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TOWARD A PURE ARBITRAL PARADIGM OF CLASSWIDE ARBITRATION: ARBITRAL POWER AND FEDERAL PREEMPTION

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I. INTRODUCTION

Recent disparate legal developments have transformed the law regarding classwide arbitration. These developments swept away the long-standing prohibition against classwide arbitration (a remnant of the historic mistrust of the arbitral process) and eliminated the "hybrid" model of classwide arbitration (another remnant, in which the courts remained involved in the arbitral process). Classwide arbitration is evolving toward a "pure" arbitral paradigm[1] permitting only the minimal court involvement authorized under the Federal Arbitration Act.[2] This article discusses the developing trend toward a pure arbitral paradigm of classwide arbitration that is evident from the United States Supreme Court's jurisprudence regarding classwide arbitration and federal preemption and considers its potential far-reaching implications.

Arbitration has collided with consumer and employment class actions. The use of arbitration as a method of dispute resolution continues to increase in a wide variety of contexts.[3] At the same time, the majority of class action cases are damages class actions[4] against business defendants.[5] About one-third of these cases arise in either the consumer,[6] commercial or employment contexts, where arbitration remains most

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1. By a "pure" arbitral paradigm, I mean a model permitting the arbitration of class actions, or "classwide arbitration" that sanctions the involvement of the judicial system only very narrowly, as contemplated by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2004).

2. 9 U.S.C. §§ 1–16 (2004).

3. Gabriel Herrmann, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 781 (2003); KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 4–5 (2000) (American Arbitration Association requests increased 21% between 1994 and 1998); DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES, A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 5 (1998) ("One of the foremost trends in corporate America in the 1990s has been the shift from traditional litigation and government agency resolution of disputes toward the use of alternative dispute resolution (ADR).").

4. DEBORAH R. HENSLER, ET AL., CLASS ACTION DILEMMAS, PURSUING PUBLIC GOALS FOR PRIVATE GAIN 52 (2000).

5. *Id.* at 53.

6. *Id.* at 53–54.

popular.[7] Most "first generation" arbitration clauses[8] common in commercial and employment contracts[9] are silent regarding the availability of class action relief in the arbitral setting.[10] Most federal courts[11] and many state courts[12] interpreted these silent arbitration clauses to preclude classwide or consolidated arbitration. One federal circuit court[13] and some state courts interpreted these silent arbitration clauses to permit classwide or consolidated arbitration.[14] Some courts permitting classwide arbitration required ongoing "judicial supervision"—the so-called "hybrid" model of classwide arbitration.[15]

With its decision in *Green Tree Fin. Corp. v. Bazzle*,[16] the United States Supreme Court implicitly reversed the course of both federal and state law prohibiting classwide arbitration and significantly expanded arbitral power to adjudicate class actions.[17] In *Bazzle*, the Supreme Court held that an arbitrator, not the court, should determine the availability of classwide arbitration where the parties' arbitration agreement is silent on the issue,[18] and further indicated that arbitrators need not necessarily interpret arbitration agreements that are silent regarding classwide arbi-

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7. LIPSKY & SEEBER, *supra* note 3, at 14.

8. I refer to the "first generation" of arbitration clauses to include clauses that are silent regarding classwide arbitration. The "second generation" of arbitration clauses address classwide arbitration specifically, and preclude classwide arbitration expressly. What I describe as "third generation" clauses address classwide arbitration in a manner far more sophisticated than earlier generations of clauses, in order to overcome unconscionability considerations. For the most part, this article addresses the first generation of arbitration clauses that are silent regarding classwide arbitration.

9. Steven J. Ware, *Symposium: Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (2001) [hereinafter Ware I]; LIPSKY & SEEBER, *supra* note 3, at 11.

10. Christopher R. Drahozal, *Arbitration Clauses in Franchise Agreements: Common (and Uncommon) Terms*, 22 FRANCHISE L.J. 81, 82 (2002) [hereinafter Drahozal I].

11. Champ v. Siegel Trading Co., 55 F.3d 269, 271 (7th Cir. 1995); Gov't of U.K. v. Boeing Co., 998 F.2d 68, 73–74 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987); Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984); Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1424 (M.D. Ala. 1997); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993).

12. Harris v. Shearson Hayden Stone, Inc., 82 A.D.2d 87, 94–95 (N.Y. App. Div. 1981); Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998); *cf.*, Unif. Arbitration Act § 10(c) (2000) ("The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.").

13. New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 3 (1st Cir. 1988).

14. Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991); Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 481 A.2d 553, 562 (N.J. Super. Ct. App. Div. 1984); Litton Bionetics, Inc. v. Glen Constr. Co., 437 A.2d 208, 220 (Md. 1981); Episcopal Hous. Corp. v. Fed. Ins. Co., 255 S.E.2d 451, 452 (S.C. 1979); Callaway v. Carswell, 242 S.E.2d 103, 106 (Ga. 1978); Boynton v. Carswell, 233 S.E.2d 185, 187 (Ga. 1977).

15. Lewis v. Prudential-Bache Sec., Inc., 175 Cal. App. 3d 935, 945 (Cal. Ct. App. 1986); Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986); *see* STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 74 (2001) [hereinafter WARE II].

16. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

17. *See Bazzle*, 539 U.S. at 452–54.

18. *Id.* at 453.

tration to prohibit the arbitration of class claims.[19] In turn, *Bazzle* spawned the promulgation of classwide arbitration procedural rules by two of the three major arbitration providers,[20] making classwide arbitration a new, if still largely uncharted, reality.

As classwide arbitration increases,[21] reexamination of the appropriate procedures for classwide arbitration, including the hybrid model of classwide arbitration, is appropriate. Expansion of the preemptive scope of federal arbitration law under the Federal Arbitration Act ("FAA")[22] and the Supreme Court's persistent pro-arbitration agenda [23] have narrowed the opportunities for state experimentation with classwide arbitral models such as the hybrid model, where ongoing judicial involvement is mandated.[24]

This Article makes three major points. First, I assert that *Bazzle* implicitly overruled case law in the majority of federal circuits and in some state courts that effectively prohibited classwide arbitration in many federal circuits and state venues. These federal and state decisions prohibiting classwide arbitration rested primarily upon two rationales. First, the "contract interpretation rationale" resulted in courts interpreting contracts that are silent regarding classwide arbitration to preclude classwide arbitration. Second, the "lack of power rationale" held that courts lacked the power and authority to send class action litigation to arbitration.[25] I argue that *Bazzle* (which does not explicitly discuss the prior federal or state authority prohibiting classwide arbitration) implicitly undermines both rationales, and effectively overrules both the state and federal authority prohibiting classwide arbitration, setting the stage for a significant expansion of arbitral power.

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19. *See id.* at 451 (indicating that the language of the contract is not clear and that the answer to the contract interpretation question is "not completely obvious").

20. *Supplementary Rules for Class Arbitrations*, AM. ARBITRATION ASS'N, *at* http://www.adr.org/index2.1.jsp?JSPssid=15753&JSPsrc=upload\LIVESITE\Rules_Procedures\Topics_Interest\AAAClassaction.htm (last visited Nov. 4, 2004) (supplementary rules became effective on October 8, 2003); Notes from Carole J. Buckner, Author, American Bar Association, Ultimate Arbitration Update CLE (August 8, 2004) (on file with author) (JAMS/Endispute announced at the American Bar Association Annual Meeting in August 2004 that it has established its policies and will publish them shortly. In contrast, the third major arbitration provider, the National Arbitration Forum, has decided not to publish rules specifically pertaining to class action arbitration.).

21. At the recent ABA Annual Meeting in August, 2004, Atlanta, Eric Tuchmann, General Counsel for the American Arbitration Association, reported that approximately 48 cases had been filed with the AAA in the last month. Notes from Carole J. Buckner, Author, American Bar Association, Ultimate Arbitration Update CLE (August 8, 2004) (on file with author). JAMS/Endispute reported it is now accepting classwide arbitration cases and announced the adoption of rules regarding classwide arbitration procedure. *Id.*

22. 9 U.S.C. §§ 1-16 (2004).

23. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

24. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (discussing the preservation of states' rights under our federalist system).

25. Champ v. Siegel Trading Co., 55 F.3d 269, 276–77 (7th Cir. 1995); Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 728–29 (8th Cir. 2001).

Secondly, given the expansion of the preemptive scope of federal arbitration law, combined with *Bazzle* and its progeny, I assert that the hybrid model of classwide arbitration, in which the court continues adjudicating certain aspects of classwide arbitration (including, for example, class certification, notice and settlement approval), is no longer legally viable. While a handful of state courts have approved the hybrid model, which mandates ongoing judicial supervision of the class action-related aspects of class arbitration,[26] and the recently promulgated AAA Rules contemplate the ongoing availability of this model,[27] I assert that the hybrid model of classwide arbitration conflicts with federal arbitration law, including *Bazzle,* and that courts should determine that federal arbitration law preempts the hybrid model of classwide arbitration. Additionally, I assert that the hybrid model of classwide arbitration is implicitly disapproved by the *Bazzle* plurality opinion.

I conclude from these premises that a pure arbitral model of classwide arbitration is mandated by the preemptive scope of federal arbitration law. Further, I conclude that *Bazzle* and its progeny endorse a pure arbitral model of classwide arbitration in which the arbitrator first determines whether the arbitration clause permits classwide arbitration, and then determines all class action-related issues. Issues of class certification, notice, discovery and approval of settlement, reserved under the hybrid model for the courts, are now appropriately determined purely within the arbitral proceeding. Judicial involvement in the arbitral process is appropriate only as expressly permitted by the FAA.

To place this analysis in context, Part II of this Article generally discusses the history of judicial hostility toward arbitration and the national policy favoring arbitration. This Part provides an important understanding of the context in which both federal and state authority prohibited courts from sending class action cases to arbitration and informs the underlying rationale for the hybrid system of classwide arbitration. Part

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26. Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991); Lewis v. Prudential-Bache Sec., Inc., 225 Cal. Rptr. 69, 75 (Cal. Ct. App. 1986); Izzi v. Mesquite Country Club, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986); Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 481 A.2d 553, 562 (N.J. Super. Ct. App. Div. 1984); Litton Bionetics, Inc. v. Glen Constr. Co., 437 A.2d 208, 220 (Md. 1981); Episcopal Hous. Corp. v. Fed. Ins. Co., 255 S.E.2d 451, 452 (S.C. 1979); Callaway v. Carswell, 242 S.E.2d 103, 106–07 (Ga. 1978); Boynton v. Carswell, 233 S.E.2d 185, 186–87 (Ga. 1977); *See* WARE II, *supra* note 15.

27. The AAA Rules provide that "[w]henever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court." *Supplementary Rules for Class Arbitrations*, AM. ARBITRATION ASS'N, Rule 1(c), *at* http://www.adr.org/index2.1.jsp?JSPssid=15753&JSPsrc=upload\LIVESITE\Rules_Procedures\Topics_Interest\AAAClassaction.htm (last visited Nov. 4, 2004). The AAA Rules also permit judicial review of the arbitrator's decisions regarding the interpretation of whether the arbitration clause permits classwide arbitration and regarding the certification of the class. *Id.* at Rule 3, 5(d). A representative of the AAA reported to the author that the AAA prefers the hybrid model. *See* Notes from Carole J. Buckner, Author, American Bar Association, Ultimate Arbitration Update CLE (August 8, 2004) (on file with author). In contrast, the rules announced by JAMS will not contemplate ongoing court involvement in classwide arbitration. *See id.*

II also describes the United States Supreme Court's reversal of this historic hostility by declaring a national policy favoring arbitration, and issuing a series of pro-arbitration decisions. The *Bazzle* decision, with its pro-arbitration bent, followed a well-established pattern in which the U.S. Supreme Court reversed the anti-arbitration decisions of lower courts and substituted pro-arbitration case law. *Bazzle* indicates that the FAA's purpose of eliminating animosity toward arbitration is still very much a mission in progress rather than a goal accomplished.

Part III describes pre-*Bazzle* federal law regarding classwide arbitration, beginning with the rather minimal jurisprudence of the U.S. Supreme Court addressing classwide arbitration. Part III then discusses in detail federal and state court authority generally prohibiting classwide arbitration, exploring the extent to which pre-*Bazzle* law continued to reflect hostility to classwide arbitration, despite the national policy favoring arbitration. This Part also discusses the decision in *Southland Corp. v. Keating*,[28] the case that both expanded the scope of FAA preemption and, at the California Supreme Court level, established the hybrid model of classwide arbitration. This Part further explores strategies utilized by corporate drafters to leverage the federal authority to eliminate corporate exposure to class actions entirely in many forums, and the resulting unconscionability backlash pursuant to which some state courts are finding such strategies ineffective. I propose that the *Bazzle* opinion may implicitly signal the U.S. Supreme Court's disapproval of the corporate strategy of avoiding class actions by using arbitration clauses.

Part IV discusses in detail the state experimentation with classwide arbitration under the "hybrid" approach, beginning with the California Supreme Court's decision in *Keating v. Superior Court*,[29] which gave birth to the "hybrid" system of classwide arbitration.[30] This Part then describes the evolution of the hybrid model through the development of the law in California and several other jurisdictions, both state and federal, that adopted the hybrid model, as well as the scope of judicial involvement in classwide arbitrations established by these decisions.

Part V discusses the *Bazzle* decision, including the North Carolina Supreme Court's opinion endorsing classwide arbitration, the U.S. Supreme Court plurality opinion, and subsequent cases interpreting *Bazzle*. In *Bazzle*, five Justices permitted the arbitrator to decide whether class arbitration should proceed, and, importantly, indicated that when an arbitration clause is silent regarding classwide arbitration, it is not clear that such silence must be interpreted to prohibit classwide arbitration.[31] This Part also discusses the handful of cases following *Bazzle* that are part of

28. 465 U.S. 1 (1984).
29. 645 P.2d 1192 (Cal. 1982).
30. *See* Southland Corp. v. Keating, 465 U.S. 1, 13–17 (1984).
31. *See Bazzle*, 539 U.S. at 454.

the slowly evolving trend toward a pure arbitral model of classwide arbitration. Finally, this Part describes and critiques the procedural rules for classwide arbitration announced by arbitration providers.

Part VI discusses the scope of federal preemption of state law regarding arbitration and describes the extent to which courts have determined that state-created laws contradicting federal arbitration law are preempted. This Part explores the United States Supreme Court's jurisprudence regarding federal preemption of state law in the area of arbitration, and describes Professor Christopher Drahozal's analytical model for determining whether a particular state law is preempted by federal arbitration law.

Part VII describes the pure arbitral paradigm of classwide arbitration. First, this Part explains why the *Bazzle* decision implicitly overrules the line of authority prohibiting classwide arbitration by undermining both the lack of power rationale and the contract interpretation rationale. Secondly, this Part demonstrates why a pure arbitral model of classwide arbitration is viable under federal preemption law and why that model is implicitly endorsed by the *Bazzle* decision. In this Part, I argue that, after *Bazzle*, arbitrators can determine that a silent arbitration clause permits classwide arbitration and I conclude that under the applicable law regarding judicial review of arbitral decisions, it is not likely that courts will vacate such rulings. Finally, this Part concludes that federal arbitration law preempts the hybrid model of classwide arbitration and indicates how the *Bazzle* decision implicitly rejects the hybrid model in favor of a pure arbitral model. Consideration of all of these developments leads to the conclusion that only a pure arbitral model of classwide arbitration remains legally viable.

II. THE SCHIZOPHRENIC CONTEXT: HISTORICAL ANIMOSITY YIELDS TO A NATIONAL POLICY FAVORING ARBITRATION

A. *Judicial Antipathy Toward Arbitration*

The common law regarded arbitration agreements with "hostility."[32] At common law, parties could revoke or repudiate an arbitration agreement at any time before an award was rendered under either a doctrine of "revocability"[33] or "voidability."[34] Alternatively, courts "flatly denied any remedy for the failure to honor an arbitration agreement."[35] Nineteenth century judges disfavored private arbitration[36] because it was said

32. Southland Corp. v. Keating, 465 U.S. 1, 32 (1984) (O'Connor, J., dissenting).
33. *Southland*, 465 U.S. at 32 (O'Connor, J., dissenting).
34. *See* STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 10 (2002).
35. *Southland*, 465 U.S. at 32 (O'Connor, J., dissenting).
36. Circuit City Stores v. Adams, 532 U.S. 105, 131 (2001) (Stevens, J., dissenting).

to "oust the jurisdiction of the courts."[37] Echoing a rationale repeatedly expressed in anti-arbitration jurisprudence,[38] and implied by the hybrid model of classwide arbitration,[39] early arbitration statutes provided[40] and early court decisions held that arbitrators were "'not ordinarily well enough acquainted with the principles of law or equity' to administer justice effectively."[41]

Although the FAA was enacted to reverse the historical animosity against arbitration,[42] judicial hostility continued as courts placed certain subject matters beyond the reach of arbitration by declaring them "inappropriate" for arbitral adjudication.[43] A pattern emerged. First, either the Supreme Court, or lower courts, declared certain substantive legal matters inappropriate for arbitration.[44] The Supreme Court questioned the competence of arbitrators to resolve complex claims, holding, for example, that "the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness,"[45] and precluding the arbitration of antitrust claims.[46] But over time, the Supreme Court rejected these limitations,[47] overruling the majority of cir-

37. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942) (internal citations omitted).

38. Wilko v. Swan, 346 U.S. 427, 436 (1953) (expressing concern that arbitration permits decisions by arbitrators lacking judicial instruction on the law). At various times, courts have declared a variety of substantive areas of law off limits to arbitration, including antitrust, usury, patent, securities law, ERISA and others, only later to permit such matters to be arbitrated. IAN R. MACNEIL, AMERICAN ARBITRATION LAW, REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 64 (1992).

39. Classwide arbitration will either require continual judicial intrusion or make lay arbitrators inappropriate. Keating v. Superior Court, 645 P.2d 1192, 1215 (Cal. 1982) (Richardson, J., dissenting).

40. *See* MACNEIL, *supra* note 38, at 21. MacNeil indicates that reformers wanted the elimination of the rule of revocability, while courts tried to preserve that rule. *Id.* at 28, 31.

41. BENNETT, *supra* note 34, at 10 (citing Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845)). MacNeil points out that early anti-arbitration statutes including the English Arbitration Act of 1889, early drafts of the Uniform Arbitration Act by the Conference of Commissioners on Uniform State Laws, approved by the ABA in 1924, and early Illinois law allowed submission of questions of law for determination by the courts rather than by arbitrators. *See* MACNEIL, *supra* note 38, at 32–33, 37, 48–49, 54. AMERICAN ARBITRATION ASSOCIATION, DISPUTE-WISE BUSINESS MANAGEMENT IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 6 (2003) ("Both arbitrators and mediators are perceived to be better qualified today than they were in the 1998 study [by Lipsky & Seeber].").

42. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Circuit City Stores v. Adams, 532 U.S. 105, 111 (2001); WARE II, *supra* note 15, at 22.

43. BENNETT, *supra* note 34, at 21; MACNEIL, *supra* note 38, at 64.

44. BENNETT, *supra* note 34, at 11 (discussing *Wilko*, 346 U.S. at 437–38, *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989) (overruling *Wilko* and enforcing pre-dispute agreement to arbitrate as to securities claims)).

45. BENNETT, *supra* note 34, at 11 (quoting *Wilko*, 346 U.S. at 437).

46. Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 828 (2d Cir. 1968), *overruled by* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 638 (1985) (enforcing agreement to arbitrate as to antitrust claims).

47. *Mitsubishi Motors Corp.*, 473 U.S. at 632 (rejecting four rationales for limiting the reach of arbitration, including the assertions that "antitrust issues . . . require sophisticated legal and economic analysis, and thus are 'ill-adapted to strengths of the arbitral process . . . [and that] decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the

cuits following its earlier decisions[48] and rejecting the concept that antitrust, securities and RICO claims were "too complex" for arbitrators.[49]

B. The National Policy Favoring Arbitration

Congress enacted the FAA[50] with the express purpose of reversing "the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts."[51] Congress intended the FAA to overcome early attitudes[52] and to establish a strong national policy in favor of arbitration.[53] The FAA's provisions manifest a "liberal federal policy favoring arbitration agreements."[54] The FAA provides an expeditious technique of dispute resolution intended to reduce the burden on precious judicial resources,[55] as well as to address the costliness and delays of litigation.[56]

The presumption in favor of arbitration is "a powerful one."[57] The courts are directed by precedent to move cases out of the court system and into arbitration "as quickly and easily as possible."[58] At the same time, the legislative history reflects a clear intent to assure the institutional competency of the arbitration system.[59] Congress intended to create a system of arbitration in which the parties "need not resort to the courts at all."[60]

Questions of arbitrability should be addressed with a healthy regard for the federal policy favoring arbitration.[61] In its decisions, the Supreme Court repeatedly rejected attacks on arbitration that are premised upon "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants."[62]

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business community . . .'") (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, 723 F.2d 155, 162 (1st Cir. 1983)).

48. Shearson/Am. Express v. McMahon, 482 U.S. 220, 238 (1987) (overruling the majority of circuits holding that claims under the Securities Exchange Act were not arbitrable).

49. *Rodriguez de Quijas*, 490 U.S. at 485 (holding Securities Act claims are arbitrable); *McMahon*, 482 U.S. at 238, 242 (holding Securities Exchange Act and RICO claims are arbitrable); *Mitsubishi Motors Corp.*, 473 U.S. at 640 (enforcing agreement to arbitrate as to antitrust claims).

50. 9 U.S.C. §§ 1–16 (2004).

51. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); *see also* Circuit City Stores v. Adams, 532 U.S. 105, 111 (2001); WARE II, *supra* note 15, at 22.

52. Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995).

53. Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 727 (8th Cir. 2001).

54. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 (1983).

55. Barrentine v. Ark. Best Freight Sys., Inc., 450 U.S. 728, 753 (1981) (Burger, C.J., dissenting).

56. Herrmann, *supra* note 3, at 787.

57. Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000).

58. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22.

59. *See* Herrmann, *supra* note 3, at 787 (the procedure set forth in the FAA "safeguard[ed] the rights of the parties").

60. *Id.* at 788.

61. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

62. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89–90 (2000) (quoting *Rodriguez de Quijas*, 490 U.S. at 481).

In fact, arbitration strikes a balance between the two competing policies of efficiency and competency.[63] On one hand, arbitration is defined and uniquely characterized by its efficiency,[64] including cost reduction resulting from a more limited scope of review and the reduction of discovery.[65] On the other hand, the competing interest in "competency," the quality of justice, weighs against taking the efficiency measures of arbitration to an extreme.[66]

III. PRE-*BAZZLE* FEDERAL LAW REGARDING CLASSWIDE ARBITRATION

A. Southland Corp. v. Keating

One case, *Southland Corp. v. Keating,*[67] established both the preemptive scope of the FAA,[68] and, because the U. S. Supreme Court did not address the issue, also coincidentally launched the most experimental state program regarding the combination of class actions and arbitration, the so-called "hybrid" system of classwide arbitration.[69] This Part discusses the preemption holdings and the class action aspects of the U. S. Supreme Court's *Southland* decision and the due process issues raised. The California Supreme Court's decision in *Keating v. Superior Court*[70] is discussed in further detail in Part IV below concerning the "hybrid" system of classwide arbitration.

In *Southland,* approximately eight hundred 7-Eleven franchisees filed a state court class action against the owner and franchisor of 7-Eleven convenience stores.[71] The parties' agreement provided that "any controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association."[72] The franchisor moved to compel arbitration, and the franchisees requested that the court certify a class.[73] The trial court compelled arbitration of all claims except those arising from California franchise law and did not rule on the class certification motion.[74] Regarding the issue of conducting the arbitration on a classwide basis, the California Court of Appeals determined that "there was no 'insurmountable obstacle'" to doing so and directed "the trial

63. *See* Herrmann, *supra* note 3, at 782.
64. *Id.*
65. Ware I, *supra* note 9, at 90.
66. *See id.*
67. 465 U.S. 1 (1984).
68. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).
69. Keating v. Superior Court, 31 Cal. 3d 584, 613 (1982) (permitting classwide arbitration while acknowledging that classwide arbitration procedure would "entail a greater degree of judicial involvement than is normally associated with arbitration"), *rev'd on other grounds in Southland,* 465 U.S. at 16.
70. 31 Cal. 3d 584 (1982).
71. *Southland,* 465 U.S. at 3–4.
72. *Id.* at 4.
73. *Id.*
74. *Id.*

court to conduct a class certification proceeding."[75] The California Supreme Court determined that the claims under California franchise law were not arbitrable.[76] The U.S. Supreme Court in *Southland* determined that federal arbitration law preempted the California franchise law and held the claims should be arbitrated.[77]

While the FAA does not fully preempt state law regarding arbitration, under the preemption doctrine first announced in *Southland*, the FAA preempts state laws that undermine arbitration by "requiring a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[78] In *Southland*, the Court considered whether a statute requiring "judicial consideration" of the franchisee's claims in direct conflict with Section 2 of the FAA violated the Supremacy Clause of the Constitution.[79] The Court held that Congress, by enacting Section 2 of the FAA, "withdrew the power of the states to *require a judicial forum* for the resolution of claims which the contracting parties agreed to resolve by arbitration."[80]

The Court explained that the FAA permitted "only two limitations on the enforceability" of arbitration agreements: (1) the contract is not part of a transaction involving commerce or a maritime transaction; or (2) the limitation arises from "grounds as exist at law or in equity for the revocation of any contract."[81] Nothing in the FAA permits "any additional limitations under State law."[82] Examining legislative history, the Court declared that the purpose of Congress in enacting the FAA was to foreclose state attempts to "undercut the enforceability of arbitration agreements"[83] and held that the FAA "preempts a state law that withdraws the power to enforce arbitration agreements."[84]

The *Southland* Court then scrutinized the California statute to determine whether it fit within the savings clause of Section 2 of the FAA and determined that the California law was "not a ground that exist[ed] at law or in equity 'for the revocation of *any* contract,' but merely a ground that exist[ed] for the revocation of arbitration provisions in contracts subject to the California [law]."[85] Noting the potential for state laws to "wholly eviscerate congressional intent to place arbitration agreements 'upon the same footing as other contracts,'" the Court indicated that the

75. *Id.* at 5.
76. *Id.*
77. *Id.* at 17.
78. *Id.* at 10.
79. *Id.*
80. *Id.* (emphasis added).
81. *Id.* at 10–11.
82. *Id.* at 11.
83. *Id.* at 16.
84. *Id.* at 16 n.10.
85. *Id.* at 16 n.11.

California law conflicted with the FAA and therefore violated the Supremacy Clause.[86]

Describing the issue as "the propriety of superimposing class action procedures on a contract arbitration,"[87] the U.S. Supreme Court left intact the California Supreme Court's ruling remanding the case to the trial court for determination of whether classwide arbitration was appropriate because the franchisor did not assert the claim that if state law required class action procedures, state law would conflict with the FAA in violation of the Supremacy Clause.[88]

The franchisor did argue that state law did not permit arbitrations to proceed as class actions.[89] As discussed below, the California Supreme Court had rejected this argument, holding that because state arbitration law authorized consolidation, it was not likely that the California Legislature "intended to preclude a *court* from ordering classwide arbitration in an appropriate case."[90] Because the franchisor had not opposed class procedures on "*federal* grounds," and the California Supreme Court in *Keating* had not "passed upon the question whether superimposing class action procedures on a contract arbitration was contrary to the [FAA]," the U.S. Supreme Court in *Southland* held that it lacked "jurisdiction to resolve the question as a matter of federal law."[91]

The *Southland* Court also left the issue of due process in classwide arbitration unaddressed. The defendant had argued that "requiring arbitrations to proceed as class actions 'could well violate the [federal] constitutional guaranty of procedural due process.'"[92] In its determination that the California Supreme Court did not pass on the preemption issue, so that the U.S. Supreme Court lacked jurisdiction to address the class action arbitration issue, the *Southland* Court seems to have overlooked the fact that the due process argument could have provided it with such jurisdiction, since it did not expressly address the issue beyond acknowledging that *Southland* raised the argument below.

After *Southland,* the U.S. Supreme Court said little about classwide arbitration, until *Bazzle.* In *Gilmer v. Interstate/Johnson Lane Corp.*,[93] the plaintiff sought to defeat an agreement to arbitrate claims under the Age Discrimination in Employment Act by arguing the inferiority of arbitration to litigation, since arbitration procedures did not permit class actions.[94] In response, the Court acknowledged that "NYSE rules also

86. *Id.* at 16.
87. *Id.* at 8.
88. *Id.*
89. *Id.*
90. *Keating*, 31 Cal. 3d at 613 (emphasis added).
91. *Southland*, 465 U.S. at 9.
92. *Id.* at 8.
93. 500 U.S. 20 (1991).
94. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991).

provide for collective proceedings," implicitly approving classwide arbitration.[95]

B. *Federal Authority Prohibiting Classwide Arbitration*

Against this backdrop of uncertain guidance from the U.S. Supreme Court, despite the national policy favoring arbitration and perhaps reflecting continued judicial ambivalence toward arbitration, particularly classwide arbitration, an extensive body of federal law developed prohibiting the adjudication of class action disputes in arbitration. This Section discusses that federal law and its dual rationales for prohibiting class actions in arbitration.

Prior to *Bazzle,* most federal courts concluded that absent a provision in the parties' arbitration agreement expressly allowing the parties' arbitration to proceed on a classwide basis (in other words, where the parties' agreement was silent regarding classwide arbitration), the arbitration could not proceed on a classwide or consolidated basis.[96] This line of authority reveals two rationales for this prohibition. The first rationale, which I describe as the "lack of power" rationale, holds that the court lacks the authority to certify an individual plaintiff as a class representative for other parties whose claims are subject to arbitration,[97] lacks express authority to consolidate arbitration proceedings,[98] and lacks authority to apply Federal Rule of Civil Procedure 23 in class arbitration.[99] The second rationale, which I describe as the "contract interpretation" rationale, posits that as a matter of contract interpretation, courts cannot "read into" an otherwise silent agreement a provision expressly allowing classwide arbitration.[100]

One of the key decisions describing these two rationales as the basis for prohibiting classwide arbitration is *Champ v. Siegel Trading Co.,*

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95. *Gilmer*, 500 U.S. at 32.

96. Champ v. Siegel Trading Co., 55 F.3d 269, 271 (7th Cir. 1995); Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1423–1424 (M.D. Ala. 1997); Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993); Gov't of U.K. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); Weyerhauser Co. v. Western Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984).

97. *Champ*, 55 F.3d at 271.

98. *Id.* at 274–77; Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 728–729 (8th Cir. 2001) (holding that the district court did not err in compelling arbitration of the dispute as individuals rather than as a class, because "district court was without power to consolidate arbitration proceedings when arbitration agreements were silent on the issue").

99. *Champ*, 55 F.3d at 276–77 (holding that the Federal Rules of Civil Procedure are not applicable in proceedings before arbitrators which are regulated by the rules of the arbitration association).

100. *Id.* at 277.

Inc.[101] In *Champ*, the plaintiff sought class certification from the court after the court ordered that the matter be arbitrated.[102] Reversing its own prior ruling,[103] the trial court held that it lacked the authority to certify a class arbitration where the parties had not agreed to such a procedure in their arbitration agreement.[104] Although the claimant initially seeking class certification settled her matter, two other claimants received permission to intervene and appealed the court's determination.[105] The intervenors claimed that the court had authority under FRCP Rule 23, as incorporated through Rule 81(a)(3),[106] to order classwide arbitration,[107] and that FAA Section 4 did not preclude classwide arbitration because the contract did not expressly preclude it.[108]

In the absence of authority directly on point, *Champ* relied heavily upon cases holding that district courts lacked the power to consolidate arbitration[109] and determined that Section 4 of the FAA precluded the court from reading into the parties' agreement a term allowing classwide arbitration, which might disrupt the negotiated risk/benefit allocation and direct the parties to proceed with an arbitration different in nature from that agreed upon.[110] The Second,[111] Fifth,[112] Sixth,[113] Seventh,[114] Eighth,[115] Ninth[116] and Eleventh Circuits[117] held that courts lacked the power to order consolidated arbitration. Treatises, commentators, and cases reasoned that, if the courts lacked power to order consolidation,

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101. 55 F.3d 269 (7th Cir. 1995).

102. *Champ*, 55 F.3d at 271.

103. The court initially adopted the hybrid approach permitting the combination of the class action and arbitration, with court supervision, and directed that the court determine the issue of class certification. *See* Stephen H. Kupperman & George C. Freeman III, *Symposium: Achieving Justice in Arbitration, Selected Topics in Securities Arbitration: Rule 15C2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1588 (1991).

104. *Champ*, 55 F.3d at 271.

105. *Id.* at 274.

106. *See* FED. R. CIV. P. 81(a)(3) (providing that in arbitration proceedings under the FAA, the Federal Rules of Civil Procedure apply to the extent that matters of procedure are not otherwise provided for under the FAA).

107. *Champ*, 55 F.3d at 274.

108. *Id.*

109. *Id.* at 274–75.

110. *Id.* at 275.

111. Gov't of the U.K. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993).

112. Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987).

113. Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991).

114. *Champ*, 55 F.3d at 275 (finding no basis to distinguish between classwide arbitration and consolidation); Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Can., 210 F.3d 771, 774 (7th Cir. 2000) (Judge Posner acknowledges the general rule that courts cannot consolidate arbitration in defiance of parties' contractual agreement, but finds the agreement in questions permits consolidation).

115. Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674–75 (D. Minn. 1993), *overruled on other grounds in* Green Tree Fin. Corp.—Ala. v. Randolph, 531 U.S. 79, 88 (2000); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990).

116. Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F. 2d 635, 637 (9th Cir. 1984).

117. Protective Life Ins. Corp. v. Lincoln Nat'l. Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989).

then by analogy they also lacked authority to order classwide arbitration.[118]

The *Champ* court also determined that it could not fill the procedural gap regarding classwide arbitration procedure with Federal Rule of Civil Procedure 23 because no procedural gap existed.[119] Because the FAA required enforcement of the parties' arbitration agreement according to its terms, and the agreement was silent regarding class arbitration, the *Champ* court reasoned that the parties themselves had provided for non-class action arbitration.[120] The *Champ* court further explained that Rule 81 allowed procedural gap-filling only in judicial proceedings pertaining to arbitration[121] and, importantly, acknowledged that Rule 81 did not authorize application of the Federal Rules of Civil Procedure to proceedings on the merits before arbitrators, who are regulated by the rules of the arbitration provider.[122] The *Champ* court concluded that parties relinquished their rights to pursue a class action under Federal Rule of Civil Procedure 23 when they agreed to arbitration.[123]

Other pre-*Bazzle* decisions following *Champ* similarly held that the district court's lack of power to consolidate arbitration proceedings precluded the court from ordering classwide arbitration, often without reference to the contract interpretation rationale.[124] The rationale of some federal decisions prohibiting classwide arbitration, such as *Gammaro v. Thorp Consumer Discount Co.*,[125] rested expressly on the court's lack of power.[126]

In *Champ,* the intervenors also argued that the proper interpretation of the contract supported their request that the court should order class arbitration because an order compelling class arbitration did not contradict the terms of the parties' agreement, which was silent regarding classwide arbitration.[127] But the *Champ* court rejected this argument, holding that the court may not read into an arbitration agreement that is

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118. ALAN S. KAPLINSKY, ARBITRATION AND CLASS ACTIONS: A CONTRADICTION IN TERMS, PRACTICING LAW INSTITUTE CORPORATE LAW AND PRACTICE COURSE HANDBOOK 244 (2003) (citing FEDERAL ARBITRATION LAW, § 18.9.1, at 18:91).

119. It is interesting to note that one of the major private arbitration providers has chosen to "fill the procedural gap" by implementing a rule similar in many respects to Federal Rule of Civil Procedure 23. *See* AAA Supplementary Rules for Class Arbitration, *available at* http://www.adr.org/sp.asp?id=21936.

120. *Champ*, 55 F.3d at 276.

121. *Id.* (noting that such judicial proceedings include petitions for orders compelling arbitration, confirmation of arbitration awards, motions for vacatur of awards and applications for modifying or correcting arbitration awards).

122. *Id.*

123. *Id.* at 276–77.

124. *See e.g.*, Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 728–29 (8th Cir. 2001).

125. 828 F. Supp. 673 (D. Minn. 1993), *overruled on other grounds in* Green Tree Fin. Corp.—Ala. v. Randolph, 531 U.S. 79, 88 (2000).

126. *Gammaro*, 828 F. Supp. at 674–75.

127. *Champ*, 55 F.3d at 274.

silent regarding classwide arbitration a provision permitting such a procedure.[128] The *Champ* court refused "to substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement."[129] The *Champ* court referenced its obligation under the FAA to "enforce the parties' agreement as they wrote it," even when doing so might create inefficiency.[130]

Judge Rovner concurred with the result in *Champ* based upon the premise that the courts lacked authority to order classwide arbitration, but made some interesting assertions regarding the contract interpretation issue that are consistent with the *Bazzle* court's interpretation of arbitration agreements that are silent regarding class action arbitration.[131] Judge Rovner stated:

> I attach less significance than the majority to the fact that the parties have not spoken to this subject in the arbitration agreement they signed. Class certification is a matter that parties rarely, if ever, speak to in their contracts, even when they have made other provisions for the resolution of potential disputes. And, practically speaking, I doubt that class certification is something that corporate defendants who draft these agreements for their clients to sign would ever consent to in writing; they typically have far more to gain by forcing unhappy customers to bear the expense of arbitrating individually. [Citations omitted.] Thus, I do not view silence in the arbitration agreement as a bar to class certification.[132]

Even prior to *Bazzle,* one commentator agreed with Judge Rovner's observations, and found it striking that courts so readily construed silence to preclude class arbitration rather than to permit it.[133]

Several state courts followed these precedents, refusing to order the consolidation of arbitration proceedings[134] or to allow classwide arbitra-

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128. *Id.* at 277.

129. *Id.* at 275 (citing Universal Reinsurance Corp. v. Allstate Ins. Co., 16 F.3d 125, 130 (7th Cir. 1994).

130. *Id.* at 277 (citations omitted).

131. *Id.* at 277–78 (Rovner, J., concurring).

132. *Id.*

133. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 84, 86-87 (2000) (noting that such an approach would involve "considerably less intrusion upon the contractual aspects of the relationship) [hereinafter Sternlight I].

134. *See e.g.*, Consol. Pac. Eng'g., Inc. v. Greater Anchorage Area Borough, 563 P.2d 252, 255 (Alaska 1977) (holding that court lacks power to order consolidation of arbitration proceedings where arbitration agreement is silent regarding consolidation); Bateman Constr., Inc. v. Haitsuka Bros., Ltd., 889 P.2d 58, 64 (Haw. 1995) (holding that court cannot consolidate arbitrations where the arbitration agreement is silent regarding consolidation of arbitration); Pueblo of Laguna v. Cillessen & Son, Inc., 682 P.2d 197, 199-200 (N.M. 1984); *In re* Cullman Ventures, Inc., 682 N.Y.S.2d 391, 395 (N.Y. App. Div. 1998) (holding that court cannot consolidate arbitrations); Bay County Bldg. Auth. v. Spence Bros., 362 N.W.2d 739, 742 (Mich. Ct. App. 1984) (noting trial court erred in ordering consolidation of arbitrations where arbitration agreement was silent regarding consolidation); S.K. Barnes, Inc. v. Valiquette, 597 P.2d 941, 943-44 (Wash. Ct. App. 1979) (deny-

tion, based on similar analyses.[135] A notable exception is the First Circuit, which permits courts to consolidate arbitrations. In *New England Energy, Inc. v. Keystone Shipping Co.*,[136] the First Circuit rejected the contract interpretation rationale relied upon by *Champ* and cases following *Champ*.[137] The *Keystone* court stated "We disagree that ordering consolidation . . . improperly modifies the agreement [especially] when the language of the arbitration clause is broad, and in no way suggests limits on the subjects or parties to the agreed-upon arbitration," and concluded "arbitration is still arbitration even if it is consolidated arbitration."[138] The *Keystone* court held that where arbitration contracts are silent regarding consolidation, "[u]nquestionably, there is no intent manifested against consolidation,"[139] and concluded that the lower court had not abused its discretion by consolidating the matters.[140] As discussed below, after examining the language of an arbitration agreement similar to that construed by these federal and state authorities,[141] and without discussion of these precedents, the *Bazzle* plurality concluded that the contract interpretation issue was not so obvious.[142]

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ing consolidation of arbitration proceedings based upon both the lack of court power and the silence of the arbitration clause regarding consolidation); 1 DOMKE ON COMMERCIAL ARBITRATION § 32:3 (2003).

135. *See e.g.*, Med. Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998) (denying class wide arbitration based upon the contract interpretation rationale, citing *Champ)*; Harris v. Shearson Hayden Stone, Inc., 82 A.D.2d 87, 94-95 (N.Y. App. Div. 1981) (ordering individual arbitration and rejecting class arbitration based upon a silent arbitration clause premised upon the rationale that interests in enforcing arbitration prevail over those favoring class actions, and also based upon contract interpretation rationale).

136. 855 F.2d 1 (1st Cir. 1988).

137. New England Energy v. Keystone Shipping Co., 855 F.2d 1, 5.

138. *New England Energy*, 855 F.2d at 5.

139. *Id.* at 7.

140. *Id.* at 8.

141. The arbitration provision in *Champ* is not quoted in the Seventh Circuit's decision, but is referenced in an earlier superseded decision as broad as the agreement in *Bazzle*. Champ v. Siegel Trading Co., Inc. 132 F.R.D. 51, n.1 (N.D. Ill. 1990), *vacated on reconsideration in* Perera v. Siegel Trading Co., Inc., 951 F.2d 780 (7th Cir. 1992). The provision in *Gammaro* is arguably as broad as the agreement in *Bazzle*. The *Gammaro* arbitration clause provided that:

> You and ITT Financial Services agree that, other than judicial foreclosures and cancellations regarding real estate security, any dispute, past, present, or future, between us or claim by either against the other or any agent or affiliate of the other, whether related to your loan, products you purchase from or through ITT Financial Services, or otherwise shall be resolved by binding arbitration in accordance with the arbitration rules of the National Arbitration Forum, Minneapolis, Minnesota . . . .

Gammaro, 15 F.3d at 94.

The arbitration provision in *Johnson* was equally broad, providing:

> You and we agree that any claim, dispute, or controversy between us . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . . including the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration by and under the Code of Procedure of the National Arbitration Forum.

Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000).

142. *Bazzle*, 539 U.S. at 451. The South Carolina Supreme Court in *Bazzle* indicated that the court should construe the arbitration provision that is silent regarding class wide arbitration against the drafter. Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (2002), *vacated and remanded by Bazzle*, 539 U.S 444 (2003).

C. Corporate Drafters Leveraged the Authority Prohibiting Classwide Arbitration, Provoking an Unconscionability Backlash

Businesses seeking to prevent class actions relied upon the *Champ* line of authority prohibiting class actions in arbitration and implemented a strategy of utilizing arbitration clauses to eliminate corporate exposure to class action litigation.[143] Where plaintiffs alleged a class action, and the corporate defendant sought to compel arbitration pursuant to a predispute arbitration agreement containing an arbitration clause silent regarding classwide arbitration, despite the general policies favoring both class actions and arbitration, courts frequently ordered plaintiffs to arbitrate their claims individually and dismissed the class action claims.[144] In doing so, these courts often rejected the argument that the arbitration clause was invalid because it effectively precluded class arbitration and ordered the non-class arbitration of the claims.[145] Because the arbitration piece of the agreement remained enforceable, these courts relied upon the strong policy favoring arbitration according to the agreement of the parties.[146] Plaintiffs found the prospect of pursuing small dollar amount claims in arbitration uneconomical.[147] Accordingly, corporate defendants relying upon arbitration clauses that were silent regarding classwide arbitration could often escape liability entirely. One rationale expressed for enforcing individual arbitration of claims was that a consumer could otherwise circumvent an agreement to arbitrate by bringing her claim on behalf of the general public.[148] Such an exception would plainly undermine Congress's policy to promote the enforceability of such agreements.[149] Thus, the ability to avoid class actions became a prime motivation for some businesses to utilize arbitration.[150]

A second generation of arbitration clauses, referred to as "class action waivers" or "no-class action clauses," avoided the risk of a finding

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143. KAPLINSKY, *supra* note 118, at 220; Hans Smit, *Arbitral & Judicial Decision: Class Actions in Arbitration*, 14 AM. REV. INT'L ARB. 175, 175-76 (2003); BENNETT, *supra* note 34, at 162-63.

144. KAPLINSKY, *supra* note 118, at 220; Doctor's Assocs., Inc. v. Hollingsworth, 949 F. Supp. 77, 80 (D. Conn. 1996); Coleman v. Nat'l Movie-Dine, Inc., 449 F. Supp. 945, 947-48 (E. D. Pa. 1978).

145. KAPLINSKY, *supra* note 118, at 220.

146. *Id.* at 221-22 (discussing *Champ*, 55 F.3d 269 and Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra, 198 F.3d 473 (4th Cir. 1999).

147. *See, e.g.*, Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141 (Spring 1997).

148. KAPLINSKY, *supra* note 118, at 220.

149. Meyers v. Univest Home Loan, Inc., 1993 WL 307747 *3 (N.D. Cal. Aug. 4, 1993).

150. Carroll E. Neesemann, *Should an Arbitration Provision Trump the Class Action? Yes: Permitting Courts to Strike Bar on Class Actions in Otherwise Clean Clause Would Discourage Use of Arbitration*, DISP. RESOL. MAG. 13, 15 (Spring 2002); Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action? No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would be Dangerous and Unwise*, DISP. RESOL. MAG. 13, 18 (Spring 2002) [hereinafter Sternlight II]; Ware I, *supra* note 9, at 94; Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1101 (Cal. Ct. App. 2002) (describing the strategy of using prohibitions on class actions combined with arbitration clauses as creating "virtual immunity" from small claims regardless of merit).

that silent arbitration clauses might be construed as ambiguous regarding classwide arbitration by expressly excluding class actions from arbitration.[151] *Bazzle* did not address such clauses, but many lower courts enforce them. Furthermore, some commentators predict that arbitration clauses including express prohibitions of classwide arbitration will remain enforceable, particularly where such clauses are not combined with additional factors rendering the arbitration clause vulnerable to an unconscionability determination.[152] Other commentators suggest that drafting an enforceable class action waiver is the best remedy for businesses to counteract the effect of *Bazzle*.[153]

But the Supreme Court has yet to rule on the enforceability of class action waivers or no-class action clauses.[154] In addition, the practice of including such clauses in arbitration agreements increases the risk that the class action waiver will not be enforced given recent decisions finding such provisions unconscionable,[155] or void as against public policy,[156] particularly in the context of consumer arbitration.[157]

Most federal courts, with the exception of the Ninth Circuit,[158] reject the proposition that clauses expressly precluding class arbitration are unconscionable on the grounds that the courts are "obliged to enforce the type of arbitration to which [the] parties agreed."[159] Some state courts

151. These clauses are often referred to as "no-class action" clauses or "class action waivers."

152. Neesemann, *supra* note 150, at 15.

153. Smit, *supra* note 143, at 176; Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update:* Green Tree Financial Corp. v. Bazzle—*Dazzle for Green Tree, Fizzle for Practitioners*, 59 BUS. LAW. 1265, 1272 (May, 2004).

154. Kaplinsky & Levin, *supra* note 153, at 1272 (arguing that at least three Justices believe that the FAA would preempt a determination that a class action waiver is unconscionable and that four Justices would enforce a class action waiver).

155. Kevin M. Kennedy & Bethany Appleby, Green Tree Financial Corp. v. Bazzle: *A New Day for Class Arbitrations?*, 23 FRANCHISE L.J. 84, 86 (2003); *See, e.g.*, Lytle v. Citifinancial Servs., Inc., 810 A.2d 643, 665-66 (Pa. 2002) (rejecting the argument that the severable no-class action provisions in the parties' arbitration agreement were unconscionable and violated public policy, due to lack of evidence indicating plaintiffs would be precluded from effectively vindicating their claims without a class arbitration, but allowing trial court to consider evidence on remand regarding the costs of arbitration).

156. IAN R. MACNEIL, ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT, § 18.9.2 (Supp. 1994) ("There is much to commend" courts holding that arbitration agreements prohibiting class actions are void as against public policy, because "such provisions certainly thwart the broad pro-arbitration policies of the FAA.").

157. Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 BUS. LAW. 1289 (May 2003).

158. Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (refusing to enforce an express no-class action clause in an arbitration agreement on the grounds that doing so would leave consumers without any effective method of vindicating certain categories of claims).

159. Livingston v. Assocs. Fin., Inc. 339 F.3d 553, 559 (7th Cir. 2003); Snowden v. Check-Point Check Cashing, 290 F.3d 631, 638-39 (4th Cir. 2002). *See also* Kaplinsky & Levin, *supra* note 153, at 1270 (noting all federal courts except the Ninth Circuit enforce clauses expressly waiving class actions).

take the position that an express class action waiver is enforceable.[160] Other state courts have voided or refused to enforce arbitration clauses denying arbitrators the right to hear a class action claim, finding the provision unconscionable,[161] often because the inability to pursue class actions in arbitration effectively eliminates the ability of consumers to enforce their rights.[162] Recent decisions holding a prohibition on classwide arbitration unconscionable often arise in the consumer context. Arguably, because of the small dollar amounts in controversy, a class action is the only practical means of vindicating the consumers' rights, therefore denying classwide arbitration is unconscionable.[163] Some commentators have proposed declaring binding arbitration clauses prima facie unconscionable.[164] Reflecting the uncertainty of the law in this area, JAMS, a major arbitration provider, announced that it would not enforce class action waivers in consumer arbitration agreements; shortly thereafter, JAMS reversed its policy.[165]

Although the majority of federal and state authority prior to *Bazzle* prohibited classwide arbitration, some states and the First Circuit permitted consolidated or classwide arbitrations.[166] Now that *Bazzle* has opened the door for classwide arbitration as discussed in Part VI below, it is appropriate to reconsider the minority state and federal authority

160. Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1108 (C.D. Cal. 2002); Lozano v. AT&T Wireless, 216 F. Supp. 2d 1071, 1076-77 (C.D. Cal. 2002); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. App. 2003); Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886, 896 (Ill. App. Ct. 2003); Rosen v. SCIL, LLC, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003); Edelist v. MBNA Am. Bank, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001); Gras v. Assocs. First Capital Corp., 786 A.2d 886, 894 (N.J. Super. Ct. App. Div. 2001); Blue Cross of Cal. v. Superior Court, 67 Cal. App. 4th 42, 64 (Cal. Ct. App. 1998) (holding class arbitration is available only in "the absence of an express agreement *not* to proceed to arbitration on a classwide basis").

161. Discover Bank v. Superior Court, 105 Cal. App. 4th 326, 345 (Cal. Ct. App. 2003), *cert. granted*, 65 P.3d 1285 (Cal. 2004) (holding that the FAA preempts state court from applying state substantive law to strike class action waivers from arbitration agreements); Leonard v. Terminix Int'l Co., 854 So. 2d 529, 539 (Ala. 2002); Lozada v. Dale Baker Oldsmobile, Inc. 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000); Mandel v. Household Bank (Nev.) Nat'l Assoc., 129 Cal. Rptr. 2d 380, 386 (Cal. Ct. App. 2003), *cert. granted*, 65 P.3d 1284 (Cal. 2003) (holding that term prohibiting class action in arbitration was unconscionable); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576-77 (Fla. Dist. Ct. App. 1999); Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1101 (Cal. Ct. App. 2002); West Virginia *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 280 (W. Va. 2002).

162. BENNETT, *supra* note 34, at 163; *In re* Knepp, 229 B.R. 821, 828-29 (N.D. Ala. 1999).

163. Kennedy & Appleby, *supra* note 155, at 86; *See Szetela*, 97 Cal. App. 4th at 1101; Bell-South Mobility LLC v. Christopher, 819 So.2d 171, 173 (Fla. Dist. Ct. App. 2002) (noting that contract precluding class action relief held substantively unconscionable on its face).

164. Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 379 (2002); Marissa Dawn Lawson, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable*, 23 REV. LITIG. 463, 486 (2004).

165. Press Release, JAMS, JAMS Takes Steps to Ensure Fairness in Consumer Arbitrations (November 12, 2004) (announcing policy not to enforce class action waivers in consumer arbitration agreements); Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (March 10, 2005) (announcing withdrawal of the policy due to the suggestion that JAMS "had deviated from its core value of neutrality").

166. New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 3 (1st Cir. 1988); Callaway v. Carswell, 242 S.E.2d 103, 106 (Ga. 1978); Keating v. Superior Court, 31 Cal. 3d 584, 613 (Cal. 1982); Boynton v. Carswell, 233 S.E.2d 185, 187 (Ga. 1977); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. 1991).

permitting classwide arbitration, particularly the hybrid model used in California and several other jurisdictions. Now that classwide arbitration is a reality, should arbitrators and arbitration providers adopt or accommodate the hybrid model of classwide arbitration as the AAA Rules do? Or, does *Bazzle* also implicitly negate the hybrid model of classwide arbitration? Moreover, given the vast scope of preemption of federal arbitration law, is the hybrid model still legally viable? Or, must it be abandoned? The next Part describes the history of the hybrid model, and succeeding Parts consider these questions.

IV. STATE EXPERIMENTATION WITH CLASSWIDE ARBITRATION: THE "HYBRID" MODEL

This Part discusses one form of state experimentation with classwide arbitration, the "hybrid" model, which originated with the California Supreme Court's decision in *Keating v. Superior Court.*[167] Under the hybrid system, courts have discretion to decide whether a case is appropriate for classwide arbitration, and they retain jurisdiction over the dispute while the merits are arbitrated, allowing courts to remain involved in the class-related aspects of the case.[168] In *Keating*, the court explained that classwide arbitration would entail a greater degree of judicial involvement than normally associated with arbitration, which is ideally "a complete proceeding, without resort to court facilities."[169] Instead, the *Keating* court indicated that in classwide arbitration, the trial court should make the initial determinations regarding certain class-related issues such as class certification, notice to the class, and exercise external supervision over the litigation, in order to safeguard the absent class members' right to adequate representation.[170]

Other courts[171] following *Keating*[172] indicated that, in the hybrid model, courts (not arbitrators) should handle issues involving class certification, proper notice, review of proposed settlements, and conflicts among class representatives as to the selection of arbitrators.[173] For example, *Lewis v. Prudential–Bache Securities*[174] approved class arbitration in a securities fraud case, but reserved for the court the determinations regarding certification of the class and notice to class members.[175] Echoing the historic concern regarding arbitrator qualifications to handle

167. 31 Cal. 3d 584 (Cal. 1982).
168. Sternlight I, *supra* note 133, at 39-40.
169. *Id.* at 40 (citing *Keating*, 645 P.2d at 1209).
170. *Id.*
171. Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309, 1322 (Cal. Ct. App. 1986); Lewis v. Prudential Bache Sec., 225 Cal. Rptr. 69, 76 (Cal. Ct. App. 1986).
172. *Keating*, 31 Cal. 3d at 613.
173. Sternlight I, *supra* note 133, at 40; Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991).
174. 179 Cal. App. 3d 935 (Cal. Ct. App. 1986).
175. *Lewis*, 179 Cal. App. at 945-46.

complex substantive matters, the defendant in *Lewis* argued that the "procedural complexities" associated with a class action would undermine the benefits that are typically derived from arbitration.[176] Given that the alternative to class arbitration was to force each Prudential customer to arbitrate their claims individually, and the fact that the claims were modest in amount, the court concluded that the "case appears to offer no great difficulty in adapting arbitration to fit the class action mold, *with adequate judicial supervision over the class aspects.*"[177] The court characterized the possibility of forcing individual Prudential customers to arbitrate their claims individually as "so grossly unfair as to justify structuring arbitration on a class basis in spite of the difficulty it may present."[178] Without extensive analysis or authority beyond citation to *Keating*, *Lewis* concluded that "[t]here appear to be no factors hindering class arbitration of this dispute" and appointed the AAA to arbitrate the matter, reserving for the court's determination the issues of notice and class certification.[179] Notably, the court stated that Prudential "does not suggest how the court's supervision over the class aspects will render the arbitration unmanageable or impractical."[180] The court also retained jurisdiction to supervise the case "as is necessary to safeguard the interests of the absent class members."[181]

Subsequent California cases, such as *Izzi v. Mesquite Country Club*,[182] also followed the hybrid model, carving out in classwide arbitration a variety of continuing roles for the court and allowing courts to stay the arbitration in order to determine "class action issues, including certification of the class, provision of notice and any discovery problems involved therein."[183] Alternatively, one California court indicated that courts may, in their discretion, order arbitration and reserve jurisdiction over class action-related issues, and could "at least in the first instance" order such issues determined by the arbitrator.[184] In *Izzi*, the Court observed that "arbitrators are authorized by law" to determine such issues and speculated that the court could "delegate" the class action issues to the arbitrator, allowing the arbitrator to rule upon certification and notice "subject to due process review by the court" in order to "enhance the integrity and autonomy of classwide arbitration."[185] The court acknowledged that the "due process review" of the arbitrator's decisions could result in the disruption of the proceedings. Thus, "judicial determination of the class action problems would seem preferable" to delegation of the

176. *Id.*
177. *Id.* at 946 (emphasis added).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. 186 Cal. App. 3d 1309 (Cal. Ct. App. 1986).
183. *Izzi*, 186 Cal. App. 3d at 1322.
184. *Id.* at 1322 n.6.
185. *Id.*

class action aspects of the litigation to the arbitrator, "at least until greater experience with these problems has been had."[186]

More recently, in *Sanders v. Kinko's, Inc.*,[187] an appellate court affirmed the order of a trial court staying arbitration in order to permit the court to address the class action-related issues, including the certification of the class, prior to sending the case to arbitration.[188] In *Cruz v. Pacificare Health Systems, Inc.*,[189] the California Supreme Court carved out yet another role for courts in class actions, anticipating in dicta "that courts may find it appropriate to become involved in supervising the equitable distribution of assets resulting from a class recovery."[190] However, the opinion further stated that courts should "do so without becoming involved in the merits of the underlying dispute."[191]

California is not alone in its experimentation with the hybrid model of classwide arbitration. In one of the early decisions permitting classwide arbitration, a Pennsylvania court held that classwide arbitration was not precluded by virtue of an arbitration clause that did not contain an express provision precluding classwide arbitration.[192] In *Dickler v. Shearson Lehman Hutton, Inc.*,[193] the Pennsylvania Superior Court followed the California model. The *Dickler* court held that the device of classwide arbitration best addressed two important interests. From the defense's perspective, *Dickler* held that classwide arbitration resulted in the enforcement of the parties' agreement to arbitrate their disputes.[194] Balancing this, from the plaintiff's perspective, classwide arbitration provided an economically viable alternative that preserved the deterrent effects and leverage available to plaintiffs from utilization of the class action device.[195] *Dickler* also required that the trial court handle the class certification issues and supervise the notice, but did not expressly adopt the due process rationale of *Keating* and its progeny.[196] Instead, again echoing historic concerns, *Dickler* indicated that arbitrators were "probably not equipped nor appropriate for the task of class certification" be-

186. *Id.*
187. 99 Cal. App. 4th 1106 (Cal. Ct. App. 2002).
188. *Sanders*, 99 Cal. App. 4th at 1110.
189. 30 Cal. 4th 303 (Cal. 2003). This case was decided with *Bazzle* pending. *Id.* at 319 n.5.
190. *Id.* at 319. The court distinguished judicial supervision and continuing enforcement of a public injunction, which it held was inarbitrable. (citation omitted).
191. *Id.*
192. Coleman v. Nat'l Movie-Dine, Inc., 449 F. Supp. 945, 948 (E.D. Pa 1978). Since this decision, both the NYSE and the NASD have added provisions to their rules providing that claims submitted for arbitration as class actions are not eligible for arbitration. IAN R. MACNEIL, ET AL., *supra* note 156, § 18.9.2.
193. 596 A.2d 860 (Pa. Super. Ct. 1991).
194. *Id.* at 867.
195. *Id.*
196. *Id.*

cause their orders are unreviewable prior to a final award and because they lacked broad subpoena powers.[197]

The United States Supreme Court has yet to address the hybrid model of classwide arbitration. However, an inherent tension exists between the lack of confidence in the arbitral process underlying the hybrid model and the Supreme Court's preference for arbitration, as is discussed further below.

V. THE *BAZZLE* DECISION

A. Factual Background

The facts involved two separate contracts entered into by Bazzle, Lackey and the Buggses with Green Tree Financial Corp.[198] As in *Southland/Keating,* the respondents filed separate state court actions against Green Tree, and the plaintiff, Bazzle, moved for class certification.[199] Meanwhile, "Green Tree sought to stay the court proceedings and compel arbitration."[200] In the case brought by Bazzle, the *state trial court certified the class and compelled arbitration,* (a procedure similar to what one might expect under the hybrid model of classwide arbitration) and the arbitrator eventually awarded the class damages and attorneys' fees (later confirmed by the trial court).[201]

The Lackeys and the Buggses also sought class certification, and "Green Tree moved to compel arbitration."[202] The trial court initially found the parties' agreement to arbitrate unenforceable.[203] The state appeals court reversed that decision, however, and the parties selected the same arbitrator later chosen to arbitrate the *Bazzle* dispute.[204] In the *Lackey/Buggs* action, the arbitrator, not the court, certified the class.[205] The arbitrator then proceeded to approve a class notice that was sent to class members, define the membership of the *Lackey/Buggs* class,[206] and eventually award damages and attorneys' fees[207] (ultimately confirmed by the trial court).[208]

Thus, while the trial court issued the order in the *Bazzle* matter granting class certification, and the arbitrator then conducted the class arbitration proceedings "without further involvement of the trial

197. *Id.* at 866 n.5.
198. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 448–49 (2003).
199. *Bazzle*, 539 U.S. at 449.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. Bazzle v. Green Tree Fin. Corp., 569 S.E. 2d 349, 354 (S.C. 2002).
206. *Green Tree*, 569 S.E. 2d at 354.
207. *Id.*
208. *Id.*

court,"[209] the arbitrator in the *Lackey/Buggs* matter determined that a class action should proceed within the arbitration, and handled the notice and certification issues, after interpreting the arbitration clause drafted by Green Tree.[210] Thus, in the *Lackey/Buggs* action, the trial court operated consistently with the pure (non-hybrid) model of classwide arbitration, while in the *Bazzle* action, the trial court operated more consistently with the hybrid model in which the court resolves the class-related issues before sending the matter to arbitration on the merits.

B. The South Carolina Supreme Court's Decision

The South Carolina Supreme Court withdrew both cases from the appeals court, assumed jurisdiction, and held that the parties' contractual silence regarding class arbitration permitted classwide arbitration, in the discretion of the trial court, where such a procedure would serve efficiency and not result in prejudice to the parties.[211] The South Carolina Supreme Court also held that the trial court acted appropriately in ordering classwide arbitration where the parties' agreement was silent regarding classwide arbitration.[212] Lacking United States Supreme Court precedent regarding classwide arbitration, the South Carolina Supreme Court examined both the *Champ* approach and the California (hybrid) approach to classwide arbitration.[213]

On the contract interpretation issue, the South Carolina Supreme Court cited the strong policy favoring arbitration and the principle that contracts are construed against the drafter.[214] The court found that the contract was silent regarding classwide arbitration and that language relied upon by Green Tree as precluding classwide arbitration[215] at most created an ambiguity.[216] Construing the ambiguity against the drafter,[217] the South Carolina Supreme Court rejected the *Champ* approach and instead followed the approach taken by the California courts in *Keating* and the *Blue Cross of California v. Superior Court*[218] decisions.[219]

The South Carolina Supreme Court found that the arbitrator did not act with manifest disregard of the law when certifying the class because the issue of classwide arbitration was unsettled at the time the arbitrator

209. *Id.* at 352.
210. *Bazzle*, 539 U.S. at 453–54.
211. *Id.*; *Green Tree*, 569 S.E.2d at 360.
212. *Green Tree*, 569 S.E.2d at 360.
213. *Id.* at 356–57.
214. *Id.* at 358.
215. *Id.* at 359. Green Tree relied upon the language providing for arbitration of "disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*" as creating a limitation on classwide arbitration. *Id.*
216. *Id.*
217. *Id.* at 360.
218. *Keating*, 31 Cal. 3d 584 (Cal. 1982); Blue Cross of Cal. v. Superior Court, 67 Cal.App. 4th 42, 64 (Cal. Ct. App. 1998).
219. *Green Tree*, 569 S.E. 2d at 360.

ruled.[220] Finally, the South Carolina Supreme Court rejected the claim by Green Tree that classwide arbitration violated the due process rights of absent class members.[221]

The South Carolina Supreme Court's decision made no explicit distinction between the hybrid model employed in the *Bazzle* action and the pure arbitral model employed in the *Lackey/Buggs* action. The decision affirmed both procedures, and implicitly endorsed the California model, without specifically adopting the hybrid aspects of that model.[222] As discussed below, the United States Supreme Court's decision offered no explicit discussion regarding whether a hybrid or pure model of classwide arbitration is appropriate, but implicitly rejected the hybrid model.

C. The United States Supreme Court's Decision

The U.S. Supreme Court vacated the judgment of the South Carolina Supreme Court and remanded the case to the arbitrator.[223] In doing so, the Court indicated that the issue of contract interpretation, to wit, whether the parties' arbitration agreement was silent regarding classwide arbitration or whether the agreement, as Green Tree argued, precluded classwide arbitration, was "a matter for the arbitrator to decide."[224]

Although the Court did not address the distinction between the hybrid model of classwide arbitration used in *Bazzle* and the pure model of classwide arbitration used in *Lackey/Buggs*, the Court's decision implicitly endorsed a pure model of arbitration by reserving the decision for the arbitrator.[225] At the same time, the determination implicitly rejected the hybrid model that would have reserved the issue of the contract interpretation along with other issues concerning the class-related aspects of the matter, including certification and notice, for the trial courts.

Similar to the United States Supreme Court's decision in *Keating*, the *Bazzle* decision did not address the subject of due process in classwide arbitration, leaving the issue for another day.[226] Nor did the deci-

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220. *Id.* at 361–62.

221. *Id.* at 362 (holding that Green Tree had failed to preserve the issue for appeal, but opining that at any rate, "Green Tree has not articulated precisely how it believes the class members' due process rights have been violated[,]" and opining in dicta that "the class members' rights appear to have been properly protected by the notice given to all of them[,]" noting that Green Tree had the opportunity to object to the notice and failed to do so).

222. *Id.* at 360.

223. *Bazzle*, 539 U.S. at 454.

224. *Id.* at 447.

225. *Id.* at 453.

226. The Fifth and Fourteenth Amendments to the Constitution prohibit the government from depriving a person of "life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. Outside of the classwide arbitration context, because there is no state action involved in arbitration, due process is not required. Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999); Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1190-91 (11th Cir. 1995) (holding that confirmation of arbitration award does not constitute state action sufficient to trigger constitutional protections); Judge Lawrence Waddington, *Federalizing Arbitra-*

sion expressly address whether the arbitrator's decision to permit classwide arbitration would exceed the bounds of the arbitrator's power.[227] However, the plurality's determination that the arbitrator must make the initial determination regarding whether classwide arbitration is proper implicitly permits the arbitrator to find classwide arbitration appropriate.[228]

As to the contract interpretation issue, the plurality opinion by Justice Breyer, joined by Justices Souter, Scalia and Ginsburg, sided with the South Carolina Supreme Court rather than the *Champ* line of authority.[229] Justice Breyer's opinion indicated that, because the parties agreed to submit for arbitration "[a]ll disputes, claims, or controversies arising from or relating to [their] contract or the relationships which result from [the] contract," the issue of whether an agreement to arbitrate permits or prohibits classwide arbitration (as opposed to an individual arbitration) was a matter for the arbitrator, not a judge, to decide.[230] This is so, he reasoned, because "the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question."[231] Agreeing with the South Carolina Supreme Court, Justice Breyer relied upon the longstanding principle that courts should resolve doubts concerning the scope of arbitrable issues "in favor of arbitration."[232]

Although the dissent agreed with Green Tree that the contract itself precluded classwide arbitration, Justice Breyer did not agree that the contract was as clear as the dissenters believed.[233] Despite the plurality's

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tion—The Development of Arbitration Law Offers a Classic Example of the Clash between Federal Supremacy and State Sovereignty, Los Angeles Lawyer, 26 Sep L.A. Law. 30, 31-32, 35 (Sept. 2003); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 393 (2004) (citing Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) and Davis v. Prudential Sec., Inc. 59 F.3d 1186, 1191 (11th Cir. 1995)). Commentators assert that due process is required in arbitration. Harding, at 394-95; Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 590 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 40-47 (1997) [hereinafter Sternlight II].

227. *Bazzle*, 539 U.S. at 451 (indicating by plurality only that the contract's language is not as clear as Justice Rehnquist's dissent suggests and that the contract interpretation is not completely obvious). As discussed below, these determinations leave open the possibility that arbitrators will interpret such agreements as permitting classwide arbitration.

228. *Id.* at 451-53. This conclusion follows from the premise that the arbitrator must make the decision regarding whether classwide arbitration is permitted under the parties' agreement, and the premise that the interpretation of an arbitration agreement silent regarding classwide arbitration is "not completely obvious." *Id.* at 451.

229. Although the plurality did not discuss the *Champ* line of authority, the determination that the interpretation of the language of an arbitration agreement that is silent regarding classwide arbitration is "not completely obvious," *Id.* at 451, directly contradicts the holding in *Champ* that an arbitration clause that is silent regarding classwide arbitration must be interpreted not to permit classwide arbitration. Champ v. Seigel Trading Co. Inc., 55 F.3d 269, 274-75 (7th Cir. 1995).

230. *Bazzle*, 539 U.S. at 451-52.

231. *Id.*

232. *Id.* at 452 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)).

233. *Id.* at 450-51.

ultimate conclusion that the contract interpretation question was a matter to be determined by the arbitrator, the plurality offers its own take regarding an alternate interpretation of the arbitration clause.[234] Here it is important to examine the express language of the contract, which provided that disputes "shall be resolved . . . by one arbitrator selected by . . . [Green Tree] with [the] consent of . . . [Green Tree's customer]."[235] Chief Justice Rehnquist and the dissenters interpreted the contract provision to preclude classwide arbitration because to do otherwise would ignore the terms of the parties' contract to the extent that classwide arbitration would preclude the parties, specifically here Green Tree, from selecting the arbitrator in each case.[236]

Writing for the plurality, Justice Breyer disagreed that the contract's language was quite so clear and found that "the answer to this question is not completely obvious."[237] He noted that Green Tree in fact did select the class arbitrator with the consent of its customers, and that "insofar as the other class members agreed to proceed in class arbitration, they consented as well."[238] Justice Breyer observed that "[t]he contracts do not say 'selected by . . . [Green Tree] to arbitrate this dispute and no other (even identical) dispute with another customer.'"[239] In other words, consistent with the South Carolina Supreme Court, Justice Breyer's opinion relies heavily on the fact that the arbitration clause did not explicitly negate classwide arbitration.[240]

Justice Breyer also relied upon the "broad authority the contracts elsewhere bestow upon the arbitrator," including "'all powers,' including certain equitable powers 'provided by the law and the contract,'" in support of the conclusion that one cannot directly infer from the silence of the parties regarding classwide arbitration the conclusion that the parties intended to preclude the arbitrator from ordering classwide arbitration.[241] The negative implication of these comments regarding the issue of con-

234. *Id.*
235. *Id.* at 450 (first, third, and sixth alterations in original).
236. *Id.* at 458-459 (Rehnquist, C.J., dissenting).
237. *Id.* at 451.
238. *Id.*
239. *Id.*
240. Contracts explicitly negating classwide arbitration have been upheld as enforceable by a number of courts. KAPLINSKY, *supra* note 118, at 219-20; Kaplinsky & Levin, *supra* note 153, at 1270. But other courts find such provisions are unconscionable. Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (citing Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002)); Leonard v. Terminix Int'l Co., L.P., 854 So. 2d 529, 539 (Ala. 2002); West Virginia *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 280 (W. Va. 2002); Lozada v. Dale Baker Oldsmobile, Inc. 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000); Mandel v. Household Bank (Nev.), Nat'l Ass'n., 129 Cal. Rptr. 2d 380, 385-86 (Cal. Ct. App. 2003), *cert. granted* 65 P.3d 1284 (Cal. 2003) (holding that term prohibiting class action in arbitration was unconscionable); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576-577 (Fla. Dist. Ct. App. 1999); Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1101 (Cal. Ct. App. 2002); *cf.*, Discover Bank v. Superior Court, 129 Cal. Rptr. 2d 393, 408-09 (Cal. Ct. App. 2003) (holding that the FAA preempts state court from applying state substantive law to strike class action waivers from arbitration agreements), *cert. granted* 65 P.3d 1285 (Cal. 2003).
241. *Bazzle*, 539 U.S. at 451.

tract interpretation is that a clause that does not expressly negate classwide arbitration implicitly allows for the possible imposition of such a procedure by the arbitrator. Corporate drafters who previously put stock in this more subtle contract interpretation argument must now resort to drafting express no-class action provisions in order to continue to preserve arbitration while avoiding class actions within arbitration.[242] This is so even though such language creates some risk that the entire arbitration provision will be deemed unconscionable in some jurisdictions, as discussed above.[243]

Distinguishing the question of classwide arbitration from "gateway issues" typically decided by a court, the *Bazzle* plurality decided that an arbitrator should rule on the appropriateness of classwide arbitration.[244] The Court in *Bazzle* arguably made the initial determination that the agreement did not clearly prohibit classwide arbitration.[245] Under the *Bazzle* opinion's ultimate holding, this issue is for the arbitrator, not the court to determine.[246] Accordingly, if the arbitration agreement did clearly prohibit classwide arbitration, this determination would still be for the arbitrator, not the court.[247] However, the ambiguity created by the opinion leaves open for argument the scope of the court's jurisdiction. If the court, and not the arbitrator, should make the initial determination regarding whether the agreement clearly prohibits classwide arbitration,[248] perhaps other issues pertaining to the arbitration should also be addressed by the court.[249]

Additional language in Justice Breyer's opinion creates limitations on the role of the courts and expands the role of the arbitrator, moving the law toward a pure arbitral model for classwide arbitration. *Bazzle* reserves the role of the courts in addressing certain gateway matters including whether a valid arbitration agreement exists at all and whether an arbitration clause applies to a particular controversy.[250] However, Justice Breyer distinguishes this power of the courts from the instant matter which he characterizes as "what *kind of arbitration proceeding* the parties agreed to," a matter he indicates "concerns contract interpretation

242. *See supra* Part III, C.

243. *See supra* Part III, C.

244. *Bazzle*, 539 U.S. at 451.

245. Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Tex., Inc., 343 F.3d 355, 359 (5th Cir. 2003).

246. *Pedcor*, 343 F.3d at 360 (observing the ambiguity of the Supreme Court's plurality opinion in *Bazzle*, and concluding that, even if the arbitration agreement on its face precluded arbitration, under the reasoning of the plurality opinion, "arbitrators could . . . make [that] call [regarding enforceability] without . . . prior analysis by a court.").

247. *Id.*

248. KAPLINSKY, *supra* note 118, at 251.

249. Lender's counsel Alan Kaplinsky raises the question of whether, after *Bazzle*, only an arbitrator can determine the unconscionability of an arbitration clause, whether based upon prohibition of class action suits or for other reasons. *Id.* The *Pedcor* interpretation of the *Bazzle* plurality opinion would support such a procedure.

250. *Bazzle*, 539 U.S. at 452.

and arbitration procedures" that "[a]rbitrators are well situated" to handle.[251] Thus, *Bazzle* allocates to the arbitrator a broad range of procedural matters involving what type of arbitration should occur.[252]

The comments of the plurality regarding the contract interpretation issue are significant because, as discussed below, they validate an alternate contract interpretation that would allow for an arbitrator to interpret a similar clause to permit classwide arbitration. The plurality's contract interpretation is arguably dicta, given that the decision delegates the responsibility for the contract interpretation to the arbitrator.[253] But, as discussed further below, the dicta may effectively preclude challenge to decisions by arbitrators ordering classwide arbitration by providing support for the argument that an arbitrator's award permitting classwide arbitration does not manifestly disregard the law, is not arbitrary or capricious, and does not violate public policy, and therefore, should not be vacated.[254]

Ultimately, the Supreme Court remanded the matter to the arbitrator, since the court had made the determination regarding classwide arbitration in the underlying *Bazzle* case, and because, although the arbitrator did make the determination regarding the appropriateness of class arbitration in the underlying *Lackey/Buggs* matter, the Supreme Court believed that the *Bazzle* court's determination certifying a class may have influenced the *Lackey/Buggs* arbitrator's determination that classwide arbitration was appropriate.[255] Accordingly, the Court remanded the matter for a determination by the arbitrator (independent of the Court) to determine whether classwide arbitration is appropriate.[256]

Justice Stevens, in a concurring opinion, agreed with the South Carolina Supreme Court that under South Carolina state law, class action arbitrations were permissible where the parties' arbitration agreement was silent.[257] Justice Stevens' opinion also acknowledges that there is nothing in the FAA that would preclude a decision by the South Carolina Supreme Court permitting classwide arbitration.[258] Justice Stevens characterizes the decision to conduct a class action arbitration as "correct as a

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251. *Id.* at 452-53.

252. Peter J. Kreher and Pat D. Robertson III, Case Comment, *Substance, Process and the Future of Class Arbitration*, 9 HARV. NEGOT. L. REV. 409, 414 (2004). As mentioned above, following *Bazzle*, two of the three major arbitration providers adopted specific procedures for classwide arbitration.

253. *Bazzle*, 539 U.S. at 451-52.

254. Review of arbitrators' decisions is limited as provided under section 10 and 11 of the FAA, and to a narrow scope of judicial review under certain court created exceptions, as discussed further below.

255. *Bazzle*, 539 U.S. at 452-53. The Court observed that the Lackey plaintiffs argued that the arbitrator should impose classwide arbitration because the state trial court had done so earlier in the *Bazzle* matter.

256. *Id.* at 454.

257. *Id.* (Stevens, J., concurring).

258. *Id.* at 454-55.

matter of law;" accordingly he voted to affirm the judgment, providing a fifth vote endorsing classwide arbitration.[259] Justice Stevens' opinion provided further support for an arbitrator's decision permitting classwide arbitration by helping to establish that such a determination did not violate public policy per se, is not arbitrary or capricious, and did not manifestly disregard the law.[260]

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, dissented on the grounds that the decision regarding whether classwide arbitration was appropriate was one for the Court and not the arbitrator.[261] Chief Justice Rehnquist's reasoning hinges on the provision of the arbitration agreement that disputes would be resolved "by binding arbitration by one arbitrator selected by us [Green Tree] with consent of you."[262] He asserts that the determination by the South Carolina Supreme Court allowing a class action within arbitration ignored the terms of the parties' contract to the extent that classwide arbitration would preclude one of the parties, specifically Green Tree, from selecting a separate and different arbitrator for each individual arbitration with each consumer.[263] Therefore, the dissenting Justices concluded that the FAA provisions requiring enforcement of the parties' agreement to arbitrate preempted any classwide arbitration where the result would be to deny Green Tree's contractual right to select a separate arbitrator for each dispute.[264]

Justice Thomas provided a sixth vote for leaving undisturbed the South Carolina Supreme Court's opinion permitting classwide arbitration on the grounds that the FAA is not applicable to the states.[265]

D. Beyond Bazzle

Several cases following *Bazzle* implicitly acknowledge and directly advance the trend toward a pure arbitral model of classwide arbitration by directing cases to the arbitrator for decisions regarding not only whether a class action is permissible pursuant to the parties' agreement, but also for decisions implementing classwide arbitration, such as class certification. These decisions signal the forthcoming widespread adoption of a pure model of classwide arbitration, and the demise of the hybrid model.

In *Pedcor Management Company, Inc. v. Nations Personnel of Texas, Inc.*,[266] the Fifth Circuit, applying *Bazzle,* interpreted an arbitra-

259. *Id.* at 455.
260. *See infra* Part VII, B, 1.
261. *Bazzle*, 539 U.S. at 455 (Rehnquist, C.J., dissenting).
262. *Id.* at 458.
263. *Id.* at 458-59.
264. *Id.* at 459-60.
265. *Id.* at 460 (Thomas, J., dissenting).

tion clause silent regarding classwide arbitration to require that the matter be submitted to the arbitrator to determine the appropriateness of classwide arbitration.[267] At the trial court level, the court certified the class in preparation for arbitration.[268] *Pedcor* interpreted the plurality decision in *Bazzle* by closely examining the bases for the fifth vote, as expressed in Justice Stevens' opinion, and found several points critical.[269] First, Justice Stevens would have permitted the class arbitration in *Bazzle* to stand.[270] Secondly, Justice Stevens also stated that the decision regarding "the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."[271] Thus, *Pedcor* read Justice Stevens' opinion in *Bazzle* as providing the fifth vote favoring classwide arbitration.[272]

Pedcor interpreted *Bazzle*'s contract interpretation analysis broadly. *Pedcor* reads *Bazzle* to hold that the contract provision "reflected the parties' intent to commit a broad scope of questions to arbitration, including the class arbitration question because that issue 'relat[ed] to the contract.'"[273] In contrast to some who have decried the *Bazzle* decision as muddled, the *Pedcor* opinion cites "[t]he clarity" of the *Bazzle* holding.[274] In line with the reasoning in *Bazzle,* the *Pedcor* court concluded that it was "'not completely obvious' whether the agreement forbids class arbitration."[275]

Pedcor questioned the language in the *Bazzle* decision, stating that the Court "must deal . . . at the outset" with the possibility that the contracts expressly prohibit classwide arbitration.[276] Instead, *Pedcor* indicated this determination should, according to the holding in *Bazzle*, be made by the arbitrator, not the court.[277] *Pedcor* holds that "it should not be necessary for a court to decide initially whether an arbitration agreement clearly forbids class arbitration."[278] Given this definition of the arbitrator's role, arguably even a clause prohibiting classwide arbitration should be sent to an arbitrator for a determination regarding the unconscionability of such a prohibition.

The Supreme Court of Texas in *In re Wood*[279] also broadly construed the *Bazzle* decision when it ordered arbitration and "authorized the

266. 343 F.3d 355 (5th Cir. 2003).
267. *Pedcor*, 343 F.3d at 363 (5th Cir. 2003).
268. *Id.* at 357.
269. *Id.* at 358.
270. *Id.*
271. *Id.*
272. *Id.* at 358-59.
273. *Id.* at 359 (citation omitted).
274. *Id.*
275. *Id.* at 360 (citation omitted).
276. *Id.* at 359-60 (citation omitted).
277. *Id.* at 363.
278. *Id.* at 360.
279. 140 S.W.3d 367 (Tex. 2004).

arbitrator to decide the class action issue."[280] Initially, prior to the *Bazzle* decision, the trial court in *Wood* directed the case to arbitration without deciding the issue of class certification.[281] The appellate court, implementing the hybrid approach, determined that the *court* should decide whether the parties' arbitration agreement (which was silent regarding class certification) permitted class arbitration.[282] The Texas Supreme Court construed *Bazzle* as holding that "issues of class arbitration are for the arbitrator to decide" and concluded that the Court of Appeals erred in directing the trial court to determine class certification.[283] Recognizing no distinction between the contract interpretation issue addressed in *Bazzle,* i.e., whether the contract permits classwide arbitration, and the distinct issue of whether the court or arbitrator determines class certification, the Texas Supreme Court construed *Bazzle* broadly as holding that "arbitrators make class arbitration decisions" and "the arbitrator determines what the rules in effect governing arbitration are."[284] This interpretation takes the *Bazzle* holding a step further than *Bazzle* itself. *Bazzle* requires that the arbitrator determine whether classwide arbitration is permitted under the parties' agreement.[285] *Wood* further requires that the arbitrator make the decision regarding class certification.[286] *Wood* is consistent with the underlying rationale of *Bazzle*, and the shift I expect the law to take following *Bazzle* toward a pure arbitral model of classwide arbitration.

After over twenty years of exercising court discretion under the hybrid model of classwide arbitration, California case law is also yielding, less readily, to *Bazzle.* In *Garcia v. DirectTV, Inc.*[287] the California appellate court announced that until last year, California law permitted courts to determine whether classwide arbitration was appropriate in any particular case—"but no longer."[288] *Garcia* construes *Bazzle* more narrowly than either *Pedcor* or *Wood. Garcia* construes *Bazzle* to require only that "the foundational issue—whether a particular arbitration agreement prohibits class arbitrations—must (in FAA cases) henceforth be decided by arbitrators."[289] Prior to the *Bazzle* decision, the trial court in *Garcia* had determined that the court, and not the arbitrator, should address the class action issues, including whether the agreement prohibited class arbitration.[290] The California Supreme Court granted certiorari in *Garcia,* vacated the judgment in the case affirming the trial court's

280. *In re Wood*, 140 S.W.3d at 368.
281. *Id.*
282. *Id.*
283. *Id.* at 368, 370.
284. *Id.* at 369-70.
285. *Bazzle*, 539 U.S. at 453.
286. *In re Wood*, 140 S.W.3d at 369-70.
287. 9 Cal. Rptr. 3d 190 (Cal. Ct. App. 2004).
288. *Garcia*, 9 Cal. Rptr. 3d at 191.
289. *Id.* (citation omitted).
290. *Id.* at 192.

order that the court would address the class action issues, stayed the case pending *Bazzle,* and then remanded for further consideration.[291] Following *Bazzle*, the *Garcia* court decided that the contract interpretation issue must be determined by the arbitrator.[292] On one issue, the *Garcia* court reserved judgment, indicating that "[i]mplicit in *Bazzle* is the notion that, absent a class action waiver, classwide arbitration is proper under the FAA—but the Supreme Court has yet to say that is so."[293]

Because the *Pedcor* and *Wood* decisions are more consistent with a pure arbitral paradigm for classwide arbitration, as discussed below, I anticipate that the law will continue moving in that direction. However, in much the same way that the courts such as *Garcia* exhibit hesitation regarding the adoption of a pure arbitral paradigm, the arbitration providers are responding to *Bazzle* in a variety of ways, as discussed in the next section.

E. Arbitral Procedure: The Providers Respond

The reactions of the three major arbitration providers to classwide arbitration have varied. This section discusses the response of the American Arbitration Association (the "AAA"), the issuance of rules by JAMS, and the decision of the National Arbitral Forum to proceed under its existing rules which do not specifically address classwide arbitration.

The AAA promulgated the first set of classwide arbitration rules in October 2003, following the *Bazzle* decision.[294] The AAA rules mirror Federal Rule of Civil Procedure 23 in many respects.[295] At the same time, the AAA rules accommodate the fact that adjudication will occur in the arbitral setting in a variety of respects by providing, for example, that notice to the class include the identity of the arbitrator.[296] The AAA will not accept cases for arbitration where the arbitration clause expressly prohibits classwide arbitration, unless a court so orders.[297] The provisions of the AAA rules are designed to accommodate the hybrid model of classwide arbitration by expressly permitting the arbitrator to take direction from the court on class certification and other class-related is-

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291. *Id.*

292. *Id.* at 196.

293. *Id.* at 196 n.4.

294. American Arbitration Association, Supplementary Rules for Class Arbitrations, *available at* http://www.adr.org/sp.asp?id=2136.

295. The AAA Supplementary Rules for Class Arbitrations provide requirements for class certification similar to those set forth in Federal Rule of Civil Procedure Rule 23(a), requirements for the maintenance of a classwide arbitration that are similar to Federal Rule of Civil Procedure 23(b)(3), and authority for the arbitrator to approve settlements that is similar to Federal Rule of Civil Procedure Rule 23(e). Other provisions of Federal Rule of Civil Procedure 23 were omitted, including the provision requiring the court to approve counsel.

296. American Arbitration Association, Supplementary Rules for Class Arbitration, Rule 6(b)(7), *available at* http://www.adr.org/sp.asp?id=2136.

297. American Arbitration Association, Policy on Class Arbitration, *available at* http://www.adr.org/sp.asp?id=21944.

sues.[298] The AAA rules also allow for interim review of certain arbitral rulings beyond the request for vacatur of a final award available under the FAA, including review of the Clause Construction Award and the Class Determination Award.[299] Under the FAA, there is no authority to conduct these reviews;[300] however, under the hybrid model, a court maintaining its jurisdiction over the class action-related aspects of the arbitration could exercise its discretion to conduct such a review.[301]

Arbitration provider JAMS also promulgated its rules for class action arbitrations.[302] These rules differ significantly from the AAA approach, in that, the JAMS Procedures allow the arbitration to proceed under a pure arbitral paradigm, with the arbitrator interpreting the contract as authorized by *Bazzle*, as well as the class certification and all class-related issues, including notice, through a final award, without requiring the interim reviews embedded in the AAA rules.[303] Unlike the AAA, JAMS will accept cases in which there is a class action waiver in the arbitration clause, and will interpret the clause and rule upon its enforceability or unconscionability.[304] Under the JAMS rules, courts will review issues regarding the interpretation of the arbitration clause and the arbitrator's handling of the class-related issues only if the arbitrator, in his or her discretion, decides to set forth such determinations in a partial final award subject to immediate court review.[305] On the front end of the process, the JAMS rules will permit the arbitrator to act in the broadest possible manner, consistent with *Bazzle,* even including construing arbitration clauses that prohibit classwide arbitration.[306] Compared with the

298. American Arbitration Association, Supplementary Rules for Class Arbitration, Rule 1(c), *available at* http://www.adr.org/sp.asp?id=2136.

299. In issuing the Class Determination Award, the arbitrator will determine whether to certify a class for classwide arbitration. American Arbitration Association, Supplementary Rules for Class Arbitration, Rule 5(d), *available at* http://www.adr.org/sp.asp?id=2136.

300. As discussed below, the review permitted under the FAA is limited to a motion to vacate a final arbitration award. 9 U.S.C. § 10 (2004).

301. *See infra* Part IV.

302. JAMS Class Action Procedures, (Feb. 2005) *available* at http://www.jamsadr.com/rules/class_action_print.asp.

303. *Id.* Under JAMS Class Action Procedures, (Feb. 2005), in the discretion of the Arbitrator, the Arbitrator's determinations regarding the construction of the arbitration clause and the certification of the class may be set forth in partial final awards subject to immediate court review. JAMS Class Action Procedures, (Feb. 2005), Rule 2 and 3(c).

304. *Id.* at Rule 2. JAMS announced on November 12, 2004, that in consumer cases, JAMS will not enforce clauses that waive consumer's rights to arbitrate their claims in a class action arbitration. Press Release, JAMS, JAMS Takes Steps to Ensure Fairness in Consumer Arbitrations (November 12, 2004). JAMS later reversed this position. Press Release, JAMS, JAMS Reaffirms Commitment to Neutrality Through Withdrawal of Class Action Arbitration Waiver Policy (Mar. 10, 2005).

305. *Id.*

306. At the ABA Annual Meeting Ultimate Arbitration Update session in August 2004, several panelists and audience members expressed concern that an arbitrator would have a conflict of interest in deciding both clause construction and unconscionability issues, since the arbitrator's continued employment in the matter in question depended upon the arbitrator's determination that a clause silent regarding classwide arbitration in fact permitted the procedure or, in the case of an arbitration provision prohibiting classwide arbitration, an arbitrator's ruling that a class action waiver was unconscionable or violated public policy. Others speculated that arbitrators ruling that arbitration

AAA rules, the JAMS procedures accommodate a narrower range of court intrusion into the arbitral process.

Finally, the National Arbitral Forum arbitrators continue to proceed under their own Code of Procedure, which at the present time does not specifically address classwide arbitration.[307]

VI. FEDERAL PREEMPTION AND CLASSWIDE ARBITRATION

In this Part, I examine the preemptive scope of federal arbitration law as applied to classwide arbitration. After considering general principles of preemption and prior jurisprudence regarding the scope of FAA preemption, I discuss several models of preemption analysis. In the following Part, I evaluate the continuing persuasiveness of the case law prohibiting classwide arbitration, and the viability of both the pure and hybrid models of classwide arbitration in light of these principles.[308]

A. The Scope of Preemption of Federal Arbitration Law

Since the FAA provides no procedure regarding classwide arbitration, the question of whether classwide arbitration is preempted depends upon the extent to which state arbitration law is preempted by federal arbitration law; and this in turn involves balancing preemption principles with federalism concerns.[309] Where federal and state laws conflict, under the Supremacy Clause of the Constitution,[310] federal law preempts state law; this is also true, to a certain extent, with the FAA.[311] The FAA does not expressly preempt the entirety of state law regarding arbitration.[312] As to many aspects of arbitration, including classwide arbitration, the FAA offers only "minimalist" guidance, leaving a "large penumbra" for state law.[313] It is also well established that state arbitration provisions

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clauses permitted classwide arbitration would find such a ruling a career ending determination, since such arbitrators would never again be selected by businesses to arbitrate. Author's notes of presentation by Robert Davidson, Executive Director of JAMS Arbitration Practice at the August 2004 ABA Annual Meeting *Ultimate Arbitration Update* (Aug. 8, 2004) (on file with the author).

307. The National Arbitration Forum Code of Procedure can be located at http://www.arb-forum.com/programs/code_new/. At the most recent ABA Annual Meeting session on the Ultimate Arbitration Update, Edward C. Anderson, Managing Director for the National Arbitration Forum, indicated that arbitrators with the NAF proceed under Rule 20 regarding classwide arbitration. Rule 20 provides that "[a]rbitrators have the powers provided by this Code, by the agreement of the Parties, and the applicable substantive law." Mr. Anderson advised the author that the NAF is considering whether to provide new rules regarding arbitration. Author's notes of presentation by Robert Davidson, Executive Director of JAMS Arbitration Practice at the August 2004 ABA Annual Meeting *Ultimate Arbitration Update* (Aug. 8, 2004) (on file with the author).

308. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 397 (2004) [hereinafter Drahozal II]; Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175 (2002).

309. Hayford & Palmiter, *supra* note 308, at 178.

310. U.S. CONST. art. VI, cl. 2.

311. WARE II, *supra* note 15 at 38-39.

312. Drahozal II, *supra* note 308, at 397-98.

313. Hayford & Palmiter, *supra* note 308, at 178-79.

can address "procedural" considerations involved in arbitration,[314] but only "subject to the general pro-arbitration policies articulated in the FAA" and the "gravitational pull of the FAA's pro-arbitration imperative."[315]

The Supreme Court established the "preemptive core"[316] of the federal arbitration law in *Southland Corp. v. Keating*,[317] where the Court held that the language of Section 2, specifically the phrase "involving commerce," reflected congressional intent to regulate beyond the scope of federal procedural law and to "foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[318] In *Southland*, the Court stated that by enacting Section 2 of the FAA, Congress "*withdrew the power of the states to require a judicial forum for the resolution of claims* which the contracting parties agreed to resolve by arbitration."[319]

Where the FAA conflicts with state law, state law is preempted, except to the extent permitted by Section 2 of the FAA, which permits arbitration clauses to be revoked upon "grounds as exist at law or in equity for the revocation of any contract."[320] *Southland* found that nothing in the FAA allowed the creation of any additional limitations under state law.[321] Thus, even though Congress did not intend to fully preempt state law in the area of arbitration, state law is preempted to the extent that it "conflicts with federal law" or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[322] If the application of state arbitration law results in less "'validity, enforceability, or irrevocability' of arbitration agreements," then that law is preempted.[323] From this authority it is evident that the issue of preemp-

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314. While class action law generally is viewed as more of a matter of "procedure," the "substantive implications of the class action remedy have been widely recognized." David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability and Preclusion Principles*, 38 U.S.F. L. REV. 49, 99-100 (2003).

315. Hayford & Palmiter, *supra* note 308, at 178.

316. *Id.* at 194.

317. 465 U.S. 1 (1984).

318. Drahozal II, *supra* note 308, at 399-400 (citation omitted); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 145 (1992). MacNeil disagrees with Chief Justice Burger's interpretation of the legislative history underlying the Supreme Court's majority opinion in *Southland*. Other commentators suggest that, while the *Southland* opinion incorrectly construes the FAA's legislative history, the Court's conclusion regarding the scope of FAA preemption is correct. Christopher R. Drahozal, *Federal Preemption Under the FAA—Revisiting Southland—Supreme Court's Reasoning Weak, but Conclusion Correct*, DISP. RESOL. MAG. 23 (Spring 2004) [hereinafter Drahozal III].

319. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (emphasis added).

320. WARE II, *supra* note 15, at 31-32 (quoting 9 U.S.C. § 2 (1994)).

321. *Southland*, 465 U.S. at 10–11 (citation omitted).

322. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

323. 1 IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 10.8.1 (1994 & Supp. 1999) (citation omitted).

tion hinges upon whether the state law undermines the enforceability of the agreement to arbitrate.

The FAA applies in both state and federal courts[324] and, despite extensive scholarly criticism,[325] as the law now stands, federal arbitration law preempts state law[326] to the extent that state law places arbitration agreements on "unequal footing" as compared with other contracts.[327] Thus, while state law governing an arbitration agreement may apply if the law does not "undermine the goals and policies of the FAA,"[328] a state law that renders an arbitration agreement unenforceable or requires a judicial forum for disputes that the parties agreed to arbitrate is preempted by federal law,[329] as is any state law that undermines the enforceability of arbitration clauses with respect to certain types of claims.[330]

The displacement of state arbitration law by federal arbitration law can result from conflict between the state law and a particular FAA provision or a conflict between the state law and general arbitration law.[331] For example, a New York law requiring a higher standard of proof for arbitration contracts than that required for non-arbitration contracts was held preempted by federal law.[332] A state law creating a preference for a judicial forum is also preempted because such a preference is inconsistent with the FAA.[333]

Section 2 of the FAA provides that a written agreement to arbitration in any contract involving interstate commerce shall be valid and enforceable, except on "grounds as exist at law or in equity for the revocation of any contract."[334] Section 2 is applicable in both state and federal courts, so that a procedural statute or rule that frustrates the effectiveness of the FAA is preempted by federal law,[335] while state statutes or rules that serve to further, rather than to undermine, the enforcement of arbitration agreements are followed in state court proceedings.[336] To the extent that the parties choose in their agreement to have state law

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324. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S.395, 404–05 (1967).

325. Drahozal III, *supra* note 318, at 27 (citing academic commentators who have "lined up behind Justice O'Connor['s]" dissent in *Southland* in which she expressed the opinion that "history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts.").

326. *Southland*, 465 U.S. at 15–16.

327. Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 281 (1995).

328. *Volt*, 489 U.S. at 477–78.

329. *Dobson*, 513 U.S. at 281.

330. *Southland*, 465 U.S. at 10; Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Bradley v. Harris Research, Inc. 275 F.3d 884, 890 (9th Cir. 2001).

331. 1 MACNEIL, *supra* note 323, at § 10.8.3.

332. *Id.* at § 10.8.1 (citing Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 46 (2d Cir. 1993)).

333. *Id.* at § 10.8.1.2 (Supp. 1999) (citing Saari v. Smith Barney, Harris, Upham & Co., 968 F.2d 877, 883 (9th Cir. 1992)).

334. 9 U.S.C. § 2 (1994).

335. WARE II, *supra* note 15, at 32–33; *Southland*, 465 U.S. at 16; *Dobson*, 513 U.S. at 281.

336. Blue Cross of Cal. v. Sup. Court, 67 Cal. App. 4th 42, 50 (Cal. Ct. App. 1998).

apply, courts will enforce that choice as long as the state laws in question do not conflict with the FAA.[337] Laws that effectively deny enforcement of arbitration agreements on grounds that are exclusive to arbitration are preempted by the FAA and are unenforceable.[338]

Because the FAA does not address classwide arbitration, and state statutes do not address the subject of classwide arbitration, all of the law governing the subject derives from either federal or state case law. The scope of federal preemption extends to preclude state law whether created judicially or by statute.[339] Just as federal arbitration law preempts *statutes* enacted by states that have the effect of precluding or limiting arbitration, *judicial doctrines* that have the effect of precluding or limiting arbitration are also preempted by federal arbitration law.[340]

According to these general principles of FAA preemption, courts have determined that federal arbitration law preempts state laws declaring pre-dispute arbitration agreements "void,"[341] state laws making arbitration agreements unenforceable as to certain types of claims,[342] and state laws precluding enforcement of agreements to arbitrate specific types of claims.[343] Federal arbitration law also preempts state laws making arbitration unenforceable in certain types of transactions[344] and state laws raising the standard for assent to arbitration agreements.[345] Courts have also held that state public policy defenses to the enforceability of arbitration agreements are preempted by federal arbitration law.[346]

Professor Drahozal proposes a four step analytical framework for determining whether the FAA preempts a state law governing arbitration.[347] The first step is to analyze whether the state law subject to preemption applies to contracts generally, or singles out arbitration contracts for special treatment.[348] State laws that apply only to arbitration agreements will not survive federal preemption.[349] Under this step of the analysis, if the law applies exclusively to arbitration, it is preempted.[350]

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337. *Volt*, 489 U.S. at 479.
338. WARE II, *supra* note 15, at 35–36.
339. *Blue Cross*, 67 Cal. App. 4th at 59 n.6 (citation omitted).
340. David S. Schwartz, *Federal Preemption Under the FAA: FAA Preemption: Does it Wipe Out State Contract Law?*, DISP. RESOL. MAG., Spring 2004, at 23.
341. *Dobson*, 513 U.S. at 281; WARE II, *supra* note 15, at 33.
342. *Southland*, 465 U.S. at 16.
343. WARE II, *supra* note 15, at 32; Perry v. Thomas, 482 U.S. 483, 490–491 (1987).
344. WARE II, *supra* note 15, at 36.
345. *Id.* at 37–38; *Casarotto*, 517 U.S. at 684–87.
346. WARE II, *supra* note 15, at 36 (citing 2 IAN MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT, § 16.6.1 (1994 & Supp. 1999)).
347. Drahozal II, *supra* note 308, at 407-08.
348. *Id.* at 407–11. This step in the analytical framework derives from Section 2 of the FAA.
349. *Id.* at 408.
350. *Id.* at 407–08.

The second step in Professor Drahozal's analytical framework involves determining whether the parties expressly contracted for the application of state law to the arbitration proceeding.[351] This step in the analysis is intended to accommodate the holding in *Volt Info. Sciences, Inc. v. Leland Stanford Junior Univ.*,[352] as modified by the *Mastrobuono v. Shearson Lehman Hutton, Inc.*[353] decision.[354]

The third step in Professor Drahozal's analytical framework evaluates whether the state law in question "invalidate[s], the parties' arbitration agreement, in whole or in part, conditionally or unconditionally (i.e., does application of the state law result in the parties going to court even though they have agreed to arbitrate their dispute)? If so, the law is preempted."[355] In evaluating whether state law invalidates the parties' contract, some courts have held that certain cases are not appropriate for arbitration,[356] while others (the better view) hold that "state rule[s] excluding claims from arbitration because arbitration is 'inappropriate' [are] preempted by the FAA."[357]

The fourth factor under Professor Drahozal's test requires the evaluation of the state law under one of several "alternative preemption theories"—the Keystone Theory; the RUAA Theory; the Anti-FAA Theory, the Pro-Contract Theory or the FAA Exclusivity Theory.[358] The Keystone Theory provides that a state law is not preempted when it does not "nullif[y] either party's obligation to arbitrate their dispute."[359] The RUAA Theory encompasses "the view of FAA preemption used by the drafters of the Revised Uniform Arbitration Act."[360] Under this theory, state laws dealing with "front-end" issues (arbitrability and the agreement to arbitrate) are most likely preempted, particularly those that "go to the essence of the agreement to arbitrate."[361] Under this theory, the FAA preempts state laws that alter the terms of the parties' agreements such that the procedure being enforced is no longer "arbitration."[362] Professor Drahozal indicates that a "state law providing that all arbitration proceedings shall be presided over by a state court judge would be preempted under this theory, even though the parties proceeded to 'arbitration'."[363]

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351. *Id.* at 408.
352. 489 U.S. 468 (1989).
353. 514 U.S. 52 (1995).
354. Drahozal II, *supra* note 308, at 412.
355. *Id.* at 408.
356. *Id.* at 416.
357. *Id.*
358. *Id.* at 408.
359. *Id.* at 417 (citing Keystone Inc. v. Triad Sys. Corp., 971 P.2d 1240 (Mont. 1998)).
360. *Id.*
361. *Id.*
362. *Id.* at 418.
363. *Id.*

Professor Drahozal's "Pro-Contract Theory" of preemption holds that "[a] state law that does not invalidate the parties' arbitration agreement is preempted if it conflicts with a provision in that agreement."[364] Professor Drahozal describes the Pro-Contract Theory as "broader" than the RUAA Theory in that "any state law that conflicts with a term in the parties' arbitration agreement (by singling out arbitration) is preempted."[365] Finally, Professor Drahozal describes the "FAA Exclusivity Theory" as perhaps the broadest theory of all, in that, under this theory, "[a]ll state laws that single out arbitration are preempted."[366]

The role of state *arbitration* law is narrower under the FAA than the role of state *contract* law.[367] The FAA does not preempt state arbitration law "[s]o long as state law seeks to promote commercial arbitration and to give effect to the parties' contractual choices."[368] The federal policy favoring arbitration does not give preference to any particular set of procedural rules.[369] Accordingly, states may utilize their own procedures in arbitration to the extent they are not inconsistent with the FAA.

While courts determining the scope of the FAA's preemption of state law can turn to contract law under Section 2 of the FAA to determine the applicability of state *contract* law, whether in FAA cases (involving interstate commerce) the courts should ever turn to state arbitration law is a markedly different question from whether they should turn to state general contract law. In the case of arbitration law, the courts do not have to turn anywhere; they can treat the FAA and its penumbra of general federal arbitration law as plenary.[370]

Plainly, state law relating to *arbitration* (as opposed to state contract law) does not fall within the savings clause of FAA Section 2.[371] State law principles, whether legislative or judicial, that take their meaning from the fact that a contract to arbitrate is at issue, do not fall within the ambit of the Section 2 savings clause.[372] Because of this, state arbitration law cannot restrict or contradict federal arbitration law, but may supplement it in a manner that is not in conflict with the FAA.[373] Wherever

364. *Id.* at 419.
365. *Id.*
366. *Id.* (pointing out that, while this theory does not reflect present case law, it provides a useful comparison).
367. Hayford & Palmiter, *supra* note 308, at 176–77 (describing the Supreme Court's jurisprudence as sending "mixed signals" regarding the role of state law: on one hand, leaving no latitude for state regulation through laws that negate arbitration, while on the other hand leaving no room for federal regulation of arbitration in the area of contract law).
368. *Id.* at 193–94.
369. *Volt*, 489 U.S. at 476 n.5.
370. 1 MACNEIL, *supra* note 323, at § 10.6.2.
371. *Id.* at § 10.8.1.
372. *Perry*, 482 U.S. at 492 n.9.
373. 1 MACNEIL, *supra* note 323, at § 10.8.1.

state arbitration law falls afoul either of a particular FAA provision or of federal general arbitration law, it is preempted by the FAA.[374]

A corollary to this general precept is that because the cardinal purpose of the FAA is contract enforcement, parties to an arbitration agreement can sometimes avoid preemption by agreeing that a particular state law rather than federal law will apply.[375] Because arbitration under the FAA is most importantly a contract matter, the parties may agree to incorporate state law[376] "to displace FAA silence," but only where state procedure is "manifestly designed to encourage resort to the arbitral process."[377]

This corollary is further limited, however, by the proviso that, while the parties may agree to incorporate a state law by expressly referencing it in their contract, a general choice of law clause will be held to incorporate only state *contract* law, not state *arbitration* law.[378] Further, the corollary "dissolves . . . when a generic choice of law clause refers to state law that is hostile to arbitration."[379] Harmonizing *Volt* and *Mastrobuono* clarifies the scope of permissible state *arbitration* law: state experimentation with arbitration procedure will survive preemption as long as the state arbitration law does not limit arbitration or conflict with the purposes of the FAA.[380]

Although *Bazzle* does not discuss federal preemption per se, the specific facts in *Bazzle* inform the Court's most recent pronouncement regarding the role of state law in arbitration. In *Bazzle,* the parties agreed that South Carolina law would govern their agreement,[381] so the scope of the *Bazzle* holding is not limited to contracts exclusively controlled by the FAA, but also governs contracts electing state law.[382] One court recently limited the role of state law even further by holding that the parties' selection of the "law of a state" in their contract constitutes a selection to apply the FAA (which generally does apply to states) as well as a selection of state-specific law, where the choice of law clause does not exclude the application of federal law.[383]

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374. *Id.* at § 10.8.2.

375. WARE II, *supra* note 15, at 38–39; *Volt*, 489 U.S. at 479; *cf.* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995) (holding where the parties did not contract out of FAA preemption effectively, arbitrator could award punitive damages otherwise prohibited by New York law).

376. Drahozal II, *supra* note 308, at 413.

377. Hayford & Palmiter, *supra* note 308, at 197 (citation omitted).

378. Drahozal II, *supra* note 308, at 413 (comparing Volt and Mastrobuono).

379. Hayford & Palmiter, *supra* note 308, at 198.

380. *Id.* at 199.

381. *Bazzle*, 539 U.S. at 454 (Stevens, J., concurring).

382. *Pedcor*, 343 F.3d at 361.

383. *Id.* at 361–62 n.30 (expressing "no opinion on whether arbitration agreements governed exclusively by state arbitration law would be controlled by the Court's holding in Green Tree.").

Following *Bazzle,* the *Pedcor* court recognized that "the FAA preempts state laws that contradict the purpose of the FAA by 'requiring a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"[384] *Pedcor* continued, in dicta, to indicate that "even if Texas law contained a rule contrary to [*Bazzle*], i.e., that courts may decide the class arbitration question, the simultaneous applicability of the FAA to this case would appear to preempt any contrary state law."[385]

The California court in *Garcia* acknowledged that given the preemptive scope of the FAA, it is "immaterial that, under California law, the class arbitration issues would be decided by the court rather than the arbitrator."[386] These cases recognize that *Bazzle* and preemption cases limit the role of state courts in creating arbitral procedure.

VII. TOWARD A PURE ARBITRAL PARADIGM FOR CLASSWIDE ARBITRATION

Because the FAA is silent regarding classwide arbitration,[387] one must examine federal arbitration law and apply principles of preemption to determine which models of classwide arbitration are preempted and which are permissible. Applying these principles to classwide arbitration leads to three important conclusions. First, laws prohibiting classwide arbitration, whether federal or state, judicial or statutory, are implicitly overruled by *Bazzle* and its progeny, and are preempted by federal arbitration law because such prohibitions are now inconsistent with federal arbitration law.[388] Second, laws permitting a pure arbitral model of classwide arbitration, whether federal or state, whether judicial or statutory, particularly when the parties' agreement is silent regarding classwide arbitration, are not preempted by federal arbitration law,[389] because such laws are generally consistent with federal arbitration law.[390] Third, laws creating a hybrid model of classwide arbitration requiring or permitting ongoing involvement of the courts during classwide arbitration are preempted by federal arbitration law because such procedures are inconsistent with federal arbitration law.[391] Thus, federal arbitration law, including *Bazzle*, endorses the holding of *Keating* and its progeny permit-

384. *Id.* at 362 (citing *Southland*, 465 U. S. at 10).
385. *Id.*
386. Garcia v. DirecTV, Inc., 115 Cal. App. 4th 297, 303 n.2 (Cal. Ct. App. 2004).
387. Drahozal II, *supra* note 308, at 422.
388. Whether contracts prohibiting classwide arbitration are enforceable, unconscionable or violate public policy remains an open question. See discussion Part II *supra.*
389. *Blue Cross*, 78 Cal. Rptr. 2d 779, 785, 794.
390. Drahozal II, *supra* note 308, at 422; *but see Bazzle*, 539 U.S. at 458–59 (Rehnquist, C.J. dissenting).
391. *See* 9 U.S.C. § 2 (2004); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988).

ting classwide arbitration but preempts the hybrid model of classwide arbitration.

A. Bazzle *Implicitly Overrules Prior Law Prohibiting Classwide Arbitration*

Although *Bazzle* does not address much of the prior case law prohibiting classwide arbitration, some commentators assert that *Bazzle* overruled the *Champ* line of authority.[392] This issue is critical to determining whether an arbitrator's decision interpreting an arbitration agreement to allow classwide arbitration will survive judicial review on a motion to vacate such a ruling. Certainly *Bazzle* has limited dramatically, if not eliminated, the opportunity of parties drafting arbitration agreements to leverage arbitration to defeat class actions, particularly where the parties' arbitration agreement is silent regarding classwide arbitration.[393] This Part examines the extent to which the *Bazzle* decision has dramatically altered the landscape regarding classwide arbitration and implicitly given birth to a pure arbitral paradigm for classwide arbitration by addressing two questions not expressly addressed by *Bazzle*.

Below, I address the legal viability of the *Champ* line of federal authority and similar state cases prohibiting classwide arbitration and explain that *Bazzle* has implicitly overruled *Champ*'s dual rationales by rendering the lack of power rationale moot and by rejecting the contract interpretation rationale.

Later I examine whether the hybrid model of classwide arbitration remains viable, given the preemptive scope of federal arbitration law and describe how the *Bazzle* opinion generally endorses the concept of classwide arbitration and implicitly rejects the hybrid model in favor of a pure arbitral model of classwide arbitration. I assert that the demise of the hybrid model of classwide arbitration is compelled not only by *Bazzle*, but also by virtue of the preemptive scope of federal arbitration law.

The U. S. Supreme Court in *Bazzle* did not expressly address the line of authority and did not discuss or even allude to any of the prior federal appellate level decisions restricting classwide arbitration.[394] Because of this, an analysis of the rationales for the *Champ* line of cases must be juxtaposed against the premises of the *Bazzle* decision to determine whether *Bazzle* overrules the long line of cases precluding classwide arbitration under an arbitration agreement that is silent regarding

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392. Smit, *supra* note 143, at 175–76 ("The Supreme Court properly ruled these decisions to be erroneous . . ."); Peter J. Kreher & Pat D. Robertson III, Case Comment: *Substance, Process and the Future of Class Arbitration*, 9 HARV. NEGOT. L. REV. 409, 421–422 (2004) ("The *Bazzle* decision overrules this line of cases by allowing an arbitrator to certify a class when an agreement is silent or ambiguous on that issue.").

393. Kennedy & Appleby, *supra* note 155 at 85.

394. *Id.* at 86.

classwide arbitration. Below, I analyze the continuing viability of each rationale after *Bazzle*.

1. *Bazzle* Renders the "Lack of Authority" Rationale Moot

After *Bazzle*, and following promulgation of the AAA's classwide arbitration rules and the JAMS class action procedures, the lack of a court's authority to order classwide arbitration is a moot point. Under the lack of power rationale, courts posited that they possessed no authority to send class action matters to arbitration.[395] After *Bazzle*, the court's role is limited to sending the case to the arbitrator if it determines that the parties agreed to arbitrate the controversy.[396] After *Bazzle*, an arbitration claimant's motion to the *court* for class certification is arguably inappropriate.[397] According to *Bazzle*, after the court sends the matter to arbitration, the arbitrator, not the court, must decide the appropriateness of classwide arbitration.[398] Although the *Champ* line of authority constrains the *court* from ordering *classwide* arbitration, as the *Champ* court itself acknowledges, the lack of court authority does not constrain the arbitrator from ordering classwide arbitration because the arbitrator must operate according to the agreement of the parties and pursuant to the rules of the arbitration provider.[399]

A related premise for the lack of authority rationale was that the court lacked the authority to consolidate arbitrations. After *Bazzle*, the court's lack of power to *consolidate* arbitration is meaningless because it is the arbitrator, not the court, who must decide whether class arbitration is appropriate.[400] Thus, the *Bazzle* ruling bypasses the obstacle of the lack of power, rendering one of the primary rationales for the *Champ* line of authority impotent to prevent classwide arbitration. Certainly, the lack of a *court's* power to order classwide arbitration cannot serve as a constraint on the arbitrator, since the arbitrator's conduct is regulated by the agreement of the parties and the rules of the arbitration provider. If the arbitrator determines that the parties' agreement permits classwide arbitration and the arbitration provider's rules authorize the arbitrator to conduct classwide arbitration, the lack of power on the part of the court to consolidate arbitration or order classwide arbitration creates no impediment to the arbitrator doing so.

395. See discussion Part III, B, *supra*.
396. *Bazzle*, 539 U.S. at 453.
397. *Id.* at 453–54; *Wood*, 140 S.W.3d at 370.
398. *Bazzle*, 539 U.S. at 452-53.
399. *Champ*, 55 F.3d at 276–77.
400. *Bazzle*, 539 U.S. at 452–53.

2. *Bazzle* Also Undermines the "Contract Interpretation Rationale"

The contract interpretation rationale of the line of federal and state authority prohibiting classwide arbitration under a clause silent regarding classwide arbitration is also significantly undermined by the *Bazzle* decision. The *Champ* line of authority and related cases held that an arbitration clause that is silent regarding classwide arbitration could not be interpreted, as a matter of contract interpretation, to permit classwide arbitration because such a provision could not be "read into" the contract.[401]

While *Bazzle* did not discuss this line of authority, the decision implicitly defeats its logic. *Bazzle* addresses the contract interpretation issue by examining the breadth of the parties' agreement to arbitrate.[402] If the parties intended their disputes to be resolved by the arbitrator, the court should send the matters to arbitration without resolving the class action issue.[403] In view of the broad language of the arbitration clause, *Bazzle* describes the contract interpretation as "not completely obvious."[404] This conclusion overrules the determination by lower courts that a broad arbitration clause could not be interpreted to permit classwide arbitration.

The determination that an arbitrator must decide whether the arbitration clause permits classwide arbitration also undermines the contract interpretation rationale of the prior lower court decisions. If an arbitrator must decide the question, implicit in that determination is the possibility that the arbitrator may find that the clause permits classwide arbitration. Because *Bazzle* implicitly undermines the dual rationales of the prior authority, even though it does not discuss that authority, *Bazzle* implicitly overrules the prior case law prohibiting classwide arbitration under a "silent" arbitration clause, requiring arbitrators to make such decisions and permitting arbitrators to interpret "silent" contracts to permit classwide arbitration.

B. Laws Permitting a Pure Arbitral Model of Classwide Arbitration are Viable

The language of the *Bazzle* plurality opinion and the expansive preemptive scope of federal arbitration law[405] assures the ongoing viability and likely expansion of classwide arbitration under a pure arbitral model in which judicial involvement is limited to the narrow role circumscribed by the Federal Arbitration Act[406] rather than the more intrusive judicial

401. See Part III, B, *supra*.
402. *Bazzle*, 539 U.S. at 451–52.
403. *Id.*
404. *Id.* at 451.
405. See Part VI, *supra*; Drahozal II, *supra* note 308, at 409.
406. 9 U.S.C. § 2–4 (2004) (compelling arbitration and staying litigation); 9 U.S.C. § 10 (2004) (motions to vacate arbitration awards).

role preserved by the hybrid model of classwide arbitration.[407] By deciding that an arbitrator can determine whether to adjudicate a matter the parties agreed to arbitrate through classwide arbitration,[408] the *Bazzle* Court implicitly endorsed the implementation of classwide arbitration, particularly where the arbitration clause involved is silent regarding whether the parties contemplated classwide arbitration.[409] By its implicit rejection of the line of authority prohibiting classwide arbitration, the *Bazzle* opinion implicitly endorses the analysis in *Keating*[410] and its progeny[411] holding that class actions and arbitrations are not inherently incompatible[412] and that the combination of the two is preferable to the option of eliminating plaintiffs' rights to proceed via class adjudication when they agree to arbitration.[413]

The *Bazzle* plurality does not address the issue of federal preemption.[414] But the *Bazzle* decision is consistent with the Court's prior preemption analysis. Clearly classwide arbitration does not derive from state contract law, and therefore the savings clause[415] is inapplicable to bring state or federal procedures permitting classwide arbitration within the penumbra of federal arbitration law. The law permitting classwide arbitration is judicially created.[416] Because states may supplement federal arbitration law with procedural law pertaining to arbitration, as long as such procedures do not restrict or contradict federal arbitration law,[417] permitting classwide arbitration is conceptually consistent with the pro-arbitration imperative of the FAA and the national policy favoring arbitration of disputes. Permitting classwide arbitration also places arbitration agreements on an "equal footing" with other contracts not permitting arbitration by preserving the right of claimants to pursue a class action whether they choose an arbitral or judicial forum.

Applying Professor Drahozal's analytical model of federal preemption also strongly suggests that federal arbitration law does not preempt the pure arbitral paradigm of classwide arbitration. [418] The first step in Professor Drahozal's analysis yields the conclusion that state laws per-

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407. See Part IV, *supra.*

408. *Bazzle*, 539 U.S. at 453.

409. Undoubtedly a new wave of arbitration agreements expressly precluding classwide arbitration will follow.

410. *Keating*, 645 P.2d at 1209.

411. *Lewis*, 225 Cal. Rptr. at 75–76; *Izzi*, 231 Cal. Rptr. at 322; *Dickler*, 596 A2d at 867; *Blue Cross*, 67 Cal. App. 4th at 64.

412. *Keating*, 645 P.2d at 1209.

413. *Id.*

414. The dissent in *Bazzle* would have held that federal arbitration law preempted state law permitting classwide arbitration because such law contradicted the intentions of the parties as stated in their agreement. *Bazzle*, 539 U.S. at 460 (Rehnquist, C.J., dissenting).

415. 9 U.S.C. § 2 (2004).

416. *Keating*, 645 P.2d at 1208 (noting that there is an "absence of direct authority either supporting or rejecting [the classwide arbitration] procedure").

417. See *supra* Part IV.

418. Drahozal II, *supra* note 308, at 407–412.

mitting classwide arbitration do not "single out" arbitration contracts for special treatment.[419] State laws generally permit class actions in the judicial system.[420] While a state law precluding classwide arbitration would single out arbitration situations for special treatment, state case law that permits class actions within arbitration provides treatment for arbitrated matters that is no different than that accorded to cases remaining in the judicial system.

The second step in Professor Drahozal's analysis requires an evaluation of whether the parties expressly agreed that state law should apply to their agreement.[421] Assuming that the parties did so, and that state law such as *Keating, Bazzle* and their progeny permitted classwide arbitration, then the application of state law to permit classwide arbitration would not result in any preemption problem.

The third step in Professor Drahozal's analysis addresses whether the state law invalidates the parties' agreement to arbitrate, in whole or in part; if so, the law is preempted.[422] If the state law permits classwide arbitration (assuming a non-hybrid model, which is discussed in the next section), then the application of such a law would not impermissibly result in the parties going to court rather than resolving their dispute through arbitration. Applying state law permitting classwide arbitration is consistent with the parties' agreement to arbitrate their disputes. Application of the Keystone Theory would not invalidate the law because a state law permitting classwide arbitration does not nullify the agreement of either party to arbitrate the dispute.[423] Under the RUAA Theory, because the state law permitting classwide arbitration does not vitiate the agreement to arbitrate, it should not be preempted.[424] According to the FAA-Exclusivity Theory, classwide arbitration would not be preempted since it gives effect to the parties' contractual choices insofar as the parties selected arbitration.[425]

As the dissent in *Bazzle* points out, the contractual choice of the corporate party to use a separate arbitrator for each individual arbitration is not honored by the imposition of the class action device.[426] This anti-contractual intent side-effect does not vitiate classwide arbitration because, in the view of the plurality and Justice Stevens, the parties' fundamental contractual choice to arbitrate their disputes is honored through

419. *Id.* at 409.
420. ALBA CONTE & HERBERT B. NEWBERG, 4 NEWBERG ON CLASS ACTIONS § 13.1–13.4, 13.12–13.13 (4th ed. 2003).
421. Drahozal II, *supra* note 308, at 408.
422. *Id.*
423. *Id.* at 417.
424. *Id.*
425. *Id.* at 419.
426. *Bazzle*, 539 U.S. at 459.

classwide arbitration.[427] To the extent that contractual language requires the selection of an individual arbitrator for each arbitrable dispute, with the intention of eliminating the claimants' right to file a class action by virtue of their agreement to arbitrate, arbitrators may find such provisions unconscionable or violative of public policy.[428] Arbitrators might also construe such language as ambiguous when juxtaposed with a broad arbitration clause directing all of the parties' disputes to arbitration,[429] and construe such ambiguous contract language against the drafter[430] to permit classwide arbitration in view of such ambiguity,[431] consistent with the plurality and Justice Stevens' concurrence in *Bazzle*.

The Pro-Contract Theory raises the same issue.[432] The Pro-Contract Theory holds that state laws not invalidating the parties' agreement are preempted if such laws contradict the terms of the parties' arbitration agreement.[433] While the dissenters in *Bazzle* asserted that state law permitting classwide arbitration is preempted because such a procedure conflicted with the parties' contractual rights to select individual arbitrators for each individual dispute,[434] this assertion failed to carry the day in *Bazzle* and additional arguments could defeat it in subsequent cases.[435]

As a matter of federal preemption, the key conceptual issue is whether classwide arbitration is inconsistent with the purposes of the FAA, with federal arbitration law, and with the national policy favoring arbitration. *Bazzle*'s implicit endorsement of classwide arbitration rests on the premise that classwide arbitration is fundamentally consistent with the purposes of federal arbitration law in the broadest sense.

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427. *Id.* at 451–52 (as Justice Breyer points out, the contracts in question did not say that the arbitrator must be selected by Green Tree "to arbitrate this dispute and no other (even identical) dispute with another customer."); *see e.g.*, Cole v. Long John Silver's Rests., Inc., Clause Construction Award of Arbitrator, 7, *available at* http://www.adr.org/si.asp?id=1659 ("The use of personal pronouns cannot by inference achieve the deprivation of significant rights.").

428. Such contract drafting would have the same effect as an arbitration clause requiring arbitration, but precluding classwide arbitration, a provision that some court have already found unconscionable. See *supra* Part II. At least some courts have found such clauses both procedurally and substantively unconscionable. *Szetela*, 118 Cal. Rptr. 2d 862, 868 (Cal. Ct. App. 2002) (holding that clauses prohibiting class arbitration are intended to prevent plaintiffs from seeking redress for small claims in a collective action, and to create virtual immunity from class or representative actions, despite their potential merit); *Ting*, 319 F.3d at 1150.

429. *Bazzle*, 539 U.S. at 451 (The plurality states, "We do not believe, however, that the contracts' language is as clear as The Chief Justice believes," and "Do the contracts forbid class arbitration? Given the broad authority the contracts elsewhere bestow on the arbitrator . . . the answer is not completely obvious.").

430. *Green Tree*, 569 S.E.2d at 358; *see, e.g.*, Sternlight I, *supra* note 133, at 90; Cole v. Long John Silver's Rests., Inc., Clause Construction Award of Arbitrator, 4, *available at* http://www.adr.org/si.asp?id=1659 (construing the language of the clause as creating an ambiguity to be construed against the drafter).

431. Sternlight I, *supra* note 133 at 90; *see, e.g.*, Cole v. Long John Silver's Rests., Inc., Clause Construction Award of Arbitrator, 4, *available at* http://www.adr.org/si.asp?id=1659.

432. Drahozal II, *supra* note 308, at 419.

433. *Id.*

434. *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting).

435. See *supra* notes 426–30.

In addition to the theoretical justifications for the pure arbitral model, practical considerations also suggest that the pure arbitral model is superior to a model precluding classwide arbitration because it restores the balance of power between plaintiffs and defendants in arbitration so that it resembles that existing in litigation by permitting plaintiffs to join collectively to seek redress. This is especially significant where the claims involve small dollar amounts, rendering it uneconomical for consumers or employees to pursue individual arbitrations. The aggressiveness of corporate drafters leveraging arbitration to insulate companies from class actions altogether has resulted in a nascent unconscionability backlash certain to continue.[436] Fundamentally, the decisions finding no-class action clauses unconscionable[437] are consistent with the spirit of the analysis of the *Keating* court that classwide arbitration is superior to the elimination of plaintiffs' rights to sue collectively altogether.[438] Adoption of a pure arbitral paradigm for classwide arbitration can provide the substantial benefits of arbitration[439] without sacrificing the important benefits of the class action device.

1. Courts are Unlikely to Vacate Arbitrators' Decisions Permitting Classwide Arbitration

Following *Bazzle*, arbitrators, and not courts, will determine whether a classwide arbitration is appropriate under any given contract. The Supreme Court's decision in *Bazzle* gives little guidance as to how the arbitrator should decide the contract interpretation issue, other than to say it is "not completely obvious" how arbitrators should interpret an agreement that is silent regarding classwide arbitration.[440] This is because the *Bazzle* Court explicitly determined that the matter is one that the arbitrator, not a court, must address.[441] An arbitrator interpreting a silent arbitration clause after the *Bazzle* decision can plausibly decide that classwide arbitration is appropriate.[442] Under the FAA, such a deci-

436. See *supra*, Part III, C.

437. See *supra*, Part III, C and notes 144-146.

438. *Keating*, 645 P.2d at 1206–07 (class actions provide an important mechanism for "vindicating rights [of] large groups of persons [with claims] too small to warrant individual litigation. [Prohibiting class actions regarding such claims allows the] unscrupulous wrongdoer to retain the benefits of its misconduct.") (citations omitted).

439. LIPSKY & SEEBER, *supra* note 3, at 7, 17–18 (69% of survey respondents use arbitration because it saves time and money; 60.5 % of survey respondents find arbitration has a more satisfactory process. One respondent indicated "Arbitration is cheaper [than litigation], faster, confidential, final, and binding. What more can I say?").

440. *Bazzle*, 539 U.S. at 451.

441. Kaplinsky & Levin, *supra* note 153, at 1270.

442. Lawrence J. Bracken II & Caroline H. Dixon, *AAA Releases Rules on the Administration of Class Actions*, FRANCHISE L.J. 215, 216 (2004); Eric Tuchmann, General Counsel for the American Arbitration Association, announced at the ABA Annual Convention Ultimate Arbitration Update in August 2004 that in the majority of claims for classwide arbitration, arbitrators had made rulings allowing classwide arbitration. Robert Davidson, Executive Director of JAMS Arbitration Practice predicted that arbitrators could also find clauses precluding classwide arbitration unconscionable and permit classwide arbitrations to proceed. JAMS recently announced that it will not enforce class

sion is subject only to the narrow review circumscribed by the vacatur provisions.[443] This raises the question whether courts will uphold a determination by an arbitrator that classwide arbitration is appropriate or whether parties opposed to arbitration can persuade courts upon review of the arbitrator's determination that a ruling in favor of classwide arbitration demonstrates a "manifest disregard of the law."[444] This section discusses the scope of the court's review of arbitrator decisions in the context of classwide arbitration and concludes that courts are unlikely to vacate an arbitrator's decision permitting classwide arbitration.[445]

A determination by an arbitrator that classwide arbitration *is* permissible will be reviewed upon completion of the arbitration under FAA Section 10, which provides only narrow grounds for vacating an arbitrator's decision.[446] The limited scope of judicial review of arbitration awards reflects a "strong policy supporting finality of arbitration awards and minimal judicial interference with the judgments of arbitrators."[447] Arbitration awards are "significantly more 'bulletproof' than court judgments" and most courts "tend to confirm and enforce awards."[448] The statutory and judicial principles allowing review "operate on a presumption of correctness for arbitration awards, or at least an unwillingness on the part of courts to engage in searching review of such awards."[449]

The FAA does not permit review upon the bases of erroneous findings of fact or misinterpretation of law.[450] Instead, the standards of re-

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action waivers in consumer arbitration agreements. Press Release, JAMS, JAMS Takes Steps to Ensure Fairness in Consumer Arbitrations (November 12, 2004). As of the date of publication of this article, AAA is not accepting classwide arbitration claims where the arbitration clause precludes classwide arbitration. American Arbitration Association Policy on Class Arbitrations, *available at* http://www.adr.org.ArbitrationPolicy.

443. 9 U.S.C. § 10 (2004).

444. WARE II, *supra* note 15, at 94.

445. Bracken & Dixon, *supra* note 442, at 216; Kaplinsky & Levin, *supra* note 153, at 1270 ("defendant could face a more difficult appeal than if a court had made such rulings.").

446. *See* 9 U.S.C. § 10 (2000). The procedural grounds for vacating an arbitration award are similar under the Uniform Arbitration Act and the Revised Uniform Arbitration Act. BENNETT, *supra* note 34, at 38. Under rules pending promulgation by JAMS, arbitrator's rulings will be reviewed consistent with the provisions of the FAA. Under the Supplementary Rules for Class Arbitration, interim review of arbitrator decisions is permitted. American Arbitration Association, *Supplementary Rules for Class Arbitration*, Rule 1(c), Rule 3 (permitting interim judicial review of the Clause Construction Award, pursuant to which the arbitrator determines whether classwide arbitration is appropriate, given the substance of the parties arbitration agreement), Rule 5(d) (permitting judicial review of the Class Determination Award, pursuant to which the arbitrator determines whether to certify the putative class) *available at* http://www.adr.org/sp.asp?id=2136; *See e.g.*, American Arbitration Association, *Clause Construction Award of Arbitration: Cole Rests. v. Long John Silver's., Inc.* 10 (2004) (finding the arbitration clause does not prohibit classwide arbitration, and staying further proceedings for 30 days to allow "any party an opportunity to appeal this award.") *available at* http://www.adr.org/si.asp?id=1659.

447. THOMAS J. STIPANOWICH ED., AM. BAR ASS'N, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 282 (2001).

448. *Id.*

449. BENNETT, *supra* note 34, at 26.

450. Booth v. Hume Publ'g, Inc., 902 F.2d 925, 932–33 (11th Cir. 1990); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960); STIPANOWICH, *supra* note 447, at 282.

view are directed at ensuring fair process, to maximize finality, and minimize "second-guessing by courts."[451] There are four statutory grounds for vacatur of an arbitration award. First, the award is subject to vacatur if "procured by corruption, fraud or undue means[.]"[452] A court may also vacate an award where "evident partiality or corruption" by the arbitrator exists.[453] Vacatur is also available for misconduct on the part of the arbitrator, including "refusing to postpone the hearing" or in "refusing to hear" relevant evidence, or "any other misbehavior" prejudicial to a party's rights.[454] Finally, vacatur is possible where "the arbitrators exceeded their powers, or so imperfectly executed them" that a true award on the matter "was not made."[455]

The grounds for review of an arbitration award under the Uniform Arbitration Act ("UAA"), adopted by many states, are similarly very limited.[456] Under the UAA, the court is empowered to vacate an arbitration award only under the following circumstances: (1) the award was procured by fraud, corruption or other undue means; (2) the arbitrators exceeded their powers; (3) an arbitrator was biased or corrupt; (4) the arbitrators refused to postpone the hearing where due cause therefore was shown; (5) the arbitrators refused to consider material evidence; or (6) there was no valid agreement to arbitrate.[457] The UAA further provides that the fact that a court would not have granted the relief requested is not a valid basis for vacatur of an arbitrator's award.[458]

Under federal law, the judicially created grounds for review of arbitrator's awards include (1) the award violates public policy; (2) the award is arbitrary or capricious; and (3) the award manifestly disregards the law.[459] These judicially created bases are sometimes described as independent grounds, and are used as examples of the statutory standard for vacatur based on arbitrators exceeding their powers.[460] Judicial review based on an arbitrator's manifest disregard of the law is extremely narrow[461] and requires that the arbitrator (1) know the applicable law and (2) intentionally disregarded applicable law in rendering the award.[462] Manifest disregard "can be established only where a governing legal

451. STIPANOWICH, *supra* note 447, at 283.
452. 9 U.S.C. § 10(a)(1) (2000).
453. *Id.* § 10(a)(2).
454. *Id.* § 10(a)(3).
455. *Id.* § 10(a)(4).
456. Bracken & Dixon, *supra* note 442, at 215–16.
457. UNIFORM ARBITRATION ACT § 12 (amended 1956), 7 U.L.A. 280–81 (1997).
458. *Id.* at 280.
459. Wilko v. Swan, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989). Some commentators suggest that these judicially created bases for review are simply "re-articulation[s] of § 10(d)'s bar on arbitrators exceeding their powers." Herrmann, *supra* note 3, at n.164.
460. STIPANOWICH, *supra* note 447, at 283.
461. *Id.* at 283-84.
462. *See* Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002).

principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature."[463] Where conflicting authority exists regarding a particular issue, the arbitrator's disregard of one branch of the law in favor of another is less likely to be vacated by the courts.[464] "The term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."[465]

Given these standards, the vacatur of an arbitrator's decision to permit classwide arbitration pursuant to an arbitration clause that is silent regarding classwide arbitration is unlikely.[466] First, review of the issue could occur only after a final award.[467] Given the strong policy of finality and minimal judicial interference, a court should be reluctant to set aside an arbitrator's decision either permitting or denying classwide arbitration. The argument that such an award manifestly disregards the law will no longer survive, given the manner in which the decision in *Bazzle* undermines the prior contract interpretation rationale and given the existence of the law supporting the proposition that contractually precluding classwide arbitration is both procedurally and substantively unconscionable. No longer is there "controlling law" prohibiting classwide arbitration.

One might argue that the "governing law" only directs the arbitrator to decide whether classwide arbitration is proper, i.e., a rather narrow interpretation of the *Bazzle* holding. However, the counter proposition—that *Bazzle* permits an arbitrator to determine that a silent arbitration clause permits classwide arbitration – seems far more compelling in view of the language in the *Bazzle* plurality opinion that explicitly undermines *Champ's* contract interpretation rationale.[468] If it is "not completely clear" that a broad, silent arbitration clause prohibits classwide arbitration, then it is plausible that such a clause permits such a procedure.

One might also argue that *Bazzle* is a plurality decision, and that the significance of the decision is limited accordingly. However, given the Fifth Circuit's interpretation of the *Bazzle* holding in *Pedcor*—that classwide arbitration is permissible—it cannot be argued that there is a clear governing legal principle contrary to classwide arbitration. More likely,

463. GMS Group L.L.C. v. Benderson, 326 F.3d 75, 78 (2d Cir. 2003) (quoting *Goldman*, 306 F.3d at 1216).

464. BENNETT, *supra* note 34, at 124.

465. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986).

466. *Bobker*, 808 F.2d at 933.

467. *Cf.* American Arbitration Association, Supplementary Class Arbitration Rules 3 and 6 (permitting interim reviews of arbitrator's rulings), *available at* http://www.adr.org/sp.asp?id=2136.

468. *Bazzle*, 539 U.S. at 451.

a reviewing court evaluating an arbitrator's final award in a classwide arbitration under FAA Section 10 will find that a determination allowing classwide arbitration is within the arbitrator's authority.

C. *The Hybrid Model of Classwide Arbitration Requiring Ongoing Judicial Involvement is Implicitly Rejected by* Bazzle *and Preempted by Federal Law*

In the world of classwide arbitration, at least one defendant has objected to the hybrid procedure of classwide arbitration on the grounds that the court's order compelling hybrid classwide arbitration was inconsistent with the intentions of the parties who agreed to *arbitration* rather than the "hybrid" procedure mandating continuing court involvement.[469] That court declined to address the matter, finding it premature, since class arbitration had not yet been ordered to occur.[470] This Part answers that question and concludes that the hybrid model for classwide arbitration fails to withstand scrutiny under federal preemption analysis and is rejected implicitly by *Bazzle*.

The Supreme Court's analysis of the facts in *Bazzle* signals that the Court will not tolerate the degree of interference with arbitration authorized by the hybrid model. The plurality opinion in *Bazzle* required remand of the matter to an arbitrator to decide whether the arbitrator should handle the arbitration on a classwide basis.[471] While the arbitrator had already made that determination, answering in the affirmative in one of the two companion cases, the Supreme Court questioned whether the court's ruling might have influenced the arbitrator's decision.[472] Finding that the matter was one that the parties agreed an arbitrator would decide, the U.S. Supreme Court remanded the matter to permit the arbitrator to decide, uninfluenced by the court.[473] Certainly if the arbitrator should render this threshold decision regarding classwide arbitration, the exercise of discretion of courts to permit classwide arbitration under the hybrid model cannot survive. The *Garcia* court seems to acknowledge this.[474]

Taking the analysis suggested by *Bazzle* to the next logical step, one must infer that a court no longer retains authority to decide class action-related issues previously addressed by courts using the hybrid model, including class certification, notice, discovery and settlement.[475] The rationale for the *Bazzle* plurality's opinion is that the parties agreed to

469. *Blue Cross*, 67 Cal. App. 4th at 64.
470. *Id.* The issue in *Blue Cross* officially before the court was the prospect of discovery regarding class certification. *Id.* at 47.
471. *Bazzle*, 539 U.S. at 451.
472. *Id.* at 454.
473. *Id.*
474. *See Garcia*, 115 Cal. App. 4th at 303 n.2.
475. *See supra* Part IV.

have an arbitrator, and not a court, decide all of their disputes and to limit the aspects of those disputes that would come before the court to "certain gateway matters."[476] This reasoning is equally applicable to restrict the court's ability to decide all class action-related issues previously addressed by courts operating under the hybrid model. Such an inference is consistent with *Pedcor, Garcia* and *Wood.* Under the reasoning of *Bazzle* and its progeny, there is no rationale for continued court involvement in the class-related aspects of a classwide arbitration proceeding.

Nor does the hybrid model survive scrutiny under preemption analysis. The hybrid model of classwide arbitration grafts an anti-arbitration aspect onto the arbitral process, by requiring or permitting courts to handle certain aspects of class claims during arbitration.[477] Such an approach contradicts the pro-arbitration policy of the FAA and the national policy favoring arbitration[478] by restricting the arbitrator from handling certain aspects of a classwide arbitration,[479] even though the parties agreed generally to arbitrate *all* of their disputes. The hybrid model of classwide arbitration also violates the spirit of the FAA and federal arbitration law by requiring or permitting a judicial forum for the resolution of certain aspects of the parties' disputes,[480] in violation of the rule announced in *Southland.*[481]

Because the hybrid model of classwide arbitration negates the parties' agreement, the law creating it "stands as an obstacle" to the purposes of the FAA in that the hybrid model renders the parties' agreement to arbitrate their disputes less than fully enforceable. By undermining the enforceability of the arbitration clause with respect to class claims, the hybrid model of classwide arbitration places agreements to arbitrate class actions (which are not fully enforceable under the hybrid model) on unequal footing with other agreements to arbitrate disputes (which, under federal arbitration law, are fully enforceable).

Just as courts have invalidated numerous other state laws requiring more "protection" or "process" than arbitration provides, so too should courts determine that the hybrid model singles out the arbitration of class actions for specialized treatment, and therefore is preempted by federal arbitration law.

The hybrid model undercuts both major principles underlying the FAA and federal arbitration law. First, the hybrid model undermines the fundamental policy underlying the FAA to enforce the parties' agree-

476. *Bazzle*, 539 U.S. at 451–52.
477. *See supra*, Part IV.
478. Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 727 (8th Cir. 2001).
479. Sternlight I, *supra* note 133, at 39.
480. *Keating*, 31 Cal. 3d at 613; *Lewis*, 179 Cal. App. 3d. at 940-41; *Izzi*, 186 Cal. App. 3d at 1321-22; *Dickler*, 596 A.2d at 866-67.
481. *Southland*, 465 U.S. at 10.

ments to arbitrate by negating the parties' agreement to an arbitral forum, and instead imposing ongoing judicial involvement to the extent deemed appropriate by a court with continuing jurisdiction. Second, as I have shown above, the hybrid system of classwide arbitration does not conquer, but more likely derives from and perpetuates the distrust of arbitration.

Analysis under Professor Drahozal's preemption model yields the same unqualified result.[482] Applying the first test,[483] the state law creating the hybrid model of classwide arbitration fails because it does not apply to contracts generally, but singles out arbitration contracts for special treatment. Because the hybrid procedure for classwide arbitration applies only to arbitration, it is preempted.

Applying the second test,[484] even the selection of state law will not save the hybrid model from preemption. First, courts construe the parties' option to select state law narrowly, so that arguably a generic choice of law provision incorporates only state *contract* law, and not state *arbitration* law.[485] Other courts, including *Pedcor*, construe the standard choice of state law to include *federal* arbitration law, which applies to the states.[486] Finally, as *Pedcor* recognizes, where parties select state law that conflicts with federal arbitration law, for example, by requiring a judicial forum for the resolution of a dispute that the parties agreed to arbitrate, that state law is preempted.[487]

Applying the third test under Professor Drahozal's model,[488] the hybrid model invalidates, at least in part, the parties' arbitration agreement, by requiring or permitting a judicial determination regarding class action-related issues. The restriction of these class action aspects of the parties' disputes from arbitration is premised on the rationale that arbitral resolution of such matters is inappropriate. Under the better view, the hybrid model is preempted under this test as well.

Under the alternative preemption theories, the hybrid model fares no better. Under the Keystone Theory, the hybrid model is preempted because it nullifies the parties' agreement to arbitrate, at least partially.[489] Under the RUAA Theory, because the hybrid model of classwide arbitration negates the essence of the agreement to arbitrate, to the extent that

482. *See* discussion *supra*, Part VI, A (outlining Professor Drahozal's analytical framework).
483. Drahozal II, *supra* note 308, at 407-08.
484. *Id.* at 411-13.
485. *Id.* at 413.
486. *Pedcor*, 343 F.3d at 361-62.
487. *Id.*
488. Drahozal II, *supra* note 308, at 408.
489. *Id.* at 417.

the procedure enforced no longer consists purely of "arbitration," the hybrid is preempted.[490]

Under the Pro-Contract Theory, the hybrid model is preempted because it conflicts with the parties' fundamental agreement to arbitrate their disputes.[491] Under Professor Drahozal's Anti-FAA Theory, the hybrid fails because it is inconsistent with the FAA.[492] And under the FAA Exclusivity Theory, the hybrid model fails because it is a state-created law that singles out arbitration.[493]

The AAA's Supplementary Rules for Class Arbitration accommodate the hybrid model by providing that arbitrators will follow court orders on certain of the class action-related matters designated for decision by arbitrators.[494] The AAA's Rules also provide for judicial involvement in classwide arbitration after the order compelling arbitration and prior to the final award which courts are authorized to review on a motion to vacate.[495] While these rules are consistent with the hybrid model pursuant to which courts retain ongoing jurisdiction to supervise classwide arbitrations, such procedures are inconsistent with *Bazzle* and the FAA, which do not authorize interim review or appeal of arbitrators' decisions.[496] Allowing such judicial involvement is not only inconsistent with the FAA and with the spirit of federal arbitration law, but also undermines some of the fundamental benefits of arbitration such as avoiding the expense and delays inherent in litigation, including the lengthy appellate process.[497]

Despite the conceptual desirability of state experimentation with classwide arbitration procedure where the FAA is silent, federal arbitration law preempts the hybrid model and the *Bazzle* decision implicitly negates continuing court involvement in classwide arbitration. Together these developments sound a death knell for classwide arbitration under

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490. *Id.*

491. *Id.* at 419.

492. *Id.* at 418-19.

493. *Id.* at 419-20.

494. American Arbitration Association, Supplementary Rules for Class Arbitration, Rule 1(c), *available at* http://www.adr.org/sp.asp?id=2136.

495. *Id.*, Rule 3 (permitting interim judicial review of the Clause Construction Award, pursuant to which the arbitrator determines whether classwide arbitration is appropriate, given the substance of the parties arbitration agreement); Rule 5(d) (permitting judicial review of the Class Determination Award, pursuant to which the arbitrator determines whether to certify the putative class). *See also*, American Arbitration Association, *Clause Construction Award of Arbitration: Cole v. Long John Silver's Rests., Inc.* 10 (June 15, 2004) (finding the arbitration clause does not prohibit classwide arbitration, and staying further proceedings for 30 days to allow "any party an opportunity to appeal this award.") *available at* http://www.adr.org/si.asp?id=1659.

496. Judicial review of arbitration awards is limited to the grounds set forth in 9 U.S.C. § 10.

497. LIPSKY & SEEBER, *supra* note 3, at 7, 17-18 (68% of survey respondents use arbitration because it saves time and money; 60.5% of survey respondents find arbitration has a more satisfactory process. One respondent indicated "Arbitration is cheaper [than litigation] faster, confidential, final and binding. What more can I say?"); DISPUTE-WISE BUSINESS MANAGEMENT, *supra* note 41, at 7 (69% of survey respondents use arbitration because it saves time and money; 61% of survey respondents find arbitration provides a more satisfactory process).

the hybrid model and bring the pure arbitral model of classwide arbitration closer to fruition.

VIII. CONCLUSION

The continuing expansion of both arbitration and class actions, the Supreme Court's decision in *Bazzle*, the promulgation of class action arbitration rules by arbitration providers, the expansion of the preemptive scope of federal arbitration law, and the growing chorus of cases finding that class action waivers violate public policy and are unenforceable or unconscionable, all foreshadow the impending expansion of classwide arbitration under a pure arbitral model. The dual rationales of the case law prohibiting classwide arbitration are undermined fatally by *Bazzle*. In addition, the hybrid model of classwide arbitration is no longer viable because it violates the spirit of the FAA to the extent the hybrid model requires ongoing judicial involvement in the class action aspects of an arbitration proceeding. To the extent that the AAA's new classwide arbitration rules facilitate the hybrid model, they too are flawed.

The reluctance of courts to cede the arbitration of class actions entirely to the arbitration process is a vestige of the historic animosity of the legal community toward private arbitration that violates the spirit of the *Bazzle* decision and the preemptive scope of federal arbitration law. Adoption of a pure arbitral paradigm for classwide arbitration will eliminate the hybrid approach and align classwide arbitration most closely with the FAA and with *Bazzle* and its progeny. Such an approach restores to the arbitral forum the balance of power between plaintiffs and defendants existing in the judicial setting, and offers the most equitable solution for preserving the benefits of arbitration.