1-1-2016

Saturns for Rickshaws: Lessons for Consumer Arbitration and Access to Justice

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Dean Peter B. Rutledge

Companies are increasingly requiring consumers to agree to arbitrate disputes they may have over the products or services they purchase. Pre-dispute arbitration agreements are controversial especially for consumer disputes, where, it is feared, consumers will not represent themselves and neither will lawyers come forward because of the small stakes involved in individual claims. Dean Rutledge addresses in this chapter whether consumer arbitration processes can be designed to provide greater access to justice for consumers.

Over a decade ago, Professor Samuel Estreicher laid plain the terms of the policy debate over arbitration of employment disputes.[1] Invoking the provocative and memorable phrase "Saturns for Rickshaws," Estreicher argued that the debate ultimately turned on one's view about the social goals of civil dispute resolution. Prohibiting arbitration clauses in employment disputes might guarantee a "Cadillac" system for the select few who had claims that could attract competent plaintiff's attorneys and plausible damages claims that a jury might buy. Yet for the rest (indeed the majority), civil litigation promised a "rickshaw" system – at best, little or no relief generally because their claims did not have the sticker value to attract competent counsel and, instead, languish on the dockets of understaffed and sometimes incompetent administrative agencies. By contrast, arbitration offered the prospect of "Saturns for all" – making those with "Cadillac" cases slightly worse off but those with "Rickshaw" cases comparatively better off.

While Saturns have disappeared from the new automobile market, Estreicher's metaphor retains its essential relevance to the study of arbitration. Though developed in the context of employment arbitration, it helps to frame the debate over consumer arbitration. One positive question is whether, in the consumer context, arbitration entails the same tradeoff – making a subset of consumers worse off even while making the majority of consumers better off. A related, normative question is whether that particular distribution of benefits is more socially desirable than the distribution of benefits offered by the civil litigation system.

[1] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 18 Ohio St. J. Disp. Res. 559 (2001).

Opinions differ sharply over the answers. To some, arbitration can help solve problems of access to justice by reducing aggregate process costs and expediting the delivery of relief to consumers with meritorious claims.[2] To others, arbitration can exacerbate problems of access to justice by raising costs to the consumer and, when combined with class waivers, removing the incentive of private plaintiffs' attorneys to represent individuals whose small-value claims, due to the class waiver, cannot be aggregated with those of similarly situated individuals.[3]

In my view, Estreicher's thesis holds true for consumer arbitration too: "[a] properly designed arbitration system . . . can do a better job of delivering accessible justice for average claimants than a litigation-based approach." In several respects relevant to this debate, arbitration of consumer-related disputes shares certain features in common with employment arbitration: it can lower process costs, result in favorable results for claimants and lead to prompt resolution of the dispute. Many of these benefits flow from the greater procedural flexibility afforded in arbitration. Critics of consumer arbitration fear that this procedural flexibility could provide a recipe for unfair practices, but in most respects those fears have not come to pass.

While consumer arbitration and employment arbitration are similar, they are certainly not identical. Unlike employment claims, not all consumer claims are of high value, raising the possibility that the low-stakes claim, absent some aggregation mechanism, will deter the consumer from bothering with the suit. This explains why the debate over consumer arbitration has been so extensively tied up with a discussion of class actions, where the class mechanism attempts both to aggregate nominal claims and to supply something akin to group representation. Indeed, class waivers found in consumer arbitration agreements are the one area where the empirical research lends some support to critics' claims that the procedural flexibility afforded by arbitration might actually undercut access to justice.

Yet these differences should not be fatal to arbitration of consumer disputes. It is hardly clear that class litigation vindicates the consumer's interests. Moreover, even when class devices are unavailable in arbitration, alternative mechanisms like aggregate representation by public entities (not bound by the arbitration clause) may provide a better means by which to address residual concerns about consumer access to justice.

[2] See, e.g., Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. Rev. 1 (2013); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marquette L. Rev. 1103 (2011). By "process costs," I mean the costs incurred by the parties in resolving a dispute; this includes not only attorneys' fees but also, for example, the costs of complying with discovery. On the concept of process costs, see Stephen J. Ware, *Similarities Between Arbitration and Bankruptcy Litigation*, 11 Nev. L. J. 436 (2011); Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 Notre Dame L. Rev. 523, 531–32 (2005); Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 Ohio St. J. Disp. Res. 735 (2001).

[3] See, e.g., Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses after AT&T v. Concepcion*, 88 Notre Dame L. Rev. 825 (2012); Jean Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 Ore. L. Rev. 703 (2012).

"SATURNS FOR RICKSHAWS": LESSONS FOR CONSUMER ARBITRATION

In "Saturns for Rickshaws," Estreicher identified several features of employment arbitration that made it a superior alternative to civil litigation. It lowered process costs to the employee (that is, the costs of resolving the dispute), offered prompter dispute resolution, and resulted in favorable outcomes for the employee (whether measured by win rates or award amounts). Despite these benefits, Estreicher noted that it was essential for employment arbitration to maintain certain procedural safeguards to avoid unfairness from creeping into the system. These included an experienced bench of employment arbitrators; reasonable opportunity for discovery; written, reasoned opinions; and a cost structure that obligated employers to advance the costs of the arbitration.

In many respects, consumer arbitration displays many of the same redeeming features. To understand how consumer arbitration can reduce process costs, consider a sample case. Assume that a consumer has a complaint against a company about a defective product or a suspicious charge in her bill. The consumer believes she has been wronged and has failed to achieve a mutually agreeable settlement with the company. Suppose that the dispute is weighty enough that the consumer wishes to bring it but not so weighty that she is prepared to miss a day of work to achieve resolution of the matter. Absent arbitration, a small claims court might require the consumer to miss a day's work for a hearing or forgo her claim.[4] By contrast, arbitration can facilitate resolution of that dispute by allowing the parties, either on a pre-dispute or on a post-dispute basis, to agree – indeed to require – that any decision occur entirely on the written submissions of the parties without the need for a live hearing. She can obtain a confirmable award without any need to bear the costs imposed by the non-derogable procedural rules of a litigation forum.

By "unbundling" a dispute from a particular set of procedural rules, arbitration offers the potential to address some of the nettlesome problems of access to justice explored elsewhere in this book. Some of these are well understood. For example, by eliminating a presumptive entitlement to discovery, arbitration can reduce the "process costs" of resolving the dispute.[5] Similarly, by eliminating extensive pleading practice (like motions to dismiss and motions for summary judgment), arbitration can generate results much more quickly.[6] Finally, as noted earlier, by eliminating the requirement of a hearing, arbitration can reduce the costs to a consumer and, in simple cases, the very need for legal representation.[7]

[4] For a good summary of the sorts of barriers faced in small claims adjudication, see James C. Turner and Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 U.D.C. L. Rev. 177, 187–88 (2000).

[5] See supra note 2.

[6] See Robert Summers, *Arbitration Between Attorneys and Clients*, 61 Tex. B. J. 330 (1998).

[7] See Nancy A. Welsh, *Mandatory Predispute Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 Sw. L. Rev. 187 (2012).

TABLE 33.1 *Small claims carve-outs in credit card agreements* (2010).

Type of provision	Number of clauses	% of credit card loans outstanding
Small claims carve-out for cardholder (including ones with damages caps)	42 (68.1%)	98.4
No provision	15 (31.9%)	1.6

While arbitration may be preferable to court in some cases, small claims court might be preferable in others. Arbitration preserves that choice. Arbitration agreements routinely contain "carve outs" reserving to the consumer (or either party) the right to proceed in small claims court. In our study of arbitration agreements in the credit card industry, Chris Drahozal and I found that 68.1% of agreements contained express language carving out small claims proceedings (the remaining agreements did not contain a provision on the matter).[8] When measured as a result of outstanding credit card debt, the results are even starker. Nearly all of the credit card debt subject to an arbitration agreement contains a small claims carve-out; only a fraction does not. Table 33.1 summarizes the results from our database.

Of course, from the consumer's perspective, the above-described saving in process costs afforded by arbitration matters only if the end result is a just one. On this point, the research generally supports the view that it does. As a general matter, most studies of arbitration (whether in the consumer context or otherwise) indicate that it produces favorable results for claimants (whether measured in terms of the "win rate," the recovery, or some comparison between arbitration and litigation baselines).[9] The most recent and methodologically sound study in this area confirms this general trend. A study of approximately 300 AAA consumer arbitrations revealed that "the consumer claimant won some relief against the business defendant more than half of the time."[10] According to the same study, consumers recovered

[8] Rutledge & Drahozal, 2013 B.Y.U. L. REV. at 21.

[9] See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RES. 843, 852–62 (2010). Of course, a critical research question – with both positive and normative implications – is the proper baseline for measuring favorable or just results. Certain measures – like raw win rates – may be easily measured but do not reveal much about whether the result is a just one (i.e., a $1 award may count as a "win" even when the claimant is seeking thousands of dollars). Other measures – like comparative recovery rates (which compare recoveries between arbitration and litigation in like cases) – may provide more normatively powerful accounts but are extremely difficult to measure. Moreover, any assessment of outcomes confronts a significant risk of selection bias because the universe of the cases studied may not necessarily be representative of the entire range of actual (or potential) disputes. For discussions of the methodological difficulties here, see Drahozal & Zyontz, 25 OHIO ST. J. DISP. RES. at 852; Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. & PUB. POL'Y 549, 556–60 (2008).

[10] Drahozal & Zyontz, 25 OHIO ST. J. DISP. RES. at 898.

approximately 50% of the amount sought in their complaint.[11] Perhaps most telling from the perspective of access to justice, the study also considered how consumers fared when they proceeded pro se: "*pro se* consumer claimants won some relief in 44.9% of the cases they brought" (though win rates and recovery rates were higher when the consumer was represented by counsel).[12]

These outcomes, moreover, are usually delivered in an expeditious fashion. Studies of arbitration consistently conclude that median filing times from commencement of the arbitration to issuance of the final award are short – both in absolute terms and relative to comparable data for litigation.[13] The data on consumer arbitration comport with this general trend. AAA consumer arbitrations average approximately six to seven months from median to disposition (documents-only arbitrations that lack an in-person hearing have slightly shorter durations).[14]

These outcomes are undergirded by the "Consumer Due Process Protocol." That protocol was developed in the 1990s by a group of arbitration associations, parties, and counsel who sought to ensure the development of fair procedures in consumer arbitration.[15] The Protocol contains a number of procedural guarantees akin to those recommended by Estreicher in Saturns for Rickshaws. These include a right to resolution of the dispute in a location convenient to the consumer, a right of access to information, a right to reasonable costs, and a right to all available remedies. Since its adoption, the AAA has refused to administer consumer arbitration clauses that are not in compliance with the Protocol.

How widely is the Protocol used? In a 2010 study of arbitration agreements used by credit card companies, Christ Drahozal and I found that nearly all credit card providers offer the option of arbitration administered by the AAA.[16] The AAA is committed to administering arbitrations in accordance with the Due Process Protocol. Table 33.2 summarizes the results.

The AAA aggressively polices arbitration clauses for compliance with the Due Process Protocol. Of 361 consumer arbitrations filed with the American Arbitration Association, Drahozal and Zyontz report only five involved unwaived violations of

[11] *Id.* at 899. Here it should be stressed that the percentages varied with the amount originally sought by the consumer; consumers seeking higher amounts of damages generally recovered a higher percentage of the amount sought. See *id.*

[12] *Id.* at 905. The study does not specify the precise nature of the various consumer arbitration claims under review. Nor did it explicitly compare outcomes in consumer arbitration with outcomes in consumer litigation.

[13] See *id.* at 892.

[14] See Drahozal & Zyontz, 25 Ohio St. J. Disp. Res. at 851–52 and 892–96 (collecting literature and presenting results of consumer arbitration research).

[15] For a discussion of the Protocol's history and development, see Peter B. Rutledge, *Arbitration and the Constitution* 145–56 (Cambridge 2013). A copy of the Protocol may be found on the website of the American Arbitration Association, available at www.adr.org.

[16] Rutledge & Drahozal, 2013 B.Y.U. L. Rev. at 30.

TABLE 33.2 *Choice of provider in arbitration clauses in credit card agreements (2010).*

Provider	Number of clauses	% of credit card loans outstanding
AAA	16 (41.0%)	16.3
AAA or JAMS	13 (33.3%)	81.8
JAMS	2 (5.1%)	.1
AAA, JAMS or NAF	2 (5.1%)	.5
JAMS or NAF	1 (2.6%)	0.0
Other	4 (10.4%)	1.3

the Protocol.[17] Stated otherwise, in 98.2% of the cases, either the arbitration clause complied with the Due Process Protocol or its noncompliance was properly identified and responded to by the AAA. Similarly, in 2007, the AAA refused to administer at least 85 cases, and probably at least 129 cases, because of noncompliance with the Protocol.[18]

Attorney fees represent another type of procedural safeguard that helps to enhance access to justice. For example, the Drahozal and Zyontz study of AAA consumer arbitrations found that arbitrators awarded attorney's fees to prevailing consumer claimants in 63.1% of cases in which the consumer sought such an award.[19] In those cases in which the award of attorneys' fees specified a dollar amount, the average attorney's fee award was $14,574.

Some systems offer much more protection than the Due Process Protocol. Though arbitration is sometimes criticized as imposing costs on consumers (such as arbitrator fees and filing fees) that they do not bear in the civil litigation system, contractual clauses can overcome these risks.[20] The AT&T clause at issue in the recent *Concepcion* decision supplies a good example.[21] As described by the Court, the AT&T Clause

> specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award

[17] Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 325 (2012).

[18] *Id.* at 330–31.

[19] Drahozal & Zyontz, 25 OHIO ST. J. DISP. RES. at 846.

[20] See *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 93 (2000) (Ginsburg, J., concurring in part and dissenting in part).

[21] *AT&T Mobility, LLC v. Concepcion*, 131 S. CT. 1740 (2011).

> greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

Here, too, arbitration permits a degree of innovation not possible in the civil litigation system. The civil litigation system fixes its own allocation of court costs, does not allow parties to dictate the forms of hearings, does not enforce one-sided fee-shifting arrangements, and generally does not "reward" a party if its recovery exceeded the company's last settlement offer.[22] (Indeed, in many respects, the civil litigation system imposes more burdens on the consumer – requiring her to pay filing fees, forcing her to attend a hearing, forcing her to cover her own legal fees, and potentially punishing her with costs if her recovery falls below the company's settlement offer.)

To this point, I have considered the procedural flexibility of consumer arbitration in salutary terms. Of course, it might be a double-edged sword, and the theoretical literature has identified a variety of devices such as limits on discovery or limits on remedies that might impede citizens' access to justice. Little empirical work has been done to examine whether those devices are, in fact, employed. For example, in our 2010 study of arbitration clauses in credit card agreements, Drahozal and I found that almost no clauses contained restrictions such as limits on remedies, limits on the time for filing claims, limits on discovery.[23]

The one exception to this trend was class waivers. Our initial 2010 study of forty-seven agreements found that 93.6% of them used such clauses. Subsequent studies told a more complicated story. In a subsequent examination of a more complete set of credit card agreements, we saw that the use was closer to 17% of firms and that for-profit banks were far more likely to use class waivers than member-owned credit unions.[24] However, when the use of arbitration clauses was measured not by firms but by debt load, the usage rate was far higher.[25] The recent preliminary report of the Consumer Financial Protection Bureau confirms our findings that overall utilization rates remain low, when measured by firms, but higher, when measured by debt load.[26]

To summarize this section, consumer arbitration bears many of the hallmarks that Estreicher praised about employment arbitration. It affords consumers greater

[22] Admittedly, such reward provisions appear to be rare. In our 2010 study of credit card agreements, we located only one agreement employing such a provision. In that case, the clause stated that the arbitrator should award the consumer "at least $5100 (plus any fees and costs to which you are entitled)" if the consumer requested relief, the company did not provide it, and the arbitrator subsequently awarded at least the amount of relief originally sought by the consumer.

[23] Rutledge & Drahozal, 2013 B.Y.U. L. Rev. at 39.

[24] See Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. Empirical Legal Studies 536 (2012).

[25] Measuring the usage rate by reference to debt load was difficult. This was due to a settlement in an action against some banks under which they agreed temporarily to remove arbitration clauses from their credit card agreements. See Consumer Financial Protection Bureau, Arbitration Study: Preliminary Results at 22–23 & n. 51.

[26] *Id.*

flexibility, decent results, and rapid disposition of their claims. At the same time, various procedural protections, including the Consumer Due Process Protocol and privately developed mechanisms, offer the safeguards that Estreicher deemed essential to ensuring that the promise of improved access to justice not become hollow. Available empirical evidence suggests that the use of these safeguards is widespread and regularly applied. In the next section, I consider how consumer claims differ from employment claims and explore the implications of those differences.

IMPLICATIONS OF HOW CONSUMER DISPUTES DIFFER FROM EMPLOYMENT DISPUTES

Consumer disputes can differ from employment disputes. Centrally, the stakes in some consumer disputes will be smaller than the stakes in some employment disputes. A plaintiff in an employment dispute may have a potentially large damages claim (such as a Title VII claim). By comparison, individual consumers may only suffer relatively small damages due to an alleged violation of consumer law (such as an arguably unlawful charge on a cell phone bill).[27] Absent some mechanism, this feature might discourage individual consumers from bringing claims and, consequently, result in the under-deterrence of some violations of consumer law.[28]

As a result, class actions have taken center stage in the consumer arbitration debate. Class actions potentially might overcome both of these challenges faced in the consumer context. The aggregation of large numbers of small individual claims might provide sufficient financial incentive to proceed with the dispute. Class counsel, moreover, can serve a role akin to an institutional representative on behalf of the individual claimants. Consequently, according to one standard critique of consumer arbitration, class waivers eliminate the core incentive for a consumer to bring a case. If the consumer has only sustained actual injury to the tune of a few dollars, the costs of litigation will almost certainly exceed her expected recovery. Moreover, no attorney will undertake the litigation, even on a contingent fee basis, because the attorney's expected recovery will quickly outstrip the upfront costs she must invest to maintain the litigation.[29] I refer to this problem as the "disaggregation dilemma." Only if the attorney has sufficient financial incentive to undertake the litigation can the disaggregation dilemma be solved.

[27] This is not always the case. Some consumer protection laws contain statutory damages that enhance the consumer's incentive to pursue a claim by raising the potential recovery. See, e.g., *Cicle v. Chase Bank USA*, 583 F.3d 549, 556 (8th Cir. 2009) (discussing statutory damages available under Missouri statute).

[28] In some employment claims, unions can perform this aggregative role. Consumers obviously lack a comparable body.

[29] See *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) ("If every small claim had to be litigated separately, the vindication of small claims would be rare. The fixed costs of litigation make it impossible to litigate a $50 claim (our guess – there is no evidence – of what the average claim of a member of the plaintiff's class in this case might be worth) at a cost that would not exceed the value of the claim by many times").

Particularly after *Concepcion*, the disaggregation dilemma has taken on special importance in the field of arbitration. As Drahozal's and my studies of the credit card industry demonstrate, class waivers have grown increasingly common in some industries.[30] Arbitration's critics decry the combination of class waivers and arbitration clauses as the functional equivalent of exculpatory clauses. Because consumers (and their attorneys) lack sufficient financial incentives, cases are never brought; this lack of private enforcement results in under-deterrence.[31] Moreover, to the extent arbitrators feel bound to apply the procedural rules designated by the parties (including the prospective decision not to proceed on an aggregative basis), arbitration's detractors argue there is no likelihood the arbitrator will deem the class waiver unenforceable (a decision, they continue, that could not be reviewed in post-award proceedings). Thus, a great deal of litigation has focused on whether the presence of a class waiver in an arbitration clause renders the clause "unconscionable" (and thus unenforceable) under Section 2 of the Federal Arbitration Act. *Concepcion* struck a blow to this line of argument, although the scope of its holding remains the subject of extensive, ongoing litigation in federal and state courts.

In this legal environment, some might be tempted to declare: "The answer is easy. Amend Section 2 of the FAA to ban class waivers in arbitration agreements. Problem solved!" What I hope to do in this section of the chapter is to sound a note of caution over this approach. The policy debate over the (un)desirability of class waivers in arbitration agreements – particularly as they weigh on issues of access to justice – is far more nuanced, and the prescription proposed by arbitration's critics is not clearly a panacea for consumers.

While the literature on the efficacy of class actions is vast, several recent contributions cast doubt on the utility of class actions as a means of compensating consumers. The effectiveness of the class settlement depends, in part, on the "take rate," that is the frequency with which members of a class actually redeem the benefit offered in the settlement. Several studies of class action settlements find low distribution rates, particularly where consumers must complete a form in order to receive a share of the settlement.[32] As Professor Jaime Dodge has explained, these rates remain low even where the consumer's share is non-trivial.[33] Consequently, Dodge doubts the efficacy of consumer class actions: "many class actions are only

[30] See text in accompanying notes 25–27.

[31] See, e.g., Gilles, 88 Notre Dame L. Rev. at 825, 846.

[32] See Nicholas M. Pace & William B. Rubinstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* (Rand 2008); Nicholas M. Pace et al., *Insurance Class Actions in the United States* (Rand 2007); Deborah Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand 2000).

[33] Jaime Dodge, *Disaggregative Mechanisms: The New Frontier of Mass-Claims Resolution Without Class Actions*, 63 Emory L.J. 1253 (2014).

providing compensation to a small fraction of harmed individuals, while preclusion operates to bar these individuals' claims."[34]

Once class actions are cast in a more realistic light, arbitration may do a better job, on the whole, as a means of providing compensation to consumers than class actions. Assuming the consumer chooses to arbitrate, she has a greater likelihood of actually receiving compensation for meritorious claims: the risks entailed with processing of mass claims (that is, non-redemption followed by preclusion against bringing a claim later) drop out. Moreover, most studies have shown (and the Searle report confirms) that actual outcomes in consumer arbitration (whether measured by actual win rates or actual recovery rates) are at least as good as in garden-variety consumer civil litigation.[35]

One mechanism that has increasingly drawn attention in the debates over arbitration and class action has been proceedings brought by public authorities (such as a state attorney general or an administrative agency charged with enforcement, including civil litigation, of a statutory scheme). This argument finds its roots in the Supreme Court's decision in *EEOC v. Waffle House*, which held that arbitration clauses do not bind administrative and other public authorities even when the public authority is suing on behalf of a party whose own claim falls within the scope of the arbitration agreement.[36] In reliance on the *Waffle House* theory, companies employing arbitration agreements with class waivers argue the agreements do not amount to wholesale denials of justice because the public enforcement authority remains available to bring suit in instances where the individual consumers might lack sufficient incentive to do so if they were to proceed on an individualized basis.

This argument, of course, is potentially subject to criticism. One argument, often seen in the post-*Concepcion* litigation, is that public enforcement authorities are overburdened and underfunded. Consequently, reliance on public enforcement mechanisms is, functionally, reliance on at best a limited tool. A second criticism, less widely seen, is that the public enforcement mechanisms might become "captured" by the industries they are asked to regulate through collective litigation. This argument would tap into the rich literature on regulatory capture and postulate that private enforcement mechanisms (as opposed to public ones) are less prone to capture because the incentives of the private class counsel are more closely aligned with those of her client than the incentives of the public regulatory authority.

The invocation of public enforcement mechanisms as a solution to the disaggregation dilemma brings into stark relief the role played by consumer arbitration in questions about access to justice. It is not simply a choice between individualized dispute resolution and aggregate dispute resolution. Rather, it is a choice about individualized dispute resolution backstopped by two very different models of

[34] *Id.*

[35] See Drahozal & Zyontz, 25 Ohio St. J. Disp. Res. at 852–62.

[36] 534 U.S. 279 (2002).

aggregate dispute resolution – one managed by private entrepreneurs, the other administered by the public sector.

The choice may well depend on a mixture of empirical and normative arguments. Empirically, the foregoing discussion has cast some doubt on the efficacy of private class actions as a solution to the disaggregation dilemma. Some recent anecdotal evidence, summarized in the Pepperdine Report of the Consumer Arbitration Discussion Group, suggests public enforcement authorities have provided an effective supplement to situations where consumers might otherwise lack the incentive to pursue their claims on an individualized basis.[37] Of course, whether these anecdotes have broader empirical validity is an extraordinarily difficult question to assess. It would require some conception of the "optimal" level of enforcement, taking into account the possibility of bureaucratic self-aggrandizement and the claim that public bureaucracies could always use more resources. To my knowledge, the empirical resources simply do not exist fully to assess that proposition.

Even accepting the validity of the premise – that public enforcement authorities cannot fully address the disaggregation dilemma created by individualized arbitration – it would not necessarily follow, as a normative matter, that the public enforcement model is inadequate to backstop any "access to justice" impediments created by individualized arbitration of consumer claims. One might reasonably argue public authorities, whether civil or criminal, must regularly set enforcement priorities. These enforcement priorities necessarily mean that some cases will receive the agency's attention while others will not. The deliberation that comes with the setting of those priorities reflects the very nature of our political process and the officials (elected or appointed) who are vested with the authority to enforce the statutes falling under their jurisdiction. If individual voters believe an agency's enforcement priorities do not reflect the popular will, elections (and replacement of those officials) provide a mechanism for resetting those priorities.

To summarize this part: once the unrealistically rosy scenario of class actions is cast aside, individualized arbitration hardly seems to be the monster its skeptics paint it to be. Rather, it simply represents another example of procedural unbundling. To be sure, this form of unbundling gives rise to the disaggregation dilemma. But the solution is not (necessarily) to jettison individualized arbitration altogether. Rather, a variety of mechanisms, including class arbitration and public enforcement mechanisms, exist to resolve the dilemma without the need to invalidate the arbitration clause (or at least the class waiver). The efficacy of these "backstop" mechanisms turns on a host of positive and normative questions that demand further inquiry.

[37] See National Roundtable on Consumer and Employment Dispute Resolution, Consumer Arbitration Roundtable Summary Report (Apr. 17, 2012).

CONCLUSION

The available empirical data largely validate the application of Estreicher's "Saturns for Rickshaws" metaphor to consumer arbitration. Arbitration enabled a degree of procedural flexibility while not saddling consumers with the sorts of "unfair" provisions that were feared in the literature but have not materialized in practice. Of course, more could be done. Companies could be more specific in their clauses about cost-sharing rules (a gap that the Consumer Due Process Protocol should address), and companies should consider following the lead of AT&T to ensure that consumers have adequate incentives to proceed with meritorious claims.

To be sure, the limits on these findings must be acknowledged. They concern practices in a single industry and at a single point in time. Particularly as the doctrine in this area changes, it is important to track contracting practices (something Chris Drahozal and I have done in other research).[38] Yet the experience of the credit card industry holds potential lessons for other industries with consumer relationship and counsels caution before accepting the strident but empirically undemonstrated broad-based criticism of arbitration as a tool impeding consumer access to justice.

While arbitration has the potential to improve access to justice, it also carries corresponding risks of defections from the protections afforded by the system of civil litigation. The challenge for scholarship in this area therefore becomes to assess the patterns in various industries. If the sorts of practices exemplified by the AT&T clause are widespread, then arbitration offers great promise as a potential tool for improving access to justice. On the other hand, if such practices prove to be an outlier, then the risks rise that a rule of robust enforceability for arbitration clauses might impede access to justice.

Ultimately, though, whether consumer arbitration is a boon or bane to "justice access" issues depends critically on the baseline by which results are measured. Lawyers (and legal academics) naturally train on disputes actually commenced (or that might be commenced if the barriers could be overcome). But it is worth emphasizing that such actual contested matters only represent the tip of the iceberg regarding consumer affairs. Many differences between consumers and companies, particularly in mass consumer contracting industries like cable television or telecommunications, are resolved or settled without the dispute ever ripening into an actual arbitration. Instead, arbitration merely supplies the end point against which a company can design a whole quilt of dispute resolution models by which customer disputes are resolved. It is precisely the predictability – and enforceability – of this end point that enables companies to estimate their legal costs in cases that go this far. Those predictions enable the company to settle matters expeditiously – and far more cheaply. Companies know that, if the matter is not settled, it will not result in expensive, full-blown litigation but, instead, a less expensive form of arbitration that

[38] See Peter B. Rutledge & Christopher R. Drahozal, *Sticky Arbitration Clauses*, 67 Vanderbilt L. Rev. 955 (2014).

allows for unbundled procedures tailored to the size and stakes of the dispute. This, then, ultimately may be the toughest empirical nut to crack – testing the cases we don't see – and that never ripen – precisely because they are resolved at an early stage – and are so resolved only because they occur against the backdrop of a system of arbitration. While much empirical work remains to be done, this may ultimately be the great legacy of arbitration in improving, rather than harming, the average citizen's access to justice.