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Conspiracy to Arbitrate

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CONSPIRACY TO ARBITRATE*

CHRISTOPHER R. LESLIE**

Beginning in the 1980s, the Supreme Court has ushered in a new Age of Arbitration in which firms can use arbitration clauses to include otherwise unenforceable terms in their contracts. This has allowed defendants to shorten statutes of limitations, to limit damages, and to prevent injunctive remedies altogether. Given the pro-business nature of arbitration clauses, mandatory arbitration clauses have become standard in some industries. Some industries may transition to market-wide mandatory arbitration, in part, through conspiracies to arbitrate. A conspiracy to arbitrate exists when the competing firms in a market illegally agree that they will all impose mandatory arbitration on their consumers.

This Article highlights the dangers of conspiracies to impose arbitration, their illegality, and their utility in concealing and protecting price-fixing conspiracies. Despite the fact that conspiracies to arbitrate violate antitrust law, courts have misapplied arbitration law in ways that make such conspiracies profitable and perhaps inevitable in some markets. Relying on the false premise that Congress created a federal policy favoring arbitration, federal courts have employed seemingly neutral doctrines in ways that actively implement conspiracies to arbitrate. For example, courts have compelled antitrust plaintiffs to arbitrate their claims that

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defendants have conspired to impose arbitration, which means courts are enforcing—instead of condemning—the very agreement among competitors that they are supposed to adjudicate. Courts have also misapplied equitable doctrines and have given retroactive effect to arbitration clauses. These judicial decisions protect both conspiracies to arbitrate and price-fixing cartels.

The Article then presents a case study of recent litigation involving an alleged conspiracy among banks that issue credit cards to impose arbitration clauses on their customers. Following a bench trial, the federal trial judge held—and the Second Circuit affirmed—that the plaintiffs failed to prove an agreement among the defendants to impose arbitration clauses. In reaching this conclusion, the court committed a litany of mistakes and ultimately failed to recognize that it did, in fact, actually find an illegal conspiracy to arbitrate. These errors flowed from the court’s incorrect belief that Congress intended courts to favor arbitration over litigation.

The Article concludes by proposing changes to the way that courts evaluate conspiracy-to-arbitrate claims. Federal courts are essentially complicit in antitrust violations when they compel compliance with arbitration clauses that are the product of alleged illegal conspiracies. The Supreme Court’s rush to encourage and enforce arbitration clauses should not blind lower courts to the possibility that conspiracies to arbitrate are preventing the free market from operating properly to protect consumer interests.

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INTRODUCTION

Beginning in the 1980s, the Supreme Court has ushered in a new Age of Arbitration. Based on its assertion that Congress—when enacting the 1925 Federal Arbitration Act—created a federal policy favoring arbitration, the Court has issued a series of opinions that make statutory claims subject to private arbitration. In the 2010s, the Court expanded on its pro-arbitration jurisprudence and upheld the enforceability of arbitration clauses in consumer contracts, even when

those clauses were held unconscionable under applicable state law.¹ The Court also permitted businesses to insert class-action waivers into their arbitration clauses, thus preventing victims of illegal activity from participating in class-action litigation.² The growing judicial deference to arbitration clauses has provided firms the ability to include otherwise unenforceable terms in their contracts, which may allow defendants to shorten statutes of limitations, to limit damages, and to prevent injunctive remedies altogether.³ Given the pro-business nature of arbitration clauses, mandatory arbitration clauses have become standard in some industries. If mandatory arbitration becomes the norm in a particular market, through individual firms each deciding independently to impose arbitration clauses, then the antitrust rules against collusion are not implicated.⁴

Some industries, however, may transition to market-wide mandatory arbitration, in part, through conspiracies to arbitrate. A conspiracy to arbitrate exists when the competing firms in a market illegally agree that they will all impose mandatory arbitration on their consumers. This Article explains how the Supreme Court's relatively recent arbitration opinions have converted arbitration clauses into a mechanism that firms can use to insulate themselves from liability for their illegal conduct. As a result, the Supreme Court's pro-arbitration jurisprudence encourages and protects conspiracies to arbitrate.

This Article highlights the dangers of conspiracies to arbitrate. Such conspiracies magnify all of the worst aspects of mandatory arbitration by leaving consumers with little or no meaningful ability to avoid relinquishing their rights to litigate in state and federal courts. When all of the suppliers in a particular market require their customers to submit to arbitration, consumers cannot purchase the needed product or service without surrendering their rights. Identifying the anticompetitive harms of conspiracies to arbitrate over eighty-five years ago, the Supreme Court condemned such

1. *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (finding that the Federal Arbitration Act preempted the California law that treated class-action waivers in arbitration clauses as unconscionable).

2. *See generally* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that the FAA does not allow courts to invalidate class-action waivers based on fact that the cost of individual arbitrations exceeds the plaintiff's potential recovery).

3. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 282–92 (2015).

4. *See* Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 930 (1st Cir. 1984) (Breyer, J.) (“Competitors cannot agree, for example, to insist that their contracts . . . contain arbitration clauses, even though each individual competitor can make up his own mind to insist upon such a term in any, or all, of his contracts.”).

conspiracies as per se violations of section 1 of the Sherman Act.⁵ If a market transitions to industry-wide arbitration as a result of independent decisions by each firm in the market, that may be tragic but not necessarily illegal. Section 1 of the Sherman Act condemns only agreements in restraint of trade, not unilateral decision-making. When, however, industry-wide arbitration results from an agreement among competing firms to make mandatory arbitration the industry standard, the agreement violates antitrust law. Unfortunately, as this Article details, courts as of late have been more focused on protecting the conspirators than on protecting consumers.

This Article explores how courts have developed a body of law that encourages and rewards firms that conspire to impose arbitration clauses on their customers. Most of these judgments are driven by the incorrect belief that Congress intended to create an overarching policy that reveres arbitration over litigation. This Article argues for courts to treat conspiracies to arbitrate as per se illegal, to interpret equitable and legal doctrines in a manner that discourages instead of enables such conspiracies, and to not let the so-called federal policy in favor of arbitration affect their decisions in conspiracy-to-arbitrate cases.

Part I of this Article discusses the evolution of arbitration from a method of settling inter-merchant disputes to a mechanism that businesses use to prevent their customers from pursuing claims altogether. The Supreme Court's strong endorsement of arbitration clauses has affected not merely the number, but also the content, of these provisions in consumer contracts. Today, many businesses structure their arbitration clauses to void many pro-consumer aspects of otherwise applicable law, such as long statutes of limitations and damage multipliers for successful plaintiffs. Used in this fashion, arbitration undermines consumer law and antitrust law.

Recognizing that mandatory arbitration clauses are ubiquitous in many industries, Part II hypothesizes that one reason for the expansion might be collusion among competitors. The Supreme Court first discussed conspiracies to impose arbitration clauses in 1930 in *Paramount Famous Lasky Corp. v. United States*,⁶ which condemned a conspiracy to arbitrate implemented by motion picture distributors on movie theaters.⁷ The Court's language indicates that conspiracies to impose arbitration clauses are per se illegal. Since that opinion

5. See *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43 (1930).

6. 282 U.S. 30 (1930).

7. *Id.* at 43.

came down, no scholarship has analyzed the issue of conspiracies to arbitrate.

Part II then presents a typology of conspiracies to arbitrate. Such conspiracies can be primary conspiracies: that is, stand-alone conspiracies untethered to any other illegal agreements among the conspirators. Alternatively, a conspiracy to arbitrate can be a secondary conspiracy when it is part of a larger antitrust conspiracy. In this latter scenario, rivals in a market have already decided to violate antitrust laws, for example, by fixing price. The agreement to fix price is the primary conspiracy; the conspiracy to arbitrate is a secondary conspiracy designed to conceal and protect the primary conspiracy. Part II explains how both primary and secondary conspiracies to arbitrate violate antitrust law.

Part III explores how courts have misapplied arbitration law in ways that make conspiracies to arbitrate profitable and perhaps inevitable in some markets. Prior to the Supreme Court's pro-arbitration decisions, firms had little reason to conspire to impose arbitration clauses on their customers. Now, relying on the false premise that Congress created a federal policy favoring arbitration, federal courts have employed seemingly neutral doctrines in ways that actively enforce conspiracies to arbitrate. For example, courts have compelled antitrust plaintiffs to arbitrate their conspiracy-to-arbitrate claims, which means courts are enforcing—instead of condemning—the very conspiracy that they are supposed to adjudicate.⁸ Courts have also misapplied equitable doctrines and have given retroactive effect to arbitration clauses.⁹ These judicial decisions protect both conspiracies to arbitrate and price-fixing cartels. Part III shows how all of these opinions flow from a misreading of congressional intent regarding arbitration.

Part IV presents a case study of recent litigation involving an alleged conspiracy to arbitrate among banks that issue credit cards. Following a bench trial, a federal judge held, and the Second Circuit affirmed, that the plaintiffs failed to prove an agreement among the defendants to impose arbitration clauses.¹⁰ In reaching this conclusion, the court committed a litany of mistakes and ultimately failed to recognize that it did, in fact, actually find an illegal conspiracy to arbitrate. This Part explains how these errors flowed

8. See *infra* Section III.B.

9. See *infra* Section III.C, III.D.

10. *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 415 (S.D.N.Y. 2014), *aff'd sub nom.*, *Ross v. Citigroup, Inc.*, 630 F. App'x 79 (2d Cir. 2015).

from the court's incorrect belief that Congress intended courts to favor arbitration over litigation.

Part V proposes changes to how courts evaluate conspiracy-to-arbitrate claims. Federal courts are essentially complicit in antitrust violations when they compel compliance with arbitration clauses that are the product of alleged conspiracies. The Supreme Court's rush to encourage and enforce arbitration clauses should not blind lower courts to the possibility that conspiracies to arbitrate are preventing the free market from operating properly to protect consumer interests.

I. THE EVOLUTION OF BINDING ARBITRATION

A. *From Commercial Disputes to Consumer Contracts*

The roots of arbitration lie in commercial disputes between merchants, not disputes involving consumers. Arbitration of business disputes is older than the nation itself.¹¹ Until the early twentieth century, however, pre-dispute agreements to arbitrate were not binding because either party could “repudiate arbitration agreements at any time before the arbitrator's award was made.”¹² The old system of private arbitration needed courts to enforce both the agreements to arbitrate and the decisions of arbitrators—actions that American judges were loath to take because they adhered to the English rule that “traditionally considered irrevocable arbitration agreements as ‘ousting’ the courts of jurisdiction” and, thus, unenforceable.¹³

American courts followed the English rule with vigor until Congress enacted the Federal Arbitration Act (“FAA”) in 1925.¹⁴ The core of the FAA—section 2—states that if a commercial contract provides for private arbitration to settle any contract disputes, then the promise to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁵ The FAA was drafted and championed by business groups, primarily in New York, that wanted to resolve their inter-merchant disputes through private arbitration rather than public

11. James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 747 (2009).

12. See *Southland Corp. v. Keating*, 465 U.S. 1, 32 (1984) (O'Connor, J., dissenting).

13. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974); see, e.g., *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

14. United States Arbitration Act, Pub. L. No. 68-401, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 2 (2012)).

15. 9 U.S.C. § 2 (2012).

litigation.¹⁶ All of the congressional testimony, hearings, and reports demonstrate that the FAA applied only to commercial disputes between merchants.¹⁷ As enacted, the FAA was a relatively modest law that allowed merchants to agree in advance to settle their trade disputes through arbitration. Congress never intended the FAA to apply to consumer contracts or to create any federal policy in favor of arbitration.¹⁸ Nor did Congress intend the FAA to apply to employment contracts.¹⁹

16. Leslie, *supra* note 3, at 302–06.

17. See, e.g., *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Fed. Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before Subcomm. of S. Comm. on the Judiciary, 67th Cong.* 10 (1923) (statement of W. H. H. Piatt, Chairman of the Comm. of Commerce, Trade and Commercial Law, ABA) [hereinafter *Arbitration Hearings*] (providing that the FAA applies to disputes involving “a contract between merchants one with another, buying and selling goods” (emphasis added)).

18. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1089 (9th Cir. 1998) (“Specifically, the legislative history demonstrates that the Act’s purpose was solely to bind merchants who were involved in commercial dealings.”), *abrogated by* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 192–98* (2013) [hereinafter SZALAI, *OUTSOURCING JUSTICE*]; Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 117 (1992) (noting that the writings of the drafter of—and moving force behind—the FAA “reveal[] an intent to devise a remedy entirely for commercial disputes . . . between ‘merchants’”); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 467 (1996) (“The unrebutted legislative history created prior to the FAA’s passage establishes that only disputes arising out of commercial contracts were to be arbitrable; no agreements to arbitrate employment disputes in any industry were to be included.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106–08 (2006) (arguing that legislative hearings of the FAA “make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 75–81 (1997) (analyzing legislative history of FAA and concluding “that enforcement of arbitration clauses was intended to remain within the sphere of the commercial paradigm” of contracts between merchants); Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 310 (1999) (“When Congress passed the FAA in 1925, it did not intend to allow employers or sellers of goods or services to require employees or consumers of such goods or services to resolve civil rights disputes through arbitration rather than in court. Nothing in the wording of the statute or in its legislative history supports such an interpretation.”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636 (2005) (noting that “to the limited extent that the possibility of [business-consumer or employer-employee] arbitration was considered by Congress in 1925, when it passed the FAA, those few who spoke on the issue made clear that they did not view such a use of arbitration as appropriate”); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 992 (1999) (“In the 1920s, most supporters of the FAA and the state arbitration laws intended the new statutes to apply to disputes between members of the same trade association or between participants in a

After Congress enacted the FAA, federal courts initially obeyed Congress's intent and continued to disallow binding arbitration in most contexts. For example, during the mid-twentieth century, the Supreme Court held that pre-dispute arbitration clauses could not reach federal statutory claims, such as securities fraud.²⁰ The non-arbitrability of federal statutory claims extended to antitrust law. Most famously, the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*²¹ held that pre-dispute arbitration agreements could not cover antitrust claims, which had to be decided by federal judges.²² The Second Circuit reasoned, in part, that antitrust law served the public interest and that private arbitration could reduce plaintiffs' incentives to investigate and pursue antitrust

common line of business.”); Imre Stephen Szalai, *Correcting a Flaw in the Arbitration Fairness Act*, 2013 J. DISP. RESOL. 271, 278 (2013) [hereinafter Szalai, *Correcting a Flaw*] (explaining why “the FAA was not intended to cover consumer disputes”).

19. Although this Article focuses mainly on arbitration clauses in the context of consumer contracts, the arguments also apply to employment contracts. Many employers require their employees to submit to mandatory arbitration as a condition of employment. These contract terms fundamentally undermine the rights of workers.

Agreements among employers to force arbitration clauses on their respective employees would violate section 1 of the Sherman Act. *Cf.* *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1079 (D. Colo. 2016) (finding alleged agreement to suppress au pair wages would violate section 1 of the Sherman Act); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1123 (N.D. Cal. 2012) (holding no-poaching agreements among employers violate antitrust law). Some courts do not seem to fully appreciate this. *See, e.g.*, *Drayer v. Krasner*, 572 F.2d 348, 353 (2d Cir. 1978) (“[T]he contention that an agreement among competitors to insist on arbitration clauses in contracts with a category of employees violates the antitrust law seems surprising.”).

The mistakes in the employee-arbitration context flow from the Supreme Court holding that employment disputes are subject to mandatory arbitration. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). Such decisions are wrong as a matter of legislative history because Congress did not intend the FAA to apply to employment contracts. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 40 (1991) (Stevens, J., dissenting) (“[T]he FAA specifically was intended to exclude arbitration agreements between employees and employers.”); Szalai, *Correcting a Flaw*, *supra* note 18, at 277 (“The text of the FAA, its legislative history, and the history behind its enactment, clearly reveal that the FAA was intended to facilitate the arbitration of commercial disputes between merchants, and that labor or employment disputes were expressly removed from the purview of the FAA.”); *see also* SZALAI, *OUTSOURCING JUSTICE*, *supra* note 18, at 191 (“In light of the history of the arbitration reform movement, the *Circuit City* decision is fundamentally flawed.”).

20. *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

21. 391 F.2d 821 (2d Cir. 1968).

22. *Id.* at 827–28.

actions.²³ The *American Safety* doctrine proved influential nationally, and antitrust claims were generally considered to be non-arbitrable.²⁴

In the 1980s, the Supreme Court reimagined a different legislative intent behind the FAA, which the Court claimed had created an “emphatic federal policy in favor of arbitral dispute resolution,”²⁵ pursuant to which “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”²⁶ In 1983, the Court asserted that “[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”²⁷ As a result of this Court-driven expansion of the FAA, antitrust claims, federal securities fraud claims, and RICO claims could be decided in private arbitration,²⁸ despite the public interest at stake.

As the Court initially expanded the reach of arbitration clauses, consumers could invoke two legal doctrines to prevent being forced to arbitrate. First, the unconscionability doctrine makes unconscionable contracts—and unconscionable contract terms—unenforceable. Although unconscionability is a function of state law, the FAA provides that federal courts should not enforce arbitration agreements that violate applicable state law, such as the unconscionability doctrine.²⁹ Second, when an arbitration clause covers federal statutory rights, the Effective Vindication Doctrine provides that the “arbitration of the claim will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum.”³⁰ When the Supreme Court first held that federal antitrust claims were subject to private arbitration, the justices articulated the Effective Vindication Doctrine as a means to ensure that the statutory rights of antitrust plaintiffs were still protected because “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will

23. *Id.*

24. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 620–21 (1985).

25. *Id.* at 631.

26. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

27. *Id.* at 24–25; *see also Mitsubishi*, 473 U.S. at 627 (“[T]he congressional policy manifested in the Federal Arbitration Act . . . requires courts liberally to construe the scope of arbitration agreements covered by that Act”).

28. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (RICO claims); *Mitsubishi*, 473 U.S. at 636 (antitrust claims); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985) (securities claims).

29. *See* 9 U.S.C. § 2 (2012).

30. *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282 (4th Cir. 2007).

continue to serve both its remedial and deterrent function.”³¹ Thus, the Court permitted statutory claims to be removed from public courts only because it assumed plaintiffs could still effectively vindicate their rights in private arbitration.³²

The Supreme Court, however, has effectively eliminated both of these pro-consumer doctrines—the unconscionability defense and the Effective Vindication Doctrine—when an arbitration clause includes a class-action waiver. A class-action waiver requires would-be plaintiffs to neither bring nor participate in class-action litigation against the business with whom the customers entered the contract. Through contracts of adhesion, firms can use arbitration clauses to impose class-action waivers on their customers. Because individual actions may be economically infeasible, these class-action waivers can effectively immunize wrongdoers from scrutiny altogether when the cost of pursuing individual action exceeds the maximum potential damage award.³³ In this situation, no victim will bring even a meritorious claim that is certain to win, and the law-breaking firm gets to keep all of its ill-gotten gains. Given the effects of class-action waivers, a strong argument can be made that arbitration clauses that include class-action waivers are unconscionable and violate the Effective Vindication Doctrine.

Instead, the Supreme Court has held that the Court-created presumption in favor of enforcing arbitration clauses trumps both of these pro-consumer legal doctrines. In *AT&T v. Concepcion*,³⁴ the Supreme Court held that the FAA preempted state statutes and judicial decisions that treated class-action waivers embedded in arbitration clauses as unconscionable.³⁵ Although many states prohibit the enforcement of class-action waivers in traditional contracts without arbitration clauses,³⁶ the Court in *Concepcion* held these laws inapplicable when the class-action waiver resides in an arbitration clause.³⁷ The decision provided a road map to firms wishing to eliminate class actions: put an otherwise unenforceable

31. *Mitsubishi*, 473 U.S. at 636–37.

32. *See id.*

33. *See infra* notes 39–43.

34. 563 U.S. 333 (2011).

35. *Id.* at 341.

36. Leslie, *supra* note 3, at 277–78.

37. *Concepcion*, 563 U.S. at 339, 351 (reasoning that the FAA preempted state laws that considered class-action waivers embedded in arbitration clauses to be unconscionable and, thus, unenforceable).

class-action waiver into an arbitration clause and thereby put the waiver beyond the reach of the unconscionability doctrine.³⁸

In *American Express Co. v. Italian Colors Restaurant*,³⁹ the Supreme Court effectively eliminated the Effective Vindication Doctrine as a means to ensure that victims of illegal business conduct can seek a meaningful remedy.⁴⁰ The *Italian Colors* Court considered whether the Effective Vindication Doctrine precluded an antitrust defendant from enforcing a class-action waiver in an arbitration clause when the cost of pursuing an individual claim could surpass \$1 million while the maximum possible recovery was less than \$40,000.⁴¹ A closely divided Court held that “a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”⁴² Writing for the majority, Justice Scalia claimed that victims of antitrust violations still had a right to pursue their claims in individual arbitration, even if no rational plaintiff would do so because the cost exceeded the maximum recovery.⁴³ By asserting that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim,”⁴⁴ Justice Scalia effectively abolished the Effective Vindication Doctrine as a means to protect plaintiffs from unfair mandatory arbitration clauses.⁴⁵ Businesses can now use arbitration clauses to impose class-action waivers on their customers, which makes individual claims against a law-breaking firm too uneconomical to pursue.

B. *The Growth of Pro-Defendant Arbitration Clauses in Consumer Contracts*

The Supreme Court’s pro-arbitration jurisprudence encouraged businesses to compel their customers to waive their access to court. In many industries, most of the major firms include mandatory arbitration clauses in their consumer contracts.⁴⁶ For example, the

38. Leslie, *supra* note 3, at 292–95.

39. 133 S. Ct. 2304 (2013).

40. *See id.* at 2307, 2310.

41. *Id.* at 2308.

42. *Id.* at 2307.

43. *See id.* at 2311.

44. *Id.* at 2309.

45. Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 11–12 (2015).

46. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) § 1.4.1, at 9–10 (2015) (finding that most firms in the banking,

Consumer Financial Protection Bureau found that 98.5% of licensed storefronts for payday loans and that “[s]even of the eight largest facilities-based mobile wireless providers (87.5%), covering 99.9% of subscribers,” imposed arbitration clauses on their customers.⁴⁷ As a result, “[t]ens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.”⁴⁸ Because almost all of these clauses contain class-action waivers,⁴⁹ this can make it hard—if not impossible—for consumers to protect their right to litigate.

The inability of consumers to avoid arbitration clauses can fundamentally undermine laws designed to protect consumer interests.⁵⁰ Mandatory arbitration clauses favor defendants in a number of important ways. The calculus of arbitration clauses is far different in consumer contracts than commercial contracts. In relationships between commercial parties, buyers and sellers are similarly likely to be the plaintiff or defendant. In consumer litigation, the probability of litigation positions is highly asymmetrical: the seller is far more likely to be the defendant in any dispute, and the consumer the plaintiff. As a result, if businesses can structure their arbitration clauses to include pro-defendant terms, businesses can channel customer complaints into arbitration and then undermine many aspects of consumer protection law.

1. Pro-Defendant Process

By forcing consumer-initiated disputes into arbitration, businesses can reduce their likelihood of liability because the arbitration process favors defendants in consumer litigation in three important ways. First, arbitration generally provides for less discovery

credit card, prepaid card provider, payday loan, private student loan, and mobile wireless provider industries included arbitration clauses in contracts).

47. *Id.* § 2.3, at 7; *see also id.* § 2.3.4 (detailing payday loan industry’s use of arbitration clauses); *id.* § 2.3.6 (detailing mobile wireless providers’ use of arbitration clauses).

48. *Id.* § 1.4.1, at 9.

49. *Id.* § 1.4.1, at 10 (“Across each product market, 85–100% of the contracts with arbitration clauses—covering close to 100% of market share subject to arbitration in the six product markets studied—include such no-class arbitration provisions.”).

50. *See* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052, 3082 (2015) (“[I]f exculpation is buried in the fine print of a maze of difficult-to-understand procedural provisions, then the result is private legal reform largely removed from public scrutiny as well as judicial scrutiny.”); *see also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 *U. ILL. L. REV.* 371, 376 (2016) (“For the entire categories of cases that are ushered into [arbitration]—from consumer law, to employment law, to much of antitrust law—common law doctrinal development will cease.”).

than traditional litigation. The parties in arbitration have less access to depositions, interrogatories, document requests, motions to compel, third-party documents and testimony,⁵¹ and foreign-based evidence.⁵² Limited discovery generally favors the defendants in consumer-initiated litigation because consumers are more likely to need the defendants' documents to prove their case than the defendants are going to need any documents from the consumers to mount a defense.⁵³ Furthermore, arbitration may empower defendants to simply refuse to produce damning documents. Because arbitrators are generally less aggressive regarding discovery and federal courts defer to arbitrators in discovery disputes,⁵⁴ defendants in arbitration may be more emboldened to withhold incriminating documents.⁵⁵

Second, the adjudication and review procedures in arbitration may favor defendants. Arbitrators can grant the equivalent of summary judgment or a motion to dismiss against a plaintiff, and the plaintiff has no meaningful recourse.⁵⁶ Even an arbiter's mistakes of law may be insufficient to justify judicial correction of an arbiter's

51. Lemley & Leslie, *supra* note 45, at 14–17; see Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. L. 395, 410 (1993) (noting “the difficulties in acquiring evidence from unwilling third parties” in antitrust arbitration); Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counseling*, 19 ANTITRUST 31, 32 (2004) (“[S]ome arbitration rules do not permit depositions Similarly, arbitration rules can be selected that do not allow document discovery that is as broad as that permitted under federal and state procedural rules”); Thomas Campbell, Roxane Busey & Peter Koch, *Arbitrating Antitrust Claims—The Road Less Traveled*, 19 ANTITRUST 8, 8 (2004) (“[D]epositions, interrogatories, document requests, . . . motions to compel, . . . [and] third-party discovery . . . are generally disfavored [in arbitration].”); Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 464 n.66 (2014) (“For example, the American Arbitration Association (AAA) Healthcare Payor Provider Arbitration Rules . . . limit discovery to one deposition per party unless ordered by the arbitrator.”); Elizabeth B. McCallum & R. Mark McCareins, *Arbitration Procedures: The Rules of the Road in Arbitrating Antitrust Disputes*, 19 ANTITRUST 15, 18 (2004) (“The circuits are split on whether the arbitrators have authority under the FAA to order third-party production of evidence before the arbitration hearing”); see also *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71–73 (S.D.N.Y. 1995), *abrogated on other grounds by* *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

52. Baker & Stabile, *supra* note 51, at 411 (“The problem of third-party discovery in arbitration is generally more complex in the international context.”).

53. *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 7200711, at *3 (E.D. Pa. Oct. 29, 2004) (noting that “in antitrust actions, . . . ‘the proof is largely in the hands of the alleged conspirators’” (quoting *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 95 (3d Cir. 1988))).

54. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 43 (1st Cir. 2006).

55. Lemley & Leslie, *supra* note 45, at 16.

56. See McCallum & McCareins, *supra* note 51, at 19.

errors.⁵⁷ Although judicial review of arbitration decisions is theoretically possible, it is functionally non-existent.⁵⁸ Even when an arbitrator's mistakes are dispositive, courts treat arbitration decisions as "final and effectively unappealable."⁵⁹ Coupled with the fact that many arbitrators are liable to be biased in favor of business defendants,⁶⁰ the absence of a meaningful appeals process is particularly troubling.

Third, private arbitration is, by definition, private. The confidentiality of the process makes it harder to hold defendants accountable in the court of public opinion. More importantly, confidentiality provisions likely prevent plaintiffs from learning about the arguments and outcomes of previous arbitration proceedings against the defendants. Indeed, some arbitration provisions explicitly forbid coordination and information sharing among private plaintiffs.⁶¹ All of this gives the defendant, who is a repeat player⁶² and can learn much from its previous arbitrations, an informational advantage over individual plaintiffs.

2. Pro-Defendant Terms

In addition to a process that generally favors defendants, businesses often write their arbitration clauses to include specific terms that are designed to negate many pro-plaintiff aspects of consumer protection laws. Despite the fact that many judges would find such terms unenforceable in court-based litigation, arbitrators may enforce these anti-plaintiff terms.⁶³ This section reviews several

57. See *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672, 675 (8th Cir. 2004) ("[E]rrors of law are not reviewable. Even if we would have reached a different conclusion, we cannot substitute our judgment for that of the arbitrators.").

58. Lemley & Leslie, *supra* note 45, at 20–22; McCallum & McCareins, *supra* note 51, at 21 ("Thus, the arbitrator's "'improvident, even silly, fact-finding'" does not provide a basis for a reviewing court to refuse to enforce the award." (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)).

59. Buffon & Wolson, *supra* note 48, at 33; see SZALAI, *OUTSOURCING JUSTICE*, *supra* note 18, at 7 ("Courts have described the judicial review of arbitrator's awards as 'one of the narrowest standards of judicial review in all of American jurisprudence,' and even if an arbitrator was wrong in interpreting or applying the law, the arbitrator's flawed award will still stand." (footnotes omitted) (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005))); John J. Finn, *Private Arbitration and Antitrust Enforcement: A Conflict of Policies*, 10 B.C. INDUS. & COM. L. REV. 406, 413 (1969).

60. Lemley & Leslie, *supra* note 45, at 17–20.

61. Leslie, *supra* note 3, at 290–91.

62. See generally Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999) (arguing that alternative dispute resolution participants with more resources and experience have more favorable outcomes).

63. Leslie, *supra* note 3, at 282.

categories of terms in arbitration clauses that circumvent pro-plaintiff laws.

Damage Limitations. Many consumer laws provide for more than compensatory damages. Exemplary damages, such as punitive damages, can deter future violations of the law.⁶⁴ To emphasize the importance of enhanced-damages provisions, many statutes preclude parties from waiving them.⁶⁵ Independent of statutory prohibitions, state courts may decline to enforce contract provisions that purport to prohibit money damages altogether.⁶⁶ Many firms have sought to evade such laws and rulings by including damage-limitation provisions in their arbitration clauses, which often prohibit punitive damages, incidental damages, or any other damages greater than simple compensatory damages.⁶⁷ While some arbitration clauses explicitly cap damages,⁶⁸ others strip arbiters of any “authority to award any punitive or exemplary damages” or “extra contractual damages of any kind”⁶⁹ Many of these contractual damage-limitation provisions would be unenforceable in court, but they may be enforced in arbitration.⁷⁰ At least some judges have acknowledged this asymmetry that allows firms to use arbitration to limit damages in ways that courts would not countenance.⁷¹

64. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

65. See, e.g., *Capital Equip., Inc. v. CNH Am., LLC*, 471 F. Supp. 2d 951, 957 (E.D. Ark. 2006); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 154 (Cal. Ct. App. 1997); *Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 493 (Fla. 2011).

66. See, e.g., *Health Net of Cal., Inc. v. Dep’t of Health Servs.*, 6 Cal. Rptr. 3d 235, 237–38 (Cal. Ct. App. 2003) (invalidating an insurance contract clause that prohibited the recovery of damages).

67. CONSUMER FIN. PROT. BUREAU, *supra* note 46, § 2.5.6, at 47 (“Damages limitations in prepaid card contracts with arbitration clauses were more frequent, and almost always precluded recovery of both punitive and consequential damages.”); Leslie, *supra* note 3, at 284–86 (collecting cases); Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1025 (1996).

68. See, e.g., *Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 67–68 (S.D.N.Y. 2012).

69. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405 (2003); *accord* *Captain Bounce, Inc. v. Bus. Fin. Servs., Inc.*, No. 11–CV–858 JLS (WMC), 2012 WL 928412, at *2 (S.D. Cal. Mar. 19, 2012) (“The arbitrator at such arbitration shall not be entitled to award punitive damages to any party, and the costs and fees of such arbitration shall be borne by the losing party.”).

70. Leslie, *supra* note 3, at 284–86; see, e.g., *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083, 1085–86 (8th Cir. 2001) (allowing arbiter to determine enforceability of a damage-limitation provision).

71. See *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 800 (8th Cir. 2004).

Anti-Injunction Terms. Injunctive relief plays an important role in many areas of consumer law. Judges have the inherent power to enjoin future violations of the law and also to require defendants to remedy the effects of their prior violations. Although courts will not enforce contractual provisions that preemptively waive a customer or employee's right to injunctive relief,⁷² some businesses include anti-injunction language in their arbitration clauses.⁷³ Arbiters may be more likely to enforce contractual provisions that prohibit injunctive relief.⁷⁴ Even in the absence of anti-injunction language, funneling disputes into arbitration reduces the likelihood of law-breaking firms facing injunctive measures because arbiters lack the authority to issue injunctions⁷⁵ or the competence to devise and enforce effective injunctive relief.

Fee-Shifting Provisions. Some consumer laws contain pro-plaintiff one-way fee-shifting provisions, which means that a successful plaintiff can recover attorneys' fees but a successful defendant cannot.⁷⁶ Such provisions encourage plaintiffs to bring colorable claims, especially those with low compensatory damages that would otherwise render a lawsuit too uneconomical to bring.⁷⁷ Firms likely to be defendants in litigation have attempted to blunt pro-plaintiff fee-shifting provisions by trying to contract around them, but many courts have rejected such contractual evasions of the law.⁷⁸

72. Leslie, *supra* note 3, at 286.

73. Norfolk S. Ry. Co. v. Fla. E. Coast Ry., LLC, No. 3:13-cv-576-J-34JRK, 2014 WL 757942, at *2 (M.D. Fla. Feb. 26, 2014) (noting arbitration provision stating that "the arbitrator . . . will not issue injunctive relief").

74. See Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform" Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, 472 (2015) ("[A]nti-reform' provisions . . . prohibit an individual arbitral claimant from seeking to end a practice, change a rule, or enjoin an act that causes injury to itself and to similarly-situated non-parties.").

75. Gilles & Sebok, *supra* note 51, at 465 ("[B]ecause arbitrators lack the authority to enjoin ongoing wrongful activity, each claimant bringing a separate claim has no overall impact on policy or practices that have widespread effect.").

76. See, e.g., 15 U.S.C. § 1640 (2012); Kirby v. Immoos Fire Prot., Inc., 140 Cal. Rptr. 3d 173, 180 (Cal. Ct. App. 2012) (referring to "one-way fee-shifting provision" in California Labor Code section 1194).

77. Leslie, *supra* note 3, at 287; see Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 548–49 (S.D.N.Y. 2011), *rev'd on other grounds*, 726 F.3d 290 (2d Cir. 2013).

78. See, e.g., Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 463 (9th Cir. 2014); *In re* Checking Account Overdraft Litig., 485 F. App'x 403, 406 (11th Cir. 2012) (finding fee-shifting provision unconscionable because it required a "customer to pay the bank's costs in any dispute between the customer and the bank regardless of who prevails"); Delta Funding Corp. v. Harris, 912 A.2d 104, 112 (N.J. 2006); see also Byram Concretanks, Inc. v. Warren Concrete Prod. Co. of N.J., 374 F.2d 649, 651 (3d Cir. 1967) ("We hold that in the absence of specific legislative authorization attorneys' fees may not be awarded to defendants in private anti-trust litigation."); *LaCoursiere v. Camwest Dev.*,

Undeterred, firms have tried to circumvent pro-plaintiff fee-shifting laws by drafting their arbitration clauses to preclude all fee shifting,⁷⁹ to mandate two-way “loser pays” fee shifting,⁸⁰ or even to impose pro-defendant, one-way fee shifting such that only the successful defendant can recover costs.⁸¹ Such provisions can deter plaintiffs from bringing meritorious litigation.⁸² While courts are prone to reject such attempts as unconscionable,⁸³ some courts defer to arbiters on these matters.⁸⁴

Truncated Statutes of Limitations. Firms may also use arbitration clauses to shorten statutes of limitations. Many consumer protection laws have relatively generous statutes of limitations,⁸⁵ and several states prohibit contracting parties from shortening the statutes of limitations.⁸⁶ In contrast, other states grant parties some ability to

Inc., 339 P.3d 963, 970 (Wash. 2014) (en banc) (citing cases finding pro-defendant one-way fee shifting unconscionable).

79. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) (“The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails.”); *Gatton v. T-Mobile USA, Inc.*, No. SACV 03-130 DOC, 2003 WL 21530185, at *1 (C.D. Cal. Apr. 18, 2003) (“[E]ach party will pay the fees and costs of its own counsel, experts and witnesses . . .”).

80. See, e.g., *Captain Bounce, Inc. v. Bus. Fin. Servs.*, No. 11-CV-858-JLS (WMC), 2012 WL 928412, at *2 (S.D. Cal. Mar. 19, 2012) (“[T]he costs and fees of such arbitration shall be borne by the losing party.”); see also *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109, 113 (3d Cir. 2012); Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 859 (2012) (discussing examples of “loser pays” fee shifting).

81. See, e.g., *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499–500 (Cal. Ct. App. 2012) (finding arbitration clauses unconscionable, in part, because they “require[d] plaintiffs to pay any attorneys’ fees incurred by [the defendant] but impose[d] no reciprocal obligation on [the defendant]”).

82. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 635 (2012) (noting that fee-shifting provisions can chill plaintiffs from bringing suit because the suit’s “financial burdens [would be] so prohibitive as to deter the bringing of claims”); see also *Delta Funding Corp.*, 912 A.2d at 112 (“The prospect of having to shoulder all the costs of arbitration could chill . . . consumers from pursuing their statutory claims through mandatory arbitration.”).

83. See *supra* note 78.

84. See *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 232 (Tex. 2014) (holding that the issue of unconscionability of fee-shifting provision is for the arbiter to decide).

85. See, e.g., 15 U.S.C. § 1679i (2012) (providing that the Credit Repair Organizations Act has a five-year statute of limitations).

86. See ALA. CODE § 6-2-15 (West, Westlaw through 2017 Reg. Sess.) (“[A]ny agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void.”); FLA. STAT. ANN. § 95.03 (West 2017) (“Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.”); *In re*

contractually truncate the applicable statute of limitations,⁸⁷ but only if the contractually imposed limitations period is not “unreasonably short.”⁸⁸ Courts may refuse to enforce contractually-truncated limitations periods that are too short, treating the contract provision as substantively unconscionable.⁸⁹ Some firms try to use arbitration to avoid litigating in courts before judges who would invalidate a contract provision that significantly truncates the applicable statute of limitations.⁹⁰ Arbiters may have more latitude and willingness to enforce contractually shortened statutes of limitations.⁹¹ When defendants are able to truncate statutes of limitation, lawbreakers may prevent their victims from pursuing meritorious claims.

Class-Action Waivers. Arbitration clauses increasingly contain class-action waivers. In its recent report on arbitration clauses in the financial sector, the Consumer Financial Protection Bureau found that “[n]early all the arbitration clauses studied include provisions

Cotton Yarn Antitrust Litig., 505 F.3d 274, 287 n.8 (4th Cir. 2007) (“South Carolina law prohibits contractual shortening of statutes of limitation.”); *Honeywell, Inc. v. Ruby Tuesday, Inc.*, 43 F. Supp. 2d 1074, 1078 (D. Minn. 1999) (describing shortening of statutes of limitations as “illegal per se”).

87. *See, e.g.*, *Sanders v. Comcast Cable Holdings, LLC*, No. 3:07-cv-918-J-33HTS, 2008 WL 150479, at *12 (M.D. Fla. Jan. 14, 2008); *Blue Shield of Cal. Life & Health Ins. Co. v. Superior Court*, 120 Cal. Rptr. 3d 713, 720 (Cal. Ct. App. 2011); *Wilson Fertilizer & Grain, Inc. v. ADM Milling Co.*, 654 N.E.2d 848, 853 (Ind. Ct. App. 1995); *Nez v. Forney*, 1989-NMSC-074, ¶ 7–8, 109 N.M. 161, 783 P.2d 471.

88. *Bd. of Supervisors v. Sampson*, 369 S.E.2d 178, 180 (Va. 1988) (permitting parties to alter a statute of limitations “if the contractual provision is not against public policy and if the agreed time is not unreasonably short”); *see Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003) (“We recognize that a provision limiting the time to bring a claim or provide notice of such a claim to the defendant is not necessarily unfair or otherwise unconscionable. But such a time period must still be reasonable.”); *Hambrech & Quist Venture Partners v. Am. Med. Int’l, Inc.*, 46 Cal. Rptr. 2d 33, 43 (Cal. Ct. App. 1995) (“As for shortening the limitations period, the courts will enforce the parties’ agreement provided it is reasonable.”).

89. *Zaborowski v. MHN Gov’t Servs., Inc.*, 601 F. App’x 461, 463 (9th Cir. 2014) (“[T]he contract’s sixth-month limitations period is substantively unconscionable.”); *see also Shahin v. I.E.S. Inc.*, 988 N.E.2d 873, 875 (Mass. App. Ct. 2013) (“The limitations period set out in the contract is one year from the date of the contract The limitations period thus expired one year from the date of the contract—regardless of the date of any alleged breach or its discovery [I]t is therefore invalid and unenforceable.”).

90. *Leslie*, *supra* note 3, at 284.

91. *See Lemley & Leslie*, *supra* note 45, at 13–22 (describing arbiters’ wide discretion and potential bias when applying law); Edward J. Underhill, *Statutes of Limitation and Arbitration: Limiting Your Client’s Exposure*, 101 ILL. B.J. 244, 244 (2013) (“Contrary to what many lawyers think, it’s not safe to assume general statutes of limitation automatically apply to Illinois arbitration claims. That’s why you should consider including a clause limiting your client’s exposure in your arbitration agreements.”).

stating that arbitration may not proceed on a class basis.”⁹² These waivers often deny individual victims of illegal conduct any remedy because “consumers almost never initiate individual claims against companies in arbitration.”⁹³ Thus, arbitration clauses with class-action waivers can effectively eliminate the defendant’s liability outright.⁹⁴ While state courts may refuse to enforce class-action waivers in litigation because of the Supreme Court’s *Concepcion* opinion, state judges are powerless to stop the enforcement of arbitration clauses that require the arbiter to enforce the class-action waiver.⁹⁵ Similarly, federal judges must defer to class-action waivers if embedded in an arbitration clause.

In sum, arbitration clauses today bear little resemblance to the arbitration clauses of the 1920s, when Congress enacted the FAA. Businesses appear less interested in using arbitration to settle their inter-merchant disputes⁹⁶ and more interested in using arbitration clauses to deny their customers meaningful access to the court system.⁹⁷

II. CONSPIRACIES TO ARBITRATE

What explains the growth of arbitration clauses? The proliferation of arbitration clauses could be the result of firms independently realizing the pro-business benefits of mandatory arbitration and, consequently, unilaterally inserting arbitration clauses into their consumer contracts. No business wants to be a

92. CONSUMER FIN. PROT. BUREAU, *supra* note 46, § 1.4.1, at 10 (“Across each product market, 85–100% of the contracts with arbitration clauses—covering close to 100% of market share subject to arbitration in the six product markets studied—include such no-class arbitration provisions.”).

93. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 98 (2012).

94. Lemley & Leslie, *supra* note 45, at 37.

95. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340, 357 (2011).

96. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (finding that, for firms that impose arbitration clauses on their customers and employees, “less than 10% of their negotiated non-consumer, non-employment contracts included arbitration clauses”); see also MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 280 n.26 (2013) (interpreting the Eisenberg, Miller & Sherwin study as “provid[ing] evidence that avoiding class actions is the principal purpose of many arbitration clauses”).

97. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at 22 (“Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.”).

defendant in state or federal court. Mandatory arbitration provides a way for firms to avoid court altogether, even if they have broken the law. Thus, it may be tempting for businesses to simply require all customers to submit to arbitration. However, given the anti-consumer nature of arbitration clauses, a firm that unilaterally imposes mandatory arbitration may lose customers to other competitors who do not require mandatory arbitration. Firms want to attain the pro-business advantages of mandatory arbitration without losing business to rivals. The solution may be to agree with one's competitors that all of the firms in the relevant market will insert arbitration clauses in their consumer contracts. This Part discusses the legality and dynamics of such conspiracies to arbitrate.

A. *The Illegality of Early Efforts to Impose Arbitration Through Collusion*

The Supreme Court first analyzed conspiracies to arbitrate in 1930 in *Paramount Famous Lasky Corp. v. United States*.⁹⁸ Ten movie distributors, responsible for distributing sixty percent of the films exhibited by 25,000 theater owners (referred to as “exhibitors”), agreed to impose a standard contract on all exhibitors.⁹⁹ Section 18 of this standard contract provided that “each party shall submit any controversy that may arise to a board of arbitration”¹⁰⁰ Consequently, the distributors agreed with each other to require mandatory arbitration for all disputes, forcing exhibitors to preemptively waive their right to a jury trial for any contractual disputes.¹⁰¹ As an enforcement mechanism, the distributor-drafted standardized contract provided that if any exhibitor refused to arbitrate or to comply with an arbitration award to any one distributor, then *all* of the distributors were required to demand security deposits from that exhibitor.¹⁰² Through this provision, the distributors could collectively enforce the arbitration clauses of individual distributors. The Department of Justice challenged section 18 as a violation of section 1 of the Sherman Act.¹⁰³ In no uncertain

98. 282 U.S. 30 (1930).

99. *Id.* at 36–37 (“Under an agreement amongst themselves Appellant Distributors will only contract with Exhibitors according to the terms of the Standard Exhibition Contract . . .”).

100. *Id.* at 37–38.

101. *Id.*

102. *Id.* at 40.

103. *Id.* at 36; see 15 U.S.C. § 1 (2012) (condemning agreements that unreasonably restrain trade).

terms, the Supreme Court held the distributors' agreement to impose mandatory arbitration on the exhibitors violated antitrust law.¹⁰⁴

In condemning section 18 of the standardized contracts, the Supreme Court in *Paramount Famous Lasky* appeared to hold that conspiracies to arbitrate are per se illegal. The per se rule in antitrust law is categorical. When an agreement falls in a per se category, it is condemned without proof that the particular agreement unreasonably restrains trade.¹⁰⁵ The per se rule applies to categories of restraint "that would always or almost always tend to restrict competition"¹⁰⁶ and that "lack . . . any redeeming virtue . . ."¹⁰⁷ Traditional categories of "per se illegality include horizontal price fixing among competitors, group boycotts, and horizontal market division . . ."¹⁰⁸ If their agreement falls in a per se category, antitrust defendants are precluded from arguing that their agreement is justified by a legitimate business reason, such as the industry-specific context.¹⁰⁹

Several aspects of the *Paramount Famous Lasky* opinion point to the Court using a per se approach. For example, the Court agreed with the government's characterization that the agreement among distributors had "the necessary and inevitable tendency . . . to produce material and unreasonable restraint of interstate commerce in violation of the Sherman Act."¹¹⁰ This is the lexicon of per se illegality in antitrust law. Furthermore, the Court concluded that the distributors' agreement "*necessarily* and directly tends to destroy 'the kind of competition to which the public has long looked for protection.'"¹¹¹ This, again, is similar to the language that modern courts use when condemning an agreement as per se illegal.¹¹²

104. See *Paramount Famous Lasky*, 282 U.S. at 43.

105. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 33 (1984) (O'Connor, J., concurring in the judgment) ("Under the usual logic of the *per se* rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect."), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

106. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289–90 (1985) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979)).

107. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

108. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1334 (11th Cir. 2010).

109. See *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988).

110. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 41 (1930).

111. *Id.* at 43 (emphasis added) (quoting *United States v. Am. Oil Co.*, 262 U.S. 371, 390 (1923)).

112. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977) ("*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."). In contrast, vertical restraints do not fall within the per se rule because

The *Paramount Famous Lasky* opinion's per se approach to conspiracies to arbitrate is also reflected in the Court's refusal to credit any of the defendants' industry-specific justifications for why the conspiracy to arbitrate at issue did not unreasonably restrain trade. Specifically, the Court held that the fact that the standard contract and its arbitration provision were the product of "six years of discussion and experimentation" could not render valid a combination that "unduly restrain[s] competition."¹¹³ The Court both conceded and rejected the possibility that the conspiracy to arbitrate improved the efficiency of the motion picture industry.¹¹⁴ The rejection of industry-specific justifications is a hallmark of antitrust law's per se rule.¹¹⁵ Similarly, the Court stated that the defendants' "good motives" were not relevant and provided no defense.¹¹⁶ This decision again mirrors the per se rule, as courts only consider the defendants' intent when applying the rule of reason, but not when the agreement falls in a per se category.¹¹⁷ In sum, *Paramount Famous Lasky* treated conspiracies to arbitrate as per se illegal.¹¹⁸

"vertical agreements do not necessarily threaten an injury to competition." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012).

113. *Paramount Famous Lasky*, 282 U.S. at 43 (quoting *E. States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 613 (1914)).

114. *Id.* ("It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal.")

115. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (stating that agreements falling in a per se category are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 909 (6th Cir. 2003) ("To reiterate, the virtue/vice of the per se rule is that it allows courts to presume that certain behaviors as a class are anticompetitive without expending judicial resources to evaluate the actual anticompetitive effects or procompetitive justifications in a particular case.")

116. *Paramount Famous Lasky*, 282 U.S. at 44 (quoting *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912)).

117. XI HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1911, at 266 (1998) ("[U]nder the per se rule power, intent, effect, and most defenses are irrelevant; under the rule of reason all are essential."); see, e.g., *Feminist Women's Health Ctr., Inc. v. Mohammad*, 415 F. Supp. 1258, 1262 (N.D. Fla. 1976) ("[E]vidence of the good intentions of defendants has historically been deemed irrelevant in per se cases.")

118. Some courts and commentators have recognized that the *Paramount Famous Lasky* Court took a per se approach. See *U.S. Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 789 (7th Cir. 1981) (characterizing *Paramount Famous Lasky* as a per se case, "involv[ing] conduct that can only be anticompetitive," namely "cartelization to require acceptance of a standard form contract"); *id.* at 794 (Bauer, J., dissenting) ("The courts clearly have the requisite experience with group boycotts to hold that they are per se unlawful.") (citing, among other cases, *Paramount Famous Lasky*); see Joseph P. Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 688 (1979) ("The Court in *Paramount* did not discuss whether the per se rule

Even without the precedent of *Paramount Famous Lasky*, a conspiracy to arbitrate satisfies the criteria for per se condemnation. Such conspiracies “always or almost always tend to restrict competition”¹¹⁹ because with a conspiracy to arbitrate in place, rivals do not compete with respect to this important contract term.

should be extended to include concerted refusals to deal; its decision, however, is difficult to justify solely under the rule of reason. There was virtually no discussion of the nature of the injury, either to the parties or to the public, of how competition would be affected, or even of why the practice was ‘unreasonable.’ In short, the Court was unwilling to consider the potential benefits of these agreements.”); see also Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015, 1024 (1986) (“Although the *Paramount Famous Lasky* decision did not contain language terming group refusals to deal per se illegal, the Court refused to give detailed consideration to the reasonableness of the restraints and failed to discuss why the contract at issue was illegal or how any economic injury occurred.”).

Some lower courts, however, have not treated *Paramount Famous Lasky* as a per se case. See, e.g., *De Jong Packing Co. v. United States Dep’t of Agric.*, 618 F.2d 1329, 1335 n.8 (9th Cir. 1980) (“The Supreme Court did not indicate in *Paramount Famous Lasky Corp.* or *First National Pictures, Inc.*, whether it was proceeding under the rule of reason or whether it deemed the practices in question illegal per se.”). This misinterpretation stems from courts improperly obsessing on the phrase “per se illegality,” which the Court did not use. Although *Paramount Famous Lasky* did not use the phrase “per se illegal,” that is neither surprising nor dispositive. The case was decided in 1930, and the Supreme Court did not explicitly refer to price-fixing agreements as per se illegal until 1940. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), hinted at per se illegality by denying defendants the ability to argue that price fixing is legal if the fixed price is reasonable, but the Court did not employ the “per se” terminology. *Id.* at 397–98. While not using the phrase “per se” itself, see *id.*, the Court nonetheless used language that has become the hallmark of per se illegality.

Other per se cases of the era did not explicitly say “per se” either. For example, the *Paramount Famous Lasky* Court cited *Eastern States Lumber Ass’n v. United States*, 234 U.S. 600 (1914), a decision that treated a concerted refusal to deal as per se illegal. *Id.* at 614. Like *Paramount Famous Lasky*, the *Eastern States* opinion did not use the phrase “per se illegality,” but *Eastern States* is nonetheless considered to be a per se case. See, e.g., *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 (1st Cir. 1993) (citing *Eastern States* as an example of behavior warranting “per se condemnation”); *Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 600 (7th Cir. 1984) (describing *Eastern States* as “the Supreme Court’s first case holding that a boycott was illegal per se”); *M&H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 977 (1st Cir. 1984) (describing *Eastern States* as holding that “horizontal collaboration among lumber retailers [is] considered per se illegal”); *E.A. McQuade Tours, Inc. v. Consol. Air Tour Manual Comm.*, 467 F.2d 178, 186 (5th Cir. 1972) (citing *Eastern States* as a “case[] applying per se illegality to collective refusals to deal”).

119. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289–90 (1985) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979)).

Certainly, a conspiracy to arbitrate lacks “any redeeming virtue.”¹²⁰ Even if an individual arbitration clause is defensible,¹²¹ there is still no justification for conspiring to impose such clauses throughout a market.¹²²

Therefore, because the *Paramount Famous Lasky* Court applied a per se approach, conspiracies to arbitrate are categorically illegal. A conspiracy to arbitrate is considered unreasonably anticompetitive, as a matter of law. Once the plaintiff proves the agreement, antitrust liability is established.¹²³

After the *Paramount Famous Lasky* Court condemned conspiracies to arbitrate as violating the Sherman Act, the topic essentially went dormant for several decades. This is not surprising given the limited reach of arbitration clauses in mid-century America. Mandatory arbitration clauses were not generally found in consumer contracts, and statutory claims were excluded from arbitration.¹²⁴ It would make little sense to commit a per se violation of the Sherman Act by conspiring to collectively impose contract terms that were likely unenforceable.

120. *Cf.* *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (noting per se rule applies to agreements that “because of their pernicious effect on competition and *lack of any redeeming virtue* are conclusively presumed to be unreasonable” (emphasis added)).

121. Arguably, they are not defensible when they are laden with anti-consumer provisions imposed on customers through contracts of adhesion.

122. If such clauses are as useful or valuable as their proponents claim, firms could introduce them—and consumers would accept them—without the need for a conspiracy.

123. Even if conspiracies to arbitrate do not qualify for per se illegality or quick-look condemnation, courts should still find them unreasonable under the rule of reason. Rivals in a market are expected to compete on both contract terms and the more traditional areas of antitrust concern—price, quality, and service. Whenever sellers agree to impose similar terms on their customers, regardless of whether those terms affect price or other aspects of the contractual relationship, the sellers injure competition and potentially violate antitrust law. In condemning the conspiracy to arbitrate among movie distributors, the Supreme Court in *Paramount Famous Lasky* stated, “to establish violation of the Sherman Antitrust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement.” 282 U.S. 30, 44 (1930). Thus, the members of an arbitration conspiracy may continue to compete in terms of price, quality, and service, but that does not *save* a horizontal agreement to impose arbitration clauses. Agreements among rivals to impose arbitration clauses on their customers necessarily restrain competition, and they are not excused by a legitimate business justification. While defendants may proffer the alleged benefits of arbitration—speed, efficiency, and informality—as their legitimate business justification, courts should reject any such defense; it is the *agreement* among rivals—not the arbitration clause itself—that requires a justification. Competitors have no legitimate reason to conspire to impose these anti-consumer terms in their contracts. Thus, the traditional rule of reason is a longer road, but it leads to the same destination: illegality of conspiracies to arbitrate.

124. *See supra* Section I.A.

The Supreme Court's arbitration jurisprudence of late, however, has fundamentally changed the reach and value of arbitration clauses to businesses intent on breaking the law. Businesses can now force all manner of disputes—contractual, statutory, and constitutional—into arbitration, denying consumers access to courts. Exacerbating the problem, these businesses can then make arbitration infeasible through class-action waivers. The Supreme Court's re-imagining of the purpose and reach of the FAA has made conspiracies to arbitrate potentially irresistible.¹²⁵ Because businesses can now use arbitration clauses to block consumer access to courts, the following Sections discuss how conspiracies to arbitrate have become rational in a way that they were not in the first half century after *Paramount Famous Lasky* was decided.

B. Conspiracy to Arbitrate as a Primary Conspiracy

A conspiracy to arbitrate can be either a primary conspiracy or a secondary conspiracy. In a primary conspiracy to arbitrate, the manufacturers have no underlying or pre-existing illegal conspiracy. They have not agreed to fix prices or allocate customers. They have conspired only to impose arbitration clauses. As presented by the Court, the agreement condemned in *Paramount Famous Lasky* represented a primary conspiracy to arbitrate.¹²⁶

A primary conspiracy to arbitrate can involve two distinct sets of agreements. First, rivals could agree only that every firm in a market will impose mandatory arbitration clauses on their customers. Second, firms could conspire with respect to the terms in their arbitration clauses. For example, the distributors in *Paramount Famous Lasky* colluded to impose a multilateral enforcement mechanism for their identically worded arbitration provisions.¹²⁷ More importantly, today, in the wake of *Concepcion* and *Italian Colors*, rival firms might agree that all of their arbitration clauses will include class-action waivers. This collusion would make individual arbitration so uneconomical that victims of clear legal offenses may find it pointless to bring suit. If the class-action waivers are not sufficient to prevent individual plaintiffs from pursuing arbitration, rivals could also agree to include specific terms in their arbitration clauses that preclude injunctive

125. See *supra* notes 25–45 and accompanying text.

126. See 282 U.S. at 37–41.

127. *Id.* at 40–41.

relief, prevent pro-plaintiff fee shifting, limit damages, and shorten the statute of limitations.¹²⁸

1. The Motive to Conspire to Arbitrate

The firms in a market are collectively better off if every firm imposes an arbitration clause on its customers. From an economic perspective, most firms would prefer to force their customers into mandatory arbitration—especially if doing so would allow the firms to eliminate class actions, cap damages, limit discovery, and truncate the statutes of limitation. Even if firms in the same market compete on price and product quality, they may share a communal incentive to impose arbitration agreements on all of their customers.

A firm may want the protection of an arbitration clause but worry that imposing such a clause unilaterally will cause consumers to shift to another supplier that does not impose mandatory arbitration.¹²⁹ For example, deposition testimony from an attorney at Citigroup in one conspiracy-to-arbitrate case “reveal[ed] that [the] Defendants may have been concerned that consumers would cancel their cards if Citigroup unilaterally adopted an arbitration clause.”¹³⁰ All firms benefit if they act in unison regarding arbitration clauses. That way, each firm imposing an anti-consumer arbitration clause is less likely to lose sales to a rival.¹³¹ If all the firms agree, then consumers cannot escape mandatory arbitration.¹³²

128. See, e.g., Second Consolidated and Am. Class Action Compl. at 3, *In re Universal Serv. Fund Tel. Billing Practices Litig.*, MDL No. 1468, 2003 WL 24047518 (D. Kan. Feb. 20, 2009) (alleging, in an antitrust case, that defendants conspired to impose arbitration clauses that limited discovery, banned class actions, waived punitive damages, shortened statute of limitations, and required “in some instances, [plaintiffs to] pay defendants’ attorneys’ fees if a motion to compel arbitration is granted”). Conspirators may agree to use similar language that is incomprehensible to most consumers. The language of arbitration clauses is generally more complex than other language in the same contract, which makes it harder for consumers to appreciate the legal significance of an arbitration clause. CONSUMER FIN. PROT. BUREAU, *supra* note 46, § 2.4, at 28. If conspirators conspire to use opaque language in their arbitration clauses, they may be able to make such clauses less salient. See *infra* notes 133–44.

129. See Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 410–11 (2010) (“The imposition of unfair or burdensome terms by multiple sellers suggests that any of those sellers could attract buyers by *not* imposing those terms . . .”).

130. *In re Currency Conversion Fee Antitrust Litig.*, Nos. M 21–95, 05 Civ. 7116(WHP), 2012 WL 401113, at *7 (S.D.N.Y. Feb. 8, 2012).

131. Additionally, the terms in standardized contracts, such as the inclusion and substance of arbitration clauses, can be “sticky”—a term that scholars use to describe the inertia that can delay firms from changing their contract terms. See Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 959 (2014). Contract “stickiness” can

One could argue that arbitration conspiracies are unnecessary because arbitration clauses are not salient to consumers.¹³³ According to this line of thinking, consumers do not read their contracts and are generally unaware of the presence and content of any arbitration clauses within a contract. If that is true, then a firm might impose an arbitration clause unilaterally—even though its rivals do not require arbitration—and not lose sales because consumers are oblivious or indifferent to arbitration clauses. In such markets, a conspiracy to arbitrate may seem unnecessary.

This salience argument is not as persuasive as it might seem. First, some evidence suggests that arbitration clauses are becoming more salient to consumers.¹³⁴ Mainstream media sources are more extensively reporting about the downsides of arbitration clauses for consumers.¹³⁵ In addition, consumers' rights groups are educating the public about the consequences and drawbacks of mandatory arbitration.¹³⁶ These efforts are emboldening consumers to resist publicized attempts to impose mandatory binding arbitration. For example, when General Mills attempted to unilaterally impose

slow the adoption of arbitration clauses, *see id.* at 961–62, or modification of existing arbitration clauses to include class-action waivers. *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 192–93 (2015). A conspiracy to impose arbitration clauses can help overcome this stickiness by making arbitration clauses with class-action waivers the industry norm.

132. An individual firm could possibly conclude that it would be profitable to unilaterally impose arbitration clauses on its customers because the savings in reduced litigation and liability costs will exceed the value of sales lost to customers who decide to purchase from another seller. This is ultimately an empirical question. Joining a conspiracy to arbitrate, however, simplifies the calculation by allowing a firm to obtain the pro-seller benefits of mandatory arbitration without losing sales to competitors that do not require customers to accept arbitration clauses.

133. Salience refers to consumers' awareness and concern about product or contract attributes. Price is generally salient in that consumers care about it and are more likely to purchase a lower-priced item than a similar, but higher-priced, item. On salience of terms in consumer contracts, *see* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 91–92 (2012); *see also id.* at 94 (“Industry sources also confirm the behavioral-economics prediction that issuers will aggressively compete on salient price dimensions and recoup losses through non-salient price dimensions.”).

134. *Id.* at 93–94; *see* *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 432 (S.D.N.Y. 2014) (“Plaintiffs point to some signs of incipient salience with respect to class-action-barring arbitration, such as publicity following the Minnesota Attorney General’s action against the NAF and negative publicity accompanying Wells Fargo’s introduction of class-action-barring arbitration clauses for bank account holders.”).

135. *See, e.g.*, Silver-Greenberg & Gebeloff, *supra* note 97, at 1 (reporting on banking, credit card, and other industries’ usage of arbitration).

136. *See, e.g.*, *Arbitration*, NAT’L ASS’N OF CONSUMER ADVOCATES, <http://www.naca.net/issues/forced-arbitration> [https://perma.cc/C7RR-M3DC] (providing a guide detailing arbitration and its negative aspects).

arbitration clauses on their customers, consumers protested loudly, and the company rescinded its policy.¹³⁷ The imposition of mandatory arbitration clauses is particularly likely to become salient when the other salient features of the transactions, such as price and quality, are identical across sellers.¹³⁸

Second, absent a conspiracy to arbitrate, the free market process could increase the salience of arbitration clauses.¹³⁹ Firms should compete on their contract terms,¹⁴⁰ such as whether to impose mandatory arbitration clauses and, if so, the terms of the arbitration. In many markets, the terms of arbitration clauses vary, with some being more consumer friendly than others.¹⁴¹ Competitive firms would advertise their pro-consumer terms.¹⁴² Arbitration clauses would be more salient if firms (that did not require arbitration) advertised the

137. Stephanie Strom, *General Mills Amends New Legal Policies*, N.Y. TIMES (Apr. 18, 2014), <https://www.nytimes.com/2014/04/18/business/general-mills-amends-new-legal-policies.html?mcubz=0> [http://perma.cc/F6NH-66L3]. Of course, it remains possible that in other contexts, consumers may be aware of arbitration clauses but discount their significance because consumers misjudge the likelihood of being in a dispute. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1234 (2003) (“A form term calling for arbitration of disputes in an inconvenient state, for example, is likely to be non-salient to the vast majority of buyers unless the type of contract in question commonly results in disputes.”).

138. Thus, the salience of mandatory arbitration increases in the wake of price-fixing agreements. This encourages price fixers to enter a secondary conspiracy to arbitrate. See *infra* Section II.C.

139. For example, for decades, safety was not salient in the automobile market. Lee Iacocca, the former President of Ford, famously asserted that consumers do not care about safety. Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1044 n.127 (1991) (“[H]aving announced his belief that ‘safety doesn’t sell,’ Iacocca authorized a set of criteria for the Pinto that included no reference to safety.”). But safety did become salient and is now a major selling feature of automobiles. *It’s a Safety Marketplace, and Consumers are Buying*, STATUS REPORT, (Ins. Inst. for Highway Safety, Highway Loss Data Inst., Arlington, VA), Apr. 15, 2010, at 1 <http://www.iihs.org/iihs/sr/statusreport/article/45/4/1> [https://perma.cc/H7HJ-S426]. One reason may be Volvo’s heavy comparative advertising on safety. See Gurjit Degun, *Volvo Cars Looks to the Future of Safety in Global Campaign*, CAMPAIGN (Feb. 16, 2016), <http://www.campaignlive.com/article/volvo-cars-looks-future-safety-global-campaign/1383759> [https://perma.cc/N9KW-3QE4].

140. Patterson, *supra* note 129, at 333 (“But standardization among firms also eliminates competition on the standardized terms, adding market power to bargaining power and making it even less likely that the needs of all parties will be served.”); see also Thomas Wilhelmsson, *Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts*, 17 EUR. BUS. L. REV. 49, 49 (2006).

141. See Gilles, *supra* note 80, at 829.

142. See *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 431 (S.D.N.Y. 2014) (“Competitors often force obscure terms to salience in order to distinguish and market their products. For example, Capital One’s ‘No Hassle Rewards’ campaign drew attention to the fact that some of its competitors imposed conditions such as blackout dates that made redeeming rewards like frequent flyer miles difficult.” (citations omitted)).

problems with their competitors' mandatory arbitration clauses.¹⁴³ A conspiracy to arbitrate reduces the probability of arbitration clauses becoming salient because if all firms in a market agree to impose similar anti-consumer arbitration clauses, then no firm has an incentive to educate consumers in that market in order to get a competitive advantage. Consequently, firms may be motivated to conspire to arbitrate in order to prevent arbitration clauses from becoming salient in a given market.¹⁴⁴

2. Harms of a Primary Conspiracy to Arbitrate

The dangers of conspiracies to arbitrate are easily seen through the lens of antitrust law. Private plaintiffs bringing a section 1 claim under the Sherman Act must prove that they suffered antitrust injury, which is injury caused by a decrease in competition.¹⁴⁵ In consumer-initiated antitrust actions, increased price caused by collusion is the traditional form of antitrust injury, but other harms beyond increased price can also constitute antitrust injury.¹⁴⁶ For example, an agreement among competitors to reduce quality and only sell inferior products inflicts antitrust injury.¹⁴⁷ Some cases discuss conspiracies to arbitrate as a form of group boycott in which the conspirators have agreed to refuse to sell to customers who do not waive their right to litigate.¹⁴⁸

Primary conspiracies to arbitrate inflict antitrust injury because consumer contracts with arbitration clauses—especially those that include class-action waivers—are inferior products.¹⁴⁹ In litigation

143. Lemley & Leslie, *supra* note 45, at 57.

144. *Ross*, 35 F. Supp. 3d at 431–32 (“Collusion can delay the rise to salience of product features that would normally become salient under competitive conditions.”).

145. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metro. Bottling Co.*, 94 F. Supp. 2d 804, 813 (E.D. Ky. 1999).

146. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 482–83 (1982).

147. *See Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 276 (3d Cir. 1999) (stating that a deterioration in quality constitutes an anticompetitive effect).

148. *See, e.g., Ross v. Bank of Am., N.A.*, 524 F.3d 217, 221 (2d Cir. 2008) (“The second claim alleges that the banks participated in a group boycott by refusing to issue cards to individuals who did not agree to arbitration, also in violation of Section 1.”).

149. Some might argue that the arbitration-burdened product is not inferior because it may cost less, as sellers could pass savings on in the form of lower prices. This argument is unpersuasive for several reasons. First, the competitive market would offer a mix of products, such that consumers could decide whether to pay less in exchange for waiving their right to litigate in court. *See* FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 44 (July 2010), www.ftc.gov/os/2010/07/debtcollectionreport.pdf [https://perma.cc/KFR6-VGZZ] (“For example, a consumer might be offered a ten percent interest rate without a

where plaintiffs alleged a conspiracy to arbitrate among banks that issue credit cards, one court explained that “[t]he mere existence of the clauses[] diminishes the cards’ value by foreclosing the opportunity for cardholders to go to court and address grievances through class action litigation.”¹⁵⁰ By agreeing to impose mandatory arbitration, firms are agreeing not to compete on product quality.¹⁵¹ Thus, consumers are injured by their inability to purchase the superior product.¹⁵²

Conspiracies to arbitrate also injure competition by reducing consumer choice. If all of the major players in a market require mandatory arbitration, consumers have less, or no, ability to choose a more consumer-friendly product.¹⁵³ The Supreme Court has condemned horizontal agreements that limit “consumer choice by impeding the ‘ordinary give and take of the market place.’”¹⁵⁴ Professor Robert Lande has persuasively explained that “choice-centered antitrust policy will support and lead to a more efficient market, the lowest prices, the best product quality and variety, the highest level of consumer surplus, and all the other benefits of a

mandatory pre-dispute arbitration clause, or a nine and three-quarters percent rate with such a clause.”).

Second, and more importantly, much evidence indicates that any savings enjoyed by sellers is not passed on to consumers. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 46, § 1.4.9, at 18 (“That ‘difference-in-differences’ analysis did not identify any statistically significant evidence of an increase in prices among those companies that dropped their arbitration clauses and thus increased their exposure to class action litigation risk.”); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 660 (2008) (“My review of eleven major credit card companies’ [2007] contracts, for example, indicated that consumers do not necessarily enjoy lower interest rates, or APRs, if they accept arbitration clauses.”).

Finally, when the conspiracy to arbitrate is secondary to a price-fixing conspiracy, the sellers have already agreed not to bid the price down.

150. *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 434 (S.D.N.Y. 2014).

151. *See Ross*, 524 F.3d at 224 (“[T]he alleged conspiracy to limit the cardholders to cards that require arbitration of disputes also diminished the present value of the cards offered to the cardholders. A card that limits the holder to arbitration is less valuable (all other factors being equal) than a card that offers the holder a choice between court action or arbitration.”).

152. How to quantify and monetize this injury could prove difficult. Malcolm A. Hoffman, *Proof of Damages in Private Litigation*, 36 ANTITRUST L.J. 151, 154 (1967) (discussing *Momand v. Universal Film Exch.*, 172 F.2d 37 (1st Cir. 1948)).

153. *See Ross*, 35 F. Supp. 3d at 434 (“It is undeniable that consumer choice was reduced when the seven Issuing Banks—who collectively held between 79-87% of the transaction volume and outstanding balances in the credit card market from 1999-2009—each adopted a class-action-barring clause.”).

154. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (quoting *National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

competitive economy.”¹⁵⁵ Conspiracies to arbitrate prevent this market mechanism from working. This reduction in choice represents an injury to consumers.¹⁵⁶ To the extent that conspiracies to arbitrate reduce competition regarding contract terms, antitrust law views them as harmful.¹⁵⁷

C. *Conspiracy to Arbitrate as a Secondary Conspiracy*

A secondary conspiracy to arbitrate is an additional conspiracy beyond an initial antitrust conspiracy.¹⁵⁸ One example is when firms first agree to form a price-fixing cartel and then also agree that each cartel member will impose mandatory arbitration clauses on its customers. While it would seem that adding a second conspiracy may increase the risk of being caught violating antitrust law, the second conspiracy helps insulate the first conspiracy from liability. This Section explains how, if rival firms are already fixing price, and thus already committing a felony, it makes sense to enter a secondary conspiracy—a conspiracy to arbitrate. Doing so will both limit the potential exposure from and strengthen the underlying price-fixing conspiracy.

1. Concealing an Underlying Conspiracy

An arbitration conspiracy may help conceal the existence of the underlying price-fixing conspiracy by reducing pre-trial discovery. In the context of antitrust litigation, discovery limitations will generally favor defendants.¹⁵⁹ If the defendants can stem the flow of documents, they increase their probability of victory. As one court explained, “the heart of any American antitrust case is the discovery of business

155. Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 504 (2001) (footnotes omitted).

156. See *Ross*, 524 F.3d at 223 (“The cardholders have adequately alleged antitrust injuries in fact The Complaint alleges that reduced choice and diminished quality in credit services result directly from the banks’ illegal collusion to constrict the options available to cardholders.”).

157. Discussing contract standardization more generally, Professor Mark Patterson argues that “the absence of negative effects overall does not matter, because elimination of competition on any term is an antitrust violation.” Patterson, *supra* note 129, at 409–10 (2010) (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (per curiam)).

158. As with a primary conspiracy to arbitrate, a secondary conspiracy to arbitrate could be as simple as agreeing to impose arbitration clauses on all consumers. Alternatively, it could be more detailed and include agreements to standardize the terms of arbitration clauses. These standardized terms could include class-action waivers, anti-injunction clauses, damage limitations, and shortened statutes of limitations.

159. Lemley & Leslie, *supra* note 45, at 15–16.

documents. Without them, there is virtually no case.”¹⁶⁰ Because antitrust plaintiffs generally require more evidence than do antitrust defendants, “discovery restrictions asymmetrically benefit antitrust violators over their victims.”¹⁶¹ Arbitration generally provides significantly less discovery than does traditional litigation.¹⁶² Consequently, price-fixing conspirators can stem the flow of documents by both forcing antitrust plaintiffs into arbitration and then drafting their uniform arbitration clauses to explicitly limit discovery. By removing victims of price fixing from federal court and constraining discovery in arbitration, a secondary conspiracy to arbitrate allows price fixers to prevent antitrust plaintiffs from getting the discovery they need to prove the existence of the underlying price-fixing conspiracy. Thus, both conspiracies are less likely to be discovered.

2. Undermining Pro-Plaintiff Aspects of Antitrust Law

Antitrust law contains several pro-plaintiff policies designed to encourage private plaintiffs to pursue antitrust litigation. These include automatic treble damages and attorneys’ fees for successful plaintiffs, a relatively long statute of limitations, and the ability to bring class-action litigation. Price-fixing conspirators may design their arbitration clauses to undermine these pro-plaintiff aspects of antitrust law. This Section explains how a secondary conspiracy to arbitrate can dismantle the consumer protections in antitrust law’s statutory design.

Treble Damages. Outside of some narrow statutory exceptions, federal judges must triple a successful antitrust plaintiff’s damages; jurists have no discretion.¹⁶³ These mandatory treble damages serve three related goals. First, trebling damages strengthens deterrence.¹⁶⁴ Given the fact that antitrust conspiracies are clandestine and difficult to detect and to successfully sue over,¹⁶⁵ awarding mere single damages would make price fixing net profitable.¹⁶⁶ Second, treble

160. *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1155 (N.D. Ill. 1979).

161. Lemley & Leslie, *supra* note 45, at 16.

162. *See supra* notes 51–55 and accompanying text.

163. *Kristian v. Comcast Corp.*, 446 F.3d 25, 47 (1st Cir. 2006).

164. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (citing *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 138–39 (1968)).

165. Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1634 (2008); *see also* John Gibeaut, *Antitrust American Style*, A.B.A. J., Apr. 2004, at 55, 56.

166. Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1312 (2013);

damages also better “compensate victims of antitrust violations for their injuries,”¹⁶⁷ especially in light of the fact that antitrust litigation is often protracted.¹⁶⁸ Third, treble damages “encourage private enforcement of the anti-trust laws,”¹⁶⁹ which is important because antitrust law is public interest law.¹⁷⁰ In sum, treble damages are a critical feature of America’s antitrust regime.

Price-fixing cartels have a strong incentive to conspire to use mandatory arbitration clauses to dismantle the antitrust treble damage scheme. Many firms have attempted to use arbitration clauses as a means to de-treble antitrust damages.¹⁷¹ It remains unclear whether these efforts will succeed.¹⁷² The Supreme Court has not ruled definitively on the issue,¹⁷³ but the Court has held that it is for the arbiter—not the federal judge—to decide whether an ambiguous arbitration clause limits the mandatory trebling provision of a governing statute.¹⁷⁴ Lower courts have suggested that arbiters possess the authority to strike or uphold a damage-limitation provision in an arbitration clause.¹⁷⁵ This would seem to confer upon arbiters the power to de-treble antitrust damages, a prerogative

Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO STATE L.J. 115, 134–36 (1993); Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1039 (2008) (“As long as a firm enjoys a non-negligible chance of evading responsibility, violating antitrust laws appears rational: if not caught, the firm secures illegal profits, and, if caught, it simply returns the ill-gotten gains.”).

167. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

168. *See, e.g.*, Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 374–81 (1970) (discussing the protracted length of public and private antitrust litigation); *see also* JOHN M. CONNOR, *GLOBAL PRICE FIXING* 532–33 (2001).

169. *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242–43 (5th Cir. 1974) (citing *Bruce’s Juices, Inc. v. Am. Can Co.*, 330 U.S. 743, 751–52 (1947)).

170. *See* Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 885, 885 (2012); *see also* *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 241 (1987) (“Antitrust violations generally have a widespread impact on national markets as a whole, and the antitrust treble-damages provision gives private parties an incentive to bring civil suits that serve to advance the national interest in a competitive economy.”).

171. Lemley & Leslie, *supra* note 45, at 24–25 (citing examples).

172. *Cf. Kristian v. Comcast Corp.*, 446 F.3d 25, 46 (1st Cir. 2006) (“[U]nder federal law, the remedies provided by the antitrust statute cannot be contractually waived.”); *James C. Justice Cos. v. Deere & Co.*, No. 5:06-cv-00287, 2008 WL 828923, at *4 (S.D. W. Va. Mar. 27, 2008) (“[T]reble damages as provided for in the Sherman Act is a non-waivable substantive right.”); Baker & Stabile, *supra* note 51, at 410 n.85 (“It is not clear whether arbitration tribunals are obliged to award mandatory treble damages by virtue of the Clayton Act.”).

173. *Kristian*, 446 F.3d at 47–48 (“There is no Supreme Court precedent that speaks directly to the question of whether treble damages under federal antitrust law may be waived by contract.”).

174. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003).

175. *See Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083, 1085–86 (8th Cir. 2001).

denied to federal judges.¹⁷⁶ If price fixers can de-treble damages through a secondary conspiracy to arbitrate, they can significantly reduce the incentives for consumers to investigate and bring antitrust claims and can dramatically increase the expected value of their illegal price-fixing activities, which undermines deterrence. In essence, price fixers can use a conspiracy to arbitrate to effectively repeal the Sherman Act's provision of mandatory treble damages.

Injunctive Relief. Price fixers may wish to use an arbitration conspiracy to preclude any injunctions against their interests. Antitrust courts can award successful plaintiffs injunctive relief¹⁷⁷ to achieve three goals: “(1) putting an end to illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the marketplace.”¹⁷⁸ Federal judges fashion antitrust injunctions to eliminate the “lingering effects” of antitrust violations.¹⁷⁹ Injunctive relief is important in many antitrust cases,¹⁸⁰ particularly when the plaintiff is trying to prevent anticompetitive injury before it occurs.¹⁸¹

Through a conspiracy to arbitrate, antitrust violators may draft arbitration clauses that deny arbiters the authority to grant injunctive relief.¹⁸² If every firm in a market imposes an arbitration clause with an anti-injunction provision, consumers may be unable to preserve their right to seek injunctions. Then, antitrust violators will have effectively immunized themselves against a potent remedy.

176. Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1079 (1969) (discussing antitrust law “provisions calling for mandatory treble damages and attorney’s fees for the plaintiff” and noting that “[i]n the ordinary commercial arbitration, neither of those statutory provisions would be binding on the arbitrator”); Eric James Fuglsang, Comment, *Arbitrability of Domestic Antitrust Disputes: Where Does the Law Stand?*, 46 DEPAUL L. REV. 779, 815 (1997) (“Because arbitration is designed primarily to reach a fair settlement or compromise between the parties, arbitrators are more likely to award only actual damages rather than the statutorily mandated treble damages.”); see also Lemley & Leslie, *supra* note 45, at 25–27.

177. 15 U.S.C. § 26 (2012) (permitting both the government and private plaintiffs to request injunctions to remedy antitrust violations).

178. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1059 (6th Cir. 1984) (quoting *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir. 1976)).

179. See, e.g., *Wilk v. Am. Med. Ass’n*, 895 F.2d 352, 366 (7th Cir. 1990).

180. See *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 88 (E.D.N.Y. 2000) (finding antitrust action qualified for class certification “[b]ecause the highly significant injunctive relief sought here is as important as the damages claimed”).

181. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (stating that injunctive relief “is characteristically available even though the plaintiff has not yet suffered actual injury”).

182. James J. Calder et al., *A New Alternative to Antitrust Litigation: Arbitration of Antitrust Disputes*, Spring 1989 ANTITRUST 18, 19–20 (“Parties to an arbitration generally . . . can limit the remedies available to the arbitrator.”).

Fee Shifting. Antitrust law provides for one-way fee shifting in which the successful private plaintiff—but not the successful defendant—is entitled to reasonable attorneys’ fees and costs.¹⁸³ Like the trebling of antitrust damages, courts are required to award successful antitrust plaintiffs their attorneys’ fees.¹⁸⁴ Federal courts have explained that this pro-plaintiff, one-sided fee shifting “both encourages ‘private prosecution of antitrust violations by insulating plaintiffs’ treble damage recoveries from the expense of legal fees,’ and deters violation of the antitrust laws by requiring a losing defendant to pay the plaintiffs’ attorneys’ fees ‘as part of his penalty for having violated the antitrust laws.’”¹⁸⁵ Pro-plaintiff fee shifting is particularly important in antitrust cases in which only injunctive relief is sought because “without the shifting of attorneys’ fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law A prevailing plaintiff should not have to bear such an expense.”¹⁸⁶ Absent this fee-shifting provision, plaintiffs in some cases may properly conclude that the cost of pursuing meritorious antitrust litigation is not worth the benefit.¹⁸⁷ If so, antitrust violations become more profitable and, thus, more likely.

By drafting their arbitration clauses to override antitrust law’s pro-plaintiff, one-way fee-shifting requirement, antitrust defendants may be able to nullify antitrust law’s fee-shifting mandate.¹⁸⁸ Some commentators have argued that arbiters are not compelled to follow antitrust law’s statutory mandate of fee awards to a prevailing

183. 15 U.S.C. § 15(a) (2012).

184. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 261 (1975) (“Under the antitrust laws, . . . allowance of attorneys’ fees to a plaintiff awarded treble damages is mandatory.”).

185. *Sciambra v. Graham News*, 892 F.2d 411, 416 (5th Cir. 1990) (citations omitted) (first quoting *Home Placement Serv. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); then quoting *Farmington Dowel Prods. Co. v. Forster Mfg.*, 421 F.2d 61, 91 (1st Cir. 1970)).

186. *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F. Supp. 203, 205 n.1 (S.D.N.Y. 1979) (quoting H.R. REP. NO. 94-499, at 19 (1976), as reprinted in 1976 U.S.C.C.A.N. 2572, 2589).

187. Donald I. Baker, *Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?*, 16 LOY. CONSUMER L. REV. 379, 386 (2004) (“[T]he one-way cost rule seems most important in equity cases under Section 16 of the Clayton Act. The fact that such a plaintiff can recover costs is definitely an incentive to seek an injunction.”); Lemley & Leslie, *supra* note 42, at 31.

188. For example, some arbitration clauses replace one-way fee-shifting with a two-way provision that requires the unsuccessful antitrust plaintiff to pay the defendants’ costs. *See, e.g., In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109, 112 (3d Cir. 2012).

plaintiff.¹⁸⁹ And some courts have upheld arbitration clauses that preclude an arbiter from awarding attorneys' fees to a successful antitrust plaintiff.¹⁹⁰ By conspiring to impose arbitration clauses that prohibit pro-plaintiff fee shifting, antitrust defendants can reduce the amount of their exposure and reduce the incentive for antitrust plaintiffs to bring claims at all. This conspiracy to arbitrate strengthens the underlying price-fixing conspiracy.

Statute of Limitations. Antitrust law has a four-year statute of limitations.¹⁹¹ Many firms have attempted to shorten this limitations period through arbitration clauses.¹⁹² Because of the judicial deference to both arbitration provisions and their terms, federal judges have allowed antitrust defendants to use these clauses to truncate the four-year statute of limitations to one or two years.¹⁹³ As a matter of law, this is a mistake.¹⁹⁴

By using a secondary arbitration conspiracy to truncate the statute of limitations, price fixers can protect their primary conspiracy to fix prices. First, a truncated statute of limitations gives antitrust plaintiffs less time to unearth a sufficient amount of compelling evidence to survive preliminary motions and to prove their cases to the arbiter.¹⁹⁵ Second, by manipulating the statute of limitations, firms can reduce the plaintiff's available damages. In general, a plaintiff who could recover for four years of cartel overcharges in court will only be able to recover for one year of cartel overcharges in arbitration if the defendant has inserted a one-year limitations period

189. See Baker & Stabile, *supra* note 51, at 428 (suggesting that "the arbitrator might be given broad discretion to allocate fees and costs").

190. See, e.g., James C. Justice Cos. v. Deere & Co., No. 5:06-cv-00287, 2008 WL 828923, at *5 (S.D. W. Va. Mar. 27, 2008) ("Court cannot conclude that the Dealership Agreement's limitation on attorney's fees and costs is inconsistent with the policies of the Sherman Act.").

191. See 15 U.S.C. § 15b (2012).

192. See, e.g., *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 287 (4th Cir. 2007); *Kristian v. Comcast Corp.*, 446 F.3d 25, 43 (1st Cir. 2006).

193. Buffon & Wolson, *supra* note 51, at 35 ("Thus, an arbitration agreement that requires the parties to file their claim within one year after becoming aware of a claim has been held enforceable, even when the statute of limitations period would otherwise be longer." (citing *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 826–27 (S.D. Ohio 1999))); see, e.g., *James C. Justice*, 2008 WL 828923, at *5.

194. Lemley & Leslie, *supra* note 45, at 33–34 (condemning the argument that antitrust law's four-year statute of limitations is procedural, not substantive, and therefore subject to contractual shortening).

195. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) (requiring antitrust plaintiffs to gather facts beyond "an allegation of parallel conduct, and a bare assertion of conspiracy" to survive a motion to dismiss). Arbitrators, too, can grant dispositive "pre-trial" motions.

in the parties' arbitration clause.¹⁹⁶ This effectively slashes damages by three-quarters, which undercuts both the compensatory and deterrent functions of antitrust law.¹⁹⁷

Class-Action Waivers. Class-action litigation is often necessary to remedy antitrust violations. Given the number of victims, and thus potential plaintiffs, of an antitrust conspiracy, "a class action is not only the most efficient and convenient method to resolve this controversy[;] it is the only 'fair' and 'efficient' means to adjudicate this controversy."¹⁹⁸ In many cases, no plaintiff is likely to have suffered sufficient injury to make initiating individual action cost-effective.¹⁹⁹ Because individual victims of antitrust violations do not sue, compensation is denied. And because price fixers retain their illegal profits, deterrence is extinguished.²⁰⁰

The members of a price-fixing conspiracy can exempt themselves from class litigation by agreeing that each cartel member will impose an arbitration clause that includes a class-action waiver. If the expected costs exceed the maximum recovery, as in *Italian Colors*, then no individual victim of the cartel will have sufficient financial incentives to sue any member of the conspiracy.²⁰¹ As a result, through the collusive use of class-action waivers in arbitration clauses, price fixers may effectively immunize themselves from private antitrust liability altogether.

Summary. Although a firm could unilaterally insert the above anti-consumer terms into its arbitration clauses, it may make more sense for firms in a price-fixing conspiracy to collude to impose arbitration clauses with standardized anti-consumer terms. Similar to the dynamics of a primary conspiracy to arbitrate, a firm does not want to be the only one to impose anti-consumer terms in its

196. *In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 299–300 (Johnston, J., concurring in part and dissenting in part) (“[W]hile the Antitrust Act effectively requires a four year look-back period, the contract at issue would only allow the arbitrator to consider one year of anti-competitive behavior.”).

197. See Lemley & Leslie, *supra* note 45, at 34–35.

198. *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 527 (S.D.N.Y. 1996).

199. See *id.* at 527 (“Moreover, although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf.” (citing *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968))).

200. Cf. Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 725 (2012) (“If we allow companies to insulate themselves from class actions, we are effectively allowing companies to escape many legal regulations and thereby eliminating a great deterrent to company misconduct.”).

201. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting).

contracts.²⁰² The conspiracy to arbitrate eliminates each firm's fear of being a first mover. If every firm requires similar anti-consumer terms, no firm will lose business to a more pro-consumer rival. More importantly, if every cartel member imposes the same de-trebling, anti-injunction, anti-fee-shifting, and reduced statute of limitations provisions, along with class-action waivers, then the entire cartel is protected—the antitrust violators will have effectively rewritten the antitrust statutes.

3. Alleviating Settlement Pressure

A secondary conspiracy to arbitrate also relieves the pressure to settle price-fixing litigation. Each individual firm in a price-fixing conspiracy risks significant antitrust damages in litigation. Antitrust law provides for joint and several liability,²⁰³ which makes every participant in an illegal cartel liable for the overcharges of its cartel partners.²⁰⁴ A consumer who pays an illegally elevated cartel price can choose whom to sue: the firm from which it purchased the product, another cartel member, or all of the cartel members.²⁰⁵ Because antitrust damages are automatically trebled, the victims of a price-fixing conspiracy can sue a single cartel member for three times the value of the entire cartel's overcharges. Furthermore, antitrust law denies defendants any right to contribution.²⁰⁶ Thus, a price-fixing firm could be sued for treble the amount of all cartel profits and yet be unable to recover anything from its co-conspirators.²⁰⁷

This joint and several liability—without a right to contribution—creates a dynamic that favors antitrust plaintiffs. Although bringing an antitrust lawsuit requires significant outlays, antitrust plaintiffs may be able to use early settlements to secure their funding from the defendants themselves. In price-fixing cases against multiple cartel

202. This is particularly true in a market marked by price fixing; when firms are all charging the same price, non-price terms may become more salient to consumers. With price removed as a variable for consumer decision-making, customers may be more likely to focus on, and purchase from, the firm that does not impose mandatory arbitration or does not load its arbitration clause with other remedy-reducing provisions.

203. *Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc.*, 604 F.2d 897, 904 n.15 (5th Cir. 1979).

204. *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1155 (E.D. Va. 1997).

205. *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963) (“A plaintiff need not sue all conspirators; he may choose to sue but one.”).

206. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

207. Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277, 1284 (1987).

members, each defendant has an incentive to settle early because the initial settlers can generally buy repose relatively cheaply. Antitrust plaintiffs may find it rational to allow a defendant to exit the litigation in exchange for a modest amount of money and admissible evidence against the remaining defendants. The plaintiff knows that it can still recover all of its damages from the as-of-yet non-settling defendants because of antitrust law's joint and several liability, and early settlements give the plaintiff more evidence and more leverage against the remaining defendants.²⁰⁸ Consequently, later-settling antitrust defendants often pay relatively more than early-settling defendants,²⁰⁹ which increases the *ex ante* pressure to settle early and to sell out one's cartel partners by supplying evidence to the plaintiffs.

Antitrust plaintiffs may seize on this dynamic by announcing that later settlements will have "progressively higher rates" and may make this threat credible by including most-favored-nation clauses in all settlement agreements.²¹⁰ This tactic ensures the later-settling defendants cannot receive more favorable settlement terms than the earlier-settling defendants. Because the non-settling defendants face relatively higher exposure and the plaintiffs' case against them grows stronger as the plaintiffs acquire additional evidence from each settling defendant,²¹¹ antitrust defendants "may compete against each

208. Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 777 (2009).

209. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995) ("The plaintiffs 'take small amounts ... at the beginning of the settlement process' and larger amounts as time progresses." (quoting Senate testimony of Stephen D. Susman)); Cavanagh, *supra* note 207, at 1288 n.67 (providing settlement figures in corrugated container litigation indicating that defendants who settled later paid more); see also *Antitrust Damage Allocation: Hearings Before Subcomm. on Monopolies and Commercial Law of H. Comm. on Judiciary*, 97th Cong. 37–38 (1982) [hereinafter *Antitrust Damage Allocation Hearings*] (statement of Denis McInerney, Esquire, Cahill, Gordon & Reindel) ("Consequently, it has become commonplace for late-settling defendants to be forced to contribute to settlements in amounts wholly disproportionate to their percentage of the questioned sales ...").

210. Leslie, *supra* note 208, at 758; see A.B.A. ANTITRUST SECTION, MONOGRAPH NO. 11, CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION 15–16 (1986) ("In fact, the plaintiffs openly announced that each settlement in the case would be at progressively higher rates, and each settlement agreement contained a 'most favored nation clause' that assured that succeeding settlements would be no more favorable."); see also *Antitrust Damage Allocation Hearings*, *supra* note 209, at 37–38 (statement of Denis McInerney, Esquire, Cahill, Gordon & Reindel).

211. John Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits*, 55 ST. JOHN'S L. REV. 42, 45 (1980) ("In general, whenever a defendant settles with the plaintiff for a sum less than three times the damages attributable to its acts, each remaining defendant faces an increased risk that it will be forced to bear more than its proportionate share of the damages.").

other to reach an early settlement so as not to be one of the last remaining defendants who pays a disproportionately large share of the damages.”²¹² Many antitrust defendants try to alleviate this settlement pressure by contracting with each other.²¹³

Conspiracies to arbitrate provide a mechanism for price-fixers to reduce the pressure to settle by staying out of federal court altogether. By forcing their victims into arbitration, price fixers may not have to enter settlements at all because no individual victim may find it financially feasible to pursue arbitration.²¹⁴ This strategy diminishes an antitrust defendant’s incentive to trade evidence of price-fixing in exchange for an early settlement. However, in order to avoid federal court and the subsequent settlement pressure, it is insufficient for an individual price-fixing firm to impose mandatory arbitration clauses only on its own customers. Because of antitrust law’s joint and several liability, that price-fixing firm could be sued by its co-conspirators’ customers as well. Thus, each cartel member needs all of its co-conspirators to impose similar arbitration clauses on their customers, too. If one firm in the cartel does not impose mandatory arbitration, then that firm’s customers could sue any and all members of the cartel for treble damages, and those antitrust defendants will have an incentive to expose the cartel in exchange for a relatively small settlement payment. A conspiracy to arbitrate can reduce defendants’ rush to settle antitrust litigation by ensuring that all victims of the price-fixing conspiracy are denied access to courts. This secondary conspiracy eliminates the pressure to settle, and, consequently, protects the cartel.

212. A.B.A. ANTITRUST SECTION, *supra* note 210, at 15 (“Thus, a competition develops among defendants to settle early in the case, when plaintiffs need money and settlements are cheap, which reduces the pool of remaining defendants and thereby further fuels the impetus to settle quickly.”); see WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS 29 (1986) (noting “great pressure on a defendant to settle early so as not to be exposed to the lion’s share of the joint trebled damages”); Yosef J. Riemer, Note, *Sharing Agreements Among Defendants in Antitrust Cases*, 52 GEO. WASH. L. REV. 289, 293–94 (1984).

213. Leslie, *supra* note 208, at 758–64 (detailing how price-fixing defendants have sought to mitigate the pressure to settle by entering into judgment-sharing agreements, contracts by which antitrust co-defendants agree in advance what their relative responsibility will be for antitrust damages attributed to their cartel activity).

214. Including a class-action waiver in these collusive arbitration clauses that prevents class-wide arbitration can make arbitration prohibitively expensive for individual plaintiffs and, thus, no member of the price-fixing conspiracy will be held accountable.

4. Adding a Net Beneficial, Relatively Minor Conspiracy

Given all of the complicated components of a price-fixing arrangement, the addition of a conspiracy to arbitrate is relatively minor. Price fixing is more complicated than simply setting a single fixed price and then collecting cartel profits. Cartel members will often have different profit-maximizing prices.²¹⁵ For example, firms may have different cost structures, and more efficient firms may maximize profits at a lower cartel price than firms with higher costs.²¹⁶ Even firms with similar cost structures may disagree about what price to charge, as some risk-averse firms may worry that setting price too high would attract entry into the market.²¹⁷ Furthermore, many cartels have to fix multiple prices, depending on the characteristics of the customers or the product lines involved.²¹⁸

In addition to price considerations, many cartels limit the output, sales, and even working hours of their member firms.²¹⁹ Cartels that limit total production must then negotiate each firm's individual market share.²²⁰ Moreover, all of the above agreements need to be renegotiated continually as the market conditions change.²²¹

Compared to other aspects of cartelization, a secondary conspiracy to arbitrate is relatively simple. The parties are unlikely to have different profit-maximizing arbitration terms. They all benefit from mandatory arbitration provisions and from class-action waivers, as well as from limiting discovery, shortening statutes of limitations, banning injunctive relief, and eliminating pro-plaintiff fee shifting. Furthermore, the conspirators need not meet regularly in order to renegotiate the arbitration clause terms among themselves. Once they

215. Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 826 (2011).

216. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §4.1, at 193–94 (5th ed. 2016); see also James M. Griffin, *Previous Cartel Experience: Any Lessons For OPEC?*, in ECONOMICS IN THEORY AND PRACTICE: AN ECLECTIC APPROACH 179 (Lawrence R. Klein & Jaime Marquez eds., 1989).

217. This is essentially limit pricing.

218. Hovenkamp & Leslie, *supra* note 215, at 827–28; see Joseph E. Harrington, *How Do Cartels Operate?*, 2 FOUND. & TRENDS MICROECONOMICS 1, 14–16 (2006) (discussing citric acid and plasterboard cartels).

219. See, e.g., SIMON N. WHITNEY, TRADE ASSOCIATIONS AND INDUSTRIAL CONTROL 70–71 (1934) (discussing the cotton cartel and noting that Cotton-Textile Institute capped its members' workweek to fifty-five hours per week for day shifts and fifty for night shifts).

220. See, e.g., *United States v. Andreas*, 216 F.3d 645, 652–53 (7th Cir. 2000) (discussing volume allocation in the lysine cartel).

221. Hovenkamp & Leslie, *supra* note 215, at 833–34.

have each imposed their arbitration clauses, they need not discuss the issue again.²²² As a result, the conspiracy-to-arbitrate component of a larger price-fixing conspiracy has a relatively high incremental benefit but a relatively low incremental cost.

5. Summary

Private enforcement of antitrust laws is designed to deter and punish cartel behavior. Price fixers, however, would like to prevent these private actions. In order to reduce the risk of antitrust liability, conspirators would like to preclude their victims from suing in federal court, to eliminate treble damages, to reduce the time window for which damages are recoverable, and to prevent injunctive relief. Antitrust conspirators may be able to achieve these goals through industry-wide mandatory arbitration. Especially in the wake of *Italian Colors*,²²³ a conspiracy to arbitrate may allow price-fixing firms to prevent class-action litigation and class-wide arbitration, to make the expected cost of individual arbitration exceed its benefits, and, thus, to essentially agree to eliminate private antitrust lawsuits against members of the conspiracy. Given all of these benefits, it should constitute cartel malpractice not to include a secondary conspiracy to arbitrate.²²⁴

III. JUDICIAL FACILITATION OF CONSPIRACIES TO ARBITRATE

Because conspiracies to arbitrate can inflict significant anticompetitive harm—and are per se illegal—the legal system should be designed to detect and to penalize such conspiracies. Courts, however, have constructed a legal regime that effectively protects conspiracies to arbitrate. This Part explains how courts have incentivized conspiracies to arbitrate, even while acknowledging that such agreements violate antitrust law.

222. See *infra* note 311–12 and accompanying text (discussing example of an “arbitration coalition” of rival banks disbanding after all of the firms imposed arbitration agreements on their customers).

223. Before *Italian Colors*, some courts had applied the Effective Vindication Doctrine to hold antitrust claims to be not subject to arbitration. See, e.g., *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 (DLC), 2012 WL 2478462, at *3 (S.D.N.Y. June 27, 2012) (holding arbitration agreements to be “invalid as to plaintiffs’ Sherman Act claims because the plaintiffs have established that the agreements would prevent them from effectively vindicating their rights under the Sherman Act”).

224. Cf. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3081 (2015) (“Indeed, after *Italian Colors*, it would be irrational for legal advisors *not* to insulate their corporate clients from private enforcement of substantive laws in the ways permitted under the Supreme Court’s arbitration jurisprudence.”).

A. *Supreme Court Arbitration Jurisprudence as the Catalyst for Conspiracies to Arbitrate*

In the half-century following the Supreme Court's condemnation of conspiracies to arbitrate in *Paramount Famous Lasky* in 1930, such collusion does not seem to have been a recurring problem. One explanation is that competitors did not conspire to impose arbitration clauses on their customers because the Court had rendered such agreements among competitors illegal. This law-abidance explanation is contradicted by the fact that competitors continued to fix prices after the Supreme Court held that price-fixing conspiracies were per se illegal.²²⁵ The lack of conspiracies to arbitrate is probably a function of the limited reach of arbitration clauses until the 1980s. Although the FAA made arbitration agreements between merchants enforceable,²²⁶ Congress did not intend the FAA to apply to consumer contracts, especially contracts of adhesion, or to federal statutory claims, like antitrust.²²⁷ Because arbitration clauses were not the pro-business devices that they have become, firms had little incentive to insert arbitration clauses in their consumer contracts either unilaterally or conspiratorially.

The Supreme Court set the stage for conspiracies to arbitrate in the mid-1980s when it—incorrectly—asserted that the FAA embodied a federal policy favoring the enforcement of all manner of mandatory arbitration provisions.²²⁸ The Supreme Court's incorrect claim of a congressional policy favoring arbitration makes primary conspiracies to arbitrate rational. Its pro-arbitration decisions created the legal environment necessary for arbitration conspiracies to thrive. Until consumer claims were subject to arbitration, firms had no incentive to unilaterally insert mandatory arbitration provisions in their consumer contracts. Similarly, they had no incentive to collude to impose such terms.

Furthermore, the Supreme Court's arbitration jurisprudence made secondary conspiracies to arbitrate irresistible. When the *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*²²⁹ Court

225. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940) (finding a price-fixing scheme existed in the midwestern oil market).

226. *Arbitration Hearings*, *supra* note 17, at 10 (statement of W. H. H. Piatt, Chairman of the Comm. of Commerce, Trade and Commercial Law, ABA) (providing that the FAA was designed for disputes involving “a contract *between merchants* one with another, buying and selling goods” (emphasis added)).

227. *See supra* note 18 and accompanying text.

228. *See supra* notes 25–28 and accompanying text.

229. 473 U.S. 614 (1985).

held that antitrust claims were arbitrable, it never considered how such a rule would affect consumers who sought to recover for being overcharged by a cartel.²³⁰ A legal rule that allows price-fixing claims to be channeled into arbitration rewards price fixers who include arbitration clauses in their contracts with customers.²³¹ If antitrust claims were not arbitrable, price fixers would have no reason to enter a secondary conspiracy to arbitrate. Price fixers would be unable to use arbitration clauses as a mechanism to de-treble damages, prevent injunctions, shorten statutes of limitation, or preclude class actions.

In sum, conspiracies to arbitrate were not particularly profitable until courts began enforcing arbitration clauses in consumer contracts and subjecting statutory claims to mandatory arbitration. These changes in arbitration jurisprudence incentivized competitors to conspire to impose arbitration clauses on consumers. But for the Supreme Court's pro-arbitration jurisprudence, antitrust violators would not be able to employ arbitration conspiracies to deny their customers access to courts, to prevent class actions, and to undermine the pro-plaintiff aspects of antitrust law.

B. Judicial Enforcement of Conspiracies to Arbitrate

Antitrust conspiracies face two major challenges: maximizing the likelihood of their agreement being enforced and minimizing the risk of antitrust liability.²³² Enforcement is important because if their agreement goes unenforced, the colluding firms will not attain the goals of their conspiracy. For example, because price-fixing agreements are not enforceable in court, when cartels cannot perfect a private enforcement mechanism, they are likely to be unstable and collapse into competition.²³³ Still, even failed cartels violate antitrust law, and if the conspirators are held liable, the antitrust damages could be high. The prospect of trebled damages may deter many would-be cartelists from conspiring with their competitors.²³⁴ In the

230. *See id.* at 617, 619–20 (dealing with antitrust claims based on alleged wrongful termination of dealership).

231. *See supra* Section II.C.

232. Enforcement issues affect the expected benefits of conspiring while the probability of antitrust liability goes to the expected costs of conspiring. If the latter outweigh the former, then a rational firm would decline to collude.

233. *See* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 632–34 (2004). The enforcement conundrum in traditional price-fixing conspiracies involves the risk that cartel members will cheat on the cartel agreement by charging a lower price (and/or selling more than their cartel allotment), and the non-cheating cartel members will have no ability to enforce their price-fixing agreement and to punish the cheater.

234. This is especially true if the firms conclude that an unenforceable cartel agreement is unlikely to generate significant long-term profits.

context of conspiracies to arbitrate, the enforcement conundrum has an additional facet; even if all of the conspiracy's members abide by their agreement and impose arbitration clauses on their customers, the conspirators still need the cooperation of federal judges. If judges do not enforce the conspiracy-instigated arbitration clauses, then the conspiracy cannot achieve its goals.

Some courts have approached the issue of conspiracies to arbitrate in a manner that solves this aspect of the conspirators' enforcement problem. When customers suspect that they have signed contracts with mandatory arbitration provisions that were the product of a conspiracy among the sellers in the relevant market, they may file an antitrust complaint in federal court. The antitrust defendants then inevitably respond by moving to compel arbitration because forcing their victims into arbitration was the whole point of conspiring to impose arbitration clauses in the first place. If a federal court grants the defendants' motion to compel arbitration, the judge is essentially enforcing the underlying illegal conspiracy that the plaintiffs are challenging.²³⁵

Even though a conspiracy to arbitrate cannot succeed without federal judges serving as collaborators, some courts fail to recognize that they are mere instrumentalities of an illegal cartel. As a result, they compel the victims of an arbitration conspiracy to arbitrate their conspiracy claims. For example, the Fifth Circuit has held that “[e]ven if the district court were to find that such an antitrust conspiracy [to impose arbitration clauses] existed, this finding would not compel the invalidation of the agreement to arbitrate”²³⁶ Similarly, a federal judge in Kansas held that the plaintiffs' lawsuit alleging a conspiracy to arbitrate could not be heard in federal court, but rather had to be decided by an arbitrator.²³⁷ Both of these courts cited “the FAA's strong policy toward enforcing arbitration clauses” to hold that “declaring the arbitration clauses unenforceable is not an appropriate remedy” in litigation alleging an illegal conspiracy to

235. The goal of a conspiracy to arbitrate is to funnel all claims against the defendants into private arbitration. Further, when the conspiracy to arbitrate is a secondary conspiracy, price-fixing firms are seeking to prevent their victims from bringing price-fixing claims in federal court.

236. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 (5th Cir. 1992) (affirming district court order compelling arbitration).

237. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468, 2003 WL 21254765, at *6 (D. Kan. May 27, 2003) (“In sum, the court rejects plaintiffs' argument that the arbitration clauses in this case are not enforceable because they are allegedly the product of an antitrust conspiracy.”).

arbitrate.²³⁸ This invocation of a supposed federal policy in favor of arbitration is flawed because Congress embedded no such policy in the FAA.²³⁹

In theory, federal law precludes judicial “enforcement of the arbitration provision [if enforcement] would make the Court a party to the unlawful activity” such as an antitrust violation.²⁴⁰ But this rule is rendered meaningless when courts hold that an arbitrator gets to decide whether an arbitration clause violates antitrust law.²⁴¹ If federal courts compel plaintiffs to arbitrate their conspiracy-to-arbitrate claims, then the conspirators have already succeeded; the purpose of the conspiracy was to force their customers into arbitration.²⁴² While it is true that plaintiffs could theoretically pursue their antitrust claims in arbitration, by deferring to arbitration clauses with class-action waivers, federal judges make it economically infeasible for the victims of arbitration conspiracies to bring individual claims.²⁴³

Even if individual plaintiffs did pursue their claims in arbitration, the arbitration process is much more pro-defendant, which is one reason why antitrust defendants conspire to impose arbitration clauses in the first place. With limited discovery, antitrust plaintiffs are less likely to secure incriminating evidence.²⁴⁴ Moreover, arbiters may exhibit explicit or unconscious bias in favor of antitrust defendants, who are more likely to be repeat players and thus hire the

238. *Id.* at *4; see *Dillard*, 961 F.2d at 1154–55.

239. See *supra* note 18.

240. *Jung v. Ass’n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 154 (D.D.C. 2004), *cert. denied*, 549 U.S. 1156 (2007) (“Under the FAA, however, a party is not relieved from an agreement to arbitrate on the ground that the contract is allegedly void for violation of the antitrust laws unless plaintiffs demonstrate that the Court’s enforcement of the arbitration provision would make the Court a party to the unlawful activity.”); see also *Dickstein v. duPont*, 443 F.2d 783, 786 (1st Cir. 1971) (“But antitrust defenses are allowed only in cases where the intrinsic illegality of the contract is so clear that enforcement would make a court party to the precise conduct forbidden by the law.”).

241. *Jung*, 300 F. Supp. 2d at 154 (deciding that on the issue of “whether a contract violates the antitrust laws, federal law permits the arbitrator to make that determination” (citing *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995))).

242. In some ways, this judicial error is reminiscent of the mistake that the Supreme Court made in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), in which the Court held that an arbitrator gets to decide whether the contract—containing an arbitration clause—was itself procured by fraud. *Id.* at 399–400. *Prima Paint* is widely considered to be wrongly decided and reasoned. See, e.g., *Moses*, *supra* note 18, at 130.

243. See *supra* notes 33–45 and accompanying text.

244. See *supra* notes 51–55 and accompanying text.

arbitrator again.²⁴⁵ Furthermore, antitrust defendants may load their arbitration clauses with anti-consumer terms—such as limiting discovery, shortening statutes of limitations, banning injunctive relief, and eliminating pro-plaintiff fee shifting—that would be unenforceable in federal court but may be enforced by an arbitrator.²⁴⁶ All of these factors make it less likely that participants in an actual conspiracy to arbitrate will be held liable in arbitration. In sum, when federal judges send an arbitration conspiracy complaint to arbitration, the conspirators are securing the very aims of the conspiracy that federal judges are supposed to invalidate and punish.

C. *Judicial Misuse of Equitable Doctrines to Enforce Conspiracies to Arbitrate*

Courts sometimes employ equitable doctrines to compel arbitration in ways that benefit antitrust conspirators. When antitrust plaintiffs bring lawsuits alleging price-fixing conspiracies, some courts invoke equitable principles to require plaintiffs to arbitrate claims against even those defendants with whom the plaintiffs have no contractual relationship. For example, in *In re Titanium Dioxide Antitrust Litigation*,²⁴⁷ plaintiffs brought class-action litigation against four defendants—DuPont, Huntsman, Kronos, and Millennium—for conspiring to fix the price of titanium dioxide.²⁴⁸ The plaintiffs settled with DuPont and Huntsman, the largest players in the market.²⁴⁹ Although neither Kronos nor Millennium were in contractual relationships with most of the class members, these defendants argued that those class members who had entered contracts with DuPont or Huntsman that contained arbitration clauses could not sue

245. Pat K. Chew, *Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO ST. J. ON DISP. RESOL. 195, 210 (2017) (“[E]mployers are repeat players who are likely to be more familiar with the arbitration process, including the selection of the arbitrators.”); Stephen J. Choi, Jill E. Fisch & A. C. Pritchard, *Attorneys as Arbitrators*, 39 J. LEGAL STUD. 109, 118 (2010) (discussing study that “concluded that party control of selection results in the brokerage firms, which are more likely to be repeat players, dominating the selection process and producing panels more likely to contain arbitrators who tend to side with large brokerage firms”); Lemley and Leslie, *supra* note 45, at 18–20 (describing how “repeat player bias may infect the arbitration process”); Note, *Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1170, 1175 (2009) (“If a party that is a repeat player is allowed to reject arbitrators or otherwise influence the selection process, the arbitrator will have a strong incentive to find for the repeat player consistently.”).

246. *See supra* Section I.B.2.

247. 962 F. Supp. 2d 840 (D. Md. 2013).

248. *Id.* at 844–45.

249. *Id.*

Kronos and Millennium in court.²⁵⁰ Kronos and Millennium moved to compel arbitration.²⁵¹ The district court granted the motion, holding that “the class members would be equitably estopped from avoiding the arbitration clauses that they signed with DuPont and Huntsman.”²⁵² The court was unpersuaded by the plaintiffs’ argument that this equitable estoppel “doctrine cannot apply when the connection between [the antitrust defendants] is only their illegal concerted activity.”²⁵³ Not only did the court reject the plaintiffs’ claims, the court accused the plaintiffs of being unscrupulous, informing the plaintiffs that

[t]hey cannot rely on their contracts to assert this Sherman Act claim, yet repudiate the clauses within those contracts that preclude certain members from participating in this class action litigation. To rule otherwise would in essence allow class members to have their cake and eat it too—in other words, to “rely on the contract when it works” to their advantage, while “repudiating it” when it works to their disadvantage.²⁵⁴

The court misconstrued the plaintiffs’ case; the plaintiffs were in no way trying to enforce any contracts against the remaining defendants. The plaintiffs had no contractual relationship with Kronos and Millennium at all.²⁵⁵ The plaintiffs, however, did not need one because the plaintiffs had antitrust standing to recover from any member of the price-fixing conspiracy.²⁵⁶

The court similarly applied “equitable reasons” to hold that the forum selection clauses, jury waivers, and class-action waivers

250. *Id.* at 849.

251. *Id.* at 848.

252. *Id.* at 850.

253. *Id.*

254. *Id.* at 852 (quoting *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), *rev’d sub nom.*, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003)). To accuse the plaintiffs of “rely[ing] on the contract,” *see id.*, is an odd characterization of the plaintiffs’ claims. They were neither suing for breach nor trying to enforce the contract; they were bringing a civil claim based on the defendants’ alleged criminal conduct of price fixing.

255. *Id.* at 849 (“[A]most all of the arbitration clauses that Defendants Millennium and Kronos seek to enforce derive from contracts formed between class members and either DuPont or Huntsman. Indeed, the record reflects that there are only seven Kronos contracts and seven Millennium contracts that contain arbitration clauses.”).

256. 1 NEWBERG ON CLASS ACTIONS § 2:8, at 106 (Alba Conte & Herbert. B. Newberg eds., 4th ed. 2002) (“Where a conspiracy among several defendants is alleged, such as in antitrust price-fixing conspiracies, it is settled that one coconspirator is liable for all the damages inflicted by the conspiracy, and the plaintiff has standing to sue any or all of the coconspirators whether or not the plaintiff has had any direct business dealings or other relationship with a particular defendant.”).

contained in the plaintiffs' contracts with the signatory defendants (who had settled) could also be enforced by the *non-signatory* defendants.²⁵⁷ This is outrageous: a buyer who pays an illegally inflated price for a product cannot sue the antitrust violator in court *because* of that violator's illicit relationship with another conspirator. Such reasoning fails to appreciate that enforcing an arbitration agreement with respect to non-signatories perpetuates the illegal agreement. Despite this, the equitable estoppel for co-conspirators appears to be the majority approach.²⁵⁸ Subsequently, courts in other jurisdictions have followed the reasoning of *Titanium Dioxide*.²⁵⁹

Although the *Titanium Dioxide* litigation did not involve allegations of a conspiracy to arbitrate, including such allegations does not restore the plaintiffs' right to sue in court. For example, in *In re Universal Service Fund Telephone Billing Practices Litigation*,²⁶⁰ plaintiffs alleged an antitrust conspiracy among long-distance carriers, including a conspiracy to impose arbitration clauses.²⁶¹ The district judge concluded that "notions of equity and fairness require the court to compel arbitration of plaintiffs' antitrust claims against the long distance carriers *other than their own* under the terms of those plaintiffs' arbitration clauses with their respective long distance carriers."²⁶² Like the *Titanium Dioxide* opinion, the court here asserted that because the plaintiffs had alleged "concerted misconduct" among the antitrust defendants, the defendants could take advantage of *each other's* arbitration clauses.²⁶³ The *Universal Service Fund* opinion gave substantial weight to the fact that the plaintiffs had alleged a conspiracy to arbitrate, holding that equitable estoppel principles allowed non-signatory defendants to compel plaintiffs to arbitrate even though those defendants had no contractual relation to the plaintiffs solely because "the arbitration clauses at issue are a product of the alleged conspiratorial behavior"²⁶⁴ The court accused the plaintiffs of trying "to rely on the terms of their service contracts" to claim an antitrust conspiracy but not "to be bound by the arbitration clauses in their service contracts despite the fact that those service contracts are the basis for their

257. *Titanium Dioxide*, 962 F. Supp. 2d at 852.

258. *Id.* at 851 (citing cases supporting that approach).

259. *See, e.g.*, *Valspar Corp. v. E.I. DuPont de Nemours & Co.*, 15 F. Supp. 3d 928, 933–34 (D. Minn. 2014).

260. 300 F. Supp. 2d 1107 (D. Kan. 2003).

261. *See id.* at 1139.

262. *Id.* at 1140 (emphasis added).

263. *See id.* at 1139–40.

264. *Id.* at 1140 n.17.

antitrust claims.”²⁶⁵ This characterization is inaccurate because the plaintiffs were not trying to enforce the contracts. Instead, they argued that the contracts provided evidence of an illegal conspiracy in a statutory claim against a firm with which the plaintiffs had no contract.

These cases illustrate how federal courts have become enforcers of the alleged conspiracies that they are tasked with scrutinizing and, if proven, punishing. For example, if the defendants in *Universal Service Fund* did conspire to impose arbitration clauses as alleged, then the court enforced the conspiracy by forcing the plaintiffs to arbitrate their antitrust claims. The court implemented exactly what the underlying conspirators had sought all along: to prevent their customers from litigating their antitrust claims in court.²⁶⁶ Similarly, by enforcing both the arbitration clauses and the collateral anti-consumer terms buried in those arbitration clauses, the *Titanium Dioxide* opinion assured businesses that federal courts will enforce multiple aspects of a secondary conspiracy to arbitrate.

How do courts justify using equitable doctrines to reach such inequitable results? They invoke the Supreme Court’s manufactured federal policy that reveres arbitration.²⁶⁷ Whether or not the plaintiffs’ antitrust case involves allegations of a conspiracy to impose arbitration clauses, courts have used equitable estoppel to allow non-signatory antitrust defendants to enforce their co-defendants’ arbitration clauses and have the plaintiffs’ antitrust claims removed from federal court. In both scenarios, courts have relied upon the pretended federal preference for arbitration. For example, the *Titanium Dioxide* court reasoned that the plaintiffs were compelled to arbitrate against the non-signatories because otherwise “the federal policy in favor of arbitration [would be] effectively thwarted.”²⁶⁸ Similarly, the *Universal Service Fund* court worried that if it did not allow the non-signatories to “compel arbitration of all of the plaintiffs’ claims under the terms of the respective arbitration clauses,

265. *Id.* at 1140 (“Plaintiffs are essentially attempting to ‘have it both ways.’”).

266. The misuse of equitable estoppel against plaintiffs seeking to avoid arbitration is not unique to antitrust jurisprudence but rather resides in arbitration law more broadly, as courts treat conspiracy allegations as the hook that allows non-signatories to force the alleged conspiracy’s victims into arbitration. *See, e.g.,* Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 373 (4th Cir. 2012); *Autonation Fin. Servs. Corp. v. Arain*, 592 S.E.2d 96, 101 (Ga. Ct. App. 2003) (discussing *In re Humana, Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002), *rev’d sub nom., PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003)).

267. *See supra* notes 25–28 and accompanying text.

268. *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 850 (D. Md. 2013) (quoting *MS Dealer Serv. Corp v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

the arbitration proceedings between the signatories to the service contracts . . . will ‘be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.’”²⁶⁹ As explained previously, the courts’ reasoning in these cases is troubling for three reasons. First, although courts claim that they would not compel arbitration in a manner that would effectuate antitrust conspiracies,²⁷⁰ the above decisions result in federal judges enforcing the very conspiracies to arbitrate that the plaintiffs are challenging.²⁷¹ Second, there is nothing equitable about a non-signatory to an arbitration agreement being able to force the victim of an alleged conspiracy to arbitrate into arbitration.²⁷² Third, these opinions are based on a false premise because Congress never enacted a federal policy in favor of arbitration.²⁷³

In sum, courts apply equitable doctrines in a manner that creates inequitable results. In the context of antitrust conspiracies, judges should exercise their discretion to protect the victims of illegal conspiracies, not the perpetrators.

269. *Universal Serv. Fund*, 300 F. Supp. 2d at 1140 (quoting *Sam Reinfeld & Son Imp. Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976)).

270. *Cf. Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 783 (7th Cir. 1994) (stating that an arbitration clause may be enforceable in an antitrust case “[e]specially . . . where . . . there is no suggestion that the party resisting invocation of the clause was coerced into accepting it or that the arbitrators are themselves a cat’s paw of the cartel”); *Dickstein v. duPont*, 443 F.2d 783, 786 (1st Cir. 1971) (allowing antitrust defenses to arbitration “only in cases where the intrinsic illegality of the contract is so clear that enforcement would make a court party to the precise conduct forbidden by the law”); *Jung v. Ass’n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 153–54 (D.D.C. 2004) (“Under the FAA . . . a party is not relieved from an agreement to arbitrate on the ground that the contract is allegedly void for violation of the antitrust laws unless plaintiffs demonstrate that the Court’s enforcement of the arbitration provision would make the Court a party to the unlawful activity.”).

271. In theory, an arbitrator could decide whether a particular arbitration is inappropriate because it is the product of an illegal conspiracy. Such an approach is nonsensical; the plaintiffs’ argument is that they should not be in arbitration at all. Such a misstep is similar to the Supreme Court’s flawed opinions holding that arbitrators, not courts, should determine the legality of contracts with arbitration clauses. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006).

272. *See Frank Z. LaForge, Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists*, 84 TEX. L. REV. 225, 241 (2005) (“[E]quity is not offended by the nonenforcement of an arbitration clause by a nonsignatory against a signatory.”).

273. *See supra* notes 17–18 and accompanying text.

D. Giving Retroactive Effect to Arbitration Clauses in Antitrust Disputes

A secondary conspiracy to arbitrate may become particularly attractive if price-fixing firms suspect that their cartel has been, or is about to be, detected by its victims. Price-fixing firms that have not already burdened their customers with mandatory arbitration clauses may rationally fear being sued in federal court for violating section 1 of the Sherman Act. But price-fixing conspirators can prevent themselves from being hauled into court by imposing retroactive arbitration clauses before their victims file suit. At the first sign of trouble, price fixers can amend their consumer contracts to force arbitration of antitrust violations that the firms have already committed.²⁷⁴

Courts in antitrust cases have held that companies can impose arbitration clauses requiring that all claims—including those arising *before* the insertion of the arbitration clause into the consumer contract—must be arbitrated, so long as the arbitration clause is imposed before the commencement of the litigation.²⁷⁵ For example, the First Circuit has held that arbitration provisions imposed by antitrust defendants after an alleged antitrust violation should be applied retroactively to plaintiffs' antitrust claims.²⁷⁶ Federal judges have held that the arbitration clause need not even state that it applies retroactively; as long as the clause has "broad wording," courts allow antitrust defendants to employ the clause retroactively to compel arbitration and evade litigation.²⁷⁷

Price-fixing firms can load these retroactive arbitration clauses with anti-consumer terms that effectively prevent even pre-existing victims from pursuing any remedy.²⁷⁸ For example, courts in antitrust

274. See *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 312 (S.D.N.Y. 2004).

275. *Id.* Some courts have allowed arbitration clauses to apply retroactively even to claims that have already been filed. See, e.g., *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 854–55 (D. Md. 2013) ("For those contracts where the retroactive application is not specifically stated, the broad working of each clause and the underlying federal policy in favor of arbitration lead to the conclusion that these clauses apply retroactively.").

276. *Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006).

277. *In re Titanium Dioxide*, 962 F. Supp. 2d at 854–55 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991)); see also *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420-YGR, 2016 WL 5791357, at *5 (N.D. Cal. Oct. 4, 2016) ("In particular, courts have found that the retroactive application of an arbitration agreement is not 'wholly groundless' where the arbitration provision is broad.").

278. See *supra* Section I.B.2.

cases have held that retroactive arbitration clauses can include class-action waivers and thus prevent consumers from participating in a class action based on conduct that occurred *before* the defendant inserted the class-action bar in its mandatory arbitration clause.²⁷⁹ Such rulings are troubling because class-action waivers may effectively prevent consumers from seeking any relief for their injuries. Courts have also held that antitrust defendants can use backward-applying arbitration provisions to retroactively impose a forum selection clause.²⁸⁰ By selecting a particularly inconvenient forum, price-fixing firms can manipulate the forum selection provision to make it practicably infeasible for consumers to arbitrate at all.²⁸¹ Arbiters may enforce such provisions even when judges would invalidate them.²⁸²

Courts justify their embrace of retroactive arbitration clauses by again invoking the so-called congressional policy favoring arbitration. For example, when retroactively enforcing an arbitration clause in an antitrust case, one federal judge concluded that “the underlying federal policy in favor of arbitration lead[s] to the conclusion that these clauses apply retroactively.”²⁸³ The decision is typical.²⁸⁴ The courts’ reliance on a federal pro-arbitration policy is, again, troubling and mistaken because it is based on a false reading of the FAA. Congress never intended the FAA to apply to contracts of adhesion at all, let alone contracts of adhesion used to retroactively impose mandatory arbitration of statutory claims based on conduct that predated the arbitration provision.²⁸⁵

279. See *In re Currency Conversion*, 230 F.R.D. at 312 (“[A]rbitration clauses engrafted on cardholder agreements prior to this litigation are enforceable . . .”).

280. *TradeComet.com LLC v. Google, Inc.*, 435 F. App’x 31, 34 (2d Cir. 2011).

281. Leslie, *supra* note 3, at 289–90.

282. See *id.*

283. *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 854–55 (D. Md. 2013) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991)).

284. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 35 (1st Cir. 2006) (applying arbitration clause retroactively in decision that notes the “strong federal policy of resolving any doubts concerning arbitrability in favor of arbitration” (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)); *In re Currency Conversion*, 230 F.R.D. at 312; *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1124 (D. Kan. 2003) (claiming that “[t]he FAA specifically gives full force and effect to such retroactive arbitration provisions” (citing 9 U.S.C. § 2 and collecting cases))).

285. Leslie, *supra* note 3, at 290.

IV. A CASE STUDY IN JUDICIAL TREATMENT OF CONSPIRACIES TO ARBITRATE

The judicial embrace of a fictional congressional policy favoring arbitration distorts how courts evaluate antitrust claims of illegal conspiracies to arbitrate even when a court adjudicates the lawsuit instead of sending it to arbitration. This Part presents a case study of such distortion. In *Ross v. American Express Co.*,²⁸⁶ following a bench trial, the district court held for the defendants, who were accused of conspiring to impose mandatory arbitration clauses with class-action waivers on their customers.²⁸⁷ The court's extensive opinion presents a litany of judicial errors, culminating in its failure to recognize that it did, in fact, find an illegal conspiracy to arbitrate. Ultimately influenced by the Supreme Court's assertion that Congress had endorsed arbitration over litigation, the *Ross* court made it harder for plaintiffs to establish a conspiracy to arbitrate than to prove other antitrust conspiracies.²⁸⁸

A. *Factual Background*

The alleged conspiracy was set in motion in 1999 when two partners from a top-tier law firm approached in-house counsel for American Express “about Amex co-sponsoring an ‘informal meeting of senior in-house credit card counsel representing the various segments of the U.S. credit card business’ on ‘issues of common concern,’ including arbitration.”²⁸⁹ The outside lawyers organized a conference for credit card companies.²⁹⁰ The conference’s “invitation included a proposed agenda listing ‘the use of arbitration clauses in card agreements’ as a topic” and indicated, by name, that several major credit card companies were “likely attendees.”²⁹¹ The first meeting was attended by executives or lawyers for Amex, Citi, and Discover, along with five card-issuing banks.²⁹² At the time of this first meeting, in May 1999, only First USA and Amex included arbitration clauses in their customer contracts.²⁹³ First USA hired a consultant “to develop a ‘forum to talk about arbitration issues,’” and that

286. 35 F. Supp. 3d 407 (S.D.N.Y. 2014), *aff'd*, 630 F. App'x 79 (2d Cir. 2015).

287. *Id.* at 407, 415.

288. This case study is particularly important because this group “engineered” the national “move to block class actions” by inserting class-action waivers in mandatory arbitration clauses. Silver-Greenberg & Gebeloff, *supra* note 97, at 22.

289. *Ross*, 35 F. Supp. 3d at 415.

290. *Id.* at 415–16.

291. *Id.* at 416.

292. *Id.*

293. *Id.*

consultant “furnished unsolicited updates to the Issuing Banks on competitors’ plans” regarding whether and when to adopt mandatory arbitration clauses.²⁹⁴

This initial meeting led to the banks creating a group, which called itself “the Arbitration Coalition.”²⁹⁵ Amex and First USA were listed as co-chairs on invitations to the first meeting of the Arbitration Coalition.²⁹⁶ One invitation to a meeting of the Arbitration Coalition “expressed a need to do a better job in communicating with other lenders that have adopted arbitration programs.”²⁹⁷ For its July 1999 meeting, which representatives from seven issuing banks attended, the meeting’s “Arbitration Agenda” included such items as “‘working together to turn the tide’ [and] contained the subheadings ‘sharing best practices’ and ‘drafting fair, enforceable arbitration provisions,’” as well as public relations issues.²⁹⁸ Ultimately, “[t]here were eighteen more meetings or conference calls of the self-styled ‘Arbitration Coalition.’”²⁹⁹

The members of the Arbitration Coalition often requested and shared the content of their arbitration clauses and related documents with each other. For example, one bank’s consultant on arbitration issues emailed the issuing banks, requesting “if you have not already done so, please send me the arbitration clause used by your company, any change-in-terms notices that were involved in the adoption of the clause, and any answers to FAQs or other explanations of the clause.”³⁰⁰ The Coalition members circulated, revised, and coordinated their “FAQs and Talking Points” regarding arbitration clauses.³⁰¹ The Coalition members asked each other for, and received, information about whether they allowed cardholders to opt out of an arbitration clause.³⁰² After one 2002 conference call, a representative

294. *Id.* at 447.

295. *Id.* at 416.

296. *Id.* at 417.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 416, 418.

301. *Id.* at 420 (“Following the meeting, Daily circulated revisions to the FAQs and Talking Points to Arbitration Coalition members. The revisions reflected ‘comments received from the group at our last meeting, as well as comments [Daily] received internally [at Discover].’ Daily encouraged Arbitration Coalition members to ‘tailor these documents as you see fit’ and elaborated on how Discover customized its own version.”).

302. *Id.* at 426 (“On July 31, 2001, Barry (Capital One) reached out to Gail (Bank One) to ascertain whether Bank One permitted cardholders to opt-out of its arbitration provision, and ‘[i]f yes, was there a penalty (i.e. they had to close their accounts)? And, what percentage of people opted out?’”).

of MBNA emailed its competitors, who were members of a Coalition “working group,” to ask about how to deal with “cardholders attempting to amend their agreements unilaterally to add alternate arbitration fora.”³⁰³ Before some meetings, Coalition members were emailed and “encouraged . . . to ‘bring a copy of your arbitration agreement’” to the meeting.³⁰⁴

Through the Arbitration Coalition, bank officials often shared with each other their non-public plans regarding implementing arbitration clauses. For example, Chase’s in-house counsel drafted an internal memo to memorialize the Coalition’s September 1999 meeting, which “contained non-public information relating to three Issuing Banks’ future plans for arbitration.”³⁰⁵ Similarly in 2001, after one conference call, a representative of MBNA “emailed her colleagues that Chase has an arbitration clause under ‘active consideration.’ The information about Chase’s arbitration clause was not publicly available.”³⁰⁶ The members reported to each other when they “had implemented arbitration provisions through change-in-terms notices sent to cardholders,” as well as when they were about to do so, even when that information “was not publicly known at that time.”³⁰⁷

The members of the Arbitration Coalition often inquired into the internal decision-making of their rival banks with respect to arbitration clauses. For example, in January 2001, one lawyer, whose firm was involved in the Coalition, emailed a lawyer at Citi “on behalf of ‘a client considering using arbitration clauses in credit card agreements’ . . . to ‘confirm that Universal and Citibank (South Dakota) [were] not currently using arbitration’ . . . [and to ask whether] the use of arbitration clauses is still under consideration and what the major concerns are.”³⁰⁸ These facts suggest that some banks were reluctant to impose arbitration clauses unless all of their major competitors were doing so as well, and that they wanted some assurances that all of the members of the Coalition were imposing arbitration clauses on their customers. One bank’s consultant working with the Arbitration Coalition

exhorted the group that “class actions are getting out of hand” and have become “a gaming business” and a “shakedown

303. *Id.* at 429.

304. *Id.* at 421, 443.

305. *Id.* at 419.

306. *Id.* at 428.

307. *Id.* at 423.

308. *Id.*

racket,” but that the group could “beat” the problem “by working together.” His prepared remarks suggested that the trial bar was more organized than large consumer companies because “[a]s competitors we are conditioned to go it alone” due to a “Century + of [the] Sherman [Act].”³⁰⁹

In noting the need to work together, the consultant specifically noted the “fear of competitor exploitation”³¹⁰ This sounds like the classic cartel conundrum: no firm wants to raise price without assurances that its rivals will also raise price because the first-moving firm does not want its competitors to exploit the price asymmetry to steal customers.

Taken together, the facts surrounding the creation and meetings of the Arbitration Coalition and its subgroup, the In–House Working Group, show a pattern of meetings among competitors before every bank ultimately adopted arbitration clauses with class-action waivers. The structure of the market lent itself to illegal cartelization. The court noted that the general-purpose credit card market had “high barriers to entry” and that the issuing banks collectively had approximately eighty-seven percent market share.³¹¹ The district court summarized the timeline as follows:

Together, the Issuing Banks participated in 28 meetings over a four-year period exploring avenues to displace class actions with arbitration of cardholder disputes. During that same approximate period, each Issuing Bank adopted a class-action-barring arbitration clause. While First USA implemented its class-action-barring arbitration clause more than a year before the first meeting, all of the other Issuing Banks noticed and implemented clauses within a month of an Arbitration Coalition or In–House Working Group meeting attended by their counsel. In May 2002, Chase was the last Issuing Bank to adopt such a clause. One month later, the multi-year pattern of meeting nearly bimonthly dropped off. Indeed, the Arbitration Coalition did not meet again for almost a year, and after two follow-up conference calls, appeared to have disbanded.³¹²

The court failed to appreciate how suspicious it was that the group disbanded once every bank adopted mandatory arbitration. After all, if the goal of the group was to defend arbitration clauses and to do public relations work, the group would have needed to

309. *Id.* at 424.

310. *Id.*

311. *Id.* at 430.

312. *Id.* at 439.

continue after every bank imposed an arbitration clause. In contrast, if the group's goal was to get every firm to adopt an arbitration clause with a class-action waiver, then the group could stop meeting after it attained that goal.

After reviewing the evidence, the court found no agreement among the members of the Arbitration Coalition to insert arbitration clauses (with class-action waivers) in their contracts with customers.³¹³ The court concluded

[w]hen the first meeting convened, only two defendants had class-action-barring arbitration clauses in their card member agreements. By the time the last meeting concluded, all ten of the Issuing Banks, accounting for approximately 87% of all credit card transactions in the United States, had adopted class-action-barring arbitration clauses in their card member agreements. It was only by a slender reed that Plaintiffs failed to demonstrate that the lawyers who organized these meetings had spawned a Sherman Act conspiracy among their clients.³¹⁴

The court did not apply the *per se* rule, but held that “under the ‘quick look’ analysis *on the record presented in this case*, the collusive adoption of mandatory class-action-barring arbitration clauses, if proven, would have constituted an unreasonable restraint on trade in violation of section 1 of the Sherman Act.”³¹⁵ But the court protected conspiracies to arbitrate by making it excessively difficult to prove an

313. *Id.* at 456–57.

314. *Id.* at 456.

315. *Id.* (emphasis added). “Quick look” is

an “intermediate standard” and “applies in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint.” In such cases, “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” In other words, “quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained.” Under “quick look” analysis, the competitive harm is presumed, and the “defendant must promulgate ‘some competitive justification’ for the restraint.” “If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and ‘the court condemns the practice without ado.’” “If the defendant offers sound pro-competitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.”

Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830–31 (3d Cir. 2010) (internal citations omitted) (quoting *United States v. Brown*, 5 F.3d 658, 669 (3d Cir. 1993) and *California Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999)).

agreement. The Second Circuit affirmed,³¹⁶ which is troubling because the district court made several errors, as Section IV.B argues.

B. *Judicial Mistakes*

The district court in *Ross* stated the law accurately, but it erred when applying it. The district court correctly noted that plaintiffs need not show a “formal agreement” in order to satisfy the agreement element of a section 1 claim.³¹⁷ Instead, “[t]he essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words.”³¹⁸ The agreement element is satisfied if “concert of action is contemplated and . . . the defendants conformed to the arrangement.”³¹⁹ In addition to stating the law correctly, the court also observed the reality that antitrust “conspiracies ‘nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.’”³²⁰

The court’s application of the law, however, reveals several errors. First, by failing to understand how antitrust cartels operate, the *Ross* court misread the significance of much evidence in the case. Most notably, the court seemed to think that anything that made the Arbitration Coalition “resemble[] a trade association”—such as inviting outsiders to some meetings—“cuts against any inference that an express agreement to implement and maintain arbitration clauses was articulated at the Arbitration Coalition meetings.”³²¹ The judge announced that he was “especially hesitant to infer an illicit agreement from a record in which many of the Issuing Banks’ communications resembled those of trade associations or lobbying groups.”³²² This deference to activity resembling trade associations is misplaced given that, for the past century, trade associations have played a critical role in managing and stabilizing cartel operations.³²³

316. *Ross v. Citigroup, Inc.*, 630 F. App’x 79, 80 (2d Cir. 2015).

317. *Ross*, 35 F. Supp. 3d at 437 (“No formal agreement is required to constitute an antitrust conspiracy.”).

318. *Id.* (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946)).

319. *Id.* (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 142 (1948)).

320. *Id.* (quoting *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012)).

321. *Id.* at 445. The court also acknowledged that “[t]his, however, does not preclude a tacit meeting of the minds, or a ‘gentlemen’s agreement’ among the Issuing Banks,” but it still thought that the evidence of conspiracy was “ambiguous.” *Id.*

322. *Id.* at 452.

323. Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard to Do: Determinants of Cartel Duration*, 54 J.L. & ECON. 455, 456 (2011) [hereinafter Levenstein & Suslow, *Breaking Up*] (“We find that cartels that rely on trade associations are less

Many trade associations were created specifically to disguise price-fixing arrangements.³²⁴ Trade associations are the perfect cover for cartels: their meetings explain travel records that would otherwise be evidence of cartel activity;³²⁵ they may facilitate cartel auditing,³²⁶ and they make it harder even for firms' own internal antitrust compliance programs to spot price fixing.³²⁷

Second, the *Ross* court seemed to use evidence of legal activity to offset evidence of illegal activity. For example, the court noted that the Arbitration Coalition's lobbying activity would be protected by the *Noerr-Pennington* doctrine.³²⁸ But those activities were not being challenged; they were an irrelevant distraction. Most significantly, the court attached legal significance to its impression that most of the information exchanged at the Arbitration Coalition meetings was publicly available. For example, "[w]hile there is evidence that certain of the Issuing Banks shared some internal, non-public information, the bulk of the discussion centered on publicly available information—including the arbitration clauses themselves."³²⁹ The fact that some permissible topics were discussed does not insulate the discussion and agreements on impermissible topics from antitrust liability. It neither explains nor justifies the potentially illegal activities.

Third, the *Ross* court misunderstood and misapplied the antitrust doctrines for inferring an agreement. The court began by correctly noting that antitrust plaintiffs need not have direct evidence of an agreement. Plaintiffs can prove an agreement through circumstantial evidence, which requires "conscious parallelism" and "plus factors." Conscious parallelism refers to defendants consciously engaging in parallel conduct, but this alone does not establish an agreement

likely to die a natural death."); Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 60–61 (2006) (citing literature showing between one-third and over one-half of studied cartels "were organized and maintained by trade associations").

324. Leslie, *supra* note 233, at 660.

325. CONNOR, *supra* note 168, at 32 ("The major problem with face-to-face meetings, especially for global conspiracies, is that they create a paper trail of travel records. To overcome this problem, cartels often hold meetings concurrent with those of an otherwise legitimate trade association.").

326. *See id.* at 30 ("[For cartels] [t]he cooperation of an accounting firm is more likely if the client is a trade association."); Levenstein & Suslow, *Breaking Up*, *supra* note 323, at 459 ("Many cartels exchange output, sales, and price data with each other or forward data to a third party, such as a trade association or an independent auditor.").

327. CONNOR, *supra* note 168, at 462.

328. *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 452 (S.D.N.Y. 2014).

329. *Id.* at 445.

because firms may be engaging in similar conduct without actually agreeing with each other.³³⁰ To show that the parallel conduct is the product of an agreement, the plaintiff must also show the presence of so-called “plus factors,” such as motive and opportunity to conspire, communications among the defendants, radical and simultaneous changes in business practices, and evidence that each individual firm’s action would not have made sense in the absence of an agreement.³³¹ The *Ross* court erred when performing this analysis.

At the outset, the court treated actual meetings of rivals in which they were encouraged to adopt arbitration clauses—and later did so—as mere conscious parallelism.³³² That is incorrect. Conscious parallelism would be merely that the rivals did the same thing (for example, adopt arbitration clauses). The members of the Arbitration Coalition exhibited much more than conscious parallelism because the competing banks were actually meeting about arbitration clauses and discussing how to make them the industry standard *before* ever adopting them.³³³

Furthermore, the court mishandled the individual plus factors. For example, although motive to conspire is a traditional plus factor,³³⁴ the *Ross* court tried to distinguish between the banks’ “amply demonstrate[d]” motivation to “‘work together to turn the tide’ in order to make arbitration an ‘acceptable forum for resolving consumer debates’” and a motive “to collusively adopt the clauses.”³³⁵ These are not as distinct as the court found. The court itself acknowledged that the banks were motivated to conspire to impose industry-wide arbitration clauses because they feared that mandatory

330. See *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011) (“Parallel conduct in itself is insufficient to state a plausible claim because it is ‘consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007))).

331. William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 405–06, 415 (2011).

332. *Ross*, 35 F. Supp. 3d at 441.

333. The only two Issuing Banks with arbitration clauses, Amex and First USA, were the banks that “were actively involved in planning the initial meeting of the Arbitration Coalition on July 28, 1999.” *Id.* at 440. Why would Amex try to convince its rival banks to adopt arbitration clauses with class-action waivers if Amex was already protected by such clauses in its own contracts? Because the banks with arbitration clauses needed their rivals to include similarly anti-consumer arbitration clauses before arbitration clauses became salient to consumers. See *id.* at 442 (“Even if most consumers were indifferent, this does not foreclose a motive to keep arbitration non-salient while issuers quietly adopted it across the board.”).

334. *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015).

335. *Ross*, 35 F. Supp. 3d at 442 (quoting the defendants’ documentation).

arbitration was salient.³³⁶ Consequently, consumers could start shifting their business away from banks that required arbitration. If, however, all banks imposed mandatory arbitration, consumers could not avoid arbitration clauses, and banks would not fear losing business to banks that did not impose such clauses. Furthermore, the court explicitly recognized that industry-wide arbitration, and an agreement not to compete on arbitration clauses, could help “keep arbitration non-salient while issuers quietly adopted it across the board.”³³⁷ Asserting that the banks could have been “motivated to cooperate on efforts to sway public opinion and defend the legality of their clauses in the courts and legislatures,”³³⁸ the court (without citation) announced a new legal rule that “[w]hen the motive to cooperate is just as consistent with legitimate goals as non-legitimate goals, there can be no fair inference of collusion.”³³⁹ The court ultimately failed to recognize the anticompetitive reasons why rival firms would conspire to impose arbitration clauses on their customers.³⁴⁰

Similarly, the court also mistreated the issue of product standardization as a plus factor. When firms artificially standardize their products, it counts as a plus factor, in part because this harmonization facilitates anticompetitive agreements, such as price fixing.³⁴¹ While this inquiry generally occurs in the context of physical products, it also applies to the standardization of contract terms.³⁴² In response to the plaintiffs’ argument that “the Issuing Banks’ arbitration clauses were artificially standardized as a result of their illegal agreement to include class action waivers and to otherwise bar

336. *Id.* at 442 (“The Issuing Banks harbored concerns ‘that using arbitration for credit cards could be perceived as anti-consumer.’”).

337. *Id.* at 442–43 (“While arbitration was not salient to most consumers at the time of the alleged conspiracy, collusion would ensure that no Issuing Bank facilitated a rise to salience before arbitration was firmly entrenched as the industry norm.”).

338. *Id.* at 443.

339. *Id.* The court’s reasoning is flawed. The firms had a motive to enter an illegal agreement; the court finds so. The fact that they had a motive to cooperate in legal ventures as well does not negate the motive to conspire.

340. *See supra* Section II.B.1 (describing firms’ potential benefits and incentives from entering conspiracies to arbitrate).

341. *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (“[S]tandardization of a product that is not naturally standardized facilitates the maintenance of price uniformity.”); *In re Med. X-Ray Film Antitrust Litig.*, 946 F. Supp. 209, 218 (E.D.N.Y. 1996) (“[P]lus factors include . . . the artificial standardization of products”); *see also De Jong Packing Co. v. United States*, 618 F.2d 1329, 1334 (9th Cir. 1980) (finding similar wording in letters as evidence of conspiracy).

342. *In re Currency Conversion Fee Antitrust Litig.*, Nos. M 21–95, 05 Civ. 7116(WHP), 2012 WL 401113, at *7 (S.D.N.Y. Feb. 8, 2012).

collective redress,” the court found the evidence too “ambiguous.”³⁴³ The court reasoned that although “the Issuing Banks were asked to provide copies of their arbitration clauses for analysis and discussion at meetings and they intended to work together to share ‘best practices,’” and that “the Arbitration Coalition had a special interest in defeating class action lawsuits,” arbitration clauses were becoming “*au courant*.”³⁴⁴ Thus, “it [was] unsurprising that over time each of the Issuing Banks’ arbitration clauses would morph to incorporate a class action waiver.”³⁴⁵ But arbitration clauses did not “morph” naturally; if it were going to happen naturally, then the Arbitration Coalition would not have felt the need to coordinate their efforts.

The *Ross* court likewise mishandled the defendants’ inability to explain their suspicious parallel conduct. The judge noted that “[c]ontemporaneous notes survive from only 7 of the 28 meetings.”³⁴⁶ While noting that it was “odd” that so little documentation exists for meetings involving considerable “investment of attorney time and travel expense in attending a series of meetings over a period of years,” the court deemed the scarcity of documentation “not alarming” because “formal minutes” are not “taken at a CLE or client development pitch.”³⁴⁷ But the court had earlier noted that these meetings did not resemble either CLE programs or client development meetings.³⁴⁸ Moreover, the fact that the defendants had no explanation for what happened at many of the meetings, with many attendees claiming not to remember attending,³⁴⁹ is itself an important plus factor for inferring an agreement.³⁵⁰ Thus, the court

343. *Ross*, 35 F. Supp. 3d at 448.

344. *Id.*

345. *Id.* The court failed to appreciate that “[o]ne way in which boilerplate could possibly become uniform in an industry or trade is by old-fashioned collusion, the kind that antitrust law is designed to target.” MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 41 (2013).

346. *Ross*, 35 F. Supp. 3d at 450 (“Other than three internal memos from the September 29, 1999 meeting, attendees generated little work product to inform their colleagues of what they learned at the meetings. And there is hardly any documentation regarding substance or even attendance for the In-House Working Group meetings.”).

347. *Id.* at 451.

348. *Id.* at 444–45.

349. *Id.* at 451 (“Many meeting attendees remembered very little about the substance of the meetings. At his February 2004 deposition, Heine, a ‘core’ member of the Arbitration Coalition recalled that there ‘may have been less than five meetings’ though he attended at least eleven meetings over the course of three years. Tasheff (Citi) did not remember attending the May 30, 2001 Class Action Working Group meeting even though she volunteered to lead the group’s efforts on ‘PR and Legislative Affairs’ with MacDermott (Amex) and Barry (Capital One).”).

350. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (“The failure under the circumstances to call as witnesses those officers . . . [to explain] whether they

improperly discounted the significance of these “memory gaps.”³⁵¹ The lack of notes and the claims of innocence are rendered more suspicious by the fact that the Coalition members’ denials of collusion sometimes appear feigned and not credible. For example, regarding a July 2001 conference call among the coalition members, “the call participants deny that arbitration was discussed. No attendance lists, notes, or memos of this call exist.”³⁵² The court noted, however, that “[g]uilelessly, the designated passcode for the conference call was ‘ARBITRATION.’”³⁵³ Such lack of explanation constitutes a plus factor for inferring agreements in antitrust law.³⁵⁴

In addition to these discernable mistakes with respect to individual plus factors, the *Ross* court made an overarching error by disaggregating the evidence of conspiracy. Although the judge in *Ross* correctly noted that “courts examine the existence of a conspiracy ‘as a whole’ taking into consideration the totality of the evidence, as opposed to ‘dismembering it and viewing its separate parts,’”³⁵⁵ the judge did not follow the stated rule. The judge dismembered the evidence of conspiracy and looked at it in isolation, finding each individual piece of evidence to be insufficient in and of itself to prove that the banks conspired. The court repeatedly isolated evidence in order to diminish its legal significance. For example, after characterizing “many of the Issuing Banks’ communications [as] resembl[ing] those of trade associations or lobbying groups,” the court diminished the communications among competitors as insignificant because “[m]embership and participation in a trade association *alone* does not give rise to a plausible inference of illegal agreement.”³⁵⁶ The plaintiffs, of course, were not relying on this alone.

had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants.”); Kovacic et al., *supra* note 331, at 406 (noting that “[t]he absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals) or the presentation of contrived rationales for certain conduct” as a plus factor); *see also infra* note 375 and accompanying text.

351. *Ross*, 35 F. Supp. 3d at 452 (“The memory gaps of a few witnesses do not transmogrify an honest lack of recollection into a conspiracy.”).

352. *Id.* at 426.

353. *Id.*

354. *See infra* note 375 and accompanying text.

355. *Ross*, 35 F. Supp. 3d at 438 (quoting *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

356. *Id.* at 452 (emphasis added) (quoting *LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136, 148 (E.D.N.Y. 2010)).

Similarly, after the court acknowledged that “[t]here is no question that the Issuing Banks engaged in an unusually high amount of inter-firm communications regarding arbitration,”³⁵⁷ it then asserted that “a mere showing of close relations or frequent meetings between the alleged conspirators” cannot prove the existence of a conspiracy.³⁵⁸ The plaintiffs in *Ross*, however, had significantly more evidence than “a mere showing” of frequent meetings. The plaintiffs proved that the purpose of these meetings was to make mandatory arbitration the industry standard. The court mischaracterized the plaintiffs’ argument as inferring a conspiracy solely from “opportunities to conspire,” which, according to the court, “would condemn independent professional associations.”³⁵⁹ The plaintiffs, though, were not focusing on the banks’ mere opportunity to conspire; rather, the plaintiffs proved that these meetings among competitors were specifically called to encourage agreement on industry-wide arbitration.³⁶⁰ The *Ross* court’s approach violated the fundamental rule of antitrust law—that judges should not compartmentalize evidence of agreement.³⁶¹

Finally, and most importantly, the *Ross* court failed to recognize that it had, *in fact*, found an agreement among the defendants to impose arbitration clauses with class-action waivers. When evaluating all of the evidence, the court concluded

[i]t is clear that the Issuing Banks had an agreement to explore collective advocacy efforts aimed at expanding the

357. *Id.* at 443.

358. *Id.* at 444 (emphasis added) (quoting *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981)).

359. *Id.* at 444 (citing *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1488–89 (D.C. Cir. 1984)).

360. The defendants tried to spin the meetings as client development opportunities initiated by a major law firm. *Id.* But the *Ross* court acknowledged that “[t]he number of meetings over a sustained period devoted to the topic of arbitration far exceeds a level normally associated with client development pitches or CLEs.” *Id.* Furthermore, if this was true client development, why have all of the rivals in the same room at the same time discussing how to impose the same anti-consumer terms in their contracts?

Moreover, at points the attorney leaders of the Arbitration Coalition sought information from the banks that was inconsistent with either client development or CLE. *See id.* at 444–45 (“The generation of joint work product, such as the FAQs project, is inconsistent with client development efforts because law firms do not generally parcel work assignments out to clients. And potential client invitees are not usually called on to educate one another or share internal analysis. Indeed, the significant level of cooperation among attendees was atypical of a CLE or client development pitch. Any lawyer would agree that CLEs and client development pitches do not typically involve homework assignments, the formation of sub-groups, or the development of a public relations campaign.”).

361. *See Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

enforceability of arbitration clauses and to establish class-action-barring arbitration as an industry norm. Direct evidence of this agreement abounds in meeting agendas, solicitations to fund amicus briefs and research, and willingness to explore joint action such as the FAQs project or self-regulation efforts.³⁶²

Thus, the court held that the defendants “had an agreement . . . to establish class-action-barring arbitration as an industry norm.”³⁶³ That agreement *is* a conspiracy to arbitrate. To agree to have arbitration clauses with class-action waivers as the industry norm is to agree that every firm in the industry will impose such arbitration clauses, *as they all did* following the meetings of the Arbitration Coalition.³⁶⁴ This agreement among competitors to have industry-wide arbitration clauses is illegal.³⁶⁵

The court’s description of the defendants’ actions and motives also demonstrates another mishandling of plus-factor analysis and another example of how the court did, in fact, find an illegal

362. *Ross*, 35 F. Supp. 3d at 452.

363. *Id.*

364. The district judge criticized the plaintiffs for reading evidence of an agreement “to establish class-action-barring arbitration as an industry norm . . . as evidence of a separate, illegal agreement to collusively adopt and maintain class-action-barring arbitration clauses.” *Id.* But, in the context of the Arbitration Coalition, these are equivalent.

In a way, the *Ross* court seemed to distinguish between an industry effort to standardize contract terms and an agreement among rivals to impose those standardized terms on their customers. This distinction is not persuasive. As Professor Mark Patterson has noted in the context of standardized contracts more generally, “it would make little sense for the parties to engage in a standardization effort were their uniform use of the contract not an assumption underlying that effort.” Patterson, *supra* note 129, at 394; *see also id.* at 395 (“[The] benefits of standardization arise from the widespread use of the standardized contract. Therefore, the effort makes sense if the contracts are to be adopted—as final contracts or as defaults from which negotiation begins—uniformly, but does not make sense in the absence of an understanding that they will all adopt the contract.”). Patterson explains that because standardization efforts are costly, the participants must expect a return on their investment of time and money. *Id.* at 406. He explains: “One possibility—the anticompetitive one—is that the standardization will constitute or facilitate collusion. To avoid an inference of that possibility, it seems that the standard-setters should be able to offer an alternative explanation of how their costs will be recovered.” *Id.*

Moreover, in its application, the court seemed to downplay the fact that “[a]fter the Arbitration Coalition ceased meetings, all the Issuing Banks had similar clauses.” *Ross*, 35 F. Supp. 3d at 448. Yet, that is strong evidence of agreement. *See infra* note 378 and accompanying text.

365. *See supra* Section II.A (discussing *Paramount Famous Lasky*). Moreover, because the court found that “[d]irect evidence of this agreement abounds,” *Ross*, 35 F. Supp. 3d at 452 (emphasis added), the court did not even need to consider the circumstantial evidence of conscious parallelism and plus factors, an analysis that the court ultimately performed incorrectly. *See supra* notes 334–54 and accompanying text. Circumstantial evidence is unnecessary when there is direct evidence of an illegal agreement.

agreement but failed to realize it. Traditionally, helping one's competitors perfect their contracts would be considered against a business's self-interest and would count as a plus factor.³⁶⁶ The *Ross* court conceded that the Arbitration Coalition "meetings evidenced a degree of communication and collaboration beyond what one would expect from a CLE or a trade association," but it concluded that the meetings were not against self-interest of the banks that already had arbitration clauses; instead, it asserted that those banks needed to "educat[e] their competitors on how to 'get it right'" in order to attain the "goal of establishing arbitration as an industry norm."³⁶⁷ In other words, the court reasoned that the information-sharing meetings were not against the banks' self-interest because they facilitated the goal of industry-wide arbitration. That is the cartel agreement: an agreement that every bank in the industry impose mandatory arbitration on its customers.³⁶⁸

C. *Inappropriate Deference to Arbitration*

The *Ross* opinion raises many important questions. How can a court find an illegal conspiracy and not realize it? Why did the *Ross* court mishandle plus-factor analysis? Why did it hold that conspiracies to arbitrate are not per se illegal? In short, why did the *Ross* court make so many mistakes? All of the questions share the same answer: an unhealthy deference to arbitration.

The *Ross* court's deference to arbitration clauses began with its decision not to apply antitrust law's per se rule. Despite the Supreme Court's opinion in *Paramount Famous Lasky*, which condemned conspiracies to arbitrate as per se illegal,³⁶⁹ the *Ross* court cited the so-called federal policy favoring arbitration—as well as the Supreme Court's pro-arbitration decisions in *Concepcion* and *Italian Colors*, among others—to hold that conspiracies to arbitrate are not per se illegal.³⁷⁰ Remarkably, the *Ross* court never mentioned *Paramount*

366. See *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 399 (3d Cir. 2015) ("[E]vidence of actions against self-interest means there is evidence of behavior that is inconsistent with a competitive market.").

367. *Ross*, 35 F. Supp. 3d at 448.

368. Similarly, every member of a traditional price-fixing cartel will share information with its competitors in order to facilitate the cartel's goal of raising market price. That does not make the information sharing in an individual firm's self-interest as that phrase is used in antitrust law. Rather, the individual firm benefits because the act strengthens the cartel.

369. See *supra* Section II.A.

370. *Ross*, 35 F. Supp. 3d at 454–55. The *Ross* court held that the per se rule does not apply to conspiracies to arbitrate because "the Supreme Court has expanded the reach of consumer arbitration clauses in the past thirty years." *Id.* That is not a reason to not apply

Famous Lasky.³⁷¹ Thus, the alleged congressional preference for arbitration seems to have affected substantive antitrust law.

A similar pro-arbitration bend seems to have skewed the court's interpretation of the facts. If judges regarded arbitration conspiracies as they do other antitrust conspiracies, they would undoubtedly find an agreement among competitors on analogous facts. Take the facts of *Ross* and replace "arbitration" with "raising prices," and the presence of an agreement becomes clear:

- a group of competitors created a group called the "Pricing Coalition";
- the stated goal of competitors' coalition was to make higher prices the industry norm;
- the group of competitors met 28 times;
- the competitors shared non-public information about future pricing plans;
- the competitors have no notes or memories of most of their meetings, though for one of these note-less meetings—at which the competitors claim raising price was not discussed—the passcode for the conference call was "Raising Prices";
- every firm in the coalition did, in fact, raise prices to the level articulated as the preferred "industry norm"; and
- after every firm in the coalition has raised prices to the "industry norm," the group disbands.

In price-fixing jurisprudence, such a fact pattern clearly demonstrates an agreement under antitrust law. The formation of a group with the goal of raising prices,³⁷² the holding of meetings among competitors,³⁷³ the sharing of non-public information about future

the per se rule; that is the reason why conspiracies to arbitrate are more valuable. Furthermore, the Supreme Court's embrace of unilaterally imposed arbitration clauses is irrelevant to the legality of conspiracies to arbitrate. After all, antitrust law recognizes a firm's right to raise price unilaterally, but still condemns conspiracies to raise price as per se illegal.

371. Instead, the *Ross* court relied on *Drayer v. Krasner*, 572 F.2d 348 (2d Cir. 1978). *Ross*, 35 F. Supp. 3d at 454. *Drayer* incorrectly suggested that *Paramount Famous Lasky* was not a per se case. See *Drayer*, 572 F.2d at 355; *supra* notes 98–118 (explaining why *Paramount Famous Lasky* is a per se case). More importantly, the court in *Drayer* relied on the inaccurate notion that "policy favors arbitration" and relied heavily on the fact that the unique regulations of the securities industry at issue. See *Drayer*, 572 F.2d at 353, 357–58. Thus, *Drayer* was both incorrect and distinguishable.

372. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

373. See *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("If proven, evidence of any meetings[,] . . . telephone conversations, or other electronic communications in pursuit and furtherance of the alleged conspiracy would be the most relevant evidence that could be introduced in proving the allegations of plaintiffs'")

pricing plans,³⁷⁴ the lack of an explanation for many meetings,³⁷⁵ the success in raising price,³⁷⁶ and the pretextual justifications for their meetings³⁷⁷ would be sufficient to prove an agreement in the context of price-fixing conspiracies. The fact that uniform action occurred *after* these meetings provides additional evidence of an agreement.³⁷⁸ The important point here is not that price fixing is *per se* illegal; it is that these facts are sufficient to show *an agreement* for antitrust purposes. If such facts show an agreement for a price-fixing conspiracy, they should show an agreement for a conspiracy to arbitrate.³⁷⁹

complaint of price fixing.”). In price-fixing cases, courts hold evidence of defendants’ meetings to be significant because meetings allow factfinders to infer that the prices were discussed. *See* *Weit v. Cont’l Ill. Nat’l Bank & Tr. Co. of Chi.*, 641 F.2d 457, 478 (7th Cir. 1981). But the facts of *Ross* are even more damning because we know that the defendants discussed making mandatory arbitration the industry-wide standard.

374. *See* *Todd v. Exxon Corp.*, 275 F.3d 191, 211 (2d Cir. 2001) (“[E]xchanges of future price information are considered especially anticompetitive.”).

375. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225–26 (1939); VI PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶1417c, at 109 (2d ed. 2003) (“Because contacts among competitors present a definite danger to competition, it is reasonable as a policy matter to require the companies that are meeting to explain their actions. When an innocent explanation is not forthcoming or is not plausible, the suspicion arises that the contact was made in furtherance of a conspiracy to suppress competition.”); *see also* *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98-2847, 1999 WL 691840, at *14 (4th Cir. Sept. 7, 1999) (*per curiam*) (finding forgotten conversations about important subjects as strong evidence of an illegal agreement to restrain trade).

376. *United States v. Apple, Inc.*, 791 F.3d 290, 328 (2d Cir. 2015) (affirming the holding of an illegal price-fixing agreement because “motives, coupled with the unambiguous increase in the prices, . . . was sufficient to confirm that price fixing was the goal, and the result, of the conspiracy”).

377. *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 53 (E.D. Pa. 2007). The Arbitration Coalition’s disbandment after the banks implemented uniform arbitration clauses shows that the group’s assertion of public relations and joint legal defense cooperation were pretextual.

378. *See* *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) (“Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable”); *see also* *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 239 F. Supp. 2d 180, 187 (D.R.I. 2003) (“Proof of these plus factors may include evidence of meetings attended by the defendants followed shortly thereafter by parallel behavior that goes beyond what would be expected absent an agreement.”), *aff’d*, 373 F.3d 57 (1st Cir. 2004).

379. By failing to examine the evidence through an antitrust lens, the *Ross* court failed to understand the nature of agreements among competitors. For example, in characterizing the discussions among competitors to adopt class-action-barring arbitration clauses, the judge concluded that the “aggressive communications to various Issuing Banks strike this Court as aimed at persuasion rather than collusion.” *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 453 (S.D.N.Y. 2014). Trying to *persuade* one’s competitors to raise price in direct meetings, followed by one’s competitors raising price, would constitute illegal price fixing. *See* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948)

The *Ross* court, however, apparently interpreted the analogous facts more leniently because the alleged conspiracy involved the collusive imposition of arbitration clauses. Despite the fact that conspiracies to arbitrate impose serious anticompetitive harms³⁸⁰ and can strengthen an underlying price-fixing conspiracy,³⁸¹ the court was relatively sympathetic to the goals of arbitration conspiracies.³⁸² The heart of the problem is that courts view arbitration as fundamentally good and, consequently, interpret business behavior regarding arbitration clauses as innocent and innocuous.³⁸³ This appears to have distorted the *Ross* court's interpretation of the facts. Whatever one's view of arbitration, the facts clearly prove an agreement to make mandatory arbitration the industry norm, as the court itself found but did not appreciate.³⁸⁴

V. MOVING FORWARD

The case study in Part IV illustrates in more specific detail the root of the problems identified in Part III: federal courts are so enamored with arbitration clauses that they fail to recognize the dangers and illegality of conspiracies to arbitrate. In misguided deference to the imagined virtues of mandatory arbitration, courts have misapplied equitable doctrines and antitrust law in a manner

(“It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.”); *cf. Interstate Circuit*, 306 U.S. at 227 (“Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”).

380. *See supra* Section II.B.

381. *See supra* Section II.C.

382. One might argue that this exercise is unfair because arbitration clauses are legal, while price fixing is not. But that is a false comparison. Any firm—even a monopolist—can raise price legally so long as it does so unilaterally. It is *agreements* to raise price that violate antitrust law. Similarly, the legality of individually imposed arbitration clauses does not exonerate conspiracies to arbitrate. Nor should it prevent judges and juries from finding an agreement to impose arbitration clauses when competitors' communications and actions indicate that conclusion.

383. The *Ross* court treated coordination regarding arbitration as inherently innocent. For example, when the Arbitration Coalition met in April 2001, one organizer “characterized the Arbitration Coalition as ‘the only organization uniquely devoted to protecting industry use of arbitration of consumer disputes.’” *Ross*, 35 F. Supp. 3d at 424. If a “Price-Raising Coalition” in an industry bragged that it was “the only organization uniquely devoted to raising price in an industry,” that evidence standing alone would be sufficiently damning to prove that simultaneous price increases had been the result of a Coalition-orchestrated agreement. But the *Ross* court treated the Arbitration Coalition's proclamation as beyond reproach.

384. *See supra* notes 362–68 and accompanying text.

that rewards misconduct. As a consequence, courts embolden firms to conspire to use arbitration clauses to cloak their illegal activities from scrutiny because, after their customers are denied access to courts and to class-aggregating procedures, the victims of illegal conduct often have no financially feasible procedure to protect their rights. By collectively manipulating the terms in their arbitration clauses, law-breaking firms may be able to evade legal liability altogether.

Federal judges can begin to prevent these inequitable outcomes by taking several actions. First and foremost, when plaintiffs allege that the defendants conspired to impose arbitration clauses, a court must adjudicate these claims.³⁸⁵ Sending litigation involving arbitration conspiracies to an arbiter entails enforcing the self-same conspiracy. When federal judges compel arbitration in these cases, the plaintiffs' alleged antitrust injury—being forced into the suboptimal, less-protective arbitration process—is inflicted by the very federal court tasked with remedying such injury.

Federal judges should not interpret or apply arbitration clauses expansively. For example, courts should not allow defendants to apply pre-dispute arbitration clauses retroactively to cover their previous misconduct. To do so rewards and protects illegal activity. Neither should courts invoke equitable estoppel to expand the reach of arbitration clauses. Equitable considerations demand that antitrust defendants be denied the protections of their co-conspirators' arbitration clauses. Accordingly, courts should stop turning equitable principles upside down by holding that illegal liaisons warrant estoppel against a conspiracy's victims.³⁸⁶

In addition, the *Ross* case study demonstrates that a judicial hearing alone is not sufficient to protect conspiracy victims. Judges considering allegations of arbitration conspiracies should not view the evidence and circumstances through a pro-arbitration lens. Even if mandatory arbitration were an effective and fair forum for consumer

385. One potential downside of requiring litigation of arbitration conspiracies is that antitrust plaintiffs may attempt to evade arbitration clauses by including allegations of a conspiracy to arbitrate in their complaints. This is not a problem for several reasons. First, the claims must survive a motion to dismiss. Second, requiring plaintiffs' claims of a conspiracy to impose arbitration clauses be decided by judges, not arbitrators, is the correct result because Congress never intended consumer or antitrust claims to be subject to pre-dispute mandatory arbitration in the first place. Finally, this would not be a dramatic change so much as it is a return to form. All federal antitrust claims were decided by federal judges for almost the entire first century of the Sherman Act until the Supreme Court arbitrarily changed the rules in the 1980s, opening the door to antitrust arbitration. *See supra* notes 25–28, 34–45 and accompanying text.

386. *See supra* Section III.C.

claims—which it is not³⁸⁷—that should not affect the inquiry into whether the defendants agreed to impose arbitration clauses. Yet the *Ross* court found no agreement in part because of the court’s deference to arbitration. If courts better appreciated the downsides of mandatory arbitration, including the harms inflicted by conspiracies to arbitrate, they might be more appropriately suspicious of collective efforts by firms to prevent their customers from litigating in court.

Finally, it bears noting that a return to the *per se* approach against conspiracies to arbitrate does not necessarily condemn all industry efforts to encourage arbitration. Antitrust law distinguishes between naked restraints and ancillary restraints.³⁸⁸ Naked agreements are more likely to be condemned as *per se* illegal.³⁸⁹ The facts of *Ross* resembled a naked agreement, in that the plaintiffs alleged that the competitors got together for the purpose and effect of collusively imposing arbitration clauses with class-action waivers on their customers. An industry’s conversion to mandatory arbitration need not be so naked, however. In some trades, a central body propounds a standardized contract that includes a mandatory arbitration provision.³⁹⁰ So long as members of the industry are free to accept or reject this contract and its individual terms, antitrust courts should not condemn a firm in a competitive market for unilaterally deciding to adopt a standardized contract with an arbitration clause.

At the same time, judges should also be aware of the possibility of a hub-and-spoke conspiracy. Such a conspiracy could involve a trade organization or arbitration provider convincing competing firms to concurrently impose mandatory arbitration as a means of reducing their exposure to liability without alienating customers, who would

387. *See supra* Section I.B.

388. *See Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (“A court [in an antitrust case] must distinguish between ‘naked’ restraints, those in which the restriction on competition is unaccompanied by new production or products, and ‘ancillary’ restraints, those that are part of a larger endeavor whose success they promote.”). *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1221 (2008).

389. *Id.*

390. *See, e.g., Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470, 470 n.1 (1989) (noting that standardized contract promulgated by American Institute of Architects contained arbitration clause).

One example of this scenario is the standard form contract created by the American Institute of Architects (“AIA”), which is “the ‘dominant’ provider of building design and construction documents[] and supplies a wide range of documents that are commonly used in the construction industry.” Patterson, *supra* note 129, at 352 (citing AIA website’s collection of “Document Synopses by Family”). The AIA standardized contract requires mandatory arbitration, as well as an altered statute of limitations and waiver of consequential damages. *Id.* at 353.

otherwise purchase from a seller that did not require mandatory arbitration.³⁹¹ If a trade organization requires its members to impose arbitration clauses on its customers or employees, that comes closer to being a naked restraint.³⁹² At a minimum, it looks less like truly independent decision-making.

Determining whether an industry's transition to market-wide mandatory arbitration resulted from a naked conspiracy, a hub-and-spoke conspiracy, or independent decision-making will be a function of the facts of each individual case. In making this determination, however, courts should be alert to avoid the judicial mistakes highlighted in Section III.C and the *Ross* case study. In particular, judges should not allow the false premise of a federal policy favoring arbitration to cloud their judgment as to whether the defendants actually agreed to jointly impose arbitration clauses.

In sum, if industry-wide mandatory arbitration is the result of a conspiracy among rival firms to collectively impose arbitration clauses on their customers, these firms have violated antitrust law. Consequently, federal courts should hold the co-conspirators accountable.

CONCLUSION

Private litigation is vital for the enforcement of antitrust laws.³⁹³ Because private enforcement of antitrust laws can make price fixing unprofitable, price fixers would like to undermine private enforcement. One way to do this would be to dismantle or blunt the pro-plaintiff aspects of antitrust law. For example, price-fixing firms would like to ensure that antitrust damages are not trebled; that successful antitrust plaintiffs do not recover their attorneys' fees and

391. See *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015) (explaining that "courts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes'").

392. Courts fail to appreciate the significance of such conspiracies to arbitrate. See, e.g., *Drayer v. Krasner*, 572 F.2d 348, 354 (2d Cir. 1978) ("Compelling all member firms to include an arbitration clause in contracts with registered representatives does not inhibit the freedom of any firm in competing for business or of any investor in seeking the firm that will give him the best and cheapest service.").

393. Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 26 (2013). This is particularly true with respect to arbitration conspiracies. In theory, government officials could litigate in court against alleged members of a conspiracy to arbitrate. Buffon & Wolson, *supra* note 51, at 34 ("Similarly, an arbitration provision will not prevent a government enforcement action, because the government will not be a party to the agreement."). In the current political climate, this seems unlikely.

costs; that antitrust plaintiffs cannot receive injunctive relief; that antitrust statutes of limitation are truncated; and that victims of antitrust violations cannot pursue class actions to hold antitrust violators accountable. Price fixers cannot achieve these goals directly. So, they attempt to achieve them indirectly through mandatory arbitration. Arbitration clauses do not simply shift adjudication of antitrust claims from public courts to private forums; instead, firms use these clauses to attempt to dismantle the pro-plaintiff aspects of antitrust law.

When firms in an industry each unilaterally impose mandatory arbitration clauses on their customers, that is a tragedy; when firms in an industry *agree* with each other to impose mandatory arbitration clauses on their customers, that is an antitrust law violation. How did we go from a world in which conspiracies to arbitrate were per se illegal to our current one in which federal courts hold that it is perfectly legal for competitors to agree to make arbitration the industry standard? The answer has less to do with a failure of antitrust law than a breakdown of sensible arbitration jurisprudence. Courts err when they invoke the so-called federal policy in favor of arbitration as the justification for preventing consumers from litigating claims of conspiracy to arbitrate. Congress never created such a federal policy. Congress never intended consumer claims to be forced into arbitration. It never intended antitrust claims, let alone conspiracy-to-arbitrate claims, to be subject to mandatory arbitration.

The effects of the false belief in a federal policy favoring arbitration are numerous. First, it leads courts to divert conspiracy-to-arbitrate claims from court to arbitration, where valid claims are less likely to succeed. Second, it leads to the misapplication of equitable estoppel principles in order to allow non-signatories to compel arbitration. Third, it allows lawbreakers to retroactively prevent their victims from suing in court. And, fourth, as shown by the *Ross* case study, it makes it less likely for courts to find an agreement even when one exists.

Courts compound their mistakes by misapplying ancillary legal doctrines, such as equitable estoppel. Congress certainly never intended non-signatories to be able to enforce their co-conspirators' arbitration clauses against victims of illegal price fixing. Some courts have fetishized arbitration clauses to the point that they are ignoring both the legislative history of the FAA and the practical consequences of their pro-arbitration decisions. The solution is as simple as judges correctly reading the language and legislative history

of the FAA and as difficult as having the federal judiciary admit that they have been misapplying these texts for over three decades.

The stakes are high. Although businesses tout arbitration as an efficient way to resolve disputes, firms have wielded arbitration clauses as a weapon to effectively prevent consumers from bringing any legal claims against businesses. They structure their arbitration clauses to circumvent both pro-consumer laws and the protections of judicial procedures designed to create a level playing field upon which to resolve disputes. As often written, mandatory arbitration clauses are anti-consumer: they deprive consumers of any meaningful means to remedy legal wrongs, whether that be injuries from unsafe products, deceptive overcharges, or paying an illegally fixed price. When competitors conspire to impose arbitration clauses on their customers, the firms violate antitrust law. Federal courts should hold the conspirators accountable. While an industry-wide norm of mandatory arbitration does not alone violate section 1 of the Sherman Antitrust Act, when competing firms agree among themselves to adopt and pursue that norm, that constitutes a conspiracy for antitrust purposes. Courts should never invoke any so-called federal policy favoring arbitration to negate finding an agreement when one exists.