
RECENT CASES

ARBITRATION AND CONSUMER PROTECTION — CREDIT REPAIR ORGANIZATIONS ACT — NINTH CIRCUIT HOLDS THAT STATUTORY BAN ON ARBITRATION IS NONWAIVABLE. — *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204 (9th Cir. 2010).

Congress passed the Credit Repair Organizations Act¹ (CROA) to assist consumers in making informed decisions and to protect consumers from unfair or deceptive practices when dealing with companies that purport to help rebuild credit. The CROA augments the Consumer Credit Protection Act² with additional nonwaivable consumer protections,³ including a mandatory precontractual disclosure of consumers' rights when contracting with a credit repair organization.⁴ Recently, in *Greenwood v. CompuCredit Corp.*,⁵ the Ninth Circuit denied a request to compel arbitration based on a predispute arbitration agreement, holding that the CROA's mandatory disclosure term "right to sue" creates a substantive, nonwaivable right that precludes arbitration.⁶ While the decision marks an additional step toward limiting the federal policy favoring arbitration for claims involving consumer rights,⁷ the Ninth Circuit limited arbitration by adopting a narrow definition of "sue"⁸ that the Supreme Court has rejected. As a result of this definition, the Ninth Circuit effectively created a mandatory rule that goes beyond what advocates of consumer protection support by banning arbitration of CROA claims.

The CROA requires that credit repair organizations — businesses that offer to "improv[e] any consumer's credit record"⁹ — provide consumers with a specific written disclosure statement.¹⁰ The third paragraph of this mandatory disclosure statement tells the consumer, "You have a right to sue a credit repair organization."¹¹ In addition, the CROA creates civil liability for "[a]ny person who fails to comply with

¹ Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. § 1679 (2006)).

² Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 and 18 U.S.C.).

³ 15 U.S.C. § 1679f.

⁴ *Id.* § 1679c.

⁵ 615 F.3d 1204 (9th Cir. 2010).

⁶ *Id.* at 1214.

⁷ See Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 479-81 (2009).

⁸ See *Greenwood*, 615 F.3d at 1208.

⁹ 15 U.S.C. § 1679a(3)(A)(i).

¹⁰ *Id.* § 1679c(a).

¹¹ *Id.*

any provision of this subchapter.”¹² Moreover, a waiver of “any protection provided by or any right of the consumer under this subchapter . . . may not be enforced by any Federal or State court or any other person.”¹³

CompuCredit marketed a subprime credit card called the Aspire Visa, issued by Columbus Bank and Trust, to consumers with “low or weak credit scores,” claiming the card “could be used to rebuild your credit, rebuild poor credit, and improve your credit rating.”¹⁴ Despite the assertion made in CompuCredit’s advertisements that the credit card offered an immediate \$300 line of credit with “no deposit required,” CompuCredit charged consumers \$257 in fees during the first year against their line of credit, including “a \$29 finance charge, a monthly \$6.50 account maintenance fee, and a \$150 annual fee.”¹⁵ Before receiving the credit card, each consumer received and agreed to the “Terms of Offer” and “Summary of Credit Terms” under the “Pre-Approved Acceptance Certificate,” which included a “binding arbitration provision” requiring “[a]ny claim, dispute or controversy . . . [to] be resolved by binding arbitration.”¹⁶

Wanda Greenwood and her fellow plaintiffs, each of whom had opened an Aspire Visa card, brought suit in the Northern District of California against CompuCredit and Columbus Bank and Trust, alleging violations of the CROA.¹⁷ The defendants moved to compel arbitration based on the Pre-Approved Acceptance Certificate.¹⁸ The district court denied the motion to compel arbitration.¹⁹ While the Federal Arbitration Act²⁰ (FAA) requires a district court to compel arbitration when “1) there exists a valid agreement to arbitrate; and 2) the dispute falls within its terms,”²¹ Judge Wilken found the arbitration agreement at issue void because the text of the CROA created a “right to sue” that cannot be waived.²² Noting the “federal policy fa-

¹² *Id.* § 1679g(a).

¹³ *Id.* § 1679f(a).

¹⁴ *Greenwood*, 615 F.3d at 1205 (internal quotation marks omitted).

¹⁵ *Id.* (internal quotation marks omitted). The advertisements sent by CompuCredit listed these fees “in small print amidst other information in the advertisement, and not in proximity to its representations that no deposit was required.” *Id.*

¹⁶ *Id.* at 1205–06 (providing the exact language of the Pre-Approved Acceptance Certificate, the Terms of Offer, and the Summary of Credit Terms).

¹⁷ *Id.*

¹⁸ *Id.* at 1206.

¹⁹ *Greenwood v. CompuCredit Corp.*, 617 F. Supp. 2d 980, 988 (N.D. Cal. 2009).

²⁰ 9 U.S.C. §§ 1–16 (2006).

²¹ *Greenwood*, 617 F. Supp. 2d at 984.

²² *Id.* at 988; *see* 15 U.S.C. §§ 1679c(a), 1679f(a) (2006); *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (explaining that a court presumes an arbitration agreement is valid unless “Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum” and made that intention “deducible from text or legislative history”).

voring arbitration,” Judge Wilken distinguished “the ‘right to sue’ and non-waiver language used in CROA [as] different in important respects from other statutory language”²³ at issue in the relevant Supreme Court precedents.²⁴ While the statutes at issue in those cases contain jurisdictional provisions granting access to federal courts, the CROA establishes the “right to sue,” which precludes arbitration, in a section of the statute that imposes a substantive duty of disclosure.²⁵

The Ninth Circuit affirmed.²⁶ Writing for the panel, Judge Thomas²⁷ held that the plain language of the CROA created a right to sue in a judicial forum that could not be waived.²⁸ Stating that the policy favoring arbitration can only be overcome by “[c]ongressional intent to preclude waiver” found in the statute’s text, legislative history, or “inherent conflict between arbitration and the [statute’s] underlying purposes,”²⁹ Judge Thomas read the mandatory disclosure section of the CROA as creating an unambiguous “right to sue” in a court that the broad antiwaiver provision plainly covers by protecting “any right of the consumer.”³⁰ Judge Thomas determined that the “right to sue . . . cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration” because the “plain and ordinary meaning” of “sue” does not include arbitration.³¹ Using legal dictionaries, Judge Thomas argued that the plain meaning of “sue” involves litigation “in

²³ *Greenwood*, 617 F. Supp. 2d at 986 (internal quotation mark omitted).

²⁴ *Id.* at 986–88. Judge Wilken addressed several Supreme Court cases directly. *See* *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 88–92 (2000) (rejecting the argument that the cost of arbitration prohibits enforcing rights under the Truth in Lending Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (finding arbitration consistent with the statutory scheme established by the Age Discrimination in Employment Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479–86 (1989) (finding that arbitration does not waive compliance with the Securities Act of 1933); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227–40 (1987) (distinguishing the ability to waive the jurisdictional grant from the inability to waive substantive duties created by the Securities Exchange Act of 1934); *Mitsubishi*, 473 U.S. at 628–40 (allowing arbitration of Sherman Act claims).

²⁵ *Greenwood*, 617 F. Supp. 2d at 987 (“Vesting jurisdiction to hear a claim in a particular court is qualitatively different from a statute that expressly provides for a right to sue.”). *But see* *Gay v. CreditInform*, 511 F.3d 369, 385 (3d Cir. 2007) (“We therefore construe the CROA’s anti-waiver provision as only extending to rights premised on the imposition of statutory duties, absent contrary language in the statute. . . . [T]he statute[] did not create the . . . right of consumers to sue in a judicial forum . . .”).

²⁶ *Greenwood*, 615 F.3d at 1206–07.

²⁷ Judge Thomas was joined by Judge Kleinfeld.

²⁸ *See Greenwood*, 615 F.3d at 1209.

²⁹ *Id.* at 1207 (second alteration in original) (quoting *Gilmer*, 500 U.S. at 26) (internal quotation marks omitted).

³⁰ *Id.* at 1208. Judge Thomas later argued that “Congress’s consistent use of the word ‘right’ indicates the waiver prohibition applies to the ‘right to sue,’ as identical words in a statute should be given a consistent and identical meaning throughout the statute.” *Id.* at 1210.

³¹ *Id.* at 1208.

a court of law” whereas the plain meaning of “arbitration” constitutes “dispute resolution *without result to the courts*.”³²

The Ninth Circuit also dismissed the alternative interpretation of the CROA adopted by the Third and Eleventh Circuits, distinguishing the Supreme Court precedents relied upon by those courts. First, Judge Thomas rejected the argument that the mandatory disclosure section does not create a substantive right to sue in court³³ as well as the argument that the “right to sue” actually refers to the broader right to bring a claim established in § 1679g.³⁴ Reading the statute with Congress’s purpose of “protecting consumers from misinformation” in mind, Judge Thomas reasoned that the defendants’ interpretations of the “right to sue” would either nonsensically “misinform consumers about a fictional right” or render “the entire ‘Disclosures’ section . . . superfluous.”³⁵ Judge Thomas then held that the “any other person” language in § 1679f(a) — the CROA’s antiwaiver provision — does not evince a congressional intent to allow arbitration of CROA claims because a consumer can raise CROA counterclaims in an arbitration proceeding initiated by a credit repair organization, and the arbitrator, or “person,” in that proceeding cannot enforce a waiver of the consumer’s CROA protections.³⁶ Recognizing that the court’s reading of the CROA “is in conflict with that of two . . . sister circuits,” both of which allowed arbitration of CROA claims, Judge Thomas highlighted the fact that the other circuits “g[a]ve surprisingly little regard to the ‘right to sue’ language” in the mandatory disclosure section³⁷ and consequently to the difference between that language, which creates a substantive right, and the jurisdictional provisions of other statutes that the Supreme Court found could be waived.³⁸

Judge Tashima dissented.³⁹ Although he disagreed with the majority’s interpretation of the text of CROA and lamented the creation of a circuit split,⁴⁰ his dissent used the same inquiry as the majority.⁴¹ Beginning with the text of the CROA, Judge Tashima argued that the mandatory disclosure section does not “create any substantive rights, including the right to sue,” a reading supported by the fact that other sections of Title 15 separately confer the rights mentioned in the man-

³² *Id.* (quoting 6 C.J.S. ARBITRATION § 2 (2005) (emphasis added)).

³³ *Id.* at 1209.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1210.

³⁷ *Id.* at 1211.

³⁸ *Id.* at 1212–14; see *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009); *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007).

³⁹ *Greenwood*, 615 F.3d at 1214 (Tashima, J., dissenting).

⁴⁰ See *id.* at 1216.

⁴¹ *Id.* at 1214.

datory disclosure statement.⁴² Since the civil liability section does not “mandate a judicial forum,” the “right to sue” does not mean the right to sue in court.⁴³ Judge Tashima found further support for his reading of the CROA in the “any other person” language of the waiver provision, which “clearly indicate[s] that arbitrators . . . may decide CROA claims,”⁴⁴ and in the Third and Eleventh Circuit decisions.⁴⁵ After dismissing the majority’s argument that the text unambiguously demonstrates a ban on arbitration, Judge Tashima then noted the lack of legislative history and argued that “there is no inherent conflict between arbitration and CROA’s underlying purpose.”⁴⁶

The Ninth Circuit made three necessary determinations in order to find a ban on arbitration in the CROA. First, “the plain and ordinary meaning” of “sue” precludes arbitration.⁴⁷ Second, Congress created a substantive “right to sue” in the mandatory disclosure section of the CROA that is distinct from the procedural civil liability provision.⁴⁸ Finally, the antiwaiver provision of the CROA covers the substantive “right to sue.”⁴⁹ Whether the CROA precludes or allows consumer-initiated arbitration therefore depends primarily on the decision to define “sue” either narrowly or broadly.⁵⁰ While the Ninth Circuit supported its narrow definition of “sue” with “parlance, reference, and common sense,”⁵¹ the definition fails to adopt the Supreme Court’s view that arbitration is simply another forum for adjudication. As a result of the dichotomy created between “sue” and “arbitrate,” the Ninth Circuit effectively created a mandatory rule banning arbitration of CROA claims in proceedings initiated by consumers. By removing consumers’ ability to commit to binding arbitration, the court contravened consumer protection’s purpose and the CROA’s purpose of aiding consumer choice.

In defining “sue” narrowly, the Ninth Circuit failed to follow Supreme Court precedent interpreting similar language in other statutes.

⁴² *Id.* at 1215. For example, Judge Tashima argued that § 1679g establishes the civil liability listed in the mandatory disclosure statement as the “right to sue.” *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1216.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1208–09 (majority opinion).

⁴⁸ *Id.* at 1209–10.

⁴⁹ *See id.* at 1210; *see also* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482 (1989) (explaining that antiwaiver provisions do not apply to procedural provisions).

⁵⁰ The Third Circuit noted the importance of a broad definition of “sue” in determining whether the CROA bans arbitration, stating “that even if we are wrong with respect to the scope of the CROA anti-waiver provision . . . our result in this case would not change because the statute[] did not create the underlying right[], i.e., the right of consumers to sue in a judicial forum.” *Gay v. CreditInform*, 511 F.3d 369, 385 (3d Cir. 2007).

⁵¹ *Greenwood*, 615 F.3d at 1209.

Since the CROA and its legislative history do not mention arbitration,⁵² the Ninth Circuit relied exclusively on the plain meaning of the word “sue” found in legal reference texts to distinguish “sue” from “arbitrate.” While “sue” could be defined broadly as bringing a claim in any forum,⁵³ the Ninth Circuit defined “the right to sue” narrowly as “[t]he act of suing in a court of law [which] is distinctly different from arbitration” and “cannot be satisfied by . . . arbitration.”⁵⁴ The Ninth Circuit’s definition therefore conflicts with the Supreme Court’s view of an arbitration agreement as “a specialized kind of forum-selection clause.”⁵⁵ The Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁵⁶ implicitly accepted that “arbitration is merely a form of trial to be used in lieu of a trial at law.”⁵⁷ The Ninth Circuit previously recognized this definition, interpreting the ability to “bring suit . . . in any district court” granted by the Federal Communications Act as lacking the “strong showing of congressional intent” necessary to “bar[] the arbitral forum” even though it bars state and tribal forums.⁵⁸

The Ninth Circuit attempted to distinguish the Supreme Court precedents upholding arbitration of statutory claims. The court’s discussion of *Shearson/American Express, Inc. v. McMahon*⁵⁹ and *Rodriguez de Quijas*, the two Supreme Court cases addressing the issues closest to those in *Greenwood*, focused on the application of antiwaiver provisions to substantive rights, such as the CROA’s “right to sue,” but not to procedural, jurisdictional provisions.⁶⁰ However, even if the CROA creates a substantive “right to sue,” that right bars arbitration

⁵² See *id.* at 1214 (Tashima, J., dissenting).

⁵³ A broad definition of the “right to sue” that includes arbitration also reconciles the “right to sue” in the mandatory disclosure provision, 15 U.S.C. § 1679c (2006), with the provision stating that any waiver “may not be enforced by any Federal or State court or any other person,” *id.* § 1679f(a)(2), since a consumer may choose “any other person,” including an arbitrator.

⁵⁴ *Greenwood*, 615 F.3d at 1208.

⁵⁵ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)) (internal quotation marks omitted); see also *Lamley*, *supra* note 7, at 499 (arguing that one of the main principles established by “*Mitsubishi* and its progeny” is the similar operation of arbitration agreements and forum selection clauses).

⁵⁶ 490 U.S. 477.

⁵⁷ *Id.* at 480 (quoting *Wilko v. Swan*, 346 U.S. 427, 433 (1953)) (internal quotation marks omitted) (interpreting the concurrent federal and state jurisdictional grant in the Securities Act to implicitly include arbitration because arbitration agreements, like the concurrent jurisdiction provision, “serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise,” *id.* at 483).

⁵⁸ *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 727 (9th Cir. 2007).

⁵⁹ 482 U.S. 220 (1987).

⁶⁰ *Greenwood*, 615 F.3d at 1212–13, 1213 n.5. The court also distinguished *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), based on the lack of a waiver provision in the Sherman Act, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), based on the ability to waive statutory rights at issue, and *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), as not applicable. See *Greenwood*, 615 F.3d at 1213–14.

only if the court rejects the equivalence of arbitration and adjudication in court, adopting the “judicial hostility”⁶¹ and “outmoded presumption of disfavoring arbitration proceedings”⁶² Congress sought to eliminate with the FAA. The Ninth Circuit also ignored the Supreme Court’s lengthy discussions in *McMahon*⁶³ and *Rodriguez de Quijas*⁶⁴ equating arbitration with judicial suit. The court missed the critical preliminary step of defining “sue” correctly and, as a result, relied on an outmoded distinction between “sue” and “arbitrate” to find the CROA bars arbitration.

While the Ninth Circuit’s holding addressed only predispute arbitration agreements, the decision effectively creates a mandatory rule against arbitration of CROA claims in any proceeding initiated by a consumer. By holding that “Congress intended that consumers cannot waive their right to sue under the CROA, and instead submit to arbitration,”⁶⁵ the Ninth Circuit left open the possibility that the statute similarly precludes postdispute arbitration agreements. Postdispute, a consumer can ordinarily choose to enter into an arbitration agreement to resolve CROA claims; however, submitting to arbitration requires an agreement to be bound by the result of the arbitration.⁶⁶ Since *Greenwood* held that a consumer cannot waive his or her CROA right to sue in a court, a consumer can void a postdispute arbitration agreement by asserting this CROA “right to sue.” Consumers therefore cannot meaningfully submit to arbitration,⁶⁷ whereas credit repair organizations can continue to enforce arbitration agreements in proceedings they initiate.⁶⁸

The mandatory rule against arbitration effectively created by the narrow definition of “sue” contravenes the purpose of the CROA and

⁶¹ *Gilmer*, 500 U.S. at 24 (discussing the federal policy created by the FAA). *But see id.* at 39 (Stevens, J., dissenting) (arguing that the legislative history of the FAA shows Congress intended the FAA to address only arbitration agreements between businesses).

⁶² *Rodriguez de Quijas*, 490 U.S. at 481.

⁶³ *McMahon*, 482 U.S. at 231–33.

⁶⁴ *Rodriguez de Quijas*, 490 U.S. at 480–81, 483.

⁶⁵ *Greenwood*, 615 F.3d at 1214.

⁶⁶ *See* 9 U.S.C. § 2 (2006).

⁶⁷ Justice Jackson noted the same difficulty in distinguishing between precluding pre- and postdispute arbitration agreements in *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas*, 490 U.S. 477, the only Supreme Court case to find a congressional intent to bar arbitration. *See id.* at 438 (Jackson, J., concurring) (arguing that although the Securities Act prohibits predispute arbitration agreements, parties “thereafter . . . could agree upon arbitration”). The Court in *Wilko* found the Securities Act prohibited arbitration because arbitration “lacks the certainty of a suit at law under the Act to enforce [consumers’] rights” and thus under-enforces the law. *Id.* at 432, 435 (majority opinion).

⁶⁸ The Ninth Circuit acknowledged that any CROA counterclaims a consumer raises in an arbitration initiated by a credit repair organization must be arbitrated. *Greenwood*, 615 F.3d at 1210; *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624–25, 640 (1985) (enforcing an arbitration agreement that covered statutory counterclaims).

goes further than consumer protection advocates⁶⁹ and legislation⁷⁰ support. The CROA aims to aid consumer contracting by “ensur[ing] that prospective buyers . . . are provided with the information necessary to make an informed decision.”⁷¹ While consumers have little power to choose arbitration in the context of predispute arbitration agreements, they have a better bargaining position postdispute when deciding whether to submit to arbitration.⁷² Proponents of consumer protection legislation support banning predispute arbitration agreements in consumer contracts⁷³ because the forced arbitration clause harms the consumer’s ability to contract freely.⁷⁴ Therefore, the issue with arbitration agreements is not the outmoded view that arbitration fails to afford consumers the same protections as a judicial proceeding, which the Ninth Circuit focused on by defining “sue” as distinct from “arbitrate,” but rather the elimination of the consumer’s choice in predispute agreements.⁷⁵ Effectively banning postdispute arbitration also eliminates the consumer’s ability to choose.

⁶⁹ See Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 413 (2010) (“Restricting predispute arbitration clauses represents a fair balance between arbitration and consumer protection policies.”).

⁷⁰ See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028(c), 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C.A. § 5518 (West Supp. 2010)) (granting the Consumer Protection Bureau the authority to issue rules banning predispute agreements, but noting that “[t]he authority . . . may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement . . . after a dispute has arisen”); Talent Amendment, 10 U.S.C. § 987(e)(3) (2006); Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and the Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1205–06 (2010) (discussing the predispute arbitration ban in the proposed Arbitration Fairness Act of 2009); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 160–61 (2010) (same).

⁷¹ 15 U.S.C. § 1679(b)(1) (2006).

⁷² See McGill, *supra* note 69, at 399 (arguing for a distinction between pre- and postdispute arbitration because “[a] postdispute agreement addresses the informed consent criticism and ensures that the choice of arbitration is made knowingly, with the particular dispute in mind, rather than buried within the decision to purchase”).

⁷³ See, e.g., Budnitz, *supra* note 70, at 1205 (supporting limits on predispute arbitration clauses because “whether or not consumers see or understand the [clause], they have no choice since the waivers are practically universal”); Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1042 (2010) (“Most legal commentators support enforcing adhesion contracts with an exception for unduly onerous terms . . . such as certain mandatory arbitration provisions . . .”).

⁷⁴ See Lampley, *supra* note 7, at 510 (“The main obstacle in adhesive consumer arbitration agreements is the lack of choice . . .”); McGill, *supra* note 69, at 398 (noting that banning only predispute agreements “achieves a balance between consumer protection and arbitration policies by preserving access to arbitration for all consumer disputes”); see also Todd D. Rakoff, *Is “Freedom from Contract” Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 493.

⁷⁵ Professor Ramona Lampley supports consumer contracts with differentiated pricing to reflect opt-out arbitration provisions instead of banning predispute arbitration agreements, “leav[ing] the decision to the consumer to decide.” Lampley, *supra* note 7, at 512; see also McGill, *supra* note 69, at 399 (arguing that “a limitation based on the monetary value of the dispute completely removes the possibility of arbitration for some disputes” either pre- or postdispute).