiffs will have an opportunity to bring class action suits against companies."¹⁰¹

V. KRISTIAN V. COMCAST

While bans on class arbitration have only been included in standard form contracts within the last ten to fifteen years and were consistently upheld in the majority of state and federal courts, there is still a great deal of confusion and inconsistency in rulings.¹⁰² Even the Supreme Court has found "artful ways to dodge these thorny [issues]."¹⁰³ However, in an attempt to elucidate this unclear area of law, the First Circuit decided *Kristian v. Comcast* and provided a detailed analysis of its decision. This Note will now provide the facts, holding and reasoning of that case.

A. *Procedural History*

Martha Kristian ("Kristian") represented a class of plaintiffs (Plaintiffs) who received cable service from Comcast Corporation ("Comcast") in Boston,

93. *Id.*

94. *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 (1st Cir. 2006).

95. Lipshutz, *supra* note 5, at 1694.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1695.

100. *Id.*

101. Lipshutz, *supra* note 5, at 1696.

102. *See generally* Kaplinsky, *supra* note 5.

103. Lipshutz, *supra* note 5, at 1683.

Massachusetts.¹⁰⁴ The Plaintiffs filed complaints in both state and federal court claiming that Comcast and its predecessor in interest inflated the costs of their cable services “as a result of anticompetitive practices.”¹⁰⁵ Comcast, pursuant to a mandatory arbitration provision in its Policies & Practices, sought to force arbitration.¹⁰⁶ Thereafter, Plaintiffs claimed that Comcast’s arbitration policies did not apply to them as they were added after the plaintiffs began receiving service from Comcast, and that even if the arbitration agreement could apply, it was unenforceable because it precluded all class actions.¹⁰⁷ Ultimately, the First Circuit held that Comcast’s arbitration policies did apply retroactively.¹⁰⁸ Even so, it held the policies were unenforceable because they precluded class actions and therefore precluded Plaintiffs from vindicating their statutory rights under Federal Rule of Civil Procedure 23.¹⁰⁹

B. *Facts*

The Plaintiffs began receiving cable service from Comcast between 1987 and 1999.¹¹⁰ During that period, Comcast’s contracts did not contain arbitration agreements.¹¹¹ However, “in 2001, Comcast began including an arbitration provision in the terms and conditions governing the relationship between Comcast and its subscribers.”¹¹² In 2002, the arbitration provision was amended and differed substantially from the 2001 policies.¹¹³ Both the 2002 and 2003 Comcast Policies & Procedures required mandatory arbitration and banned all forms of class representation.¹¹⁴ Comcast’s 2002/2003 Policies

104. *Kristian v. Comcast Corp.*, 446 F.3d 25, 30 (1st Cir. 2006). Plaintiffs-Appellees were James D. Masterman, Paul Pinella, Jack Rogers, and Martha Kristian. *Id.* All were Boston area subscribers for Comcast’s services. *Id.* They began receiving service in 1987, 1991, 1994, and 1999 respectively. *Id.* The mandatory arbitration provision was not added until 2001. *Id.* The ban on class action waivers was not added until 2002/2003. *Id.* All four Plaintiffs received notice of the change in terms along with their statements in November of each year. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 31.

108. *Id.* at 64.

109. *Id.*

110. *Kristian*, 446 F.3d at 30.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 31–32. The 2002/2003 Comcast Policies & Practices, in relevant part, provided in bold capital letters:

If we are unable to resolve informally any claim or dispute, we have agreed to binding arbitration. There shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis or on a bases involving claims brought in a purported representative capacity on behalf of the general public (such as a private attorney general), other subscribers, or other person similarly situated unless your state’s laws provide otherwise.

and Practices were at the center of this dispute.¹¹⁵ Each cable subscriber received notice of the terms and conditions of subscription upon installation of cable.¹¹⁶ None of the Plaintiffs received this notice because they subscribed prior to the inclusion of the arbitration agreements.¹¹⁷ However, Comcast sent notice of the amended Policies & Practices governing subscription to each of its subscribers, including Plaintiffs, annually.¹¹⁸

In 2003, based on claims of Comcast's anticompetitive practices, two groups of plaintiffs separately filed complaints.¹¹⁹ Both complaints ended up in United States District Court.¹²⁰ Comcast then sought to compel arbitration pursuant to its amended terms and conditions.¹²¹ Plaintiffs argued that their complaints arose from problems existing prior to the amended terms and conditions and therefore were not subject to the mandatory arbitration provisions.¹²² Furthermore, even if the provisions did apply, Plaintiffs argued that the arbitration agreements precluded vindication of their statutory rights under federal antitrust law, were unconscionable under state law, and were contrary to public policy.¹²³ The courts presiding over each case found that the dispute could not be arbitrated because Plaintiffs were customers prior to the 2001, 2002 and 2003 amendments of Comcast's Policies & Practices and that the amendments could not apply retroactively.¹²⁴ The district courts never addressed whether the arbitration agreements were unconscionable, contrary to public policy or prevented Plaintiffs from vindicating their statutory rights.¹²⁵ Both cases were consolidated for appeal to the First Circuit.¹²⁶

Id.

115. *See generally Kristian*, 446 F.3d at 31–32.

116. *Id.* at 30.

117. *Id.*

118. *Id.* Comcast's new arbitration provision was included in its Policies & Practices and was sent to "each Boston area subscriber's invoice as a billing stuffer during the November 2001 billing cycle." *Id.* The Policies & Practices of Comcast in 2002 and 2003 differed substantially from the 2001 version. *Id.* In this case, Comcast relied on the mandatory arbitration and class action waiver provisions in the 2002/2003 version. *Id.*

119. *Id.* at 30–33. Plaintiffs "filed a complaint against Comcast and AT&T Broadband in Massachusetts state court, alleging a cause of action under the Massachusetts Antitrust Act, Mass. Gen. Laws. Ch. 93." *Id.* Plaintiffs Kristian and Masterson "filed a complaint against Comcast, as well as several other Comcast entities, in the U.S. District Court for the District of Massachusetts, alleging causes of action under the Clayton Antitrust Act, 15 U.S.C. §§ 15 and 26. *Id.* at 31–32.

120. *Id.*

121. *Kristian*, 446 F.3d at 31.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 64.

126. *Id.* at 31.

C. First Circuit's Analysis

Reviewing the district court decisions *de novo*, the First Circuit first held that Comcast's amended terms and conditions, including the relevant arbitration provisions, did apply retroactively.¹²⁷ Therefore, Plaintiffs were subject to the mandatory arbitration agreement pursuant to Comcast's 2002/2003 Policies & Practices.¹²⁸ This is the effect of the terms applying retroactively, even though those terms were not the initial terms under which Plaintiffs accepted service.

In their appeal, Plaintiffs argued that even if the arbitration agreement applied to them, arbitration was not a fair and adequate alternative to a court of law. Thus, Plaintiffs claimed that the mandatory arbitration agreement, even if applicable, violated their statutory rights because it allowed for limited discovery, a shortened statute of limitations, barred recovery of treble damages, precluded plaintiffs from recovering attorney's fees and prohibited the use of class mechanisms.¹²⁹ Plaintiffs' vindication of statutory rights argument was based on "the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights."¹³⁰ Arbitration's original purpose was to serve as an alternative method for dispute resolution where the parties agreed to be bound,¹³¹ and it only remains a legitimate alternative where it does fairly and adequately enforce statutory rights.¹³²

D. The Supreme Court Trilogy

To determine whether the arbitration agreement's prohibition on the use of class mechanisms prevented Plaintiffs from vindicating their statutory rights, the court first had to decide whether this was a question that could be answered by the court itself or whether it had to be answered by an arbitrator.¹³³ While a court's jurisdiction is derived from a federal or state constitution, "an arbitrator's authority to settle disputes is only established through private

127. *Kristian*, 446 F.3d at 64.

128. *See generally id.*

129. *Id.* at 37.

130. *Id.* (citing *Rosenburg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14 (1st Cir. 1999)); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

131. *See generally* BENNETT, *supra* note 12, at 9–10; *Kristian*, 446 F.3d at 37.

132. *Kristian*, 446 F.3d at 37 ("[U]nless the arbitral forum provided by a given agreement provides for the fair and adequate enforcement of a party's statutory rights, the arbitral forum runs afoul of [the] presumption [of fairness and adequacy] and loses its claim as a valid alternative to traditional litigation.").

133. *Id.* at 37–42.

contractual arrangements between the parties themselves.”¹³⁴ As a result, all issues not explicitly assigned to arbitration through the arbitration agreement between the parties go to the courts.¹³⁵ When there is an issue of whether to arbitrate in the first place, there is an issue of arbitrability.¹³⁶ Here, Comcast’s contract was silent as to whether a court or arbitrator was to be the decision maker if a question of arbitrability arose.¹³⁷ For the answer, the court looked to three Supreme Court cases, *Howsam*,¹³⁸ *PacifiCare*,¹³⁹ and *Bazzle*,¹⁴⁰ referred to as the “Supreme Court Trilogy.”¹⁴¹ The Court ultimately determined that it could determine the question of arbitrability, not an arbitrator.¹⁴² Because *Howsam*, *Pacificare* and *Bazzle* formed the analysis of each of the Plaintiff’s statutory rights claims, this Note will now discuss them.

1. *Howsam v. Dean Witter Reynolds, Inc.*

In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court analyzed how to determine whether an arbitrator or a court should determine preliminary matters to an arbitration dispute.¹⁴³ For this reason the case is relevant to an understanding of the First Circuit’s decision in *Kristian*.¹⁴⁴

The crux of the dispute in *Howsam* was an arbitration rule of the National Association of Securities Dealers (“NASD”) which had a six-year statute of limitations.¹⁴⁵ The defendant argued the arbitration provision was inapplicable because the dispute between defendant and plaintiff was more than six years old.¹⁴⁶ It was left to the Supreme Court to determine whether a court or an arbitrator should decide how the NASD rule was meant to apply and whether or not it applied to the case at hand.¹⁴⁷ In *Howsam*, the Court found that the parties did not intend for a court to decide the proper application of the NASD rule, but instead intended the question to be decided by an arbitrator.¹⁴⁸

Generally, there is a presumption that parties would prefer a court to determine whether a dispute should be submitted to arbitration pursuant to

134. Lipshutz, *supra* note 5, at 1684.

135. *Id.* at 1685.

136. *Id.*

137. *Kristian*, 446 F.3d at 31–32.

138. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

139. *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003).

140. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

141. *Kristian*, 446 F.3d at 37.

142. *Id.* at 53–54.

143. *Howsam*, 537 U.S. at 84–85.

144. *Kristian*, 446 F.3d at 37.

145. *Howsam*, 537 U.S. at 81.

146. *Id.* at 82.

147. *Id.* at 82–83.

148. *Id.* at 83.

their arbitration agreement.¹⁴⁹ This determination is described as the “interpretive rule.”¹⁵⁰ Ultimately, a court determines whether the parties ordinarily would have intended a court or an arbitrator to settle “questions of arbitrability.”¹⁵¹ If a court finds the parties intended for questions of arbitrability to be determined by a court, then they will be.¹⁵² Likewise, if it is clear and unmistakable that the parties wanted an arbitrator to decide the applicability of arbitration provisions, then the “interpretive rule” will not apply and an arbitrator, not a court, will decide the case.¹⁵³

To simplify the application of this rule, the Supreme Court listed two types of disputes where courts rather than arbitrators will resolve gateway “questions of arbitrability.”¹⁵⁴ First, courts will generally resolve the dispute where it is “about whether the parties are bound by a given arbitration clause.”¹⁵⁵ Second, courts will decide gateway issues where they are about whether an arbitration agreement in a binding contract can apply to a particular type of controversy.¹⁵⁶ However, this is merely a presumption and can be waived by the parties through contract.¹⁵⁷

Moreover, where an arbitrator to a specific dispute would have far more expertise than a judge, the arbitrator should preside over the case.¹⁵⁸ This rule is known as the “concept of comparative expertise.”¹⁵⁹ In *Howsam*, the NASD arbitrators had far more expertise than a judge in understanding their own rules. A NASD arbitrator would be in a better position to understand, interpret and apply NASD rules. Therefore, where the parties are silent on whether a court or arbitrator will determine “questions of arbitrability,” the rule of comparative expertise may also apply.¹⁶⁰

Here, the Supreme Court was seeking to create rules which would uncover the parties’ intentions.¹⁶¹ This accomplishes the goal of the FAA, which is that an arbitration agreement should be treated “like any other contract, in which the intentions of the parties are paramount.”¹⁶²

149. *Id.* at 82.

150. *Id.* at 83.

151. *Howsam*, 537 U.S. at 85.

152. *Id.* at 84.

153. *Id.* at 84–85.

154. *Id.* at 84.

155. *Id.*

156. *Id.*

157. Lipshutz, *supra* note 5, at 1687.

158. *Howsam*, 537 U.S. at 85.

159. *Kristian v. Comcast*, 446 F.3d 25, 39 (1st Cir. 2006) (citing *Howsam*, 537 U.S. at 85).

160. *Howsam*, 537 U.S. at 85.

161. Lipshutz, *supra* note 5, at 1687.

162. *Id.*

2. *PacifiCare Health Systems, Inc. v. Book and Green Tree Financial Corp. v. Bazzle*

Shortly after its decision in *Howsam* the Supreme Court decided *PacifiCare Health Systems, Inc. v. Book and Green Tree Financial Corp. v. Bazzle*.¹⁶³ The Court in *Kristian* relied on both cases to decide whether an arbitrator or a court should determine if Plaintiffs were precluded from enforcing their statutory rights through mandatory arbitration.¹⁶⁴

In *PacifiCare*, several healthcare management organizations (“HMOs”) were facing claims by a group of physicians under a Racketeer Influenced and Corrupt Organizations Act (“RICO”) statute.¹⁶⁵ The HMOs sought to compel arbitration.¹⁶⁶ The physicians claimed they could not be compelled to arbitrate because of the conflict between the type of damages allowed under RICO and the arbitration provision.¹⁶⁷ As a result of the conflict, the physicians claimed they would be unable to obtain “meaningful relief.”¹⁶⁸ The HMOs insisted there was no question of arbitrability, and hence the case should immediately go to an arbitrator.¹⁶⁹

The Supreme Court compelled arbitration.¹⁷⁰ It was unclear without further inquiry whether or not the arbitration agreement conflicted with RICO.¹⁷¹ If the Court found a conflict, plaintiffs would be left with no meaningful cause of action and the validity of the arbitration would therefore be undermined.¹⁷² Due to the strong public policy in favor of arbitration, the Court concluded that the decision maker in such a case should be an arbitrator.¹⁷³ The Court reasoned that it is not its job to speculate as to how an arbitrator might rule.¹⁷⁴ Therefore, when an arbitrator’s decision will determine whether there is a conflict between an arbitration provision and governing law, “a court should not foreclose the operation of that presumption by deciding that there is a question of arbitrability when there is the possibility that an arbitrator’s decision in the first instance would obviate the need for judicial decision making.”¹⁷⁵

163. *Kristian*, 446 F.3d at 39–40; *see also* *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

164. *Kristian*, 446 F.3d at 39–40.

165. *PacifiCare*, 538 U.S. at 402.

166. *Id.* at 403.

167. *Id.*

168. *Id.*

169. *Id.* at 403–04.

170. *Id.* at 407.

171. *Kristian v. Comcast Corp.*, 446 F.3d 25, 40 (1st Cir. 2006).

172. *Id.* (citing *PacifiCare*, 538 U.S. at 406–07).

173. *PacifiCare*, 538 U.S. at 407 n.2.

174. *Id.* at 406–07.

175. *Kristian*, 446 F.3d at 40.

Lastly, the First Circuit considered the Supreme Court's decision in *Bazzele*. The contract in *Bazzele* was between a commercial lender and its customers. It provided for mandatory arbitration but was silent on the issue of class action arbitration.¹⁷⁶ The commercial lender, Green Tree, claimed arbitration could not be conducted as a class because the arbitration agreement did not specifically authorize class mechanisms.¹⁷⁷

The Court, to the dismay of many, did not rule as to whether or not arbitration could proceed on a class-wide basis where the language of a contract is ambiguous.¹⁷⁸ Instead, the Court held that because the contract itself did not address class arbitration, its terms were unclear and “‘present[ed] a disputed issue of contract interpretation.’”¹⁷⁹ Therefore, instead of determining whether or not the arbitration could proceed on a class-wide basis, the Court addressed who should be the decision-maker in the case, an arbitrator or a court.¹⁸⁰

Essentially, *Bazzele* means that where a contract is silent or ambiguous as to whether arbitration can proceed as a class, a procedural gateway issue is created.¹⁸¹ As such, it is something courts will assume the parties intended an arbitrator decide.¹⁸² *Bazzele* did not involve a gateway matter but a dispute as to the type of arbitration agreement the parties entered.¹⁸³ Because such a dispute does not involve state statutes or judicial procedures, but instead “concerns contract interpretation and arbitration procedures,” an arbitrator, and not a court, should be the decision-maker.¹⁸⁴ Therefore, when there is a dispute as to what type of arbitration the parties agreed to, under *Bazzele*, an arbitrator should resolve the dispute.

D. Summary and Application of the Trilogy

The First Circuit in *Kristian* relied on the three preceding cases to form its decision.¹⁸⁵ The Supreme Court's decision in *Howsam* informed the court that in certain situations there is a general presumption that the parties would prefer

176. *Green Tree Fin. Corp. v. Bazzele*, 539 U.S. 444, 447 (2003).

177. *Id.* at 447.

178. *Lipshutz*, *supra* note 5, at 1699.

179. *Kristian*, 446 F.3d at 41 (citing *Bazzele*, 539 U.S. at 450).

180. *Bazzele*, 539 U.S. at 452–53.

181. *Lipshutz*, *supra* note 5, at 1700.

182. *Id.*

183. *Kristian*, 446 F.3d at 41; *see also Bazzele*, 539 U.S. at 452–53 (The court stated that when the dispute is only as to what type of arbitration applies, an arbitrator and not a court should be the decision-maker because “that question does not concern a state statute or judicial procedure. It concerns contract interpretation and arbitration procedure. Arbitrators are well situated to answer that question.”).

184. *Bazzele*, 539 U.S. at 453.

185. *Kristian*, 446 F.3d at 39.

a court and not an arbitrator preside over their case.¹⁸⁶ There are two such instances, both of which apply to substantive gateway matters: 1) whether the parties ever agreed to arbitrate; and 2) whether the arbitration agreement applies to the given controversy.¹⁸⁷ However, where the gateway issue is procedural in nature courts should assume that the parties intended an arbitrator preside over their case. In *PacifiCare*, the Supreme Court added that where resolution of the controversy determines whether the case will be subject to arbitration, the courts should defer to arbitrators.¹⁸⁸ The reasoning is that courts should not take it upon themselves to speculate as to what decision an arbitrator will reach where the arbitrator's initial decision could make a judicial decision unnecessary.¹⁸⁹ Finally, in *Bazze*, the Supreme Court held that where the parties agreed to arbitrate but are in dispute as to what form arbitration is to take, such as when a contract is silent, an arbitrator shall make the decision.¹⁹⁰

In *Kristian*, Plaintiffs contended that the "Policies & Practices as a whole [were] valid."¹⁹¹ However, they contended the arbitration agreement was invalid because when it was applied to their anti-trust claim it precluded them from getting their statutorily guaranteed relief.¹⁹² They were not arguing that the arbitration agreement could not apply in antitrust cases but that "arbitration subject to the provisions at issue shield[ed] Comcast from antitrust liability, and hence conflict[ed] with the statute providing for such liability."¹⁹³ The First Circuit determined, based on the Supreme Court Trilogy, that Plaintiff's "challenges to the Policies & Practice's . . . class arbitration bar did pose [a question] of arbitrability."¹⁹⁴

186. *Id.* at 39.

187. *Id.*

188. *Id.* at 40.

189. *Id.*

190. *Id.* at 41.

191. *Kristian*, 446 F.3d at 41–42.

192. *Id.* at 42.

193. *Id.* The Court also noted:

It is true that the district court concluded that the Policies & Practices is a contract of adhesion. However, under Massachusetts law, contracts of adhesion—like the Policies & Practices—are generally enforceable absent a separate finding that such contracts are 'unconscionable, offend public policy, or are shown to be unfair in particular circumstances.' The Policies & Practices is not invalid simply because it is a contract of adhesion.

Id. at 42 n.10 (internal citations omitted).

194. *Id.* at 64.

E. Questions of Arbitrability: Class Arbitration

The Court ultimately concluded that it, and not an arbitrator, was the proper decision-maker in the *Kristian* case.¹⁹⁵ Comcast, citing *Bazze*, claimed that the issue of whether or not the arbitration could proceed without class actions was a procedural issue for an arbitrator to decide.¹⁹⁶ However, here, unlike in *Bazze* where the contract was silent as to whether class mechanisms could be utilized, the 2002-2003 arbitration agreement explicitly forbade class arbitration.¹⁹⁷ Also, in *Bazze*, there was never a dispute as to whether a ban on class actions made the arbitration agreement unenforceable.¹⁹⁸ Basically, the question in *Kristian* was one of arbitrability.

Therefore, under *Howsam*, the controversy over whether the arbitration agreement was valid was for the courts, and not an arbitrator.¹⁹⁹ *Kristian* did not fall within the realm of *PacificCare* because it was clear by the language of the agreement that banning all class mechanisms and demanding mandatory arbitration, in this situation, precluded Plaintiffs from vindicating their statutory rights.²⁰⁰ In *PacificCare* it was unclear whether there really was a conflict in terms. Therefore, the Court left it up to the arbitrator to determine if there was in fact a conflict.²⁰¹ *Kristian* also was not within the realm of *Bazze* because, in that case, the arbitration agreement was unclear as to whether arbitration had to proceed on an individual basis or could proceed as a class.²⁰² Here, the arbitration provision clearly forbade class mechanisms.²⁰³

Thus, there was a question of whether the agreement was arbitrable at all.²⁰⁴ Moreover, while the Supreme Court has never faced a case with the exact facts of *Kristian*, other federal courts have addressed similar cases and held that questions of arbitrability similar to those in *Kristian* should be submitted for arbitration.²⁰⁵ Specifically, the Eleventh Circuit, in *Jenkins v. First Am. Cash Advance of Georgia*,²⁰⁶ faced a similar issue and held there

195. *Id.*

196. *Id.* at 53.

197. *Kristian*, 446 F.3d at 31–32.

198. *Id.* at 53–54 (quoting *Green Tree Servicing Corp. v. Bazze*, 539 U.S. 444, 451 (2003) (“[*Green Tree*] does not apply here because of the clarity of the prohibition against class arbitration”).

199. *Id.* at 38–39.

200. *Id.* at 45.

201. *Id.* at 40.

202. *Id.* at 53–54.

203. *Kristian*, 446 F.3d at 53–54.

204. *Id.* at 55 (stating that although neither the court nor the Supreme Court, had ever faced a case exactly similar to *Kristian*, other courts of appeals had, and had found that there was a question of arbitrability).

205. *Id.*

206. *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005).

were questions of arbitrability.²⁰⁷ But ultimately the court in *Kristian* based its decision on state unconscionability statutes and not on a vindication of statutory rights analysis.²⁰⁸ Even so, the Eleventh Circuit previously decided a case on the basis of “vindication of statutory rights,” and held that the two rationales were similar.²⁰⁹ Therefore, because this case presented a question of arbitrability, then, as held in *Howsam*, the issue of the enforceability of the arbitration agreement was for the courts.

F. *The Merits in Kristian v. Comcast*

In reviewing the merits of Plaintiffs’ claim, the court held that the “arbitration agreement’s language ostensibly conflict[ed] with the Federal Rules of Civil Procedure, which provide for class actions.”²¹⁰ The Court used the word “ostensibly” because Comcast’s contract precluded only class arbitration, not class actions.²¹¹ Nonetheless, the court held that because Comcast had a mandatory arbitration provision and because that provision precluded class arbitration, all class mechanisms were essentially unavailable to Plaintiffs.²¹²

Because all class mechanisms were banned where there was mandatory arbitration and a preclusion of class arbitration, the presumption that arbitration provided “a fair and adequate mechanism for enforcing statutory rights,”²¹³ undermines the very policy behind class actions.²¹⁴ The policy at the very center of class actions is that where individual claims are very small, there is no incentive for a plaintiff to bring an individual claim.²¹⁵ As a result, that individual’s rights are never vindicated. This policy was upheld by the Seventh Circuit, which stated:

It would hardly be an improvement to have in lieu of [a] single class action 17,000,000 suits each seeking \$15.00 to \$30.00 The *realistic* alternative

207. *Kristian*, 446 F.3d at 55 n.18.

208. *Id.*

209. *Id.*

210. *Id.* at 54. The 2002/2003 arbitration agreement stated the following in bold capital letters:

There shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis or on bases involving claims brought in a purported representative capacity on behalf of the general public (such as a private attorney general), other subscribers, or other persons similarly situation unless your state’s laws provide otherwise.

Id. at 53.

211. *Id.* at 54.

212. *Id.*

213. *Kristian*, 446 F.3d at 54 (quoting *Rosenburg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 14 (1st Cir. 1999)).

214. *Id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)).

215. *Id.*

to a class action is not 17,000,000 individuals' suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.00.²¹⁶

The court addressed Comcast's contention that class arbitration was merely a way to redress claims and not a statutory or substantive right by holding that it "[could not] ignore the substantive implications of [it as a] procedural mechanism."²¹⁷ If each individual Comcast subscriber brought a claim individually, recovery would range from a few hundred to a few thousand dollars.²¹⁸ Meanwhile, it was estimated that, excluding attorney's fees and other fees, the cost of expert fees alone would be hundreds of thousands of dollars.²¹⁹ It is highly unlikely that any Comcast subscriber, let alone all those wishing to bring a claim, had the necessary funds to pay this cost up front.²²⁰ Even if Plaintiffs could afford to pay the expert's fees, it was even extremely unlikely that they would when only expecting to recover a few hundred to a few thousand dollars.²²¹

Thus, by explicitly mandating arbitration and explicitly banning class actions, Plaintiffs would be unable to spread expert's fees, attorney's fees, and other court fees among themselves and would ultimately be deterred from bringing their claims at all.²²² Moreover, as the Supreme Court opined in *Alabama v. Randolph*, "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."²²³ Here, the court found the Supreme Court's reasoning in *Randolph* certainly applied.²²⁴ For this reason the Court held that the ban on class arbitration precluded Plaintiffs from effectively vindicating their statutory rights under Rule 23 and was therefore unenforceable.²²⁵

216. *Id.* (citing *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

217. *Id.*

218. *Id.*

219. *Kristian*, 446 F.3d at 54.

220. *Id.*

221. *Id.* at 54–55.

222. *Id.* (quoting Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 407 (2005) ("The class mechanism ban 'particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements'—forces the putative class member 'to assume financial burdens so prohibitive as to deter the bringing of claims. . . . And these costs . . . will exceed the value of the recovery she is seeking.'")).

223. *Id.* at 55 (quoting *Green Tree Fin. Corp.—Alabama v. Randolph*, 531 U.S. 79, 90 (2000)).

224. *Id.*

225. *Kristian*, 446 F.3d at 55.

G. *The Comcast Court's Decision in Comparison to Other Federal Circuit Courts*

The *Kristian* court noted that the Third, Fourth, Seventh and Eleventh Circuits upheld bans on class mechanisms in mandatory arbitration agreements but distinguished the cases before those courts from *Kristian*.²²⁶ First, in each of the four circuits, either the plaintiffs did not claim that costs were so prohibitive as to prevent them from being able to vindicate their rights individually or their arbitration and attorney's fees were recoverable.²²⁷ For example, the court distinguished the Third Circuit's holding in *Johnson v. West Suburban Bank* because the plaintiffs in *Johnson* could have recovered attorney's fees and they would have been able to find an ample number of attorneys willing to represent them.²²⁸ As such, because Plaintiffs could be fairly and adequately represented with no upfront costs, they were still able to have their rights vindicated, even if they had to arbitrate individually.²²⁹ Likewise, the defendant in the Seventh Circuit case, *Livingston v. Associates Fin., Inc.*, agreed to pay all of the plaintiff's arbitration fees.²³⁰

The second important commonality in the decisions of these other four circuit courts is that all of the plaintiffs were bringing claims against banks or financial institutions under the TILA.²³¹ In contrast, the *Kristian* plaintiffs brought their claims under state and federal antitrust law.²³² In analyzing the differences between the cases, the *Kristian* court focused on the Third Circuit

226. *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (“[H]aving found the Arbitration Agreement enforceable we must give full force to its terms The Arbitration Agreement at issue here explicitly precludes . . . class claims or pursuing [class mechanisms].”); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (“We also reject [the plaintiff's] argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages.”); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir. 2001) (“[W]e hold that a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA.”); *Id.* at 55–56; *see also Johnson v. West Suburban Bank*, 225 F.3d 366, 379 (3d Cir. 2000) (“Because there is not irreconcilable conflict between arbitration and the goals of the TILA, we similarly hold that claims arising under the EFTA [Electronic Fund Transfer Act] may also be subject to arbitration notwithstanding the desire of a plaintiff who previously consented to arbitration to bring his or her claims as part of a class.”).

227. *Kristian v. Comcast Corp.*, 446 F.3d 25, 56 (1st Cir. 2006).

228. *Id.* (citing *Johnson*, 225 F.3d at 374).

229. *Johnson*, 225 F.3d at 374–75.

230. *Kristian*, 446 F.3d at 56 (citing *Livingston*, 339 F.3d at 557).

231. *Id.*

232. *Id.*

case *Johnson v. West Suburban Bank*.²³³ This is because the other circuit court decisions relied on the precedent set forth in *Johnson*.²³⁴

The Third Circuit in *Johnson* relied on the Supreme Court's holding in *Gilmer v. Livingston/Johnson Lane Corp.*²³⁵ In *Gilmer*, the plaintiff challenged arbitration on the grounds that it did not permit class mechanisms.²³⁶ The Supreme Court held that because the plaintiff, who brought an age discrimination case, could effectively vindicate his statutory rights in the arbitral forum, arbitration should be compelled.²³⁷ The Third Circuit extended this holding relating to the ADEA to claims brought under TILA.²³⁸ The cases reflect both that the parties contracted to arbitrate and that so long as plaintiffs could enforce their statutory rights through arbitration, the contract provision would be upheld.²³⁹ In *Johnson*, because the plaintiff was able to recover attorney's fees and costs, could also have his rights enforced through administrative means, and would not have necessarily received a greater recovery by proceeding as a member of a class, the court upheld the bar on class mechanisms.²⁴⁰

Ultimately, the reasons the Third Circuit used to uphold the ban on class mechanisms in the arbitral forum did not apply to the plaintiff's antitrust claims in *Kristian*.²⁴¹ First, there is a fundamental difference between litigating TILA claims and antitrust claims because antitrust claims are far more involved and complex. Generally, under TILA a specific act or transaction is in dispute.²⁴² Because TILA claims normally involve a specific act, they involve a more simplistic analysis. However, determining whether a company violated state and federal antitrust laws requires looking at the businesses actions as a whole,²⁴³ which entails looking much deeper in a much more complicated, expensive and time consuming analysis.²⁴⁴ Likewise, the antitrust laws themselves are very complex and difficult to comprehend. This fact is bolstered by uncontested expert affidavits submitted by plaintiffs that detail the time consumption, expense and labor required to prosecute antitrust claims.²⁴⁵ One unopposed expert with twenty-six years of experience litigating

233. *Id.*

234. *Id.*

235. *Kristian*, 446 F.3d at 56.

236. *Id.* at 56; *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

237. *Kristian*, 446 F.3d at 56.

238. *Id.*

239. *Id.*

240. *Id.* at 56–57.

241. *Id.* at 57.

242. *Id.* at 57.

243. *Kristian*, 446 F.3d at 58.

244. *Id.*

245. *Id.*

class actions stated that in order to prosecute the antitrust claims plaintiffs would have to undertake:

[D]efining the relevant product market, defining the relevant geographic market, establishing the market power of defendants and the manner in which they exercised such power; the effects of potential competition within the relevant markets; the impact of conduct on any non-incumbent cable providers in the relevant market; analyzing the ‘swapping’ agreements alleged in the Complaint, as well as merger and purchase of asset transactions that defendants may have been involved in relating to the alleged monopolization conduct; reviewing and analyzing the increases in cable subscription rates over time; establishing Comcast’s alleged monopoly overcharges in relevant markets; and further calculating the named plaintiffs’ damages.²⁴⁶

Expert fees alone were estimated to range from \$300,000 to over \$600,000.²⁴⁷ This cost did not even take into account additional fees such as computer analysis or air travel reimbursements.²⁴⁸ Nor does it take into account attorney’s fees or court costs, none of which are recoverable under Comcast’s arbitration agreement.²⁴⁹ Most importantly, considering the huge expense alone, which one expert estimated could reach into the millions, the individual recovery for a plaintiff would likely range from a few hundred to a few thousand dollars.²⁵⁰ Based on the foregoing, it is highly unlikely that consumer antitrust plaintiffs, such as those in *Kristian*, would bring claims if precluded from using class mechanisms.

Second, unlike in *Johnson*, antitrust consumers like those in *Kristian* will be unable to find representation because, unlike claims brought under TILA, attorney’s fees and costs are not recoverable under Comcast’s arbitration agreement.²⁵¹ As explained above, the cost for the *Kristian* plaintiffs is substantial and an attorney would have to have hundreds of thousands to millions of dollars to invest upfront for only a few hundred to few thousand dollars likely to be recovered. Considering the uncertainty as to whether plaintiffs will win or lose on their claim, the attorneys could potentially lose over a million dollars, have no guarantees, and see nothing in return.²⁵² Therefore, it was highly unlikely that any attorney would be willing to represent an individual plaintiff against Comcast.²⁵³

246. *Id.*

247. *Id.*

248. *Kristian*, 446 F.3d at 58.

249. *Id.* at 50.

250. *Id.* at 58.

251. *Id.* at 57–60.

252. *Id.* at 59 (Plaintiffs’ expert, Howard J. Sedran, noted that “[i]t should not surprise anyone that a qualified attorney would not pursue a few individual cases on a contingent basis where even a victory would result in the loss of millions of dollars of time and expense.”).

253. *Id.* at 59.

For this reason alone there was sufficient support for the court to find the arbitration agreement unenforceable. Several courts have struck down class action waivers in arbitration agreements where the recovery is so small that no reasonable person would bring a claim.²⁵⁴ The courts in these cases have realized that “by increasing plaintiff’s transaction costs, defendants can induce them to accept lower settlements or even drop their claims altogether.”²⁵⁵ Requiring arbitration and banning class mechanisms is contrary to the Supreme Court’s justification for class actions: that it is often irrational or impractical for individuals to bring claims when recoveries are small and costs are prohibitive.

Finally, unlike in *Johnson*, it was unlikely that administrative enforcement of antitrust claims would remedy the plaintiffs’ injuries.²⁵⁶ When Congress enacts a statute and calls for both private and administrative enforcement of the statute, it envisions both will play a role in ensuring the law is followed and carried out.²⁵⁷ Where private enforcement is virtually impossible, Congress’s intent is undermined and true enforcement is unlikely to exist.²⁵⁸

Based on the huge differences in complexity, cost, and other methods of enforcement between TILA claims and antitrust claims, the reasoning used by the Third Circuit could not apply in *Kristian*.²⁵⁹ Therefore, because the bar on plaintiffs’ use of class mechanism precludes them from enforcing their statutory rights, they could not be compelled to arbitrate their claims if forced to do so individually.²⁶⁰

H. Other Courts

In its final point of analysis, the court in *Kristian* supported its position with the holdings of other courts.²⁶¹ For the most part, those courts refusing to compel arbitration where class mechanisms are banned are state courts who are applying state unconscionability statutes.²⁶² The *Kristian* court stated that because “many unconscionability arguments are merely reiterations of vindication of statutory rights arguments,” they are equally supportive of its holding.²⁶³

254. *Kristian*, 446 F.3d at 59.

255. *Id.* (quoting Jean B. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 86 (2004)).

256. *Id.* at 57–60.

257. *Id.*

258. *Id.*

259. *Id.* at 57–59.

260. *Kristian*, 446 F.3d at 59.

261. *Id.* at 60.

262. *Id.*

263. *Id.* at 63.

One example of a similar unconscionability argument is the Ninth Circuit holding in *Ting v. AT&T*.²⁶⁴ In *Ting*, the court held that arbitration could not be enforced where there was a ban on class mechanisms, pursuance of individual claims was not economically feasible, and no claims were likely to be brought absent the availability of class mechanisms.²⁶⁵ The court also noted that even if a claim were brought a plaintiff would be highly unlikely to find an attorney willing to handle the case where attorney's fees and costs were not recoverable under the arbitration agreement.²⁶⁶ Ultimately, the Ninth Circuit held that a ban on class mechanisms in the arbitral forum was such a deterrent to litigation of claims that the corporate defendant was essentially shielded from all liability.²⁶⁷ The court in *Kristian*, relying on *Ting*, also found that because plaintiffs had no way to vindicate their statutory rights if unable to bring their claims against Comcast as a class, Comcast would be able to shield itself from liability.²⁶⁸ Moreover, this would frustrate the enforcement of antitrust laws because all of Comcast's subscribers with similar claims either would be unable to withstand the cost to bring claims individually or would be able to find representation.²⁶⁹

I. *The Kristian Court's Conclusion*

Ultimately, the court severed the portions of the arbitration agreement banning class mechanisms. However, the arbitration agreement itself was not severed. Plaintiffs were therefore compelled to arbitrate but were permitted to do so on a class-wide basis.

V. EFFECTS AND IMPLICATIONS OF *KRISTIAN*

Due to the unsteady history and inherent distrust of arbitration, courts have struggled with the enforcement of arbitration agreements for the past century.²⁷⁰ While congressional adoption of the FAA in 1925 and a federal policy very much in favor of arbitration have reinforced the validity and enforceability of arbitration, courts are still weary to enforce it in situations involving mandatory arbitration agreements in contracts of adhesion between corporations and ordinary consumers.²⁷¹ The result for courts has been several

264. *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

265. *Kristian*, 446 F.3d at 60.

266. *Id.*

267. *Id.* at 60–61; *see also* *Ting v. AT&T*, 182 F.Supp.2d 902, 918 (N.D. Cal. 2002) (Plaintiffs had complaints about AT&T's billing system and practices. Their recovery expectations were minimal.).

268. *Kristian*, 446 F.3d at 61.

269. *Id.*

270. BENNETT, *supra* note 12, at 11–13.

271. *Id.* at 10–13.

decades of unclear case law which shirks the major issues altogether.²⁷² For this reason, *Kristian v. Comcast*, the second federal circuit court case to find bans on class arbitration unenforceable and the first to find so on a theory of vindication of statutory rights, is important and insightful.

Though *Kristian* is a novel holding and helps to elucidate a controversial area of law, even on adoption by the Supreme Court or other courts it is unlikely to have much impact on the law for two primary reasons. First, where an arbitration agreement is silent, Supreme Court precedent in *Bazze* and *Howsam* indicates that a procedural issue of arbitrability is present and the proper decision-maker is an arbitrator.²⁷³ Second, even where class actions are explicitly banned, *Kristian* may not apply as it is likely to be read narrowly.

First, under *Bazze* and *Howsam*, where an arbitration agreement is silent and the only issue is whether arbitration can proceed as a class, an arbitrator, not a court, is the proper decision-maker.²⁷⁴ Therefore, if a corporation wishes to avoid judicial review of its arbitration agreement, it need only remain silent as to whether class actions are barred. The Supreme Court in *Bazze* never got to the merits of the case nor determined whether class actions could be barred because they determined there was not an issue of arbitrability for them to decide.²⁷⁵ Because there is such a strong federal policy in favor of arbitration and because the FAA requires arbitration agreements to be considered equivalent to any other contractual provision, this must be the case.²⁷⁶

In *Kristian*, if Comcast had not explicitly barred class mechanisms the First Circuit's only allowable action, if abiding by Supreme Court precedent, would be to apply the holding of *Bazze* and leave interpretation of the contract to an arbitrator. Therefore, if courts begin following *Kristian*, corporations wishing to stay out of court would likely remain silent on the issue of class mechanisms. Because an arbitrator would not be bound by the First Circuit's holding, and because the great weight of authority is contrary to the *Kristian* decision, it is not possible to determine whether arbitration on a class-wide basis would be allowed or prohibited.

In the end, arbitration has proven to be equally fair to both major corporations and individual consumers, so there need not be a fear that a major conglomerate will be able to stifle the rights of consumers indefinitely.²⁷⁷ However, it is not clear that *Kristian* would greatly impact the law.

272. See generally Kaplinsky, *supra* note 5; Lipshutz, *supra* note 5.

273. See generally *Kristian*, 446 F.3d at 40–50.

274. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 452–53 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

275. See *Kristian*, 446 F.3d at 41. See generally *Bazze*, 539 U.S. 444 (2003).

276. BENNETT, *supra* note 12, at 11; see also PRACTICING LAW INSTITUTE, *supra* note 11, at 5; Lipshutz, *supra* note 5, at 1679.

277. See generally Dawson, *supra* note 4; Lipshutz, *supra* note 5.

Additionally, because there is no record as in judicial decisions, it would not be as persuasive as in a judicial court, even if followed.

If the effect of *Kristian* and subsequent cases decided similarly encourages companies to leave their arbitration agreements vague so that the only issues will be of procedural arbitrability, there are several implications. First, absent congressional direction as to whether arbitration can proceed as a class and when it cannot, arbitrators will have great discretion to determine whether or not class mechanisms may be prohibited. One negative aspect of this scenario is that arbitrators have less experience in certifying and managing class actions.²⁷⁸ In cases where class arbitration has been permitted, such as in California, judges have kept a watchful eye and ensured that notice, certification and management of the class was as prescribed.²⁷⁹ Also, class actions can be dangerous in arbitration because they are more private and notice is more difficult.²⁸⁰ Because of the opt-out provision in Rule 23(b)(3), it becomes more worrisome that a future litigant will be unable to bring a valid claim because they were joined to a class, unaware, left without recovery, and were subsequently bound by the arbitrators decision.²⁸¹ Moreover, this result would undermine the very policy at the core of arbitration that the parties agree to arbitrate and agree to be bound.²⁸² Under Rule 23(b)(3), it is possible that a person never intended to be bound but nonetheless is. However, this can hardly be used to attack class actions as the policies under arbitration have eroded such that an arbitration provision hidden in small print on the back of a standard form contract are sufficient to bind plaintiffs.²⁸³

Second, even if *Kristian* is adopted by the Supreme Court or all other courts, it is not likely to greatly impact the law because it will likely be read narrowly. Ultimately, the effect of *Kristian* for all courts wishing to mirror its decision is that for every type of claim there must be analysis as to whether arbitration can fairly proceed on a class-wide basis.

The First Circuit went to considerable lengths to discover whether in *Kristian*, which dealt with antitrust claims, Plaintiffs were unable to vindicate their statutory rights.²⁸⁴ By the court's own admission, antitrust law is a very analytical and complex area of law that requires extensive research and analysis to determine whether there has been a violation.²⁸⁵ Due to its

278. Lipshutz, *supra* note 5, at 1690.

279. *Id.* at 1691.

280. *Id.* at 1717.

281. *Id.* at 1714.

282. See PRACTICING LAW INSTITUTE, *supra* note 11, at 2.

283. See Kinkel v. Cingular Wireless, 857 N.E.2d 250 (Ill. 2006).

284. See generally *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

285. *Id.* at 57.

complexity and the absence of provisions allowing for attorney's fees to be recovered, antitrust law is especially expensive and unique.²⁸⁶

The Supreme Court, while not providing many clear answers, has already stated that in certain cases, such as ADEA cases (i.e., *Gilmer*), plaintiffs are not disadvantaged by having to bring claims individually.²⁸⁷ While the Supreme Court noted its holding may not be the most fair or convenient solution for consumers, the parties had the ability under both the FAA and contract law to choose their dispute settlement procedure.²⁸⁸ The First Circuit only held as it did because, unlike ADEA claims, antitrust law is so much more complex, requires more sophisticated analysis, and does not allow for recovery of attorney's fees.²⁸⁹

In fact, *Kristian* does little to clarify the law for corporations or consumers dealing with arbitration disputes. The only clear guideline from *Kristian* is that under state and federal antitrust law, plaintiffs are precluded from vindicating their statutory rights if class mechanisms are barred because the cost of litigation is so prohibitive and the availability of counsel is limited. Because the Supreme Court, and several other circuit courts, have already considered the same issue in other contexts, they are likely to be more determinative than *Kristian*.²⁹⁰

If a plaintiff in another circuit brings the same or similar case, there is no guarantee that a federal court will rely on the First Circuit's decision because it does not bind the other circuits and is in the minority in comparison to other federal circuit courts that have considered the issue. Even if a comparable case comes to the First Circuit, the court will again have to reweigh every factor to determine whether the case is more like *Kristian* and antitrust law, or more like an ADEA or TILA claim, which the vast majority of federal courts hold can bar class arbitration.

Finally, if courts, corporations and consumers are unhappy with the fact that all arbitration provisions could potentially be silent on whether class actions can be precluded and thus go to arbitration, then Congress, the body that enacted the FAA in 1925, should be called on to correct the problem. Congress has the authority to state whether arbitration can proceed on a class-wide basis or can strengthen the *Kristian* decision by providing examples of the types of cases, such as antitrust cases, where arbitration can and should proceed on a class-wide basis.

286. *Id.* at 57–59.

287. *Id.* at 42.

288. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

289. *Kristian*, 446 F.3d at 64.

290. *Id.* at 39–45.

CONCLUSION

In sum, arbitration has created conflict among the courts for the past century. While the First Circuit's decision in *Kristian* is novel and seems contradictory to that in other circuits, in reality, it is not. The First Circuit went to considerable effort to elucidate the differences between antitrust law and other areas of law under which such claims had been brought before, such as ADEA or TILA. It is unlikely that if the First Circuit were to consider whether arbitration could proceed absent class mechanisms in a claim brought under TILA or ADEA, it would find the agreement unenforceable. Nonetheless, *Kristian* is an important case and will likely prove to be a guiding light as courts continue to define the bounds of arbitration law absent Supreme Court and congressional guidance. If anything, *Kristian* reflects that the debate among the courts is far from over and more likely that not, will continue to create divisions.

FALON M. WRIGLEY*

* J.D. Candidate 2008, Saint Louis University School of Law. I would like to thank my parents for their unwavering support and encouragement throughout my academic career, my sister for her advice and guidance, and my husband for his support and understanding.