

The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts

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ABSTRACT

The doctrines of unconscionability and good faith have played paramount roles in limiting the ability of businesses to impose unfair contract terms on consumers. Yet the continuing role of these doctrines is being threatened by the proliferation of mandatory arbitration provisions in consumer agreements. If this trend continues, the ability of courts to further develop these contract doctrines in consumer cases will be severely limited. The Essay begins with a discussion of the role that common law plays in regulating consumer contract terms and discusses how the unconscionability and good faith doctrines have evolved as limitations on unfair standard terms over the years. It then reviews the increasing use of mandatory arbitration clauses in consumer contracts and the likely effects of this trend on consumer contract litigation. The Essay concludes by exploring what this might mean going forward if the common law of unconscionability and good faith are essentially frozen in time, and if mandatory arbitration results in fewer published decisions interpreting and applying consumer statutes.

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INTRODUCTION

In the typical merchant-consumer transaction, standard terms are the norm. Apart from very basic terms of the contract (e.g., price,

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quantity), the written agreement is generally not viewed as reflecting an actual agreement between the parties. Most consumer transactions are documented by contracts of adhesion in which most, if not all, of the terms are drafted by the merchant and are nonnegotiable. Even if consumer contracts were negotiable, the vast majority of consumers may not be aware of this possibility or, quite reasonably, may conclude that they cannot bargain effectively over terms either because they do not understand the legal import of those terms or they cannot envision alternatives that would better serve their interests.

Standard terms in consumer contracts are regulated in the public sector by statutes, agency regulations, and common law.¹ Consumer legislation exists at federal, state, and (sometimes) local levels. In particular, consumer protection at the federal level is extensive, especially in the area of consumer credit.² Over the years, states and municipalities have adopted laws addressing a wide variety of consumer contracting situations. There are common themes present in the array of state laws and some areas in which federal law controls. For the most part, however, each state adopts its own approach to protecting its residents from deceptive and unfair practices in consumer contracts.³

¹ To some extent, market forces may serve a regulatory function as well, and in some sectors, trade associations or other groups may recommend or require certain standard terms for members. This Essay, however, focuses on regulation of standard terms by the public sector (i.e., legislation, agency enforcement, and court decisions).

² See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tits. X & XIV, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C. tits. 2, 5, 7, 11, 12, 16, 18, 19, 20, 22, 25, 26, 28, 29, 30, 31, 41, 42, 44, 49, 112 (2012)); Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009) (codified as amended in scattered sections of 15 U.S.C.); Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1667f (2012)); Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960 (1988) (codified as amended at 15 U.S.C. §§ 1610-1646 (2012)); Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (1988) (codified as amended at 15 U.S.C. §§ 1637, 1647, 1665b (2012)); Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified as amended at 15 U.S.C. §§ 1666-1666j (2012)); Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (codified as amended at 15 U.S.C. §§ 1667-1667f (2012)); Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. §§ 1681-1681x (2012)); Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681x (2012)); Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500, 1521-25 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691f (2012)); Electronic Fund Transfer Act, Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified as amended at 15 U.S.C. §§ 1693-1693r (2012)).

³ State consumer statutes became popular in the 1960s during the rise of postwar consumerism in the United States. See Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 829-30 (2006). Prior to that time, the Federal Trade Commission ("FTC") was the principal government agency charged with protecting consumer rights. See *id.* at 830 n.9

Similarly, agency regulations such as Regulation Z (truth in lending) and Regulation E (electronic funds transfers) impose mandatory disclosure requirements and some limitations on contract terms in consumer contracts within their scope.⁴

Standard terms imposed by statutes and regulations are prolific and provide important specific protections to consumers, but they are not the only—and perhaps not even the greatest—influence on the terms of consumer contracts. The focus of this Essay is the regulation of standard terms in consumer contracts at common law (i.e., judges deciding cases in published opinions).⁵ In particular, the Essay focuses on the two most important common law doctrines in this area—unconscionability and good faith—and to a lesser extent on court decisions that interpret consumer statutes.⁶ They have all played a central role in regulating standard terms in consumer contracts over the years, yet their continuing role is being threatened by the proliferation of mandatory arbitration provisions in consumer contracts. These arbitration provisions typically prohibit class actions, whether in court or in arbitration. Most consumer-oriented businesses prefer these provisions, and they have been upheld as enforceable by the Supreme Court in a series of decisions that make it difficult for consumers to challenge their validity.⁷

(“[T]he Federal Trade Commission both proposed mini-FTC Acts for the states and helped in the drafting of a similar model consumer protection statute for the Council of State Governments from the mid-1960s through the early 1970s.” (citing DONALD P. ROTHSCHILD & DAVID W. CARROLL, *CONSUMER PROTECTION: TEXT AND MATERIALS* 887 & n.248, 889 & n.261 (2d ed. 1973))). Existing state statutes governing business conduct, such as the Uniform Commercial Code, included some, but not many, consumer protection provisions. By the end of the 1970s most states had enacted at least one general consumer protection law to curb unfair or deceptive acts and practices, and a variety of industry-specific laws. See CAROLYN L. CARTER & JONATHAN SHIELDON, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* 1 (8th ed. 2012) (noting that all states have at least one consumer protection statute and giving summaries of their content).

⁴ See 12 C.F.R. §§ 226.5, 1005.4, 1005.6(b) (2017).

⁵ The term “common law” can have more than one meaning. Early definitions saw common law as “customary law, the law of ‘long use’ and ‘custom.’” John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. REV. 1739, 1768 (2008) (quoting EDWARD COKE, *THE COMPLETE COPYHOLDER* (1630), reprinted in 2 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 563 (Steve Shepard ed., 2003) (“Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised.”)). As used in this Essay, however, the definition of common law is judge-made law, through published decisions, that exists as vehicle for law creation, development, and change over time.

⁶ Court decisions interpreting statutes might not be considered part of the common law construed in its narrowest sense (i.e., legal norms created solely by the judiciary). In this Essay, they are treated as part of the common law regulation of standard contract terms.

⁷ The pro-arbitration stance of the Supreme Court began with the decision in *Moses H.*

If this trend continues, the ability of courts to develop contract doctrine in consumer transactions may be severely limited. Part I of this Essay begins with a discussion of the role that common law plays in regulating consumer transactions. It then discusses how the unconscionability and good faith doctrines have evolved as limitations on standard terms in consumer contracts. Part II discusses the increasing use of mandatory arbitration clauses in consumer contracts and the likely effects of this trend on consumer contract litigation. Finally, Part III explores what it might mean for the future of consumer protection if the common law doctrines of unconscionability and good faith in consumer contracts are essentially frozen in time as mandatory arbitration results in fewer published decisions interpreting and applying consumer statutes.

I. REGULATING STANDARD TERMS IN CONSUMER CONTRACTS AT COMMON LAW

In a common law judicial system, courts decide cases, and, in the process of doing so, create law. Legislatures create law through the enactment of statutes, and administrative agencies do so through rulemaking and enforcement proceedings; courts create law by deciding cases, writing opinions, and publishing them.⁸ Courts are generally

Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). Subsequent Supreme Court cases all evince a strong pro-arbitration position. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that employee exception of the Federal Arbitration Act (“FAA”) should be narrowly construed); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (holding that possibility of excessive costs is insufficient to defeat arbitration clause); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that FAA preempts state statute restricting arbitration); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding that courts should “rigorously enforce agreements to arbitrate” (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24)).

⁸ The importance of common law as a supplement to statutory law has been described as follows:

Our society has an enormous demand for legal rules that actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited, and much of that capacity must be allocated to the production of rules concerning governmental matters, such as spending, taxes, and administration; rules that are regarded as beyond the courts’ competence, such as the definition of crimes; and rules that are best administered by a bureaucratic machinery, such as the principles for setting the rates charged by regulated industries. Furthermore, our legislatures are normally not staffed in a manner that would enable them to perform comprehensively the function of establishing law to govern action in the private sector. Finally, in many areas the flexible form of a judicial rule is preferable to the canonical form of a legislative rule. Accordingly, it is socially desirable that the courts should act to enrich that supply of legal rules that govern . . . [business] conduct—not by taking on lawmaking as a free-standing function, but by attaching much greater emphasis to the establish-

bound by precedent and must follow decisions of higher courts, and all courts are supposed to give serious consideration to the rationale of other courts deciding similar cases.⁹ Through the process of judicial decisionmaking, courts create, define, and refine legal rights, supplementing those created by statutes or agency rules.¹⁰ Courts serve a “gap-filling” role, deciding cases involving transactions that are only partially or ambiguously addressed by statutes and regulations.¹¹ Courts also help maintain “consistency between similar rights in the absence of legislative action.”¹² Sometimes courts create law in areas where the legislature has done little or nothing, making law in the classic common law tradition.

In the field of consumer law, courts supplement legislative and regulatory dictates through the development of common law rules and principles, providing remedies and defining rights for individuals who feel that they have been wronged by businesses.¹³ Courts play a pivotal role in policing market failure as they protect consumers from what they perceive as the unjustified exercise of market power, and

ment of legal rules than would be necessary if the courts’ sole function was the resolution of disputes.

Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 193 (1999) (quoting MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 4–5 (1988)). See generally Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004) (discussing changes and trends in the development of the common law).

⁹ Among the distinguishing characteristics of the common law are:

its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of supremacy of law—that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts.

Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 5 (1936).

¹⁰ See generally Richard Alderman, *The Future of Consumer Law in the United States—Hello Arbitration, Bye-Bye Courts, So-Long Consumer Protection* (U. of Houston L. Center Pub. L. & Legal Theory Series 2008-A-09, 2007), <https://ssrn.com/abstract=1015517>.

¹¹ See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 112–13 (2016) (describing “judges not as interpreters of legislation but as partners of the legislators” when they “interpret” statutes).

¹² Alderman, *supra* note 10, at 8.

¹³ Richard Alderman has noted this trend:

American consumers have benefited greatly from this Anglo-American legal culture. The American civil justice system has spawned judicial reform dealing with everything from a wide range of product safety issues, to the establishment of premises liability, and the creation of performance standards in landlord-tenant and service contracts. Courts have become increasingly receptive to claims of overreaching, and have liberally construed our many consumer protection laws to provide increased protection from false, misleading and deceptive acts.

Id. at 3 (footnotes omitted).

courts provide a means by which consumers can seek redress from perceived abuses in the marketplace.¹⁴ Although critics of this process may argue that in so doing judges usurp the authority of the elected legislature to create the rules governing market participants, any usurpation is at most temporary because legislatures are free to enact laws that reverse judicial decisions if they so choose. That they frequently allow those decisions to stand can be seen, at a minimum, as legislative acquiescence to the role that courts play in policing market behavior in consumer transactions. Without common law regulation of consumer contracts, all public-sector limitations on standard terms would have to come from the other branches of government. While there are certainly advantages to legislative and agency deliberation and subsequent enactment of consumer contract norms, the role of courts in policing consumer transactions is longstanding and is generally accepted as a legitimate and important exercise of judicial power.

At common law, the regulation of standard terms in consumer contracts can take many forms but the most often used and most well developed common law doctrines are the doctrines of unconscionability¹⁵ and good faith.¹⁶ Each plays a different role. Unconscionability is generally used to limit the legal effect of unfair terms as evaluated at the time the contract was made. It prevents overreaching by the contract drafter in the contract formation process. The good faith doctrine is generally used to evaluate the legal effect of contract terms throughout the post-contract period of contract performance. It prevents overreaching and abuse of discretion by the contract drafter during contract performance.

In April 2017, a team of contract and consumer law experts at the American Law Institute (“ALI”) released a draft Restatement of the Law, Consumer Contracts, commenting on both of these common law doctrines.¹⁷ This draft Restatement, focusing solely on consumer contracts, is an attempt to supplement the more general Restatement (Second) of Contracts, recognizing that consumer contracts present

¹⁴ See *id.*

¹⁵ See *id.* at 27.

¹⁶ See Feinman, *supra* note 8, at 26.

¹⁷ RESTATEMENT OF THE LAW, CONSUMER CONTRACTS (AM. LAW INST., Discussion Draft, Apr. 17, 2017). The draft Restatement has not been approved by the ALI and this process that can take several years. Even if approved by that body of legal experts, the Restatement has no force of law in the United States. But like the Restatement (Second) of Contracts (and Restatements of the law in numerous other fields), an ALI-approved Restatement addressing consumer contracts could prove influential in the development of consumer contract law across the United States. Courts often use Restatement provisions when deciding cases, and when they do so the Restatement provisions become part of the common law of the United States.

unique challenges and situations that justify special treatment. The drafters of the Consumer Contracts Restatement approached the project by recognizing two important trends in consumer law that have emerged over the past several decades. First is the emphasis courts place on contract formation principles: a requirement that there be mutual assent to contract terms.¹⁸ The draft recognizes that this trend has generally favored businesses because they have found little difficulty getting consumers to “agree” to standard contract terms without understanding the details or import of what they are agreeing to.¹⁹ Technological developments have facilitated this trend, as “click-wrap”²⁰ agreements proliferate and consumers find themselves agreeing to something but not taking the time (or having the ability) to understand the standard terms to which they are expressing their consent.²¹ Although the contract formation process is thus not a process of true “mutual assent,” courts usually hold consumers to the standard contract terms unless they are prohibited by statute or regulation, are deemed to be unconscionable, or breach the duty of good faith and fair dealing that the business is deemed to owe the consumer.²²

The second trend recognized by the drafters is the tendency of government regulators (e.g., the Federal Trade Commission, state agency enforcers, and legislatures) to prohibit the use of certain standard terms in consumer contracts that are deemed to be particularly unfair, surprising, or oppressive.²³ The draft Restatement recognizes the interplay between this trend and the “mutual assent” trend. Businesses increasingly require consumers to “assent” to terms that favor the business, and regulators react by putting limits on how far they can go in imposing onerous terms on unwitting consumers. The draft thus provides that a standard contract term becomes part of a consumer contract only if the consumer has been given “reasonable notice of the standard contract term” and a “reasonable opportunity to review it.”²⁴

¹⁸ *Id.* at 1.

¹⁹ *See id.* at 1, 7.

²⁰ *See id.* at 30–31.

²¹ The author recently received an email from Uber stating that he was deemed to agree to its revised terms and conditions (which included a broad arbitration provision) simply by using the Uber app one more time or using any Uber services. *See also* U.S. TERMS OF USE, PART 2—ARBITRATION AGREEMENT, UBER, <https://www.uber.com/legal/terms/us/> (last updated March 23, 2017).

²² RESTATEMENT OF THE LAW, CONSUMER CONTRACTS 1 (Discussion Draft).

²³ *Id.*

²⁴ *Id.* § 2. The draft does not specify what constitutes “reasonable notice” and “reasonable opportunity to review,” although Comment 8 states that “[t]he test for adequacy of notice depends on whether in the circumstances it is conspicuous enough to reasonably alert the con-

The draft also permits businesses to impose standard contract terms after the consumer has first signified assent to the transaction, but only if the consumer has a reasonable opportunity to terminate the contractual relationship after the standard terms are available for review.²⁵ Modifications of standard contract terms are covered by similar rules (reasonable notice of the term and right to reject the term).²⁶ Notably, the draft also recognizes that at common law the unconscionability and good faith doctrines are central to the regulation of consumer contract terms.²⁷ The role that these doctrines play is briefly discussed below.

A. *The Unconscionability Doctrine*

At common law, the unconscionability doctrine is one of the few doctrines that allows a consumer to avoid harsh contract terms to which she has technically agreed either by signing, clicking, or manifesting some other form of assent. In the absence of statutory or regulatory mandates, the unconscionability doctrine stands as one of the few defenses to harsh terms imposed by the business in the contract formation process. As the unconscionability doctrine developed at common law in the United States, courts generally asked whether two elements were present: procedural infirmities and substantive unfairness. As stated in *Williams v. Walker-Thomas Furniture Co.*,²⁸ the consumer must show that he or she had no meaningful choice (procedural infirmity) in manifesting assent to the term, and that the term is in fact unreasonably favorable to the party imposing that term (substantive unfairness).²⁹ In consumer contracts, the procedural element is seldom an issue. Almost by definition, a typical consumer “adhesion” contract will not give the consumer any meaningful choice regarding standard contract terms.

sumer to the existence of terms.” *Id.* § 2 cmt. 8. Presumably, courts would give meaning to these terms as they decide individual cases or class actions.

²⁵ *Id.* § 2(b)(1)–(2).

²⁶ *See id.* § 3 cmt. 4 (adopting the rule of Article 2 of the Uniform Commercial Code (“UCC”), modifications of standard terms do not need new consideration to be binding, so long as they comply with the doctrine of good faith).

²⁷ *Id.* §§ 4–5.

²⁸ 350 F.2d 445 (D.C. Cir. 1965).

²⁹ *Id.* at 449. As phrased in the draft Restatement, a term will be voidable as unconscionable only if it is: “(1) Substantively unconscionable, namely unfair or unreasonably one-sided, and (2) Procedurally unconscionable, amounting to unfair surprise or depriving the consumer of meaningful choice.” RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 5(b) (Discussion Draft).

The substantive element, however, is often contested. Drawing on judicial decisions, the draft Restatement elaborates on what is meant by “substantive” unconscionability.³⁰ A contract term is substantively unconscionable if it acts to:

- (1) Exclude or limit the business’s liability or the consumer’s remedies that would otherwise be applicable for
 - (A) Death or personal injury for which, in the absence of a contractual provision in the consumer contract, the business would be liable, or
 - (B) Any loss to the consumer caused by an intentional or negligent act or omission of the business, or
- (2) Unreasonably expand the consumer’s liability, the business’s remedies, or the business’s enforcement powers, that would otherwise be applicable, or
- (3) Unreasonably limit the consumer’s ability to pursue a complaint or seek reasonable redress for a violation of a legal right.³¹

This leaves to the courts much discretion to determine what constitutes an “unreasonable” term.³² Courts have generally found terms unconscionable if they have an unreasonably adverse effect on a consumer’s justifiable expectations in the context of the transaction. Examples of terms held to be unconscionable include a term whereby a consumer receives a product that does not work but is barred from a refund by a warranty disclaimer,³³ clauses that require arbitration in a foreign jurisdiction or where the filing fee greatly exceeds the amount of the claim,³⁴ and a term that gives the merchant the unfettered power to act unilaterally, such as where the agreement includes open

³⁰ RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 5 cmt. 2, 3, 5 (Discussion Draft).

³¹ *Id.* § 5(d).

³² Note that the draft specifically references, as potentially unconscionable, contract terms that restrict a consumer’s ability to obtain redress of his or her rights. *Id.* § 5(c)(3). This could become important as consumers continue to challenge mandatory arbitration provisions as unconscionable. The Supreme Court has made it difficult for consumers to challenge arbitration provisions on unconscionability grounds, but it is still possible to do so in several courts (particularly in California). *See, e.g.,* Sanchez v. Valencia Holding Co., 353 P.3d 741, 746 (Cal. 2015); Sonic-Calabasas A. Inc. v. Moreno, 311 P.3d 184 (Cal. 2013); Brinkley v. Monterey Fin. Servs., Inc., 196 Cal. Rptr. 3d 1 (Ct. App. 2015) (finding fee-shifting part of arbitration provision unconscionable).

³³ *See* Universal Leasing Servs., Inc. v. Flushing Hae Kwan Rest., 565 N.Y.S.2d 199, 199 (App. Div. 1991); Industralease Automated & Sci. Equip. Corp. v. R.M.E. Enters., Inc., 396 N.Y.S.2d 427, 432 (App. Div. 1977).

³⁴ *See* Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 571, 574–75 (App. Div. 1998); Teleserve Sys., Inc. v. MCI Telecomms. Corp., 659 N.Y.S.2d 659, 660 (App. Div. 1997).

terms and the seller has the right to fill in any term it chooses.³⁵ In *Williams*, for example, the D.C. Circuit held that a term in a consumer credit contract requiring cross-collateralization with a pro-rata payout could well be deemed unconscionable because the goods that Mrs. Williams bought on credit might remain as collateral far longer than a consumer would reasonably expect.³⁶

One of the enduring strengths of the unconscionability doctrine is its elasticity and ability to adapt to changing times and commercial practices. To take an example based on *Williams*, if cross-collateralization with a pro-rata payout is held to be unenforceable, credit sellers may react by including other terms that seek to achieve similar goals, such as a term granting the seller a security interest in all the consumer's household items with each new purchase. When that clause is held unconscionable,³⁷ they may inflate the stated "cash price" of the goods in an effort to ensure profitability on a credit sale to a high-risk consumer. When extremely high prices are challenged as unconscionable, the transaction might be restructured as a rent-to-own lease instead of a credit sale, and so on. Although the unconscionability standard is not easy to satisfy and—like all common law development—moves in fits and starts, it is malleable enough to give consumers an opportunity to limit the effects of standard contract terms as consumer transactions evolve and new areas of commerce emerge.

B. *The Good Faith Doctrine*

Among common law doctrines that can limit the effect of standard terms in consumer contracts, the good faith doctrine has probably been the most controversial and has seen the most evolution over time.³⁸ If a standard term addresses matters arising post-contract for-

³⁵ See *Sunbeam Farms, Inc. v. Troche*, 442 N.Y.S.2d 842, 845–47 (Civ. Ct. 1981); cf. *Nalezene v. Blue Cross of W.N.Y.*, 569 N.Y.S.2d 264, 265 (App. Div. 1991) (contract not substantively unconscionable because "sole judgment" clause "does not give defendant an unfettered right arbitrarily to reject claims for skilled nursing care; it merely expresses the practice of all insurers to pay only for covered expenses or occurrences, and a denial of coverage is subject to judicial review"); *Zuckerberg v. Blue Cross & Blue Shield of Greater N.Y.*, 464 N.Y.S.2d 678 (Special Term 1983), *rev'd on other grounds*, 487 N.Y.S.2d 595 (App. Div. 1985), *aff'd*, 490 N.E.2d 839 (N.Y. 1986).

³⁶ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (D.C. Cir. 1965). Under the agreement, every purchase that Mrs. Williams made at the store was deemed to be collateral for all other debts she had incurred in the past and might incur in the future, and because of the pro-rata payout provision she would own none of the collateral (household items) free and clear until all of the purchased items had been paid off in full. *Id.*

³⁷ Or when it is rendered unenforceable by statute or regulation, as in the Uniform Consumer Credit Code, or the FTC's Credit Practices Rule, 16 C.F.R. pt. 444 (2017).

³⁸ See, e.g., James P. Nehf, *Bad Faith Breach of Contract in Consumer Transactions*, in

mation—i.e., during contract performance, particularly if it gives the business discretion in performing its obligations—those obligations and responsibilities must be exercised in good faith.³⁹ According to most courts, the meaning of good faith at common law is now the same as in the Uniform Commercial Code (“UCC”): honesty in fact and observance of reasonable standards of fair dealing.⁴⁰

The good faith doctrine in consumer transactions has gone through periods of revision and reevaluation over the years. Courts (and legislatures) have taken up the task of delineating the boundaries of the doctrine, identifying specific types of behavior that constitute bad faith in contract settings.⁴¹ Most courts in the United States did not recognize good faith as an independent duty with the same legal significance as other express or implied contractual duties until the latter half of the twentieth century.⁴² Prior to this point, good faith was frequently referenced, but only as an interpretive tool to give meaning to some other contractual duty. It is the relatively recent acceptance of good faith as an independent duty which has generated much activity in the courts (and law journals) over the years.⁴³

American judges initially embraced the doctrine of *caveat emptor*—“let the buyer beware”—with more enthusiasm than their English brethren,⁴⁴ but the notion that contracting parties owe a duty of good faith to each other can be found even in early reported cases.⁴⁵ At the end of the nineteenth century, during the pinnacle of liberal economic thought, Bishop’s treatise on contract law observed:

GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT 115, 128 (Roger Brownsword, Norma J. Hird & Geraint Howells eds., 1999) (“One of the most important of these areas is the banking industry, where an ongoing relationship between the financial institution and its customers is the norm, and opportunities to perform discretionary duties abound. American courts have not hesitated to imply a good faith obligation in these relationships, and on occasion have imposed heavy penalties, including punitive damages, for a breach of the duty.”).

³⁹ RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 4 (AM. LAW INST., DISCUSSION DRAFT, Apr. 17, 2017).

⁴⁰ *Id.* § 1(a)(7); see, e.g., *Pierce v. QVC, Inc.*, 555 F. Supp. 2d 499, 502 (E.D. Pa. 2008) (“Pennsylvania courts have adopted the general duty of good faith and fair dealing in the performance of a contract as found in the Restatement (Second) of Contracts § 205 and Pennsylvania’s Uniform Commercial Code imposes a similar requirement.” (citations omitted)).

⁴¹ See Nehf, *supra* note 38, at 128.

⁴² See *id.* at 9.

⁴³ See *id.* at 4.

⁴⁴ See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 180 (1977); Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith’s Unnaural History*, 72 TEX. L. REV. 1317, 1330 (1994).

⁴⁵ See HORWITZ, *supra* note 44, at 180 (applying *caveat emptor* unless shown that merchant “knowingly . . . sold defective goods”).

The law presumes each [party] to be acting in good faith toward the other; and it binds each to the other, to whatever good faith requires. The implication may be derived from the words employed, from the acts of the parties viewed in connection with the thing contracted about, or from the nature of the transaction.⁴⁶

By the beginning of the twentieth century, judges routinely referred to the implied obligation of good faith performance.⁴⁷

Despite considerable support for imposing an implied duty of good faith in the caselaw, the ALI in 1920 did not give explicit recognition to the doctrine when it drafted the Restatement (First) of Contracts.⁴⁸ Nevertheless, courts continued to impose good faith duties, and by the 1970s, when the ALI prepared the revised Restatement (Second) of Contracts, the doctrine was more firmly rooted in American law.⁴⁹ Section 205 of the Restatement (Second) proclaims: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”⁵⁰ The doctrine’s inclusion solidified it as a central tenet of the common law of contracts, though the absolute rule was probably overstated at the time, and it has not been applied rigorously in every contract since its publication. It is applied consistently enough, though, to be fairly regarded as one of the defining characteristics of American contract law, particularly in consumer transactions.⁵¹

Like the doctrine of unconscionability, the good faith concept is fluid, highly adaptive, and not easily reduced to a concise formula.

46 JOEL PRENTISS BISHOP, *THE DOCTRINES OF THE LAW OF CONTRACTS, IN THEIR PRINCIPAL OUTLINES, STATED, ILLUSTRATED, AND CONDENSED* § 106 (1878).

47 In one of the early precedents to modern good faith litigation of insurer liability, a New York court required the insurer to act with “entire good faith and fair dealing in its transactions” with the insured when demanding that the insured provide proof of loss. *See Armstrong v. Agricultural Ins. Co.*, 29 N.E. 991, 992 (N.Y. 1892).

48 Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689, 690 n.5 (2013) (“It did not receive widespread acceptance in the United States until the mid-twentieth century.” (quoting Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 228 (2005))); Eugene F. Mooney, *Old Kontract Principles and Karl’s New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 246 (1966) (stating that the duty of good faith was not initially widely accepted in the United States and England).

49 *See, e.g.*, U.C.C. § 2-305(2) (AM. LAW INST. & UNIF. LAW COMM’N 1962) (imposing the obligation of good faith on contracts with open price terms).

50 RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

51 The draft Restatement of Consumer Contracts continues this treatment by including good faith as one of the central tenets of interpreting and enforcing consumer contract terms. *See* RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 4 (AM. LAW INST., Discussion Draft, Apr. 17, 2017).

The official comment to the Restatement (Second) acknowledges that "its meaning varies somewhat with the context," but offers little in the way of guidance.⁵² It explains that good faith has something to do with the expectations of the parties and general principles of fairness and moral behavior. Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," and in contrast, bad faith conduct "violate[s] community standards of decency, fairness or reasonableness."⁵³ Through judicial decisions over time, however, the doctrine gains meaning.

Various commentators have attempted to provide a definitional foundation to assist judges in developing the good faith doctrine, but none has gained general acceptance in the courts. Robert Summers, whose writings on the subject were influential in the drafting of the Restatement, advocated an "excluder" analysis of good faith.⁵⁴ The excluder analysis posits that good faith has no general meaning of its own, and that attempting to construct a positive meaning is both unnecessary and futile.⁵⁵ Good faith, Summers argues, can best be described by excluding activities that constitute bad faith.⁵⁶ He calls for the compilation of a list of what courts would find to be bad faith conduct under certain circumstances or in particular types of transactions; good faith conduct then becomes all behavior not on the list.⁵⁷ Good faith, then, is not really an affirmative obligation imposed upon the parties, but more resembles a default position attained when a party avoids bad faith conduct. This framework has some appeal because, if good faith conduct is the generally accepted behavior of contracting parties, compiling a list of specific behaviors and general practices would surely be a hopeless task. On the other hand, it should be less burdensome to identify those rarer instances which deviate from the norm as examples of unacceptable behavior. Moreover, as a practical matter, courts are seldom asked to identify good faith conduct, but are frequently asked to address specific conduct one party says constitutes bad faith by the other. Bad faith conduct is therefore more likely to appear in published cases to inform the inquiry.

The other dominant definitional framework of good faith is an extension of the bargain model, which attempts to reconstruct the le-

⁵² RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a.

⁵³ *Id.*

⁵⁴ Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968).

⁵⁵ *Id.* at 197-99.

⁵⁶ *Id.* at 201.

⁵⁷ *Id.* at 202-03.

gitimate expectations of the parties at the time of contracting and then asks whether the conduct is consistent with those expectations. Early in the debate, Alan Farnsworth took the view that good faith is simply one application of basic principles of contract law.⁵⁸ The task is to imply terms that are consistent with the parties' reasonable expectations, an exercise judges do all the time in similar contexts. Over the years, certain tools have become accepted as legitimate inquiries to assist courts in divining these expectations (custom, trade usage, past dealings, etc.), which helps quiet criticism that the good faith standard has no normative base and gives judges too much discretion, leading to unpredictable results. While there will always be some uncertainty when a party is charged with bad faith conduct, the problem is no different from the other disputes that require reasonable inferences about the parties' legitimate expectations created in the bargain (e.g., mistake, consequential damages, liquidated penalties, and contract formation).⁵⁹

Each of these (and other) discussions of the definitional problem with the good faith doctrine has found some measure of acceptance in legal commentary and support in the caselaw. “[L]egal reform advocates have been content to see the definition develop piecemeal in the common law tradition. While definitional uncertainties and normative inquiries remain, there currently seems to be less dissatisfaction with the present state of the law compared with previous eras.”⁶⁰ And, at least in consumer transactions, “the tendency is to accept the good faith doctrine more readily.”⁶¹

⁵⁸ See E. Allan Farnsworth, *Good Faith in Contract Performance*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 153, 161 (Jack Beatson & Daniel Friedmann eds., 1995) (reprising earlier observations and endorsing the comments of Justice Antonin Scalia in *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984)).

⁵⁹ Steven Burton's *Harvard Law Review* article took Farnsworth's view in a different direction. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 *HARV. L. REV.* 369, 369 (1980).

⁶⁰ Nehf, *supra* note 38, at 127.

⁶¹ *Id.* Besides insurance law,

[o]ne of the most important of these areas is the banking industry, where an ongoing relationship between the financial institution and its customers is the norm, and opportunities to perform discretionary duties abound. American courts have not hesitated to imply a good faith obligation in these relationships, and on occasion have imposed heavy penalties, including punitive damages, for a breach of the duty.

Id. at 128.

II. THE GROWING Pervasiveness of Mandatory Arbitration Provisions

In recent years, it has become common for consumer contracts to include mandatory arbitration clauses. These clauses typically state that either the business or the consumer can require that disputes between them be resolved by privately appointed arbitrators, sometimes with an exception for cases brought in small claims court. Where these clauses exist, either side can generally block lawsuits from proceeding in a court of general jurisdiction. These clauses may also bar consumers from bringing group claims (class actions) either in court or in the arbitration proceeding. As a result, no matter how many consumers are injured by the same conduct, consumers must resolve their claims individually against the company in binding arbitration. If the amount in controversy is relatively small, the costs of arbitration alone will deter most consumers (and lawyers) from bringing the case. Mandatory consumer arbitration has long been under attack by consumer advocates and others who have found fault with the manner in which arbitration is agreed to, the process itself, and the results of arbitration proceedings.⁶² In a series of court decisions,⁶³ however, the U.S. Supreme Court has enforced mandatory arbitration provisions in consumer contracts despite strong opposition from consumer groups,⁶⁴ and despite the holdings of many lower courts that have been more sympathetic to consumers' concerns.⁶⁵ Those Supreme Court decisions

⁶² See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302 (1999); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004); 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; Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331 (1996).

⁶³ See *supra* note 7.

⁶⁴ The Supreme Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011), declared the supremacy of the FAA and its preemption of state laws banning class-arbitration waivers. Later in *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015), the Supreme Court reversed an intermediate California state court's interpretation of idiosyncratic language in an arbitration clause, ensuring that a case would be sent to arbitration rather than proceeding as a class action in court. See also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (holding that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act even though the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012).

⁶⁵ See, e.g., *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74, 88, 90

give effect to the intent of Congress, as expressed in the Federal Arbitration Act (“FAA”)⁶⁶ enacted in 1925, that contractual provisions to arbitrate disputes should be given full force and effect.⁶⁷

It is important to note that the FAA itself says that it does not override general state law principles governing contract enforceability,⁶⁸ which would include challenges to the contract on unconscionability and good faith grounds. But in response to this opening in the FAA, many businesses now include contract terms in consumer contracts providing that the validity of the contract, and the arbitration provision itself, must be decided by the arbitrator and not a court.⁶⁹ Thus, any challenge to the contract on unconscionability, good faith, or other common law or statutory grounds must be decided by the arbitrator. Following a 2010 Supreme Court decision,⁷⁰ courts have generally enforced such provisions, thus making it difficult to get court involvement at the very preliminary stage of determining whether the contract, including the arbitration clause, is even enforceable. Therefore, it is possible today to have an arbitrator decide cases in which a consumer contract has a patently unconscionable term, a business has

(Ct. App. 2014); *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1149 (Ct. App. 2012); *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 799–800 (Ct. App. 2012). Some courts continue to resist (or distinguish) Supreme Court precedent and refuse to enforce arbitration clauses with class action waivers. *See, e.g.*, *Meyer v. Kalanick*, 185 F. Supp. 3d 448, 458–59 (S.D.N.Y. 2016).

⁶⁶ Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

⁶⁷ Section 2 of the FAA provides:

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

9 U.S.C. § 2 (2012).

⁶⁸ *Id.*

⁶⁹ A valid delegation clause requires the court to refer a claim to arbitration to allow the arbitrator to decide gateway arbitrability issues. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010); *Kubala v. Supreme Prod. Servs.*, 830 F.3d 199, 202 (5th Cir. 2016) (“[I]f the party seeking arbitration points to a purported delegation clause, the court’s analysis is limited. It performs the first step—an analysis of contract formation—as it always does. But the only question, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause—that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated.”).

⁷⁰ *Rent-A-Ctr.*, 561 U.S. at 67. The Court held that under the FAA such delegation clauses are presumptively enforceable, and that so long as an arbitration agreement’s other terms do not inhibit enforcement of a delegation clause, courts must enforce them. *Id.*

not applied a contract term in good faith, or the business has clearly violated a consumer protection statute. Furthermore, the decision will be made without the possibility of appeal and without publication of the decision to the public at large.

Recently, however, consumer advocates saw a step in the other direction. In a much-anticipated move in May 2016, the Consumer Financial Protection Bureau (“CFPB”) proposed a rule that would prohibit most financial services companies from including mandatory arbitration provisions in their consumer contracts if those provisions bar consumers from bringing class actions in court.⁷¹ The measure was supposed to take effect in September 2017,⁷² but was later delayed. Note that the rule only applies to financial service providers who are regulated by the CFPB, and that it does not flatly prohibit binding arbitration provisions in consumer financial contracts.⁷³ It does protect class actions in courts, however, which would open a door to future development of common law in situations that are well-suited to consumer class actions.⁷⁴ The future of the CFPB, however, is far from

⁷¹ Arbitration Agreements, 81 Fed. Reg. 32,830 (May 24, 2016) (codified at 12 C.F.R. pt. 1040 (2017)). The rule prohibits providers of certain consumer financial products and services from enforcing an agreement that (1) provides for mandatory arbitration of any future dispute between the parties and (2) bars the consumer from filing or participating in a class action with respect to that consumer financial product or service. 12 C.F.R. § 1040.4(a). The rule also requires a financial services provider that is involved in an individual arbitration to submit specified arbitration records to the CFPB. 12 C.F.R. § 1040.4(b). This would allow the agency to monitor what types of consumer cases are arbitrated and what outcomes result from those proceedings. Currently, most arbitration proceedings are private and the results are not reported to the public. Arbitration Agreements, 81 Fed. Reg. at 32,844.

⁷² Arbitration Agreements, 12 C.F.R. pt. 1040 (2017).

⁷³ 12 C.F.R. § 1040.3.

⁷⁴ See 12 C.F.R. § 1040.4. A CFPB study in 2015 showed that very few consumers bring individual actions against their financial service providers either in court or in arbitration. See Alan S. Kaplinsky et al., *The CFPB's Consumer Arbitration Study Takes Center Stage*, 71 Bus. Law. 731, 738 (2016). The study found that class actions provide a more effective means for consumers to challenge questionable practices by these companies, which is not surprising because most consumer complaints do not involve enough money to justify hiring a lawyer to bring an individual action whether in court or in arbitration. *Id.* at 737–38. According to the study, class actions bring hundreds of millions of dollars in relief to millions of consumers each year and cause companies to alter their legally questionable conduct, often by settling the dispute to avoid paying huge damage awards. *Id.* at 738. The study showed that at least 160 million class members were eligible for relief over the five-year period studied. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 8.1 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. Other findings in the study, however, showed that arbitration can be an effective and relatively inexpensive way for consumers to resolve individual disputes. Kaplinsky, *supra* note 74, at 738.

certain.⁷⁵ In an effort to counter this move by the CFPB, the Republican-controlled House of Representatives approved a fiscal year 2017 appropriations bill that contained various provisions intended to restrict the CFPB's authority. Regarding arbitration, the bill included a provision that none of the CFPB's funding

may be used to regulate pre-dispute arbitration agreements . . . and any regulation finalized by the Bureau to regulate pre-dispute arbitration agreements shall have no legal force or effect until the requirements regarding pre-dispute arbitration specified in the report accompanying [the bill] under the heading "Bureau of Consumer Financial Protection" are fulfilled.⁷⁶

At the time of the writing of this Essay, however, the Senate had yet to vote on the measure.⁷⁷ In the end, none of this mattered as Congress passed a law overturning the CFPB's arbitration rule in October 2017.⁷⁸

III. IMPACTS OF ARBITRATION ON THE REGULATION OF STANDARD TERMS

In light of the Supreme Court's favorable treatment of mandatory arbitration provisions in consumer contracts, it is not a stretch to say that if a business deals with consumers on a regular basis and has an opportunity to impose standard contract terms, it might be legal malpractice not to include a legally enforceable mandatory arbitration provision that prohibits individual actions in court and class actions whether in court or in arbitration.⁷⁹ There is some evidence that busi-

⁷⁵ The D.C. Circuit held that the structure of the CFPB did not comply with constitutional requirements in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 8 (D.C. Cir. 2016).

⁷⁶ Financial Services and General Government Appropriations Act, H.R. 5485, 114th Cong. § 506 (2016).

⁷⁷ *H.R. 5485 – Financial Services and General Government Appropriations Act, 2017*, CONGRESS.gov, <https://www.congress.gov/bill/114th-congress/house-bill/5485> (last visited Oct. 18, 2017).

⁷⁸ Ezequiel Minaya, *The Morning Ledger: Congress Votes to Overturn CFPB Arbitration Rule*, WALL ST. J.: MORNING LEDGER (Oct. 25, 2017, 6:01 AM), <https://blogs.wsj.com/cfo/2017/10/25/the-morning-ledger-wed-oct-25/>.

⁷⁹ See *Mercedes Homes, Inc. v. Colon*, 966 So. 2d 10, 20 (Fla. Dist. Ct. App. 2007) (Griffin, J., dissenting) ("What we have begun to see is that virtually all consumer transactions, no matter the size or type, now contain an arbitration clause. And with every reinforcing decision, these clauses become ever more brazenly loaded to the detriment of the consumer—who gets to be the arbitrator: when, where, how much it costs; what claims are excluded; what damages are excluded; what statutory remedies are excluded; what discovery is allowed; what notice provisions are required; what shortened statutes of limitation apply; what prerequisites even to the

nesses are swiftly adding such provisions to their standard terms.⁸⁰ If that is the case, and as well drafted arbitration provisions become more common, there is a real possibility that standard terms in consumer contracts will seldom be challenged in court.⁸¹ The potential consequences of this result are worth considering and may be troubling. The courts' ability to define consumer rights depends upon their authority to decide cases and issue written opinions that address important questions of law. Arbitration prevents courts from serving this important function and replaces it with private (and usually unpublished) decisionmaking. The common law system allows the courts to create law, set precedent, and change the law over time as circumstances warrant. This is particularly important in the area of consumer law, which is a newer body of law than many other areas of common law.⁸² Until about sixty years ago, few consumer protection statutes existed and *caveat emptor* reigned. Mandatory arbitration poses a serious challenge to the common law tradition in the development of consumer rights in its relatively early stage of development. Although consumers have relied as much upon the courts as the legislatures to establish and define their rights throughout the post-World War II era of consumerism,⁸³ they are being excluded from the courts with greater frequency.

right to arbitrate are thrown up—not to mention the fairness or accuracy of the decision itself. The drafters have every incentive to load these arbitration clauses with such onerous provisions in favor of the seller because the worst that ever happens, if the consumer has the resources to go to court, is that the offending provisions are severed. The state courts, demoralized by the United States Supreme Court's disapproval, have too often allowed these overreaching provisions to succeed. Most consumers can't read them, won't read them, don't understand them, don't understand their implication and can't afford counsel to help them out.”)

⁸⁰ See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 372; Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 38 (noting more than ninety percent of credit card agreements had arbitration clauses); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1344–45 (2015).

⁸¹ Much has been written about the privatization of decisionmaking in this and other contexts. See Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 170, 174–77 (2005); Ed Kinkeade, *Point-Counterpoint: Two Judges' Perspectives on Trial by Jury: Introduction*, 12 TEX. WESLEYAN L. REV. 497, 497 (2006); Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35, 56–59 (2006); Kirk W. Schuler, Note, *ADR'S Biggest Compromise*, 54 DRAKE L. REV. 751, 751–52 (2006).

⁸² William L. Corbett, *Arbitrating Employment Law Disputes*, 68 MONT. L. REV. 415, 426 n.70 (2007) (noting that consumer law, like employment law, is of relatively recent origin).

⁸³ “If one were to attempt to write a history of the law in the United States, it would be largely an account of the means by which the common-law system has been able to make progress through a period of exceptionally rapid social and economic change.” Stone, *supra* note 9, at 11.

What effects will this trend have on the future development of the common law of consumer contracts? To begin, it is important not to overstate the case. Even with a continuing proliferation of arbitration clauses in consumer contracts, there will still be some cases examining standard terms in those contracts. There will likely always be some consumer contracts that do not include arbitration clauses, even if the number dwindles over time.⁸⁴ Some decisions will inevitably result from disputes involving those contracts, and the common law will move forward. Even if arbitration clauses are included in the overwhelming majority of consumer contracts, some common law will develop regarding the arbitration clause itself. Courts will still be called upon to decide whether the consumer agreed to the arbitration provision in the first place.⁸⁵

Another line of cases will concern the scope of the arbitration clause. Was it broad enough to cover the type of claim that the consumer brought? Did it refer the case to an arbitral forum that can accept such a case? Did it effectively ban class actions? And even if the arbitration clause says that these issues must be decided by the arbitrator, the scope and effectiveness of that delegation clause will continue to be litigated.⁸⁶ One might expect, however, that over time businesses will learn how to properly draft an arbitration clause that clearly evidences consumer consent to arbitration in a proper forum, one that covers all possible consumer disputes arising out of the transaction, and delegates the question of whether the clause is enforceable to the arbitrator in a way that a consumer cannot reasonably challenge

⁸⁴ Courts have held that an arbitration must go both ways. *See, e.g.*, *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169 (5th Cir. 2004) (striking down the arbitration clause from an agreement which only obligated arbitration by the consumer); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding against an employer whose employment contract contained an arbitration clause that the employer could change on a whim and would not apply equally to both parties). So, if a business would prefer to sue its consumer customers in court, an arbitration provision may not be in its interest.

⁸⁵ *See, e.g.*, *Meyer v. Kalanick*, 199 F. Supp. 3d 752, 766 (S.D.N.Y. 2016) (holding that Uber's terms of service were not agreed to under a "browsewrap" analysis).

⁸⁶ Courts have held that the parties' agreement to arbitrate under American Arbitration Association ("AAA") rules constitutes a valid delegation to the arbitrator. *See, e.g.*, *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (ICC, not AAA). The Third and Tenth Circuits have declined to follow this approach. *See Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 225-26, 228 (3d Cir. 2012); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998).

in court. When that happens as a matter of course in consumer contracts, there will be little left for courts to decide.

It is easy to envision a world in which only a very limited class of consumer contract issues will be decided in courts. What will that mean for the common law regulation of standard terms? Studies have begun to show what the impact could be on the interpretation of consumer statutes by courts. Myriam Gilles examined cases decided under the Illinois Consumer Fraud Act⁸⁷ that involved consumer contracts.⁸⁸ She found that if mandatory arbitration clauses were included in those contracts, a majority of those disputes would have never resulted in published opinions (and most of the other cases were not of the type that would have led to consumer common law development in any event).⁸⁹ She concluded that the impact on the development of consumer law in Illinois would likely be immense.⁹⁰

Owen Fiss warned more than thirty years ago that by exchanging the public function of dispute resolution for private ordering, there is a risk in undermining law itself.⁹¹ In the years since, others have questioned what might happen if “the common law . . . cease[s] to be a living organism.”⁹² Arbitration decisions are seldom published, and even in a state such as California, which requires disclosure of arbitration awards, there is no requirement that the arbitrators state reasons or explain the rationale behind the decision.⁹³ But even if reasons were stated, arbitration decisions have no binding or precedential effect on future decisions. Reviewing these developments, Gilles warns that “when law ceases to grow, it stagnates and eventually ceases to be (or be relevant).”⁹⁴

It is also easy to envision several consequences of stagnation in the development of common law doctrines in consumer contract law. First, with little new precedent coming from courts in consumer cases, older precedent becomes less and less relevant. As new areas of com-

⁸⁷ 815 Ill. Comp. Stat. 505/1 (2007).

⁸⁸ See Gilles, *supra* note 80, at 416–17.

⁸⁹ See *id.* at 419.

⁹⁰ *Id.* (“The full deployment of arbitration clauses in standard form agreements, then, would surely have an immense impact on the development of consumer protection law.”).

⁹¹ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

⁹² Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 786 (2002).

⁹³ See CAL. CIV. PROC. CODE § 1281.96 (West 2016).

⁹⁴ Gilles, *supra* note 80, at 413; see Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH. L. REV. 303, 324–25 (2012) (“Without cases, our common law will stagnate . . . Without cases, lawyers and judges will be unable to continue in their work of perfecting the law.”).

merce and forms of contracting emerge, new cases applying older precedent to new situations number far fewer and may eventually cease entirely. Older precedent becomes dated and, ultimately, irrelevant. For example, while the basic rule on unconscionability as stated in *Williams v. Walker-Thomas Furniture Co.* has survived through the years, application of the rule to the facts of the case—assessing the validity of a cross-collateralization provision with a pro-rata payout in a standard form consumer credit contract⁹⁵—has long been overtaken by consumer credit statutes prohibiting such provisions and those with similar effect.⁹⁶ With the common law functioning normally and moving forward as a living organism over time, the courts would apply the decision (and its progeny) to new situations, and the unconscionability doctrine would maintain its relevance. As that flow of cases winnows away, the unconscionability doctrine eventually loses its relevance as a limit on standard terms in modern consumer contracts.

Similarly, if published case precedents on common law consumer doctrines become few and far between, the effects may be felt in consumer arbitration itself. Although arbitrators are not bound by the law, most presumably attempt to make decisions based on what they perceive to be the law. With doctrinal development frozen at a time in the distant past, parties bringing cases in arbitral forums in the future would be arguing those cases under legal standards and precedents that prevailed years ago. Decisionmakers (mostly arbitrators but including judges in the few cases that still make it to the courts) would have little or no contemporary precedent to draw upon as guides to support reasoned outcomes. Judges and arbitrators would have an impoverished body of published decisions, diminishing in relevance over time, to inform their decisions as they seek to mete out justice in the cases that come before them.

Fewer common law decisions involving consumer contracts can also influence the development of legislative and regulatory norms. Common law decisions often spark legislative action. Beginning in the 1970s, several courts declared consumer rent-to-own contracts unconscionable.⁹⁷ Even though such decisions were in the minority (several

⁹⁵ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (D.C. Cir. 1965).

⁹⁶ See *supra* note 2 and accompanying text.

⁹⁷ See, e.g., *Murphy v. McNamara*, 416 A.2d 170, 179–80 (Conn. Super. Ct. 1979). But see *In re Allen*, 174 B.R. 293, 297 (Bankr. D. Or. 1994) (rent-to-own agreement not unconscionable). As another example, decisions such as *Williams v. Walker-Thomas Furniture Co.* brought attention to cross-collateralization clauses in consumer credit contracts, spurring enactment and amendment of consumer credit codes to address the issue. See *Walker-Thomas*, 350 F.2d at 447–48; James W. Bowers, *Some Economic Insights into Application of Payments Doctrine*:

courts enforced rent-to-own contracts), they got the attention of consumer groups and, more importantly for spurring legislative action, the attention of industry associations that were not hesitant to lobby state legislatures for statutory protection. Now all but a handful of states have statutes that, for better or worse, make rent-to-own transactions lawful if the regulatory dictates are followed, and the laws include some mandatory disclosures and other limits on contract terms that can benefit consumers. If the standard terms in 1970s rent-to-own contracts had required arbitration of all disputes, those court decisions might not have been rendered. Legislation addressing the industry might ultimately have come about if driven by other forces, but there is no question that common law decisions prompted legislative action more urgently. If controversial court decisions involving consumer contracts go away, one of the principal driving forces of legislative action in the area of consumer law will no longer be present.⁹⁸

Mandatory arbitration of consumer contract disputes may also freeze in time the meaning of consumer statutes. Courts are frequently called upon to interpret state and federal consumer protection statutes, addressing ambiguities or gaps in the statutes and applying statutory language to situations that legislatures might not have foreseen.⁹⁹ Such decisions can have several important effects on the development of law. First, they give the statute meaning. Consumer legislation is often deliberately written in broad terms (e.g., prohibitions of “misleading” or “unfair” practices) that call for elaboration and application to specific situations. Historically, courts have been expected to serve that function by publishing decisions that apply the statute to emerging areas of consumer transactions. Second, court decisions construing statutory language are often the cause of statutory and regulatory amendments and enactments. When the Indiana Supreme Court interpreted the word “interest” in the state’s small loan statute to render a typical payday loan contract violative of the stat-

Walker-Thomas *Revisited*, 89 CHI.-KENT L. REV. 229, 244 (2014) (“After the case, the National Commissioners on Uniform State Laws drafted a Uniform Consumer Credit Code (1968), directing the application of payment strategy, urged by consumers’ counsel in *Walker-Thomas*, mandatory.”). Other courts held that high bank fees for overdrafts were set by the banks in bad faith. *See Best v. U.S. Nat’l Bank*, 739 P.2d 554, 566–67 (Or. 1987).

⁹⁸ Similarly, after a court ruled that charging a fee for cashing a check and not depositing it for a period of time was really a disguised loan, *see Hamilton v. York*, 987 F. Supp. 953, 956–57 (E.D. Ky. 1997), the Kentucky legislature quickly responded with a statute addressing these “deferred deposit” transactions and making them legal under certain conditions. *see KY. REV. STAT. ANN.* 286.9-100(1) (West 2011).

⁹⁹ *See POSNER, supra* note 11, 112 (discussing the “thankless task” of judges struggling to interpret statutes in situations that legislatures did not foresee).

ute,¹⁰⁰ the wheels of legislative action quickly went into high gear to address industry concerns and a law was soon enacted that modified the definition and permitted payday loans under certain conditions.¹⁰¹ When the Eleventh Circuit ruled that yield spread premiums paid to a mortgage broker violated a provision of the Real Estate Settlement Procedures Act,¹⁰² the U.S. Department of Housing and Urban Development responded with a policy statement explaining when yield spread premiums are permitted under the Act and when they are not.¹⁰³ Then, in the Dodd-Frank Act, Congress further addressed the issue and banned yield spread premiums in consumer mortgages except under very limited circumstances.¹⁰⁴ Frequently, such litigation begins with a consumer who entered into a contract with a business. A mandatory arbitration clause would prevent the case from being decided in the courts. When this occurs, not only is common law development frozen in time, but statutory interpretation and legislative or regulatory action in response to court decisions can be frozen as well.

CONCLUSION

Although unlikely in the near term, it is possible that Congress will eventually amend the FAA to limit its reach in consumer cases. The Supreme Court's composition could also change in such a way that causes it to pull back some of its decisions strengthening the FAA. For at least the next several years, however, it is unlikely that Congress will do anything to place limitations on the FAA or enact legislation that counters the Supreme Court decisions rendering the effects of the FAA broader than Congress may have envisioned in 1925. And the Court's composition is not likely to change any time soon in a way that will result in limitations on mandatory consumer arbitration. It is worth thinking about what might happen if, over a period of decades, Congress does nothing and Supreme Court prece-

¹⁰⁰ *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572, 577 (Ind. 2001).

¹⁰¹ See generally IND. CODE ANN. § 24-4.5-7 (West 2016).

¹⁰² 12 U.S.C. § 2607(a) (2012) ("No person shall give and no person shall accept any . . . thing of value pursuant to any agreement or understanding . . . that business . . . shall be referred to any person."); *Culpepper v. Inland Mortg. Corp.*, 132 F.3d 692, 697 (11th Cir. 1998).

¹⁰³ See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10,080, 10,084 (Mar. 1, 1999). It revised the policy in 2001 in response to another decision by the Eleventh Circuit. See Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052 (Oct. 18, 2001) (responding to *Culpepper v. Irwin Mortg. Corp.*, 253 F.3d 1324 (11th Cir. 2001)).

¹⁰⁴ See 15 U.S.C. § 1639b(c)(1), (c)(2)(B) (2012).

dent remains essentially where it is. Without further development of the unconscionability and good faith doctrines at common law, and with fewer and fewer court decisions interpreting and applying state and federal consumer statutes, the potential impact of arbitration on standard terms in consumer contracts terms looms large. When that happens, a powerful and enduring check on the ability of businesses to impose harsh terms on consumers in the contracting process will have been lost.