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Class Action vs. Arbitration: Does TILA Support Class Actions in Arbitration Where Statutory Rights are Concerned - Johnson v. West Suburban Bank

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Class Action vs. Arbitration: Does TILA Support Class Actions in Arbitration Where Statutory Rights are Concerned?

Johnson v. West Suburban Bank[1]

I. INTRODUCTION

Johnson v. West Suburban Bank is an important case in American jurisprudence because it combines several United States Supreme Court cases to establish a test for whether arbitration provisions relating to statutory rights should be upheld when they essentially preclude class actions. This Casenote will examine the progression the courts have taken and *Johnson*'s subsequent test. Finally, an evaluation of this test will follow.

II. FACTS AND HOLDING

Plaintiff Terry Johnson ("Johnson") desired to bring a class action against Defendants County Bank of Rehoboth Beach, Delaware ("Bank") and Tele-Cash, Inc., Bank's agent in the transaction.[2] Johnson and Bank entered into a short-term loan on July 10, 1998.[3] The amount of the loan was $250.[4] The two-week loan resulted in an $88 finance charge, which translated into an annual percentage rate of 917%.[5] The agreement required Johnson to make a one time payment of $338 two weeks after he received his loan.[6]

The loan agreement between Johnson and Bank contained an arbitration provision.[7] This provision declared that any dispute regarding the loan, no matter who brought it, would be arbitrated.[8] The arbitration provision also stated that since the loan was involved in interstate commerce, the Federal Arbitration Act[9] ("FAA") governed the arbitration provision.[10] Furthermore, the loan agreement expressly

1. 225 F.3d 366 (3d Cir. 2000).
2. *Id.* at 368.
3. *Id.* at 369.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* The provision specified the Code of Procedure of the National Arbitration Forum as the governing rules. *Id.*
9. 9 U.S.C. §§ 1-16 (1994).
10. *Johnson*, 225 F.3d at 369.

notified Johnson that by signing the loan he waived his right to litigate any matters concerning the loan.[11]

Johnson filed a judicial claim, on behalf of himself and an assumed class of others in similar circumstances, with the District Court of Delaware.[12] Johnson contended that Bank and Tele-Cash violated two statutes, the Truth in Lending Act[13] ("TILA") and the Electronic Fund Transfer Act[14] ("EFTA").[15] First, Bank and Tele-Cash did not give sufficient disclosure of the high rate of interest.[16] Second, Bank and Tele-Cash required loan applicants to open an account.[17] Before loan approval, Bank and Tele-Cash required the loan applicants to authorize electronic fund transfers from that account to pay off the loan.[18] This preauthorization was irrevocable.[19]

Bank and Tele-Cash requested a stay of the proceedings and a motion to compel arbitration.[20] The loan agreement specifically waived any judicial forum and established that any dispute about the loan should be settled by means of arbitration.[21]

To keep his claim in court, Johnson argued that the arbitration provision conflicted with the purposes of TILA and EFTA.[22] Johnson proposed that Congress' intent toward these statutes was to encourage district courts to provide for class actions pursuant to the Federal Rules of Civil Procedure.[23] Johnson further contended that Congress' intent to promote class actions could be found in the statutes' legislative history.[24] Johnson claimed that allowing class actions under TILA and EFTA helps discourage violations—a public policy goal.[25]

The District Court of Delaware ruled for Johnson, declaring that there existed a significant conflict between the statutes and arbitration.[26] The district court subsequently denied Bank and Tele-Cash's motion to compel arbitration.[27] Bank and Tele-Cash appealed to the Third Circuit Court of Appeals.[28] The appellate court reversed the district court, ruling that there was no significant conflict between TILA, EFTA, and arbitration under the FAA.[29] Moreover, the appellate court recognized that congressional intent towards the FAA should be considered in

11. *Id.* at 370.
12. *Id.*
13. 15 U.S.C. §§ 1601-1693 (1994 & Supp. IV 1998).
14. 15 U.S.C. § 1693 (1994).
15. *Johnson*, 225 F.3d at 370.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 368.
23. *Id.* at 368-69. Rule 23 provides the requirements for class actions. FED. R. CIV. P. 23.
24. *Johnson*, 225 F.3d at 369.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

determining if an arbitration agreement should be enforced.[30] Furthermore, upon looking at the text of the statutes, their respectful legislative histories, and their purposes, the court could not find congressional intent to deem class actions more important than arbitration provisions within a contract.[31]

The appellate court held: when there exists an arbitration provision that essentially prevents a class action under statutory rights, the courts must examine congressional intent as provided in the text of the statute, the statute's legislative history, and the purpose of the statute, while taking into consideration Congress' purpose of enacting the FAA and if the objecting party can still be adequately vindicated by arbitration, to determine if the arbitration provision is enforceable or not.[32]

III. LEGAL BACKGROUND[33]

A. Supreme Court Case Law

The question of whether arbitration provisions are enforceable when plaintiffs attempt to bring a class action suit on grounds of violation of TILA and EFTA is one of first impression for the courts of appeal.[34] However, there have been several district courts that have dealt with this question, many allowing for arbitration.[35] As a result, the Third Circuit Court of Appeals used several United States Supreme Court cases concerning related matters to aid in determining what the ruling should be concerning class action suits under TILA and EFTA versus arbitration clauses.[36]

1. Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.[37]

The United States Supreme Court decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* in 1985.[38] Mitsubishi Motors Corp. ("Mitsubishi") filed for an order of arbitration[39] against Soler Chrysler-Plymouth, Inc. ("Soler") in the

30. *Id.*
31. *Id.*
32. *Id.* at 368-79.
33. EFTA contains class action recovery provisions that are substantially similar to TILA. *Id.* at 378. Therefore this Casenote will mainly examine TILA.
34. *Id.* at 370.
35. *Id. Compare* Thompson v. Illinois Title Loans, Inc., No. 99-C-3952, 2000 WL 45493 (N.D. Ill. Jan. 11, 2000) (holding that a substantive right to a class action is not created within TILA), *and* Lopez v. Plaza Fin. Co., 1996 WL 210073, at *3 (N.D. Ill. Apr. 25, 1996) (stating that Congress does not create a right per se, just puts limits on class action liability—TILA neither requires nor grants substantive right to class action), *with* Lozada v. Dale Baker Oldsmobile, Inc. 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (holding that the "[r]emedial purposes of TILA are substantially defeated or impaired by arbitration clauses" and rejecting defendant's motion to compel arbitration because arbitration clause was unconscionable).
36. *Johnson*, 225 F.3d at 370-71.
37. 473 U.S. 614 (1985).
38. *Id.* at 614.
39. Mitsubishi brought its arbitration action under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Id.*

United States District Court for the District of Puerto Rico because the two companies disagreed about who breached the sales agreement between them.[40] The sales agreement contained an arbitration provision that provided for arbitration if there existed a breach of the agreement.[41] Soler's counterclaim contained, among other things, allegations of violations of the Sherman Act.[42] The Puerto Rico district court ordered arbitration of all the complaint issues and most of the counterclaims.[43] Even though antitrust claims are normally not arbitrable, the district court said that the international nature of the business relationship called for arbitration on the antitrust issues as well.[44] The United States Court of Appeals for the First Circuit affirmed the district court's opinion with the exception of the antitrust issues.[45]

The United States Supreme Court granted certiorari to decide what an American court's duty is when an arbitration agreement concerns antitrust claims within an international transaction.[46] The Supreme Court ruled that "if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."[47] The Supreme Court continued by stating that the parties should be held to arbitration if they all agree to arbitrate unless Congress has shown an intention not to allow judicial remedy waivers for the statutory rights at issue.[48] Furthermore, it is the party contesting the arbitration that must show Congress' intent.[49] Since Soler agreed to arbitration by signing the sales agreement with Mitsubishi, Soler was held to arbitration unless Congress had shown an intent to the contrary within the Sherman Act.[50] The text and legislative history did not show Congress having such a contrary intent in regard to an international context.[51] Therefore, the Supreme Court ruled that the Sherman Act was subject to arbitration under the FAA.[52]

2. Dean Witter Reynolds Inc. v. Byrd[53]

The Supreme Court also decided *Dean Witter Reynolds Inc. v. Byrd* in 1985.[54] In 1981, Lamar Byrd ("Byrd") invested $160,000 in securities from Dean Witter

40. *Mitsubishi Motors*, 473 U.S. at 617-19.
41. *Id.* at 617. The arbitration clause also provided for arbitration of "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement . . . ." *Id.*
42. *Id.* at 620. The Sherman Act is an anti-trust statute. 15 U.S.C. § 1.
43. *Mitsubishi Motors*, 473 U.S. at 620-21.
44. *Id.* at 621.
45. *Id.* at 621-22.
46. *Id.* at 624.
47. *Id.* at 628.
48. *Id.*
49. *Id.*
50. *Id.* at 628-29. The Supreme Court said this applied only to an international context and refused to look at the issue from a domestic context. *Id.*
51. *Id.*
52. *Id.* at 629.
53. 470 U.S. 213 (1985).
54. *Id.* at 213.

Reynolds Inc. ("Witter").[55] Within about five months, the account value fell more than $100,000.[56] Byrd filed a cause of action for several pendent state law issues and federal securities issues against Witter in the United States District Court for the Southern District of California.[57] Upon investing, Byrd signed a Customer's Agreement that called for arbitration of all disputes stemming from the agreement.[58] Witter subsequently filed a motion to compel arbitration of the pendent state law issues and sever the federal securities issues to be resolved in a federal judicial forum.[59] Witter's motion for severing the federal issues from the pendent state issues and compelling arbitration of the state issues was denied by the district court.[60] The Court of Appeals for the Ninth Circuit affirmed in an interlocutory appeal.[61]

The United States Supreme Court granted certiorari to answer the question of whether, when a claim raises both federal securities issues and pendent state issues, a federal district court can deny compelling arbitration of pendent state issues of law even though the parties had agreed to arbitrate.[62] The Court considered the legislative history of the FAA to determine Congress' intent regarding whether or not arbitration should be compelled in the case at issue.[63] Congress intended to place arbitration provisions "upon the same footing as other contracts, where it belongs."[64] Moreover, Congress wanted to override the long judiciary tradition of not enforcing arbitration agreements.[65] Furthermore, Congress' primary concern, and reason for passing the FAA, was to "enforce private agreements into which partes had entered."[66] Therefore, the Supreme Court ruled that arbitration of pendent state claims should be compelled to protect both the contractual rights of the parties and their FAA rights, unless another federal statute sufficiently says otherwise.[67]

3. Shearson/American Express, Inc. v. McMahon[68]

The United States Supreme Court decided *Shearson/American Express, Inc. v. McMahon* in 1987.[69] Eugene and Julia McMahon ("McMahon"), as trustees and individually, were customers of Shearson/American Express Inc. ("Shearson") between 1980 and 1982.[70] Julia McMahon signed two customer agreements that contained arbitration provisions for any controversies concerning the agreements.[71] In 1984, McMahon filed an amended cause of action against Shearson with the

55. *Id.* at 214.
56. *Id.*
57. *Id.* Jurisdiction of the federal court was based on diversity of citizenship. *Id.*
58. *Id.* at 215.
59. *Id.*
60. *Id.* at 215-16.
61. *Id.* at 216.
62. *Id.* at 214.
63. *Id.* at 218-21.
64. H.R. REP. NO. 96, at 1 (1924).
65. This tradition came from English common law. *See Dean Witter*, 470 U.S. at 220 n.6.
66. *Id.* at 221.
67. *Id.* In other words, Congress must sufficiently express its intent to limit the FAA.
68. 482 U.S. 220 (1987).
69. *Id.* at 220.
70. *Id.* at 222-23.
71. *Id.* at 223.

United States District Court for the Southern District of New York claiming violations of the Securities Exchange Act of 1934[72] ("Exchange Act"), the Racketeer Influenced and Corrupt Organizations Act[73] ("RICO"), and state laws.[74] Shearson moved to compel arbitration under the two consumer agreements.[75] The district court ruled that McMahon's Exchange Act and state law claims were arbitrable, but the RICO claims were not arbitrable because the federal government had great interest in the enforcement of such claims by federal courts.[76] The appellate court agreed with the district court that the state laws were arbitrable and "public policy" called for judicial forums for RICO claims but reversed the lower court concerning the Exchange Act, declaring that Exchange Act claims were not arbitrable.[77]

The United States Supreme Court granted certiorari to decide whether Exchange Act claims and RICO claims are arbitrable.[78] The Supreme Court observed that the FAA, by itself, "mandates enforcement of agreements to arbitrate statutory claims."[79] However, a contrary congressional directive can overrule the FAA in particular statutes, leaving it up to the party opposing arbitration to show Congress' intent.[80] McMahon did not sufficiently show that Congress intended to deny arbitration under the Exchange Act or RICO.[81] Therefore, the Supreme Court overruled the appellate court and remanded the matter for arbitration.[82]

4. Gilmer v. Interstate/Johnson Lane Corp.[83]

In 1991, the United States Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*[84] In 1981, Robert Gilmer ("Gilmer") took a job with Interstate/Johnson Lane Corporation ("Interstate") as Manager of Financial Services.[85] A requirement of employment was to register with several stock exchanges as a securities representative, which Gilmer did.[86] The application for the New York Stock Exchange ("NYSE") contained an arbitration provision.[87] This arbitration provision stated that Gilmer and Interstate would arbitrate disputes as required by the stock exchanges that Gilmer registered with.[88] Rule 347 of the NYSE provided for arbitration of employment matters.[89] Gilmer was fired by Interstate in 1987 at the

72. 15 U.S.C. § 78 (1994).
73. 18 U.S.C. § 1961 (1994).
74. *McMahon*, 482 U.S. at 223.
75. *Id.*
76. *Id.* 224.
77. *Id.*
78. *Id.* at 225.
79. *Id.* at 226.
80. *Id.*
81. *Id.* at 242.
82. *Id.*
83. 500 U.S. 20 (1991).
84. *Id.* at 20.
85. *Id.* at 23.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

age of sixty-two.[90] Gilmer filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC").[91] He then filed a complaint of age discrimination under the Age Discrimination in Employment Act of 1967[92] ("ADEA"), as amended, with the United States District Court for the Western District of North Carolina.[93] Interstate filed a motion to compel arbitration under the registration application and Rule 347 of the NYSE.[94] Interstate claimed that the FAA mandated compelling arbitration.[95] The district court denied Interstate's motion for arbitration, ruling that Congress intended to protect the ADEA from compelled arbitration and ensure a judicial forum for its claimants.[96] The United States Court of Appeals for the Fourth Circuit reversed, ruling that neither the legislative history and purpose of the ADEA nor the statutory text provide substantial proof that Congress intended to exclude arbitration from the ADEA.[97]

The United States Supreme Court granted certiorari to answer the question of whether an arbitration agreement should be enforceable when the issue lies within the ADEA.[98] The Court again reiterated that arbitration agreements concerning statutory claims are enforceable because of the FAA.[99] The Court recognized that it was Gilmer's responsibility to show Congress' intent against arbitration enforcement within the ADEA.[100] The test to determine Congress' intent is to look at the text of the ADEA, its legislative history, or an existing "inherent conflict" between the purposes of the ADEA and arbitration.[101] Gilmer attempted to argue that arbitration of ADEA issues would hinder important social policies.[102] However, the Supreme Court believed that arbitration was as capable as a judicial forum in handling such social policies.[103] Gilmer also argued that arbitration was not adequate for relief because it did not provide for class actions.[104] To this the Supreme Court answered that the individual is not barred from relief even if not allowed to bring a class action.[105] Furthermore, just because the individual signed a compulsory arbitration agreement, this does not preclude the EEOC from bringing and obtaining equitable relief for class actions.[106] Therefore, the Supreme Court ruled that compulsory arbitration is allowed concerning statutory issues arising from the ADEA.[107]

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90. *Id.*
91. *Id.*
92. 29 U.S.C. § 621 (1994).
93. *Gilmer*, 500 U.S. at 23-24.
94. *Id.* at 24.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 26.
100. *Id.*
101. *Id.*
102. *Id.* at 27.
103. *Id.*
104. *Id.* at 30.
105. *Id.* at 32.
106. *Id.*
107. *Id.* at 35.

B. *Truth in Lending Act*

Subchapter I of the Consumer Credit Protection Act is short-titled Truth in Lending Act.[108] TILA's purpose is to make sure consumers have information about the credit terms of their prospective loans.[109] Section 1640 provides for the remedies and how to determine the quantity of such remedies for violations of TILA.[110] As § 1640 relates to class actions, it provides for a maximum amount[111] and lists the factors to be considered in determining the remedies for the case at hand.[112]

IV. INSTANT DECISION

The Third Circuit Court of Appeals made a step-by-step progression in *Johnson* to reach its outcome of overruling the district court and compelling arbitration under TILA and EFTA.[113] The appellate court focuses mainly on TILA, stating that the same examination of EFTA can be made and the same outcome results.[114]

First, the appellate court looked at the statutory language of TILA.[115] The court acknowledged that within TILA there exists civil liability for inadequate disclosure by the lender.[116] Furthermore, the court agreed that TILA addresses class actions, but only in a manner that limits remedies available under TILA, and give factors for considering such remedies.[117] The court concluded that the "right" to a class action is a procedural right stemming from the Federal Rules of Civil Procedure.[118] Furthermore, because the text of TILA does not show congressional intent to provide for a statutory right of class action under TILA, the court held that a right to a class action under TILA does not exist within the text of TILA.[119]

The court then proceeded to consider TILA's legislative history.[120] The court examined the Senate and House Reports concerning amendments that have been made to TILA.[121] The court then ruled that since the legislative history does not explicitly exclude arbitration, Johnson needed to show that irreconcilable conflicts exist between arbitration and TILA's purposes.[122]

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108. 15 U.S.C. § 1601-1693.
109. *Id.* § 1601.
110. *Id.* § 1640.
111. *Id.* § 1640(a)(2)(B). The maximum amount is the lesser of $500,000 or one percent of the creditor's net worth. *Id.*
112. *Id.* § 1640(a)(4). These factors include, but are not limited to, "the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional." *Id.*
113. *Johnson*, 225 F.3d 366.
114. *Id* at 378-79.
115. *Id.* at 371.
116. *Id.*
117. *Id.*
118. *Id.* Rule 23 governs arbitration. FED. R. CIV. P. 23.
119. *Johnson*, 225 F.3d at 371.
120. *Id.* at 371-73.
121. *Id.*
122. *Id.*

The court split TILA's purposes into two sections: public policy goals and substantive rights.[123] Johnson argued that class action awards serve as penalties for violating lenders under TILA, in which the attorneys act as "private attorneys general," and that class actions serve more of a deterrence than individual claims or arbitration would.[124] The court rejected this argument, finding that individual claims and arbitration do not necessarily provide less deterrence than class actions and that class actions are not required to meet TILA's other goals.[125] The court continued by stating that the rights created under TILA are not foreclosed from the individual because he or she has to bring an individual claim or arbitrate.[126] Moreover, the court relied on *Gilmer* to rule that because Johnson does not lose his statutory rights if compelled to arbitrate under the arbitration agreement of the loan, the statute's public policy goals do not outweigh arbitration.[127] Furthermore, the court found that an individual's incentive to seek remedies under TILA is not quashed.[128] The court then contended that factors outside of consideration of TILA must be examined, specifically Congress' intent in enacting the FAA.[129] The court looked to *Dean Witter*, to decide that because there is a question as to whether irreconcilable conflicts exist between arbitration and TILA, FAA goals should be considered on equal footing with TILA public policy goals in determining if compulsory arbitration under an arbitration agreement is enforceable.[130]

The court then addressed substantive rights[131] and again looked to *Gilmer* for guidance.[132] The Supreme Court in *Gilmer* still allowed for arbitration when it ruled that even if a class action remedy is available, it does not mean that the parties cannot bargain around it as long as the waiver allows for adequate vindication of the dispute.[133] Therefore, because TILA allows for adequate vindication within the arbitration context, Johnson must be compelled to arbitrate in accordance with the arbitration agreement on the loan application that he signed.[134]

The subsequent test the court decided on to determine if an arbitration agreement concerning statutory rights is enforceable, even if it basically precludes a class action remedy, is as follows: (1) Congress' intent to preclude waiver of a judicial forum must be explicitly deducible from looking at the text of the statute in question, the statute's legislative history, and the statute's purposes; (2) Congress' intent in enacting the FAA, namely to encourage arbitration, must be held on equal footing as the statute in question's purpose; and (3) even if Congress does allow for

123. *Id.* at 373-78.
124. *Id.* at 373.
125. *Id.*
126. *Id.*
127. *Id.* at 374.
128. *Id.* The court goes on to say that recovery could be lower under class action because there is a cap on class action suits, and because attorney's fees are available in the judicial forum, attorney's fees should be available under arbitration. *Id.*
129. *Id.* at 375.
130. *Johnson*, 225 F.3d at 376.
131. *Id.* at 377-79.
132. *Id.*
133. *Id.* at 377.
134. *Id.* at 378.

class actions within the statute in question, if the opposing party's rights can be adequately vindicated, arbitration should not be precluded.[135]

V. COMMENT

Johnson basically states that when a request for a class action goes up against an arbitration provision, the arbitration provision will win unless the contesting party can show without a doubt that Congress intended for a class action override, or that without the class action the party would not be able to get an adequate remedy.[136] It has been argued that mandatory arbitration agreements that preclude class action litigation are unconscionable because they do not give plaintiffs an effective remedy.[137] Plaintiffs with small claims are not able to consolidate their disputes under an arbitration agreement and really cannot afford to arbitrate the dispute on an individual basis.[138] However, courts have not accepted this argument.[139]

So how is the "little guy" going to get redress? The appellate court in *Johnson* contends that administrative bodies will be able to keep the violating entity in line.[140] How persuasive is this really? Not all statutes are patrolled by administrative agencies, and those that are have agencies that are too small to handle the caseload.[141] Therefore, the administrative agency has to pick and choose, leaving some small-claims plaintiffs without a remedy. Allowing the potential plaintiff to combine with similarly positioned parties helps the ruling administrative body in many ways. It allows the administrative body to focus on other violating entities. It serves as a deterrent, ensuring that other potential violating entities know that they cannot get away with violations because there is an effective way for harmed plaintiffs to achieve justice. In short, there is a public policy—stopping small claims violators—that suggests that class actions should be allowed.

Another way for class actions to win over arbitration provisions is for Congress to be more explicit in its legislation. Courts look to legislative intent to determine if an arbitration provision can set aside a plaintiff's ability to join a class action. Sometimes legislative intent toward such an issue is extremely difficult to fathom from the statute or legislative history.[142] If Congress specifically mentioned within

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135. *Id.* at 368-79.

136. *Id.*

137. *See* F. Paul Bland, Jr., *Materials on Pre-dispute Arbitration Clauses*, 1172 PLI/Corp. 113, 159-62 (2000); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. Rev. 1, 78-82 (2000).

138. Bland, Jr., *supra* note 137; Sternlight, *supra* note 137.

139. *See* Sternlight, *supra* note 137, at 56-60.

140. *Johnson*, 225 F.3d at 377-78.

141. Sternlight, *supra* note 137, at 81.

142. Especially when the legislature is basically silent, i.e., TILA and class action versus arbitration. However, it may be argued that at least some class actions under TILA are discouraged. In 1995, the United States Congress placed a five-month moratorium on certain TILA class actions. Truth in Lending Class Action Relief Act of 1995, Pub. L. No 104-12, 109 Stat 161 (codified as amended at 15 U.S.C. § 1640 (Supp. IV 1998). The Congressional Record shows that Congress was reacting to the case of *Rodash v. A.I.B. Mortgage Co.*, 16 F.3d 1146 (1994). Congress claimed that as a result of the Eleventh Circuit Court rescinding a mortgage loan because of technicalities, too many class actions were being filed and that a moratorium was needed in order for Congress to address the issue. 141 Cong. Rec. 66,

the statute or the legislative history the exclusion of judicial forum waivers, the plaintiff would be allowed to join a class action.[143] However, this will take time to persuade Congress to do. If, in fact, it is possible to persuade Congress to do.

It is understandable that the courts want to balance the respective sides in order to determine whether or not arbitration provisions should be upheld. Arbitration provisions are very useful in many situations. However, instead of looking at only the availability of administrative remedies, maybe courts should look at the likelihood of administrative remedies. How long would it take for the ruling administrative body to get around to the plaintiff's claim versus the ability of the plaintiff to take the claim to court? If it is more efficient or more just to allow the plaintiff to join a class action and go to court, why not allow it?

There will be times, probably most of the time, that arbitration provisions should be upheld, even if it essentially precludes the plaintiff from a class action. However, the courts should take these situations very seriously. If the plaintiff is precluded from a class action and the ruling administrative body is too busy to deal with the violating defendant, then the plaintiff may be out of a satisfactory remedy or out of a remedy completely. The plaintiff still has the possibility of arbitration, but it may not be a satisfactory remedy, either because of economics or time and trouble.

VI. CONCLUSION

The debate concerning arbitration provisions versus the ability to form a class action is far from over. In fact, it has just begun. There are many federal statutes that the courts will have to examine to determine if an arbitration provision should be enforced or not because it waives a judicial forum and essentially precludes the formation of a class action. *Johnson* is precedent for future courts to look at in their determinations. Hopefully, courts will see that the ability, not just the availability, of administrative bodies working for plaintiffs' remedies should also be considered in their determinations.

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S5614-15. Senator D'Amato claimed that "[t]he threat of rescissions on so massive a scale could wreck havoc on our mortgage lending system and the secondary mortgage markets." *Id.* at S5615. Then in September of 1995, Congress passed the Truth in Lending Act Amendments of 1995. Pub. L. No 104-29, 109 Stat. 271 (codified as amended in scattered sections of 15 U.S.C.). From the Congressional Record, it looks as if Congress was more interested in protecting the lender and not the consumer's ability to file class actions. *See* 141 Cong. Rec. 152, H9513-16 and 140 Cong. Rec. 149, S15450.

143. *See* Sternlight, *supra* note 137, at 120-22.