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## RETHINKING ANTI-AGGREGATION DOCTRINE

David L. Noll\*

*This Article proposes a new approach to “anti-aggregation agreements”—contractual provisions that purport to prohibit parties from participating in class actions and other aggregate proceedings. Anti-aggregation agreements are permitted by Supreme Court doctrine under the Federal Arbitration Act but eliminate financial incentives for attorneys to seek out and prosecute wrongdoing. Where private litigation performs an important deterrent function, anti-aggregation agreements raise the prospect that protected companies will be permitted to violate the law with impunity.*

*Taking the Supreme Court’s arbitration doctrine as a given, the Article argues that an anti-aggregation agreement’s enforceability should be tied to its effect on actual regulatory compliance. Consistent with the Court’s preference for privately-designed dispute-resolution procedure, this test allows an anti-aggregation agreement to be enforced by default. But if a party shows that the agreement permits significant, unremedied wrongdoing, the agreement is not enforced.*

*In contrast to the leading approach in the doctrine and scholarship, this test allows enforcement of anti-aggregation agreements that eliminate claiming against a protected company. At the same time, the test invalidates agreements that result in substantial wrongdoing, regardless of their effect on claiming. In doing so, the test ties the decision not to enforce an anti-aggregation agreement to a fact of normative and legal significance. Where it is shown that enforcement of an agreement permits significant unremedied wrongdoing, there can be little doubt that eliminating incentives for private attorneys to enforce the law creates an impermissible gap in the regulatory enforcement framework.*

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The disagreements and circuit splits that have followed the Supreme Court's decision in *AT&T v. Concepcion*<sup>1</sup> provide a much-needed opportunity to reconsider doctrine governing the enforceability of anti-aggregation agreements—contractual provisions that purport to prohibit either side to a contract from asserting claims in connection with others.<sup>2</sup> A basic justification for rules that authorize aggregate claiming is to overcome the problem of process costs overwhelming the stakes in individual proceedings. By permitting similarly-situated claimants to share the costs of claiming, aggregation enables claiming that otherwise would be a money-losing proposition.<sup>3</sup> Together with rules that permit an attorney to recover reasona-

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1 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Compare *In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204, 218 (2d Cir. 2012) cert. granted sub nom. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (invalidating anti-aggregation agreement that made it prohibitively costly to assert antitrust claim), and *Reyes v. Macy's, Inc.*, 135 Cal. Rptr. 3d 832, 836 (Ct. App. 2011) (denying a motion to arbitrate claim under California Private Attorney General Act, because Act creates a group, not individual, claim), with *In re Am. Express Merchs.' Litig. (Amex IV)*, 681 F.3d 139, 145 (2d Cir. 2012) (Jacobs, C.J., dissenting from denial of rehearing en banc) (arguing that “*Amex III* is incompatible with the FAA [Federal Arbitration Act]”), and *Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011) (reading *Concepcion* to establish that any “state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA”), and *Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 385 (Ct. App. 2012) (enforcing a motion to arbitrate claim under California Private Attorney General Act, on the ground that the Federal Arbitration Act preempts state non-waiver rule).

2 See, e.g., Citibank, Checking Plus (Variable Rate) Account Agreement 5 (Sept. 13, 2011) (on file with *Notre Dame Law Review*) (“Unless mutually agreed to by you and us, claims of two or more persons may not be joined, consolidated, or otherwise brought together in the same arbitration (unless those persons are joint account holders or beneficiaries on your account and/or related accounts, or parties to a single transaction or related transaction).”). A note on terminology: because they most obviously affect class action litigation, pre-dispute agreements to forgo litigating or arbitrating disputes on an aggregate basis are commonly referred to as “class action” or “class arbitration” waivers. See, e.g., Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT'L ARB. 199, 201 (2004) (discussing waivers). However, such agreements typically proscribe all proceedings that do not take place on a one-on-one basis, including not only class actions, but consolidated individual proceedings and suits brought by a private party in a private attorney general capacity. I thus use the more general “anti-aggregation” label.

3 See, e.g., ROBERT G. BONE, *THE ECONOMICS OF CIVIL PROCEDURE* 266–67 (2003) (“The class action collects all the same claims together in a single lawsuit with a large aggregate recovery. This gives an attorney a strong incentive to take the case and earn a fee based on the results he achieves for the class as a whole. . . . From an economic point of view, the main benefit of the small claim class action is deterrence.”); DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR*

ble fees from the “common fund” created by a successful lawsuit,<sup>4</sup> this creates a powerful incentive for private attorneys to seek out and prosecute violations of the law.<sup>5</sup>

Anti-aggregation agreements pose a direct challenge to this mechanism of law enforcement. Formally justified as an effort to simplify and streamline dispute resolution, their most important practical effect is to eliminate the cost-spreading made possible by aggregation. In doing that, anti-aggregation agreements eliminate incentives for attorneys to seek out and prosecute violations of the law.

The challenge for courts, underscored by *Concepcion*, is that private agreements governing dispute resolution procedure are sheltered by the Federal Arbitration Act (FAA).<sup>6</sup> Although the FAA allows an anti-aggregation agreement to be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract,”<sup>7</sup> the Supreme Court has read the Act to express a “liberal federal policy favoring arbitration,”<sup>8</sup> which ordinarily demands enforcement of arbitration agreements “according to their terms.”<sup>9</sup> In the absence of wholesale revision of the Court’s FAA jurisprudence, the question is what, if anything, overrides the FAA’s default policy of enforcing private dispute resolution contracts according to their terms.

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PRIVATE GAIN 6–7 (2000) (“Damage class actions have significant capacity to achieve public goals: to compensate those who have been wrongfully injured, to deter wrongful behavior, and to provide individuals with a sense that justice has prevailed. But what drives damage class actions is private gain: the opportunity they offer lawyers to secure large fees by identifying, litigating, and resolving claims on behalf of large numbers of individuals, many of whom were not previously aware that they might have a legal claim and most of whom play little or no role in the litigation process.”); 1 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 1:8 (5th ed. 2011) (“[C]lass actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies.”).

4 See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

5 In the words of the article that first recognized the point, “the class suit is a vehicle for paying lawyers handsomely to be champions of semi-public rights. . . . [T]he suit which might not be brought at all because the demands on legal skill and time would be disproportionate to the original client’s stake can, when turned into a class suit, be brought and handled in a manner commensurate with its magnitude.” Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

6 9 U.S.C. §§ 1–16 (2006).

7 *Id.* § 2.

8 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (internal quotation marks omitted)).

9 *Id.* at 1745–46 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

This Article proposes that the enforceability of an anti-aggregation agreement should turn on its effect on actual regulatory compliance. Consistent with the Supreme Court's preference for privately-designed dispute-resolution procedure, this approach allows an anti-aggregation agreement to be enforced by default. But if a party shows that an agreement permits significant unremedied wrongdoing, it is not enforced. I refer to this as the "outcomes approach."

The outcomes approach differs substantially from the leading approach in the doctrine and scholarship—here termed the "claiming approach."<sup>10</sup> Under the claiming approach, the enforceability of an anti-aggregation agreement depends entirely on its effect on claiming: if an anti-aggregation agreement has too great an effect on the incidence or availability of claiming against a protected company, it is not given effect. The outcomes approach, by contrast, enforces agreements that eliminate claiming, but only if they do not permit significant, unremedied wrongdoing.

The benefits of this change in focus are twofold. First, the decision not to enforce an agreement is linked to a fact of normative and legal significance. Where it is shown that enforcement of an anti-aggregation agreement permits significant unremedied wrongdoing, there can be little doubt that eliminating incentives for private attorneys to enforce the law creates an impermissible gap in the regulatory enforcement framework. Second, the outcomes approach avoids problems of tailoring endemic to the claiming approach; because of its focus on claiming, the claiming approach fails to account for the possibility that mechanisms other than private litigation will provide adequate enforcement of the law, as well as the possibility that wrongdoing will persist despite *de minimus* claiming (a phenomenon made

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10 See, e.g., *In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204, 218 (2d Cir. 2012) (invalidating anti-aggregation agreement that made assertion of antitrust claim prohibitively costly and largely following, although not citing, J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1760–69 (2006)); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1222–24 (11th Cir. 2007) (invalidating anti-aggregation agreement under Georgia law because it made claiming cost-prohibitive and adversely affected the market for representation of legal claims); *Kristian v. Comcast Corp.*, 446 F.3d 25, 56–59 (1st Cir. 2006) (invalidating contractual restrictions on attorney's fees and costs and availability of class arbitration, because they prevented effective vindication of federal antitrust rights); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1905 (2006) [hereinafter Nagareda, *Aggregation*] (proposing that in determining the enforceability of a class-action waiver, courts examine "whether the unavailability of aggregation would reduce the potential upside [to plaintiffs' counsel] to such a degree as to demonstrate a 'likelihood' that lawyers will not represent claimants").

possible by anti-aggregation agreements that cover the costs of claiming on an individual basis). As a result of these benefits, the outcomes approach is far less susceptible to claims that it is inconsistent with the FAA.

Admittedly, the shift to fact-intensive analysis focused on regulatory outcomes requires parties seeking to escape an anti-aggregation agreement to make an additional, threshold showing of unremedied wrongdoing. That showing, however, is analogous to the showing required at other threshold procedural checkpoints. And the costs of demanding a showing of unremedied wrongdoing are offset by the new approach's increased accuracy and greater compatibility with Supreme Court arbitration doctrine.

The Article proceeds in four parts. Part I describes the rise of anti-aggregation agreements and the evolution of the claiming approach. Parts II and III describe previously unidentified problems with the claiming approach and their influence on the Supreme Court's troubling decision in *Concepcion*. Part IV outlines the basic features of the outcomes approach, considers how the approach would operate in practice, and addresses objections.

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Before proceeding, two notes about the Article's scope. First, I focus on the issues raised by anti-aggregation agreements, leaving to one side debates about the general desirability of shifting dispute resolution from public courts to private tribunals. As a factual matter, practically all anti-aggregation agreements appear in arbitration agreements.<sup>11</sup> Nevertheless, it is useful to isolate anti-aggregation provisions for analysis, because they raise a different set of concerns than the general shift to private dispute resolution.

Second, in arguing that the doctrine should focus on an anti-aggregation agreement's relationship to significant unremedied wrongdoing, I do not suggest that this is the *only* way of invalidating an anti-aggregation agreement. Some rights are "fundamentally defined by their aggregative or public nature,"<sup>12</sup> so that enforcement of an anti-aggregation agreement will eliminate substantive rights.<sup>13</sup>

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11 See, e.g., Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 893, 884–85 tbls.3 & 5 (2008).

12 Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 185.

13 See, e.g., *In re D.R. Horton, Inc.*, 2012 WL 36274, at \*1 (N.L.R.B. Jan. 3, 2012) (No. 12-CA-25764) (concluding that imposition of an anti-aggregation agreement via an employment agreement is an unfair labor practice under the National Labor Relations Act because it interferes with employees' right to "engage in concerted activities

In addition, some anti-aggregation agreements cannot be enforced because they violate generally applicable principles of contract law, such prohibitions on fraud or misrepresentation.<sup>14</sup> The argument here is that a focus on regulatory outcomes (and not claiming) is the best *general* response to the problem of anti-aggregation agreements. I claim that regulatory outcomes should drive the analysis in the majority of cases that do not involve features like group rights, fraud, or misrepresentation.

### I. THE CLAIMING APPROACH

As noted, a basic justification for rules authorizing aggregate claiming invokes aggregation's potential to facilitate enforcement of the law. By holding out a financial incentive for private attorneys to prosecute wrongdoing, aggregation encourages attorneys to bring lawsuits. Aggregation thereby creates a market in law enforcement, which shapes regulated actors' expectations about the payoff of violating the law.<sup>15</sup> Instead of relying on government enforcement, the law is enforced through "an infrastructure of private prosecutors who earn a living, at defendants' expense, practicing in the relevant area of law."<sup>16</sup>

Building on this logic, the claiming approach reasons that eliminating financial incentives for private attorneys to prosecute wrongdoing will generate harms that justify invalidating an anti-aggregation agreement. The approach assumes that too great a reduction in claiming "prevents the effective vindication of federal rights" or extinguishes "the only economically feasible means for enforcing . . . statu-

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for the purpose of collective bargaining or other mutual aid or protection"); *AT&T Mobility LLC v. Gonnello*, 2011 WL 4716617, at \*4 (S.D.N.Y. Oct. 7, 2011) (No. 11 Civ. 5636(PKC)) (denying demand to arbitrate antitrust claim because "[t]he parties withheld from the arbitrator the power to decide questions that would necessarily affect the rights of more than the parties to the dispute through the grant of declaratory or injunctive relief"); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 408–11 (S.D.N.Y. 2011) (denying enforcement to anti-aggregation agreement that barred assertion of pattern-and-practice discrimination claim held jointly by affected employees).

14 See 17A C.J.S. *Contracts* §§ 199–226 (2011); see also David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 457 (2011) (noting that the manner in which some anti-aggregation agreements have been imposed violates the "preexisting duty" rule because no consideration passes in exchange for a new restriction on the availability of aggregation).

15 See *supra* text and sources accompanying note 3.

16 SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 31 (2010).

tory rights.”<sup>17</sup> The approach remedies this problem by requiring that anti-aggregation agreements honor the incidence and availability of claiming when aggregation is available.

To explain this approach, it is necessary to briefly review the Supreme Court’s current understanding of the FAA, the efforts of the corporate defense bar to leverage the Act into a protection against aggregate litigation, and the judicial response to those efforts. My primary argument in this Part is descriptive. In reviewing the evolution of the claiming approach, I hope to show that although they differ in superficial respects, the dominant responses to anti-aggregation agreements in the doctrine and scholarship are fundamentally concerned with the same phenomenon: an agreement’s effect on claiming.<sup>18</sup>

17 *In re Am. Express Merchs.’ Litig. (Amex II)*, 634 F.3d 187, 198 (2d Cir. 2011).

18 Although this Article is the first scholarly work to offer a general account of the claiming approach, it draws heavily on the work of other scholars who have examined the judicial response to anti-aggregation agreements. *See, e.g.*, Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 391–98 (2006) (predicting that increased recognition of anti-aggregation agreements will “kill” the modern class action); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 U.C.L.A. L. REV. 605, 630–36 (2010) (describing use of unilateral contract amendments to restrict contractual remedies); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 166–82 (2006) (discussing credit card issuers’ use of National Bank Act to export favorable state law nationwide and restrict consumer remedies); Nagareda, *Aggregation*, *supra* note 10, at 1895–1909 (proposing that courts analyze anti-aggregation agreements’ effects on the market for representation of legal claims); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 118–33 (2012) (discussing Supreme Court’s turn to FAA as a source of dispute resolution law and legal debates in *Concepcion*). In addition to sources discussing anti-aggregation agreements, an enormous literature considers the Supreme Court’s embrace of arbitration. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1437–39 (2008) (modeling judicial debate over arbitration in game theoretic terms); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987) (setting out framework for evaluating dispute resolution systems and concluding that ADR is lacking in many respects); Paul D. Carrington & Paul H. Haagan, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (critiquing development of arbitration doctrine through the Supreme Court’s 1995 term); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) (describing procedural safeguards appropriate for arbitration of employment claims); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 239 (2012) (arguing that “through a series of poorly-reasoned decisions,” the Supreme Court has endorsed the use of arbitration to eliminate accountability for wrongdoing); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (describing the embrace of arbitration as a facet of the Rehnquist



A. *Restricting Aggregation Through Contract—Doctrinal Foundations*

Anti-aggregation agreements are found predominantly in agreements to arbitrate disputes.<sup>19</sup> Though there does not appear to be a case on point, a contractual provision restricting aggregation outside the context of an arbitration agreement would conflict with the federal class action rule and perhaps be disregarded for that reason.<sup>20</sup> The FAA, however, gives private parties great authority to regulate procedure in the context of agreements to arbitrate.

The operative provision of the Act, Section 2, provides that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>21</sup> For most of the twentieth century, the FAA was understood to neither apply in state court nor permit the arbitration of statutory claims.<sup>22</sup> But beginning in 1983, the Supreme Court embarked on an ambitious reinterpretation of the Act that greatly expanded its scope.<sup>23</sup> Among other things, the Court held that (1) the Act creates a federal right to enforcement of arbitration agreements which preempts state law;<sup>24</sup> (2) Section 2 applies in state courts notwithstanding the many provisions of the Act that regulate federal

Court’s general hostility to litigation). My focus here is on contractual restrictions on aggregation, thus I leave to one side debates about other effects of privatizing dispute resolution.

19 See, e.g., Eisenberg et al., *supra* note 11, at 884–85 tbls.3 & 5 (analyzing the pattern of class action waivers in contracts with arbitration clauses).

20 The precise question presented by such a provision is whether Federal Rule of Civil Procedure 23 is subject to *ex ante* waiver by a private litigant, or is a non-waivable rule governing the processing of claims in federal court. Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) (holding that Rule 23 takes precedence over conflicting state rule because Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action”).

21 9 U.S.C. § 2 (2006).

22 See, e.g., *Wilko v. Swan*, 346 U.S. 427, 437–38 (1953) (rejecting demand for arbitration of claims under the Securities Exchange Act); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275–76 (1926) (“[The FAA] rests upon the constitutional provision by which Congress is authorized and to establish and control inferior Federal courts. . . . It is no infringement of the right of each State to decide for itself what contracts shall or shall not exist under its laws.”).

23 See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (interpreting § 2 to establish “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary” and “create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act”).

24 *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

court procedure;<sup>25</sup> and (3) virtually any cause of action can be subject to an *ex ante* agreement to arbitrate.<sup>26</sup>

The Court's new understanding is premised on the view that arbitration merely changes the *forum* in which claiming occurs, and thus does not affect the parties' legal entitlements or the deterrent and remedial functions of the law. In the first decision recognizing the arbitrability of statutory rights, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court wrote that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."<sup>27</sup> "By agreeing to arbitrate a statutory claim," the Court explained, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>28</sup> As Professor Richard Nagareda observed, "the repetition of this language in the Court's FAA case law has turned [it] into something of a mantra."<sup>29</sup>

At the same time the Supreme Court was expanding the scope of the FAA, the corporate defense bar was mobilizing against the expanded use of class actions made possible by the 1966 amendments to the Federal Rules of Civil Procedure. Those amendments famously authorized class-action proceedings where "questions of law or fact common to class members predominate over any questions affecting only individual members,"<sup>30</sup> leading to increased use of aggregation in many areas of the law.<sup>31</sup> Given increased liability exposure in aggregate proceedings, it was "only a matter of time" before the defense bar attempted to leverage the FAA to limit clients' susceptibility to aggregate litigation.<sup>32</sup> In the late 1980s,<sup>33</sup> corporations began redrafting standard form contracts regulating the relationship

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25 *Southland Corp. v. Keating*, 465 U.S. 1, 12–16 (1984).

26 See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (regarding arbitration implicating the Truth in Lending Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (regarding arbitration implicating the Age Discrimination in Employment Act); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 240 (1987) (regarding arbitration implicating the Securities Exchange Act of 1934 and RICO).

27 473 U.S. 614, 637 (1985).

28 *Id.* at 628.

29 Nagareda, *Aggregation*, *supra* note 10, at 1897.

30 FED. R. CIV. P. 23(b)(3).

31 See generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and "the Class Action Problem"*, 92 HARV. L. REV. 664, 664–66 (1979) (describing growth of, and backlash against, class actions in federal court).

32 Nagareda, *Aggregation*, *supra* note 10, at 1898 ("The rise of mandatory arbitration coincided roughly with the emergence of class action litigation as a subject of

between the buyer and seller of mass-market products to require not only binding arbitration of disputes, but also that arbitration occur on a one-on-one basis.<sup>34</sup> And thus, the anti-aggregation agreement was born.

*B. First Generation Restrictions and the Meaning of “Arbitration”*

As the product of contract, the design of an anti-aggregation agreement is limited only by the ingenuity of the company that devises it, the company’s ability to secure “assent” by bundling the agreement with a good or service demanded by the market, and legal limits on parties’ authority over dispute-resolution procedure. Even so, three distinct generations of anti-aggregation agreements are recognized in the literature.<sup>35</sup>

First generation agreements limited aggregation almost by accident, providing that the parties agreed to “arbitrate” disputes without addressing the availability of aggregate proceedings one way or the other.<sup>36</sup> Although concerns about unremedied wrongdoing lurked in the background, the primary issue courts addressed when asked to enforce such agreements was one of contract interpretation: Does a bare reference to “arbitration” necessarily contemplate one-on-one proceedings, or does it also encompass proceedings in which the claims of multiple parties are resolved? Courts divided, with some holding that a court cannot order class arbitration “absent an express

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concern to corporate America. It would be only a matter of time before businesses would put two and two together.”).

33 The earliest decision I am aware of which addressed an argument that an arbitration agreement precluded use of the class action device is *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957 (S.D.N.Y. 1988), *abrogated by* *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

34 Nagareda, *Aggregation*, *supra* note 10, at 1898.

35 See Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL’Y 477, 503–09 (2009); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1106 (2011).

36 For example, the agreement at issue in the landmark Seventh Circuit decision recognizing the enforceability of “shrinkwrap” contracts, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), provided: “Any dispute or controversy arising out of or relating to [this] Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.” *Hill v. Gateway 2000, Inc.*, 1996 WL 650631, at \*2 (N.D. Ill. Nov. 7, 1996) (No. 96 C 4086).

provision in the parties' arbitration agreement providing for [it],"<sup>37</sup> and others holding to the contrary.<sup>38</sup>

Perhaps because the meaning of "arbitration" is seemingly a question of state contract law, the Supreme Court did not enter the fray till 2010, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*<sup>39</sup> There, the Court held that the FAA establishes a federal default rule in favor of one-on-one proceedings, according to which "arbitration" means "one-on-one arbitration" absent a basis in the parties' agreement or state law for thinking otherwise.<sup>40</sup> Relying on snippets of prior opinions and the general purposes of the FAA, the majority opined that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."<sup>41</sup>

### C. *Second Generation Restrictions and the Rise of the Claiming Approach*

Although *Stolt-Nielsen* is a puzzling decision,<sup>42</sup> its significance for anti-aggregation doctrine is limited. That is because, by the time the case was handed down, anti-aggregation agreements had evolved. Rather than relying on the definition of "arbitration" to exclude aggregation, second generation agreements expressly rule it out. For example, Citibank's Checking Plus Account Agreement purports to exclude customers from bringing claims via a class action, in a private attorney general capacity, or simply in combination with other cus-

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37 *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 276–77 (7th Cir. 1995); *see also* *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (holding class arbitration may not be ordered in the absence of an express provision); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998) ("We conclude that to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration.").

38 *See, e.g.*, *Keating v. Superior Court of Alameda Cnty.*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 865 (Pa. Super. Ct. 1991).

39 130 S. Ct. 1758 (2010).

40 *Id.* at 1773–75.

41 *Id.* at 1775.

42 Like *Concepcion*, *Stolt-Nielsen* is striking for its inability to cite authority for the understanding of arbitration it adopts and the casual manner in which it federalizes basic questions of contract interpretation. It is also notable for ignoring the defendant's concession that the agreement under review could be read to allow arbitration, an example of larger phenomena described in Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 693–705 (2012). *See Stolt-Nielsen*, 130 S. Ct. at 1765 ("The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators.").

tomers involved in the same dispute.<sup>43</sup> Under the literal terms of the agreement, an action in which all relevant parties are joined cannot be maintained if the bank accidentally credits *A* for a deposit by *B*, or *C* undertakes to pay *D*'s obligations and fails to do so.<sup>44</sup>

Second generation agreements prompted a number of decisions that addressed the conflict between restrictions on aggregation and aggregation's claim-enabling function. One group of decisions maintained the conflict was of no consequence, because the FAA required enforcement of *any* procedural limitations in an agreement to arbitrate.<sup>45</sup> I set these to one side, because they offer no theory for when procedural limitations in an arbitration agreement are permissible; taken to their logical extreme, such decisions would allow dispute resolution by magic eight ball or mortal combat, provided it is required by an "arbitration agreement." A second group of decisions, which I focus upon, considered the relationship between anti-aggregation agreements and the viability of private regulatory enforcement, and invalidated anti-aggregation agreements with too great an effect on the incidence or availability of claiming. The most important decisions were delivered by the California Supreme Court in *Discover Bank v. Superior Court*<sup>46</sup> and the Second Circuit in *In re American Express Litigation*.<sup>47</sup> Although the U.S. Supreme Court overruled *Discover Bank* in *Concepcion*, one must understand both *Discover Bank* and *American Express* to understand the evolution of the claiming approach.

*Discover Bank* involved a second generation anti-aggregation agreement the bank imposed on holders of the Discover Card, which provided that "neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other cardmembers with

43 See *supra* text and sources accompanying note 2.

44 *Id.*

45 For example, the Third Circuit's decision in *Johnson v. West Suburban Bank*, 225 F.3d 366, 369, 373 (3d Cir. 2000), rejected a challenge to a provision that required one-on-one arbitration of claims under the Truth in Lending Act, on the ground that nothing in the Act evinced Congress's intention to *preserve* the availability of class-action claiming. For similar decisions, see, e.g., *James v. McDonald's Corp.*, 417 F.3d 672, 675, 677 (7th Cir. 2005); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926 (N.D. 2005).

46 113 P.3d 1100 (Cal. 2005).

47 *In re Am. Express Merchs.' Litig. (Amex I)*, 554 F.3d 300 (2d Cir. 2009), *cert. granted, judgment vacated sub nom.*, *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010), *aff'd on remand, In re Am. Express Merchs.' Litig. (Amex II)*, 634 F.3d 187 (2d Cir. 2011), *aff'd, In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204 (2d Cir. 2012), *reh'g en banc denied, In re Am. Express Merchs.' Litig. (Amex IV)*, 651 F.3d 139 (2d Cir. 2012) *cert. granted sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594. For a summary of *American Express's* procedural history, see *infra* note 57.

respect to other accounts, or arbitrate any claim as a representative or member of a class or in a private attorney general capacity.”<sup>48</sup> Cardmembers sought to bring suit against Discover in California court asserting a classic negative-value claim.<sup>49</sup> The bank, plaintiffs alleged, imposed a twenty-nine dollar late fee on customers who paid their bill after one p.m. on the date payment was due, without a legal basis for the charge.<sup>50</sup> Because no one would hire an attorney to prosecute a twenty-nine dollar claim, plaintiffs sought to represent a class of similarly situated cardholders. The bank moved to dismiss the suit in lieu of one-on-one arbitration.<sup>51</sup>

The California Supreme Court ruled that the anti-aggregation agreement was unconscionable as a matter of California contract law, because it destroyed the financial incentive for class-action lawyers to seek out and prosecute wrongdoing. Because “damages in consumer cases are often small . . . ‘the class action is often the only effective way to halt and redress . . . exploitation.’”<sup>52</sup> While “[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses,”<sup>53</sup> such waivers eliminated the “only” effective means of enforcing the law, exculpating the bank from liability for wrongdoing.

Based on its analysis of the Discover agreement, the court set out a general test for when a class-action waiver would not be enforced. Under it, the dispositive facts were that (1) the waiver was found “in a consumer contract of adhesion,” (2) “in a setting in which disputes between the contracting parties predictably involve small amounts of damages,” and (3) the party challenging the agreement alleged that the protected party carried out “a scheme to deliberately cheat large numbers of consumers out of individually small sums of money[.]”<sup>54</sup>

Thus stated, the holding of *Discover Bank* looked less like a judicial decision than a statutory rule. Rather than concluding that the

48 *Discover Bank*, 113 P.3d at 1103 (capitalization normalized). The agreement also provided that Delaware law would govern disputes between customers and the bank, an example of the exportation of state law authorized by the National Bank Act. See Issacharoff & Delaney, *supra* note 18, at 159–66. The California Supreme Court did not decide whether California law applied to claims of California cardholders, though it strongly implied that application of California law was necessary to vindicate the state’s public policy. See *Discover Bank*, 113 P.3d at 1118.

49 As used in the law-and-economics literature, a “negative value” claim is one in which the costs of litigating the claim are greater than the potential judgment. BONE, *supra* note 3, at 34.

50 *Discover Bank*, 113 P.3d at 1104.

51 *Id.*

52 *Id.* at 1108–09 (citing *Linder v. Thrifty Oil Co.* 2 P.3d 27, 38 (Cal. 2000)).

53 *Id.* at 1108.

54 *Id.* at 1110.

agreement before it had impermissible effects, *Discover Bank* established a rule which invalidated *any* agreement satisfying the court's three criteria.<sup>55</sup> In contrast, the other major judicial response to second generation agreements takes a narrower approach and focuses on whether an anti-aggregation agreement precludes the assertion of particular, identifiable claims.<sup>56</sup> The fullest statement of this approach appears in the Second Circuit's decision in *American Express*.<sup>57</sup>

That litigation involved a provision of American Express's agreement for "small" merchants that process up to \$10 million in transactions annually, which requires arbitration of disputes and prohibits merchants from participating in an action "in a representative capacity or as a member of any class of claimants."<sup>58</sup> Several merchants subject to the agreement alleged that the merchant agreement's "Honor All Cards" provision created an illegal product tie by requiring them to accept less profitable credit cards alongside Amex's traditional charge card.<sup>59</sup> Following the standard script, plaintiffs sought to avoid the anti-aggregation provision so they could share the costs of

55 See generally Fredrick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995) (describing and defending phenomenon of "opinions as rules").

56 See, e.g., *Dale v. Comcast Corp.*, 498 F.3d 1216, 1222–24 (11th Cir. 2007); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007); *Kristian v. Comcast Corp.*, 446 F.3d 25, 56–59 (1st Cir. 2006).

57 *American Express* has an unusual procedural history. The original appellate panel consisted of Circuit Judges Sack, Pooler, and Sotomayor. After the panel rendered its first decision, *In re Am. Express Merchs.' Litig. (Amex I)*, 554 F.3d 300 (2d Cir. 2009), Judge Sotomayor was elevated to the Supreme Court. Amex petitioned for certiorari, and the Supreme Court vacated the Second Circuit's decision for further consideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). *Am. Express Co. v. Italian Colors Restaurant*, 130 S. Ct. 2401 (2010). On remand, a two judge panel consisting of Judges Sack and Pooler reaffirmed the original panel decision. *In re Am. Express Merchs.' Litig. (Amex II)*, 634 F.3d 187, 200 (2d Cir. 2011). Following the Supreme Court's decision in *Concepcion*, the panel *sua sponte* placed a hold on the mandate to consider the effect of that decision. Six months later, the panel's final decision, *Amex III*, concluded that *Concepcion* did not affect the validity of *Amex I* and *Amex II*. *In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204, 214–19 (2d Cir. 2012). In *Amex IV*, the Court divided evenly on whether to rehear the case en banc. *In re Am. Express Merchs.' Litig. (Amex IV)*, 681 F.3d 139 (2d Cir. 2012). The Supreme Court granted certiorari, 133 S. Ct. 594 (2012), and will hear the case on February 27, 2013.

58 *Amex I*, 554 F.3d at 306 (capitalization normalized).

59 A tie is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958). A tie "violates § 1 of the Sherman Act if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." Eastman

claiming. Amex demanded that their action be dismissed in favor of one-on-one arbitration.<sup>60</sup>

Relying on *Mitsubishi's* statement that arbitration does not frustrate the objectives of the substantive law “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,”<sup>61</sup> plaintiffs sought to establish that enforcement of the anti-aggregation provision would make it prohibitively expensive for them to assert a tying claim against Amex. To this end, they introduced evidence from an economist and an attorney, which showed that due to the expense of hiring expert witnesses, it would cost “at least several hundred thousand dollars” to assert their claim.<sup>62</sup> Because the recovery available to an individual plaintiff was orders of magnitude smaller, plaintiffs contended that Amex’s agreement prevented “effective vindication” of the statutory cause of action.<sup>63</sup>

The Court of Appeals agreed and ordered that plaintiffs be permitted to proceed as a class. It anchored its decision on both *Mitsubishi* and Congress’s decision to authorize private enforcement of the Sherman Act. Where an anti-aggregation provision renders a particular claim negative value, the court reasoned, the agreement conflicts with Congress’s decision that there should be “strong private enforcement mechanisms and incentives in the antitrust statutes,” and effectively “grant[s] [the protected company] de facto immunity from antitrust liability.”<sup>64</sup> Despite the claim that enforcement of the anti-aggregation agreement would effectively immunize Amex from antitrust liability, the court did not consider the extent to which Amex is subject to other enforcement mechanisms.<sup>65</sup> Nor did it consider whether Amex had, in the case before it, violated the law. Instead, underscoring importance of claiming to its analysis, the court opined that if the class-action waiver were enforced, Amex would be shielded from liability “even where it *may have* violated the antitrust laws.”<sup>66</sup>

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Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462 (1992) (citing Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969)).

60 *Amex I*, 554 F.3d at 308.

61 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

62 *Amex I*, 554 F.3d at 316.

63 *Id.* at 315–16.

64 *Id.* at 320 (quoting Brief for Am. Antitrust Institute at 15).

65 *See id.* at 315–20.

66 *Id.* at 320 (quoting Brief for Am. Antitrust Institute at 15 (emphasis added)).



*D. Third Generation Restrictions and the Market for Legal Representation*

Third generation anti-aggregation agreements respond to the concern that restricting aggregation will eliminate *all* claiming by coupling strict restrictions on aggregation with incentives to bring suit in an individual capacity. The state-of-the-art is the agreement at issue in *Concepcion*, which was designed by AT&T and imposed on cellphone customers via AT&T's Wireless Service Agreement.<sup>67</sup> As a statistical matter, approximately a quarter of the readership of this Article is subject to that agreement.<sup>68</sup>

The AT&T agreement mandates one-on-one arbitration of disputes and prohibits class actions and other forms of aggregate litigation. Yet it also provides that AT&T will pay all costs of arbitration unless the arbitrator determines an action is frivolous, and makes available a \$7,500 premium—plus double attorneys' fees—if the arbitrator awards relief in excess of AT&T's last settlement offer prior to the selection of arbitrators.<sup>69</sup> For the individual claimant, the agreement makes pursuing a claim a lucrative undertaking. A \$100 claim litigated to judgment can result in a \$7,600 award against AT&T, with AT&T paying double the claimant's attorneys' fees.

Why would a profit-maximizing corporation provide outsized incentives for individuals to assert claims against it? The answer involves the possibility that by doing so, the corporation could also eliminate plaintiff-favoring features of aggregate litigation through the aggregation ban. If enforced, that ban eliminates the cost-spreading aggregation permits,<sup>70</sup> increases search costs for would-be claimants,<sup>71</sup> and frustrates the development of plaintiff-side expertise.<sup>72</sup> The logic—and likely objective—of third generation agreements is to

67 *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852 (9th Cir. 2009), *rev'd sub nom.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

68 *See, e.g., comScore Reports March 2010 U.S. Mobile Subscriber Market Share*, COMSCORE INC. (May 6, 2010), [http://www.comscore.com/Press\\_Events/Press\\_Releases/2010/5/comScore\\_Reports\\_March\\_2010\\_U.S.\\_Mobile\\_Subscriber\\_Market\\_Share](http://www.comscore.com/Press_Events/Press_Releases/2010/5/comScore_Reports_March_2010_U.S._Mobile_Subscriber_Market_Share).

69 Brief for Petitioner at 6–7, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893). Since the lower courts' decisions in *Concepcion*, the premium has been raised to \$10,000. *See id.*

70 *See supra* text accompanying note 3.

71 *Cf. Martin H. Redish & Nathan D. Larsen, Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1586 (2007) (“In the class action, absent parties traditionally remain passive, ceding the control of litigation strategy to those who serve as named parties.”).

72 *See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974) (observing that repeat litigants “develop expertise,” “have ready access to specialists,” and “enjoy economies of scale and enjoy low start-up costs for any case”).

diminish the defendant's net liability exposure by restricting claimant-favoring features of aggregate litigation, all while rebutting the contention that the agreement eliminates claiming entirely.<sup>73</sup> Stated differently, agreements such as AT&T's reflect a bet that the settlements, judgments, premium payments, and attorneys' fee awards that result from encouraging individuals to sue will be less than the company's liability exposure if aggregation is permitted.<sup>74</sup>

No court decision has fully explored the legal implications of that bet.<sup>75</sup> When AT&T's third generation agreement was challenged in California federal court, the Ninth Circuit concluded that its validity was controlled by *Discover Bank*, even though *Discover Bank* involved a *second* generation agreement that eliminated claiming entirely rather than suppressing it through a "plaintiff-friendly" arbitration agreement. The court predicted that AT&T would simply settle claims to avoid paying the \$7,500 premium,<sup>76</sup> and ruled that this doomed the agreement because it destroyed the incentive for class action lawyers

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73 Further evidence that the purpose of third generation anti-aggregation agreements is to suppress claiming can be found in the fact that agreements to arbitrate are disproportionately used in consumer contracts, notwithstanding the broad applicability of the reasons corporations give for favoring arbitration. See Eisenberg et al., *supra* note 11, at 893 (concluding from study of varying use of arbitration clauses across contracts within the same firms that "consumer arbitration clauses are used as means for avoiding aggregate dispute resolution"). There is also anecdotal evidence that corporate actors impose mandatory bilateral arbitration to suppress claiming. See, e.g., *Class Action Bans in Arbitration Pacts Could Create Limits on Substantive Rights*, 72 U.S.L.W. 2294 (2003) (reporting a Mayer Brown lawyer's statement that he advises employers to impose aggregation agreements on employees because "you can usually avoid class actions"); Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L. J. 141, 141 (1997) (recommending that franchisors impose arbitration agreements on franchisees "[s]ince many (and perhaps most) of the putative class members may never [pursue individual claims], and because arbitrators typically do not issue runaway awards").

74 Of course, this can be stated algebraically. Let  $L_i$  equal the expected liability the company faces from individual claiming regardless of incentives to sue,  $L_i^*$ , the expected liability the company faces if it provides incentives for individual claiming,  $L_a$ , the expected liability the company faces if aggregation is permitted, and  $P$  the probability that the agreement will be upheld. Adoption of a third generation agreement is cost-justified when  $L_i + L_i^* + 1 - P(L_a) > L_i + L_a$ . When  $L_i$  is zero because individual claims are negative value, adoption of a third generation agreements is cost effective when  $L_i^* + 1 - P(L_a) > L_a$ .

75 A possible exception is the district court opinion in *Concepcion, Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at \*11 (S.D. Cal. Aug. 11, 2008) (No. 05cv1167 DMS (AJB)). That opinion, however, turned primarily on the district court's understanding of California law, not the broader effects of enforcing the agreement.

76 *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855–56 (9th Cir. 2009).

to seek out violations of the law.<sup>77</sup> When the Supreme Court reviewed the Ninth Circuit's decision, it did not focus on the AT&T agreement. Instead, the Court addressed the very different question of whether the *Discover Bank* rule in its entirety was preempted by the FAA, and held that it was.<sup>78</sup> The Court reasoned that while that rule did not formally mandate the availability of class-wide arbitration, "it allows any party to a consumer contract to demand it"—a result "inconsistent with the FAA" because it interferes with the Act's policy of promoting "streamlined proceedings and expeditious results."<sup>79</sup> The Court's discussion of the AT&T agreement's effects was limited to a brief rebuttal of the dissent's argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."<sup>80</sup> This argument did not save *Discover Bank* from preemption, the majority concluded, because "States cannot require a procedure that is inconsistent with the FAA," and "the claim here was most unlikely to go unresolved."<sup>81</sup>

Although no court has explored the implications of a third generation agreement, a proposal by Professor Nagareda suggests the contours of a claim-based analysis.<sup>82</sup> Nagareda's proposal is characteristically nuanced, but its crux is that in determining whether an anti-aggregation agreement is enforceable, courts should focus on how the agreement affects the market for *representation* of legal claims.<sup>83</sup>

Nagareda begins by noting the mantra that arbitration will not disrupt the remedial and deterrent schemes created by Congress so long as arbitration allows effective vindication of statutory rights.<sup>84</sup> From this, he concludes that the key limitation on anti-aggregation agreements is that they respect the institutional role of Congress, and particularly Congress's decision to authorize private enforcement of a statutory scheme: "The legitimacy of the arbitral forum . . . stems from the premise that an arbitration clause lacks the power to alter preexisting rights in the manner of reform legislation."<sup>85</sup> An agreement

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77 *Id.*

78 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' . . . California's *Discover Bank* rule is preempted by the FAA." (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

79 *Id.* at 1749–51 (citations omitted).

80 *Id.* at 1753.

81 *Id.*

82 See Nagareda, *Aggregation*, *supra* note 10.

83 See *id.* at 1901.

84 See *id.* at 1897.

85 *Id.* at 1901.

violates this limitation when “the waivers in nominally private contracts take on a public, law-reform dimension, effectively writing out of substantive law the notion of private enforcement.”<sup>86</sup>

How do we know if an agreement takes on “a public, law-reform dimension”? Nagareda proposes that “courts . . . examine carefully the framework for the bringing of claims on an individual basis [and] specifically, the financial arrangements to do so in the absence of aggregation.”<sup>87</sup> The “central question” in this analysis “is whether the unavailability of aggregation would reduce the potential upside [to plaintiffs’ counsel] to such a degree as to demonstrate a ‘likelihood’ that lawyers will not represent claimants.”<sup>88</sup> Where *some* claiming remains possible—as with third generation agreements that provide reasonable incentives for individual claiming—the agreement may be enforced. But where an agreement makes *all* claiming negative value, it cannot be enforced because it “write[s] private enforcement out of the underlying statute.”<sup>89</sup>

Though Nagareda’s analysis is premised on the legislative decision to permit private enforcement, he does not explain why the decision to create a private right of action should be equated with individual as opposed to aggregate claiming or why, when Congress creates a private right of action, it should be understood to be speaking to the financial relationship between a claimant and her attorney. He does not indicate what *kind* of legal representation an anti-aggregation agreement must allow, despite the significant differences between lawyers that represent individual claims and major plaintiffs’ firms. Nor does he link his analysis to any particular statute that authorizes private regulatory enforcement. Rather, like the judicial response to first and second generation restrictions on aggregation, the dispositive consideration is an agreement’s effect on claiming. While analysis of anti-aggregation agreements “calls for nuanced treatment sensitive to context,”<sup>90</sup> the bottom line is whether an agreement permits claiming with the benefit of counsel.

## II. PROBLEMS WITH THE CLAIMING APPROACH

As the prior Part describes, the fundamental value vindicated by the claiming approach is preserving claiming. Despite superficial differences in the tests promulgated by courts and commentators, all

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86 *Id.* at 1902.

87 *Id.* at 1904.

88 *Id.* at 1905 (citations omitted).

89 *Id.* at 1904.

90 *Id.* at 1896.

forms of the claiming approach are remarkably consistent when considered from a functional perspective. At bottom, the approach asks, “What effect does an agreement have on claiming?” Too great an effect—too little claiming (whether in an arbitral or judicial forum)—and an anti-aggregation agreement is not enforced.

This Part and the next outline previously unidentified problems with this approach and consider their consequences for judicial regulation of anti-aggregation agreements. A threshold problem involves the legal basis for the claiming approach. All versions of the approach require a particular level of claiming: *Discover Bank*, the level that prevails in public court; *Amex*, claiming that is financially practical; and the “market for representation” standard the level that prevails if there is a viable market for individual legal representation.<sup>91</sup> But the argument that the law *ever* requires a particular level of claiming is tenuous.

The more important problems have to do with how the claiming approach implements the concerns it is motivated by. At bottom, doctrines that follow the claiming approach are concerned with the potential that anti-aggregation agreements will permit unchecked wrongdoing. Where competition between sellers fails to regulate dispute resolution procedure, the fear is that anti-aggregation agreements will eliminate an essential deterrent mechanism and lead to unremedied violation of the law.<sup>92</sup> Yet by focusing on *claiming* instead of regulatory outcomes, the analysis sweeps both too broadly and not broadly enough. Too broadly, because strong forms of the analysis (e.g., *Discover Bank*) invalidate agreements that have no substantial effect on regulatory compliance. Not broadly enough, because weak forms of the analysis (e.g., the market for representation standard)

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91 See *infra* Part II.A.

92 There is a rich literature on the reasons why competition may fail to provide adequate regulation of non-salient contractual terms. See, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. REV. 1373, 1388–1394 (2004) (describing competitive dynamics that encourage exploitative pricing mechanisms in credit card agreements); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1222–24, 1288–89 (2003) (arguing that buyers of mass-market goods and products are rationally indifferent to non-salient contractual terms and proposing that courts substitute penalty terms for terms that exploit buyer ignorance). Here, I assume market failure in at least some areas where anti-aggregation agreements are employed, and that generalist courts are incapable of conducting reliable economic analyses of the relevant market every time an anti-aggregation agreement is challenged. Cf. *id.* at 1285 (“Judicial determinations of which contract terms are efficient and which terms are inefficient are subject to a high likelihood of error.”).

permit extensive, unremedied wrongdoing so long as a modicum of claiming is preserved.

None of these problems is necessarily fatal. Nearly all laws are over- or under-inclusive relative to their justification and there are circumstances in which imprecise tailoring helps to accomplish the objectives of the law.<sup>93</sup> But in view of the Supreme Court's preference for private dispute resolution, an exclusive focus on claiming works serious mischief. The claiming approach rejects anti-aggregation agreements in the absence of clear legal authority or demonstrated harms, based on conclusions about the relationship between claiming, corporate wrongdoing, and compliance that turn out to be surprisingly speculative. That, in turn, leads to doctrinal incoherence.

### A. *Baseline Problems*

The initial difficulty with the claiming approach involves the baseline it uses to determine the validity of an anti-aggregation agreement. All versions of the claiming approach reject agreements that do not preserve a particular level of claiming. They fail to show, however, that any level of claiming is required by law.

To simplify the discussion, I take as an example the *American Express* decisions discussed in Part I.C.<sup>94</sup> In defense of its anti-aggregation provision, Amex pointed out that the Clayton Act, which creates a private right of action to enforce the antitrust laws, provides expert and attorneys' fees to successful litigants.<sup>95</sup> Amex's arbitration agreement did not alter these statutory incentives, thus the company argued that its one-on-one arbitration agreement was consistent with Congress's judgment regarding the appropriate incentives to sue.

The Second Circuit rejected the argument because it thought the fees provided by Congress did too little to encourage claiming. The court reasoned that the forty dollar per diem for expert witnesses under the Clayton Act was "not going to pay for the expert fees [the plaintiffs' expert] estimated will be necessary to make an individual plaintiff's case . . . ."<sup>96</sup> And "[e]ven with respect to reasonable attorney's fees, which are shifted under § 4 of the Clayton Act, *the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their*

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93 See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1507–12 (2008); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67–68 (1983).

94 See *supra* notes 58–64 and accompanying text.

95 See *In re Am. Express Merchs.' Litig. (Amex I)*, 554 F.3d 300, 317 (2d Cir. 2009).

96 *Id.*

*evaluation of their suit's potential costs.*"<sup>97</sup> The court thus seems to have assumed that the plaintiff-side incentives to sue that prevail under the patchwork of procedural rules and statutes that govern in public court hold the status of prescriptive law, or at least a baseline from which too much deviation is not tolerated.

As a threshold matter, the court's reasoning is puzzling because the Clayton Act was enacted prior to the invention of the modern class action in 1966. More recent statutes, such as the Truth in Lending Act, reflect Congress's expectation that class action litigation will be available to enforce the statute's commands.<sup>98</sup> But the Clayton Act merely provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."<sup>99</sup> Enacted in 1914, there is no indication that Congress saw class action litigation as an essential component of the antitrust enforcement framework.

More fundamentally, the legal authorities the court invoked for the proposition that claiming must be cost-effective do not say that. As noted above, the court relied on two authorities: the Supreme Court's statement in *Mitsubishi* that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function,"<sup>100</sup> and Congress's decision to allow private enforcement of the Sherman Act. Neither, however, speaks to the cost-effectiveness of private claiming.

The Court's statement in *Mitsubishi* must be read in light of the fact that the rules which govern proceedings in public court generally leave parties where they are, neither guaranteeing the cost-effectiveness of claiming on the one hand nor using the cost of process to deter litigation on the other. For example, the "American rule" of attorneys' fees holds that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing

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97 *Id.* at 318 (emphasis added); accord *In re Am. Express Merchs.' Litig.* (*Amex III*), 667 F.3d 204, 218 (2d Cir. 2012).

98 See 15 U.S.C. § 1640(a)(1) (2006 & Supp. V) (specifying allowable damages and formula for calculating damages in certain class actions); S. REP. NO. 94-590, at 8 (1976) (noting, in amendments to Truth in Lending Act, that "[t]he chief enforcement tool will continue to be private actions for actual damages and civil penalties").

99 15 U.S.C. § 15(a) (2006 & Supp. V).

100 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

therefor.”<sup>101</sup> Where not modified by statute, the rule makes countless claims negative value, because the cost of hiring an attorney exceeds the expected judgment.

Because of the neutrality toward claiming reflected in ordinary procedural rules, it is difficult to understand the Supreme Court’s statement about “effective” vindication of rights as a mandate that claiming be cost-effective. That interpretation would not only work a significant change in federal procedure, but place parties subject to an anti-aggregation agreement at an advantage to litigants in the ordinary courts, since only parties subject to an anti-aggregation agreement would be guaranteed cost-effective claiming. Moreover, statutes providing attorneys’ fees, damage multipliers, and other incentives to sue would become superfluous, because lawsuits would already be subject to a cost-effectiveness requirement.

Another way of approaching the problem is to consider the factors that influence the economics of claiming. The desirability of asserting a claim at any point in time depends on the currently applicable procedural rules, the cost and availability of litigation financing, and the remedies available if liability is established. But these things are not static. Changes in procedural rules make it easier or more difficult for claimants to win;<sup>102</sup> changes in the capitalization and structure of plaintiff-side firms affect the availability of financing;<sup>103</sup> and changes in remedies affect the judgments claimants can expect to recover.<sup>104</sup> There is no obvious reason for privileging the incentives to sue that obtain under any combination of these factors, yet this is exactly what the court’s decision requires.

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101 *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); see also *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) (“The general practice of the *United States* is in opposition [sic] to [awarding the prevailing party attorneys’ fees]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.”).

102 Consider, for example, the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005), which was enacted with the twin purposes of “mak[ing] it harder for plaintiffs’ counsel to ‘game the system’ by trying to defeat diversity jurisdiction” and “plac[ing] the determination of more interstate class action lawsuits in . . . the federal courts.” S. REP. NO. 109-14, at 5.

103 See generally Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010) (describing existing financing systems and proposing regulatory reforms to facilitate a robust litigation-finance market).

104 Consider, for example, the Telephone Consumer Protection Act (as amended by the Junk Fax Prevention Act of 2005), 47 U.S.C. § 227(b)(3)(B) (2006), which imposes a statutory penalty of \$500 per fax on anyone who sends an unsolicited fax advertisement.



That leaves Congress's decision to permit private enforcement to support the court's judgment. But here, the court overreads the authorities. For the reasons just explained, the mere creation of a statutory cause of action cannot be understood to require that claiming be cost-effective. And the other incentives to sue established by statute—such as attorneys' fees under the Clayton Act—are preserved by Amex's anti-aggregation agreement.

Focusing on particular claims that become negative value because of an anti-aggregation agreement changes the frame within which these problems arise, but does not remedy them. *American Express* reasoned that “forcing plaintiffs to bring their claims individually . . . would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute.”<sup>105</sup> However, this kind of “conflict” with Congress's purposes exists any time plaintiffs intend to rely on sufficiently expensive experts, regardless of whether the claim is subject to an anti-aggregation agreement. Moreover, the court nowhere explained how Congress mandated that it be cost-effective to pursue particular claims, or how its analysis could be reconciled with Congress's decision to provide financing mechanisms *inadequate* to pay for the plaintiffs' preferred experts. Conceding that “the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court,” the best the court could offer was the tautology, “[e]radicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes.”<sup>106</sup>

### B. Addressing Unremedied Wrongdoing—Overbreadth

The claiming approach's assumption that the law requires a particular level of claiming has a tenuous legal basis. But that does not mean that the approach is necessarily misguided. Perhaps the claiming approach's insistence on preserving a particular level of claiming can be justified on the ground that doing so is necessary to ensuring compliance with the law.

Without doubt, there are circumstances in which private claiming is essential to compliance. In the era of Madoff and AIG, it is hard to imagine a public official expending resources to enforce the Junk Fax

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105 *In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204, 213 n.5 (2012).

106 *Id.* at 213 n.5, 218.

Prevention Act of 2005,<sup>107</sup> which expresses our profound national commitment to “provid[ing] all individuals with fax machines . . . protections from unsolicited senders of unsolicited faxes, and an opportunity to opt out of receiving future unsolicited faxes from them.”<sup>108</sup> But it is logically dubious to conclude from this that a particular level of claiming is essential to compliance with most statutory schemes. The problem is threefold.

(1) *Varying deterrent effects*—First, the deterrent effect of private claiming is not uniform. Some norms are widely observed in the absence of private claiming,<sup>109</sup> others are widely observed despite generating significant claiming,<sup>110</sup> and still others are widely violated while generating widespread claiming.<sup>111</sup> To assume a decrease in compliance from a mere decrease in claiming, private claiming must be known to serve a deterrent function. But no form of the claiming approach is premised on such a showing.

(2) *The connection between wrongdoing and claiming*—Relatedly, violations of the law in the real world do not necessarily result in claiming. As a leading observer explains, “the arrival of matters at the doors of lawyers and courts is a late stage in an extended process by which the dispute has crystallized out of the sea of proto-disputes.”<sup>112</sup> “Changes in perceptions of harm, in attributions of responsibility, in expectations of redress, [and] in readiness to be assertive . . . all . . . affect the number of grievances, claim and disputes.”<sup>113</sup>

107 Pub. L. No. 109-21, 119 Stat 359 (2005) (amending the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2000)).

108 S. REP. NO. 76, at 9 (2005). A docket search confirms that no actions were brought by public agencies in federal court for violation of the Junk Fax Act in calendar year 2010. See BloombergLaw Docket Search (Feb. 2, 2012) (on file with *Notre Dame Law Review*).

109 For an example, recall the rule that cars must drive on the right side of the road.

110 For an example, recall trademark protections; despite highly visible disputes over particular marks, most marks are respected most of the time.

111 See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (describing persistence of “second generation” forms of workplace discrimination even as overt discrimination against women and people of color has diminished in response to employment discrimination litigation); see also Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1228–29 (2011) (describing ways in which prohibitions of sexual harassment perpetuate workplace discrimination).

112 Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 12 (1983).

113 *Id.* at 18.

These intuitions are formalized in the well-known literature on the economics of litigation and settlement, which attempts to identify conditions in which claimants will bring suit rather than settle or abandon claims.<sup>114</sup> One of that literature's central insights is that the study of litigated cases "discloses very little about how legal rules affect the behavior of those subject to them or affect the generation of legal disputes themselves."<sup>115</sup> Instead, the literature hypothesizes that the fact of claiming typically reflects non-merits factors, such as parties' inability to agree on the value of a claim, unequal access to information, differential stakes, or hubris.<sup>116</sup> The problem this poses for the claiming approach is simple: if the fact of claiming is not a good indicator of primary behavior, it is difficult to see why the law should demand any level of claiming.

(3) *The effect of alternate law enforcement mechanisms*—Lastly, as corporate defendants are fond of pointing out, claiming may be superfluous if other enforcement mechanisms provide robust enforcement of the law. The point is illustrated in many cases testing the enforceability of an anti-aggregation agreement.

The plaintiff in these cases typically contends that the agreement reflects an attempt by the defendant to immunize itself against liability for wrongdoing.<sup>117</sup> The defendant responds by making a display of

114 See, e.g., Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. 92 (1997); Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29 (1995); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985) (responding to Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985)); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 59–60 (1982).

115 Priest & Klein, *supra* note 114, at 1.

116 See, e.g., *id.* at 39–40 (hypothesizing that fact of litigation reflects legal uncertainty or different stakes between parties to a dispute); Hylton, *supra* note 114, at 188 (hypothesizing an asymmetric access to information); Shavell, *supra* note 114, at 59–60 (hypothesizing excessive optimism on the part of plaintiff or defendant). The hypothesis that claiming is driven by non-merits factors yields a prediction—that plaintiffs will prevail in approximately fifty percent of litigated disputes—that has considerable empirical support. See, e.g., Priest, *supra* note 114, at 234; Priest & Klein, *supra* note 114, at 31–54. *But see* Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 494 (1996) (concluding that any plaintiff win rate may be observed if parties have asymmetrical access to information).

117 See, e.g., Brief for Respondents at 4, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893) ("The agreement . . . allows AT&T to negate the incen-

the strength, diversity, and effectiveness of other law enforcement mechanisms it is subject to. For example, in *Concepcion*, AT&T touted the fact that it was subject to oversight by “a whole host of federal and state agencies—including the Federal Communications Commission, the Federal Trade Commission, the state attorneys general, and the state public utility commissions.”<sup>118</sup> Aggregate claiming, AT&T implied, was in no way necessary to guarantee its compliance with the law; even if claiming is reduced or eliminated, these other actors would step in.

Courts have not yet worked out a rigorous response to this debate.<sup>119</sup> But for present purposes, what is crucial is the shortcoming in the claiming approach the debates highlight. Insofar as that approach is motivated by a desire to ensure that anti-aggregation agreements do not permit unremedied wrongdoing, it is incomplete because it does not account for enforcement of the law through other mechanisms, at either a general or case-by-case level.

A hypothetical will amplify the point. Suppose that companies *A* and *B* are headquartered in states *Green* and *Red* and compete in the same national market for a consumer product. *A* is subject to aggressive oversight by the Attorney General of *Green*, but industry has captured state regulators and lawmakers in *B*'s home state *Red*. If both *A* and *B* adopt the same anti-aggregation agreement, the case for invali-

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tives that consumers who suspect systemic fraud or deceptive practices might have to investigate, determine whether they have a legal claim, and prosecute that claim. It also effectively eliminates any incentive a lawyer might have to represent such consumers.”).

118 Brief for Petitioner at 45, *Concepcion*, 131 S. Ct. 1740 (No. 09-893).

119 Some, such as the California Supreme Court in *Discover Bank*, insist that claiming always plays a critical enforcement role but fail to substantiate their view. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109–10 (Cal. 2005). Others conclude just as casually that no gap in deterrence will result from giving effect to an anti-aggregation agreement. For example, a widely cited Third Circuit decision, *Johnson v. West Suburban Bank*, rejected the argument that an anti-aggregation agreement frustrated the objectives of the Truth in Lending Act, based in part on the theory that “the statute’s administrative enforcement provisions . . . offer meaningful deterrents to violators of the TILA if private enforcement actions should fail to fulfill that role.” 225 F.3d 366, 375 (3d Cir. 2000) (emphasis added). The court’s prediction that “meaningful deterrents” would ensure compliance was based solely on the authority of federal agencies to enforce the statute; the court did not suggest that any agency had the capacity to enforce the statute, and the prediction appears to have been flatly wrong. The years following *Johnson* saw massive mortgage fraud by subprime lenders, which was not deterred by the TILA’s administrative enforcement provisions. See FINANCIAL CRISIS INQUIRY COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 160–64 (2011).

dating *B*'s agreement would be substantially stronger than the case for invalidating *A*'s. Because of regulatory capture in *Red*, enforcement of *B*'s agreement would lead to a total enforcement gap, allowing even significant wrongdoing to go without a remedy. Enforcement of *A*'s, however, would merely remove a backstop to the state attorney general's efforts.

Analyses that privilege claiming are insensitive to this distinction. Because both agreements have an identical effect on claiming, they would stand or fall together.

### C. Addressing Unremedied Wrongdoing—Underbreadth

The result of the foregoing problems is overbreadth. When claiming does not serve a deterrent function, wrongdoing does not result in claiming, or alternate remedial mechanisms provide robust enforcement, the argument that aggregation is essential to policing compliance with the law breaks down. But invalidating agreements that have no substantial effect on compliance is not the only way in which the claiming approach is poorly tailored. If only a small level of claiming is required—as with the market-for-representation approach advocated by Professor Nagareda—the claiming approach becomes *under-inclusive*. Here, anti-aggregation agreements are enforced even if they permit widespread wrongdoing, provided they preserve a modicum of individual claiming.<sup>120</sup>

That is significant, because it is reasonable to expect that in a non-trivial number of cases, modern anti-aggregation agreements will make widespread wrongdoing financially attractive. As detailed above, third generation agreements reduce the defendant's overall liability exposure by prohibiting plaintiff-side cost-spreading, increasing search costs, and thwarting the development of plaintiff-side expertise, while preserving a modicum of claiming.<sup>121</sup> Though they preserve individual claiming, such agreements also create a powerful incentive to engage in widespread, low-stakes wrongdoing by eliminating the possibility that it will be fully remedied.

Defenders of the claiming approach might respond that this simply shows more claiming is needed, to force the defendant to internalize the costs of its behavior. But if we attempt to implement that

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120 See Nagareda, *Aggregation*, *supra* note 10, at 1904 (“The real question about a given waiver of class-wide arbitration is whether, if enforced, it effectively would write private enforcement out of the underlying statute. This question calls for courts to examine carefully the framework for the bringing of claims on an individual basis . . .”).

121 See *supra* text accompanying notes 71–73.

suggestion, the claiming approach ceases to supply a judicially manageable standard for evaluating anti-aggregation agreements. Assuming there are *some* circumstances in which an agreement may be honored, a court would need to identify whether a particular agreement is part of the critical mass necessary for effective deterrence to determine whether it could be enforced. For fairly obvious reasons, that question will be difficult for courts to answer.

#### D. *The Role of Private Ordering*

A final problem with the claiming approach involves its fit in the larger body of federal dispute resolution jurisprudence. *Ex ante* agreements governing dispute resolution procedure are increasingly given effect by courts.<sup>122</sup> This body of law raises difficult questions about legislative intent and the ability of competition to provide adequate regulation of dispute resolution procedure. At the theoretical level, however, recognition of private procedural ordering is justified by the same considerations that generally justify giving the force of law to private promises. Because each side “attaches its own unique value to the objects that are exchanged,” enforcing promises improves welfare in the long run.<sup>123</sup> If a market is competitive, this holds even if agreements are not individually negotiated, as with standard-form contracts of adhesion.<sup>124</sup>

The difficulty this raises for claim-based analyses is that they do not incorporate a theory of the circumstances in which private ordering should be respected. The claiming approach does not demand a showing of buyer exploitation, competitive dynamics likely to produce inefficient contract terms, or other forms of market failure.<sup>125</sup> Instead, it singles out the right to assert claims with others and holds that in broad categories of cases, that right is not a proper subject of exchange. That is puzzling, because at least some of the interests commonly vindicated through aggregate litigation—such as the enforcement of contractual obligations—are quintessentially private entitlements widely recognized to be proper subjects to private

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122 Professor Henry Noyes catalogs rights that have been found subject to private modification or waiver, including constitutional “due process” rights, the Seventh Amendment right to trial by jury, rules of evidence, and procedural rules governing discovery and settlement. Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 599–612 (2006).

123 RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 42 (2003).

124 See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 116 (6th ed. 2003).

125 Cf. Korobkin, *supra* note 92, at 1279–85.

exchange.<sup>126</sup> To be sure, many aggregate proceedings vindicate public interests, such as ensuring compliance with the antitrust laws.<sup>127</sup> The claiming approach, however, makes no effort “to disentangle the private and public purposes of a citizen-initiated lawsuit,”<sup>128</sup> and instead treats all claims equally. Any agreement with too great an effect on the incidence and availability of claiming is suspect.

### III. THE CLAIMING APPROACH IN *CONCEPCION*

As the prior Part shows, there are problems with the claiming approach. The metric that approach tests for is not required by law. The approach is over- and under-inclusive, with strong versions invalidating agreements that have no substantial effect on compliance and weak versions enforcing agreements that permit widespread wrongdoing. And the approach fails to offer an account of the circumstances in which private ordering should be respected.

These problems manifest themselves in doctrinal incoherence. When the Supreme Court attempts to reconcile the claiming approach with the preference for private ordering it has read into the FAA, the Court perceives a binary choice between claiming and private ordering. The possibility that private ordering might give rise to substantial harms is lost, as is the possibility that the law might respond to such harms when they arise while generally respecting private ordering.

There is no better example than *Concepcion*. Confronted with the district court’s findings that AT&T’s anti-aggregation agreement “sufficiently incentivizes consumers in disputes involving small dollar amounts to pursue [the] informal claims process,” and that individual consumers were better off under the agreement than if class actions

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126 See, e.g., *Yu v. State St. Corp.*, 686 F. Supp. 2d 369, 375 (S.D.N.Y. 2010). On parties’ authority to limit contractual remedies, see, for example, *Martin Marietta Corp. v. Int’l Telecomms. Satellite Org.*, 991 F.2d 94, 98 (4th Cir. 1992) (“Equally sophisticated parties who have the opportunity to allocate risks to third party insurance or among one another should be held to only those duties specified by the agreed upon contractual terms and not to general tort duties imposed by state law.” (quoting *Martin Marietta Corp. v. Int’l Telecomms. Satellite Org.*, 763 F. Supp. 1327, 1332 (D. Md. 1991))); *Wilson Trading Corp. v. David Ferguson, Ltd.*, 244 N.E.2d 685, 687 (N.Y. 1968) (“Parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract.”).

127 See, e.g., *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 114 (S.D.N.Y. 2010).

128 Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22 (1996).

were available,<sup>129</sup> the Ninth Circuit offered only the assertion that the policy of California law is to encourage claiming to justify invalidating the agreement.<sup>130</sup> Moreover, the *Concepcion* plaintiffs provided little evidence to show that the AT&T agreement had problematic effects. In the Supreme Court, they pointed to only four publicly available sources to show the agreement allowed unchecked wrongdoing: (1) AT&T's inability to show that "'claims . . . for deceptive advertising' or 'other alleged wrongdoing'" had been resolved through arbitration (plaintiffs did not explain why AT&T would have arbitrated such claims while *Discover Bank* was on the books);<sup>131</sup> (2) a decision by a Washington district court finding that "AT&T was involved in fewer than 200 consumer arbitrations—representing, at that time, roughly 0.0029 percent of AT&T's customers—over a five-year period from 2003 to 2007" (again, plaintiffs did not explain why AT&T should be expected to have participated in more arbitrations at a time when aggregate proceedings were permitted by *Discover Bank*);<sup>132</sup> (3) reports by two government agencies concluding that many consumers are unhappy with their cellphone service;<sup>133</sup> and (4) a statement by the Better Business Bureau to the effect that "the wireless industry generates more consumer complaints than any other industry."<sup>134</sup> Beyond this, plaintiffs proffered no evidence regarding the extent to which the AT&T agreement allowed unchecked wrongdoing. The district court made no findings to this effect.<sup>135</sup>

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129 *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at \*11 & n.10 (S.D. Cal. Aug. 11, 2008) (No. 05CV1167 DMS (AJB)).

130 *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009) ("The provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim. Although this is, in and of itself, a good thing, the problem with it under California law—as we read that law—is that not every aggrieved customer will file a claim.").

131 Brief for Respondents at 4, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010) (citation omitted).

132 *Id.* at 4 (citing *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1257 (D. Wash. 2009)).

133 *Id.* at 5 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-34, FCC NEEDS TO IMPROVE OVERSIGHT OF WIRELESS PHONE SERVICE (2009), available at <http://www.gao.gov/new.items/d1034.pdf>; FED. COMM'NS COMM'N, FCC SURVEY CONFIRMS CONSUMERS EXPERIENCE MOBILE BILL SHOCK AND CONFUSION ABOUT EARLY TERMINATION FEES (2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-298415A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298415A1.pdf)).

134 *Id.* at 6 (citing Mary Pilon, *Cellphone Industry Sparks the Most Complaints*, WALL ST. J. DIGITS BLOG, (Mar. 8, 2010, 1:36 PM), <http://blogs.wsj.com/digits/2010/03/08/cellphone-industry-sparks-the-most-complaints/>).

135 *See Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at \*2–5 (S.D. Cal. Aug. 11, 2008) (No. 05CV1167 DMS (AJB)).



For the block of the Supreme Court open to private ordering and hostile to aggregation to begin with, this was too much to take. Speaking through Justice Scalia, the Court bemoaned that the *Discover Bank* rule “allows any party to a consumer contract to demand [aggregation],” notwithstanding the FAA’s requirement that agreements to arbitrate be enforced “according to their terms.”<sup>136</sup> This put *Discover Bank* squarely at odds with the FAA, which ostensibly embodied Congress’s commitment to “streamlined proceedings and expeditious results.”<sup>137</sup>

The Court, however, seemed almost oblivious to the possibility that enforcement of an anti-aggregation agreement could turn courts into accessories to wrongdoing. The only section of its opinion that acknowledged the possibility responded to the dissent’s argument that a state could mandate class-wide arbitration to ensure that “small-dollar claims” do not “slip through the legal system.”<sup>138</sup> “States,” the Court retorted, “cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>139</sup> The Court immediately made clear, however, that no such wrongdoing was at issue in *Concepcion*, because “the claim here was most unlikely to go unresolved.”<sup>140</sup>

Accordingly, as a matter of reading precedent, *Concepcion* does not preclude all judicial scrutiny of anti-aggregation agreements.<sup>141</sup>

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136 *Concepcion*, 131 S. Ct. at 1748, 1750.

137 *Id.* at 1749 (internal quotation marks omitted). The Court elided the fact that the Congress which enacted the FAA in 1925 could not possibly have had a view on the transformation in class action practice that followed the 1966 amendments to the federal rules.

138 *Id.* at 1753.

139 *Id.*

140 *Id.* (citations omitted) (“[T]he arbitration agreement provides that AT&T will pay claimants a minimum of \$7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT&T’s last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be ‘essentially guarantee[d]’ to be made whole . . .”).

141 *Accord In re Am. Express Merchs.’ Litig. (Amex III)*, 667 F.3d 204, 216–17 (2d Cir. 2012) (concluding that *Concepcion* did not overrule an earlier doctrine holding that an anti-aggregation agreement must permit the effective vindication of statutory rights, and that an arbitration agreement containing an anti-aggregation provision may be challenged on the ground that it makes claiming cost-prohibitive); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639–40 (2012) (noting that there are many classes of cases that class action waivers simply cannot reach). *But see Litman v. Cellco P’ship*, 655 F.3d 225, 231 (3d Cir. 2011) (“[T]he holding of *Concepcion* [is] broad and

But the unthinking way in which the majority dispatched *Discover Bank* suggests the claiming approach's problems of doctrinal design are enduring. In *Concepcion*, there was no credible suggestion that AT&T's agreement permitted extensive wrongdoing. But when that case inevitably occurs, the response will be the same. The validity of the agreement will turn on a fact of questionable relevance—the agreement's effect on claiming—setting up another round of Supreme Court kabuki.

#### IV. THE OUTCOMES APPROACH

The claiming approach responds to the risks created by anti-aggregation agreements by focusing on an agreement's effect on claiming. Although some versions of the approach survive *Concepcion*, this fact does not mitigate the analysis's deeper problems or ensure that it will withstand further scrutiny in the Supreme Court. Thus, regardless of *Concepcion*'s precedential effect, there is an urgent need to revisit the law governing anti-aggregation agreements.

Fortunately, the very deficiencies of the claiming approach suggest a way forward. This new approach modifies the claiming approach by shifting its focus to regulatory outcomes. If an anti-aggregation agreement permits the company it protects to engage in extensive, unremedied wrongdoing, the agreement is not enforced.

This Part begins the project of explaining the outcomes-based approach to anti-aggregation agreements. I first describe the outcomes approach and set forth its costs and benefits. I then outline strategies litigants might follow in proving that an anti-aggregation agreement permits extensive, unchecked wrongdoing. Finally, I conclude by revisiting *Concepcion* and considering whether, on the record developed there, claimants challenging AT&T's anti-aggregation agreement could make the showing the outcomes approach demands.

##### A. *Defining the Approach*

The outcomes approach examines the *ex post* effect of an anti-aggregation agreement on the protected company's primary behavior. If enforcing an agreement permits extensive, unremedied wrongdoing, the agreement is not enforced because of its tendency to promote violation of the law.<sup>142</sup>

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clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'").

142 See 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 19:11 (Richard A. Lord ed., 4th ed. 2010).

This approach modifies the claiming approach in two ways. Functionally, it shifts the frame of analysis from *ex ante* to *ex post*. Where the claiming approach assumes that an anti-aggregation agreement's potential interference with private enforcement of the law will result in unremedied wrongdoing, the outcomes approach is to wait and see. The outcomes approach thus allows for the possibility that an anti-aggregation agreement is welfare-enhancing, while providing a backend safety valve in cases where the agreement has harmful effects.

Normatively, the outcomes approach alters the considerations invoked to deny enforcement of an anti-aggregation agreement. Both the claiming and outcomes approaches are ultimately concerned with enforcement of the law, and can be distinguished from theories of procedure that, for example, justify claiming as an expression of democratic values.<sup>143</sup> But they invoke wrongdoing in fundamentally different ways. Where the claiming approach focuses on the relationship between an anti-aggregation agreement and the legislative decision to authorize private enforcement, the outcomes approach views anti-aggregation agreements through the lens of contract theory, examining whether enforcement of an agreement results in harms to the integrity of the market, third parties, or the public.<sup>144</sup> It is premised on the view that widespread wrongdoing necessarily affects third parties, in a way that justifies refusing to enforce a private, contractual undertaking.

In making this move, the outcomes approach strengthens the legal basis for non-enforcement of anti-aggregation agreements. The principle that contractual ordering will be respected only so long as it does not give rise to harms to the integrity of the market, third parties, or the public is well established, and perhaps best known from cases where the consideration or performance contemplated by a contract

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143 See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that courts sit “to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them”).

144 The principle that “private transactions presumptively are efficient only if there are no negative externalities, that is to say, no adverse effects on third parties,” is commonplace in the law-and-economics literature. Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 513–14 (2011) (collecting sources). Indeed, even strong advocates of private ordering acknowledge externalities as a limitation on private parties' regulatory authority. See, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1684 (1996) (arguing that while the state should generally enforce norms that arise from private ordering, it “cannot justify enforcing a norm that harms one community on the grounds that it arose from a consensual process in another community”).

would violate the law. As early as 1829, the Supreme Court concluded that a contract which had the effect of circumventing the maximum interest rate chargeable by the Bank of the United States could not be enforced because it worked “a fraud upon a statute.”<sup>145</sup> In an early twentieth-century case, the Court refused to give effect to an attorney’s claim for fees that arose out of a conflicted representation, because enforcement of the contract would “produce the recognized abuses which follow fraud and disloyalty by agents and trustees.”<sup>146</sup> Half a century later, the Court would write that although “[t]here is no statutory code of federal contract law, . . . our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.”<sup>147</sup> Many state law decisions are to the same effect.<sup>148</sup> As one state supreme court summarized the doctrine, “An agreement which ‘contemplates or necessarily involves the defrauding or victimizing of third persons as its ultimate result’ is void as against public policy.”<sup>149</sup>

The difficult questions, then, involve the precise connection between enforcement of an anti-aggregation agreement and unremedied wrongdoing sufficient to deny an agreement enforcement. What counts as wrongdoing? When may an anti-aggregation agreement be denied enforcement, and what precisely must be

145 *Bank of U.S. v. Owens*, 27 U.S. (2 Pet.) 527, 536 (1829).

146 *Weil v. Neary*, 278 U.S. 160, 173 (1929).

147 *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982).

148 *See, e.g.*, *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 852 (10th Cir. 1972) (applying Oklahoma law) (“An agreement, the object of which is the commission of a civil wrong against a third person, is also illegal and void although such wrong may not be an indictable offense or crime.”); *L’Orange v. Med. Protective Co.*, 394 F.2d 57, 62 (6th Cir. 1968) (applying Ohio law) (“The general rule is that an insurance contract is illegal and void when its purpose is to promote, encourage or effect a violation of law.”); *Flegenheimer v. Brogan*, 30 N.E.2d 591, 593 (N.Y. 1940) (“Whatever is injurious to the interests of the public is void, on the grounds of public policy.”); *Tator v. Valden*, 198 A. 169, 171 (Conn. 1938) (“It is unquestionably the general rule, upheld by the great weight of authority, that no court will lend its assistance in any way toward carrying out the terms of a contract, the inherent purpose of which is to violate the law.”).

149 *Shea v. Grafe*, 274 N.W.2d 670, 673 (Wis. 1979) (quoting *Twentieth Century Co. v. Quilling*, 110 N.W. 174, 176 (Wis. 1907)). The principle that an agreement which encourages violation of the law may not be enforced is also well established within the Supreme Court’s arbitration jurisprudence. For example, the Court wrote in *Mitsubishi* that it “would have little hesitation in condemning [an arbitration] agreement as against public policy” if it served as “a prospective waiver of a party’s right to pursue statutory remedies.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

shown? Here, it will be helpful to define several features of the outcomes approach with precision.

First, by “wrongdoing,” the approach contemplates any violation of a public regulatory statute but excludes violations of purely “private” rights, such as simple breach of contract. The line is drawn at this point because violation of a regulatory statute supports an inference that the defendant’s conduct harms third parties or the integrity of the market. The legislative determination that conduct is illegal supplies the basis for concluding that the defendant’s behavior has effects beyond the parties, which by definition are not priced into the terms of their commercial relationship. The wrongdoing contemplated by the outcomes approach thus encompasses the substantive violations of the law most familiar from the class action context, including violation of consumer protection laws,<sup>150</sup> violation of the antitrust laws,<sup>151</sup> and violation of the federal securities statutes.<sup>152</sup>

Second, by “extensive” wrongdoing, the outcomes approach contemplates wrongdoing an order of magnitude greater than that alleged in a typical one-on-one dispute. A rough guide is provided by Federal Rule of Civil Procedure 23(a), which permits certification of a class action only if “the class is so numerous that joinder of all members is impracticable.”<sup>153</sup> Wrongdoing that satisfies Rule 23(a)’s numerosity standard generally establishes the “extensive wrongdoing” contemplated by the outcomes approach, because it suggests an underlying course of conduct that injures victims on a mass basis.

Third, the causal relationship required by the outcomes approach is between enforcement of an anti-aggregation agreement on one hand and *unremedied* wrongdoing on the other. This design choice responds to the difficulty of generalizing about the circumstances in which eliminating aggregate claiming will lead to unremedied wrongdoing. As noted, some anti-aggregation agreements will cause a substantial gap in deterrence, but others will not.<sup>154</sup> Requiring

150 See, e.g., *Blessing v. Sirius XM Radio Inc.*, 756 F. Supp. 2d 445, 454–55 (S.D.N.Y. 2010).

151 See, e.g., *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 114 (S.D.N.Y. 2010).

152 See, e.g., *Yu v. State St. Corp.*, 686 F. Supp. 2d 369, 375 (S.D.N.Y. 2010).

153 FED. R. CIV. P. 23(a)(1); see 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 3:12 (5th ed. 2011) (collecting cases and noting that although Rule 23(a) does not incorporate a numerical threshold, courts consider “judicial economy arising from avoidance of a multiplicity of actions, geographic dispersion of class members, size of individual claims, financial resources of class members, and the ability of claimants to institute individual suits” in determining whether the class is so numerous that joinder of all members is impracticable).

154 See *supra* Parts II.B–C.

a showing of unremedied wrongdoing ensures that anti-aggregation agreements are invalidated only when enforcing the agreement produces an impermissible gap in the framework for regulatory enforcement.

Finally, the showing that the outcomes approach demands is preliminary, analogous to other threshold procedural showings such as the requirement that a plaintiff show a plausible entitlement to relief to withstand a motion to dismiss,<sup>155</sup> the requirement that a plaintiff show the requirements of Rule 23 are satisfied to obtain certification of a class action,<sup>156</sup> and the requirement that a plaintiff show the defendant committed an act directed at the forum to establish personal jurisdiction.<sup>157</sup> Like these requirements, the outcomes approach does not require proof of the plaintiffs' claims on the merits.<sup>158</sup> Proceedings will be "less formal" and evidence "less complete" than in a full trial on the merits.<sup>159</sup> And the findings reached by the court will go only to enforceability of the anti-aggregation provision, not the merits of the plaintiffs' claims.<sup>160</sup>

For purposes of explaining the outcomes approach, it may be helpful to consider an illustrative case in which a court applying it would not enforce an anti-aggregation agreement.<sup>161</sup> Suppose a cable television company that holds a monopoly on a major urban market has a long history of imposing improper charges on customers and correspondingly is the subject of a long history of class action litigation. Following *Concepcion*, the company imposes an anti-aggregation agreement on customers that is identical in all material respects to AT&T's. The rate of claiming against the company predictably declines to near-zero. Nevertheless, a few cranks pressing insubstan-

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155 See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

156 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008).

157 See *Calder v. Jones*, 465 U.S. 783, 788–89 (1984).

158 See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (discussing preliminary injunctions).

159 *Id.*

160 Courts and commentators generally view the enforceability of an anti-aggregation agreement as a question for the court rather than the arbitrator. See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 53 (1st Cir. 2006); George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 *YALE J. INT'L L.* 1, 46 n.199 (2012). Nevertheless, at least some challenges to provisions restricting the availability of aggregation have been directed to arbitration. E.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003). So long as an arbitrator can conduct a reasonable investigation into whether an anti-aggregation agreement permits unchecked wrongdoing, the analysis proposed here could be undertaken by either court or arbitrator.

161 The example is based loosely on *Kristian*, 446 F.3d at 25.

tial claims take advantage of the “plaintiff friendly” arbitration process to assert claims against the company. A year passes, and a consumer group makes a threshold showing that the company has continued to impose illegal charges, say by assessing a “Federal Telecommunications Fee” that is neither required by law nor permitted by the company’s service agreement. The group alleges based on a review of SEC filings that the company has not been the subject of any enforcement proceedings by state or federal agencies.

Under the facts given, the company’s billing practices have been preliminarily shown to violate the law. They are uniform as to its millions of its customers. There is a clear relationship between the company’s adoption of the anti-aggregation agreement and extensive, unremedied wrongdoing. And the class, by hypothesis, has affirmatively demonstrated that enforcement of the aggregation ban would allow the defendant to continue its unlawful conduct. A court applying the outcomes approach accordingly would have a strong basis for invalidating the agreement. The agreement does not simply to eliminate a procedural mechanism *capable* of remedying wrongdoing but is *known* to immunize the corporation for wrongdoing not addressed through other enforcement mechanisms.<sup>162</sup>

Note that this conclusion provides a substantially stronger basis for invalidating an anti-aggregation agreement than a mere reduction in the rate of claiming. Although the claiming and outcomes approaches make use of similar evidence, the outcomes approach ties the enforceability of the agreement to a fact of legal significance: its relationship to known violation of the law.

### B. *Costs and Benefits*

With its features defined, the costs and benefits of the outcomes approach are readily apparent. As for costs, an *ex post* analysis focused on primary compliance with the law imposes a greater burden on litigants seeking to escape an anti-aggregation agreement than an analysis focused on claiming alone. The requirement of showing unremedied wrongdoing further creates a lag between the point at which an anti-aggregation provision is adopted and the point at which it may be successfully challenged. Because the outcomes approach demands evidence of *unremedied* wrongdoing, there will be a period of time in which the agreement is enforced.

These costs, however, are offset by two important benefits. The first is accuracy. As Part II explains, it is questionable whether a focus

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162 See *supra* note 148 and accompanying text.

on claiming accurately identifies anti-aggregation agreements that allow extensive unremedied wrongdoing. The outcomes approach, by contrast, tests for that phenomenon directly. To be sure, it is theoretically possible that although it tests directly for compliance with the law, the outcomes approach will identify fewer problematic agreements than the claiming approach. For example, it might be that making the showing required by the outcomes approach is so difficult that no litigant would undertake to invalidate an anti-aggregation agreement. But for reasons developed immediately below, I believe that the showing demanded by the outcomes approach is reasonably feasible to make.

Second, the outcomes approach is less susceptible than the claiming approach to claims of inconsistency with the FAA. The argument that scrutiny of an anti-aggregation agreement countervenes the FAA rests on the federal policy in favor of streamlined proceedings the Supreme Court has read into the Act.<sup>163</sup> Because aggregate proceedings are costly and time-consuming, they offend the FAA.

Unsubstantiated claims about the effects of an anti-aggregation agreement do not persuasively rebut that agreement, but a concrete showing of unremedied wrongdoing does. Where an agreement is rejected under the outcomes approach, it is because the agreement is known to promote violation of the law. The court holds that the policies embodied in substantive law trump the FAA's policy favoring streamlined proceedings. Indeed, invalidation of an anti-aggregation agreement upon a showing that the agreement permits unremedied wrongdoing follows from the assumption underlying the Court's modern FAA jurisprudence—that regulatory statutes will continue to serve their “remedial and deterrent function[s]” when dispute resolution is shifted to a private forum.<sup>164</sup> Even if one accepts at face value *Concepcion*'s statement that the reference to “arbitration” in the FAA favors certain “fundamental” procedural attributes such as bilateral proceedings,<sup>165</sup> that fact does not preclude invalidating an anti-aggregation agreement based on its actual effects on regulatory compliance.

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163 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”). But see *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”).

164 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

165 See *Concepcion*, 131 S. Ct. at 1748.



### C. *Proving Unremedied Wrongdoing*

The outcomes approach is more accurate and less likely to succumb to claims of conflict with the FAA. The question remains, however, whether this is a *workable* way of assessing anti-aggregation agreement. Can it reasonably be demonstrated that a corporation protected by an anti-aggregation agreement has engaged in extensive wrongdoing that has gone unremedied by reason of the agreement, or is that showing impossible to make?

In part, this concern is addressed by the outcomes approach's similarity to other threshold procedural showings, such as the showing required to withstand a motion to dismiss or obtain a preliminary injunction. Though the underlying claims can be staggeringly complex, preliminary injunctions "are broadly used."<sup>166</sup> In principle, there is no reason why establishing that an anti-aggregation agreement permits extensive, unremedied wrongdoing would be more difficult than establishing a likelihood of success on the merits in the "patent, copyright, and trademark infringement, corporate mergers, breaches of contract, nuisances, marriages, entertainment, and even manner of dress" cases in which the preliminary injunction is regularly used.<sup>167</sup>

Moreover, at the nuts-and-bolts level, a number of strategies are available for showing that an anti-aggregation agreement permits extensive, unremedied wrongdoing. A review of these strategies suggests that although the burden imposed by the outcomes approach is real, it is not insurmountable.

(1) *Demonstrated wrongdoing, cost-prohibitive claiming*—One strategy is suggested by cases such as *American Express*.<sup>168</sup> Plaintiffs might offer evidence that enforcement of an anti-aggregation agreement would

166 Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 382–83 (2006).

167 *Id.* For an example of the issues litigated in preliminary injunction proceedings, consider claims of trademark infringement. In New York federal court, litigants must proffer evidence required by Judge Friendly's *Polaroid* test. See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) ("Courts should examine (1) the strength of the mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the prior owner will 'bridge the gap' [i.e., that the trademark owner will enter the market in which the allegedly infringing use occurs]; (5) actual confusion; (6) the defendant's good faith in adopting its mark; (7) the quality of the defendant's product; and (8) the sophistication of the buyers."); see also *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 391 (2d Cir. 1995) (citation omitted). The use of expert opinion evidence is common. See, e.g., *Real News Project, Inc. v. Indep. World Television, Inc.*, 2008 WL 2229830 (S.D.N.Y. May 27, 2008) (No. 06 Civ. 4322(GEL)).

168 See *supra* text accompanying notes 56–66.

make it cost prohibitive to assert claims on an individual basis *along with* a threshold showing of wrongdoing. Provided that the defendant is not subject to alternate enforcement mechanisms—an issue on which it would logically bear the burden of proof—these showings would support the conclusion that an anti-aggregation agreement permits extensive, unremedied wrongdoing. As already noted, that conclusion provides a substantially stronger basis for invalidating an anti-aggregation agreement than a mere reduction in the rate of claiming.<sup>169</sup>

(2) *Same conduct, restricted remedies*—The second strategy relies on the stability of the protected corporation’s conduct during the period in which an anti-aggregation agreement is imposed. The idea here is to prove unremedied wrongdoing through evidence that: (a) the protected corporation engaged in a pattern of wrongdoing prior to adoption of an anti-aggregation agreement; (b) the wrongdoing was previously addressed through aggregate claiming; and (c) the defendant did nothing to modify its conduct following its adoption of an anti-aggregation agreement.

The potential of this strategy is illustrated by a 2002 decision of the district court for the Northern District of California, *Ting v. AT&T*.<sup>170</sup> In May and June 2001, AT&T required customers of its long-distance telephone service to assent to a “Consumer Services Agreement” (CSA) as part of the de-tariffing process mandated by the Telecommunications Act of 1996.<sup>171</sup> Section 7 of the CSA contained a standard, if particularly lopsided, second generation anti-aggregation clause which prohibited customers from asserting claims on an aggregate basis.<sup>172</sup> A challenge to the class-action waiver was brought by a class of California consumers.

In a remarkable decision, the district court made thorough findings regarding the circumstances in which the class-action waiver was adopted and its effect on the mechanisms available to police AT&T’s compliance with the law. The court found that prior to adopting the anti-aggregation provision, the company settled significant class

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169 See *supra* text accompanying note 162.

170 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 319 F.3d 1126 (9th Cir. 2003).

171 Prior to the enactment and implementation of the 1996 Act, a long-distance telecommunications carrier was prohibited “from charging [its customer] rates for its services other than those specified in its duly filed tariff.” *Ting*, 319 F.3d at 1131. The 1996 Act replaced the tariff system with one in which rates were subject to contract. *Id.* at 1132.

172 *Ting*, 182 F. Supp. 2d at 910.

actions alleging fraudulent and improper billing practices<sup>173</sup> and that enforcement of the class-action waiver would preclude similar actions in the future.<sup>174</sup> Discrediting an AT&T executive's testimony that the company "wanted to give the consumers a broad range of options' to resolve disputes," the court determined "that AT&T's principal purpose" in imposing the agreement "was to put sufficient obstacles in the path of litigants to effectively deter many claims from being pursued."<sup>175</sup> The court further found that AT&T made numerous misrepresentations to secure consumers' assent to the agreement;<sup>176</sup> that the Federal Communications Commission did not timely respond to consumer complaints of improper or fraudulent billing and advertising practices by long-distance carriers (and in fact chose not to address consumers' claims as a matter of policy);<sup>177</sup> and that enforcement of the anti-aggregation provision "ultimately, would serve to shield AT&T from liability even in cases where it has violated the law."<sup>178</sup>

*Ting* made these findings in the context of a state-law unconscionability challenge; however, there is no reason they would not support the conclusion that an anti-aggregation agreement allowed unchecked wrongdoing. Although the court did not expressly find that AT&T's anti-aggregation agreement permitted unremedied wrongdoing, it found that enforcement of the agreement would remove the only mechanism capable of remedying small-scale violations of the law. Such a finding, combined with a threshold showing

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173 *Id.* at 917–18.

174 *Id.* at 918 ("If the Legal Remedies Provisions contained in AT&T's new CSA had governed customers' rights in these situations, it is highly unlikely [that] any of the [class action] claims would have been prosecuted.").

175 *Id.* at 920–21.

176 For example, the mailing announcing the imposition of the Customer Services Agreement misleadingly advised customers "that your AT&T service or billing will not change under the AT&T Consumer Services Agreement; there's nothing you need to do." *Id.* at 911. (In fact, if customers wished to avoid Section 7's limitations on remedies, they were required to cancel AT&T service.) *See id.* at 929. Customers that noticed Section 7's arbitration provision and complained to AT&T were falsely advised, "All of the other major long distance carriers have also included an arbitration provision in their service agreements." *Id.* at 914. (In fact, Verizon California, which controlled 8.8% of the market at the time of suit, did not impose arbitration on customers.) *Id.* at 929 n.15.

177 The court found that the FCC required seventeen years to respond effectively to consumer complaints of "slamming,' the unauthorized substitution of a consumer's preferred long distance carrier for another without proper consent." *Id.* at 919.

178 *Id.* at 918.

that the company engaged in wrongdoing, would permit a court following the outcomes approach to refuse to enforce the agreement.

(3) *Generalizing from individual adjudications*—A final strategy for proving extensive, unremedied wrongdoing relies on insights from the class certification context. The intuition here is that if a defendant is consistently losing adjudications or arbitrations (“adjudications,” for short) and would face class-wide liability but for a restriction on aggregation, a court may conclude that the agreement permits extensive, unremedied wrongdoing.

As a formal matter, two showings are necessary to establish the invalidity of an anti-aggregation agreement this way. First, the plaintiff must present a statistically valid sample of adjudications that resolved claims representative of those held by a broader class of similarly situated persons.<sup>179</sup> And second, the adjudications must have been overwhelmingly resolved in favor of the claimant. Where a plaintiff makes these showings, a court will again have a strong basis for invalidating an anti-aggregation agreement. Through evidence of wrongdoing at the micro level, the litigant establishes that the defendant has engaged in macro-level wrongdoing that has not been addressed by reason of a contractual limitation on aggregation.

Is this workable? Several issues must be addressed. The first set involves the costs of bringing individual adjudications that are presented as evidence of unremedied wrongdoing. If the amount at stake in an individual arbitration or litigation is paltry, will the claimant find it worthwhile to assert a claim?

Although this concern is important, the economic incentives for plaintiff-side firms to attack anti-aggregation provisions suggest it can be overcome. As an extensive literature describes, aggregate litigation in the United States is largely underwritten by well-capitalized and diversified plaintiff-side firms that stand to earn a percentage of the recovery in cases they litigate.<sup>180</sup> Such financing has traditionally

179 The requirement of statistical validity imposes a number of constraints on plaintiffs’ selection of individual test cases. For example, the universe of claims must be defined appropriately, sample cases must be selected at random, and a sufficiently large sample must be adjudicated. Cf. Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 TEX. L. REV. 571, 629–33 (2012) (describing sampling requirements for trial of aggregate claims).

180 See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 670 n.1 (1986) (“[A] key characteristic [of plaintiff’s attorneys litigating complex products-liability actions is] their ability to make substantial cash investments in an action.”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 163 (2007) (“[P]laintiffs’ class action lawyers . . . not only comprise the most

occurred through contingency-fee agreements,<sup>181</sup> but there is no apparent reason why plaintiff-side firms could not undertake to represent individual claims to lay a groundwork for a challenge to an anti-aggregation agreement.<sup>182</sup> Indeed, because anti-aggregation provisions threaten a substantial revenue stream for such firms, it will be in their economic self-interest to do so.<sup>183</sup>

Another set of concerns, familiar from the mass tort context, involves the possibility that a corporate defendant will settle meritorious cases to prevent plaintiffs from amassing enough evidence of wrongdoing to mount a challenge to an anti-aggregation agreement. In the mass tort context, it is common for corporate defendants to settle strong claims rather than risk the large verdicts, collateral estoppel, and development of adverse precedent that litigation and trial invites.<sup>184</sup> In the anti-aggregation context, one might similarly worry

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effective lobbying counterweight to corporate interests in contemporary politics, but . . . use their wealth to finance further class action litigation against U.S. companies.”)

181 Molot, *supra* note 103, at 90.

182 A plaintiff-side firm’s representation of individual claimants could almost certainly be structured to observe the common law prohibitions of Champerty (trading an interest in the proceeds of litigation for money) and maintenance (financing of litigation by an “intermeddler” with no interest in the suit). See 14 C.J.S. *Champerty and Maintenance* §§ 1–2 (2011). This is because the common law does not consider an agreement “to render the ordinary services of an attorney, in consideration of receiving a percentage of the money or a part of the thing recovered,” unlawful. *Id.* § 13 (citing *Marshall v. Bickel*, 445 A.2d 606 (D.C. 1982); *Genins v. Geiger*, 240 S.E.2d 745 (Ga. 1977)).

183 The suggestion that litigation of individual claims will be underwritten by plaintiff-side firms raises the possibility of free-riding. If firms *A*, *B*, and *C* undertake a campaign of individual litigation to establish the invalidity of anti-aggregation agreement, what is to be done if firms *X*, *Y*, and *Z* subsequently commence proceedings that exploit the value of the earlier work? In the related situation presented by non-class aggregate proceedings, the law responds by requiring *X*, *Y*, and *Z* to compensate *A*, *B*, and *C* for the value of the “common benefit” created by *A*, *B*, and *C*’s work. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 130 (2d Cir. 2010) (Kaplan, J., concurring) (“The desirability—indeed, the compelling need—to have pretrial proceedings managed or at least coordinated by lead counsel or a steering or executive committee demands the existence of a source of compensation for their efforts on behalf of all.”). This suggests that existing law provides workable mechanisms for controlling freeriding.

184 The best known example of this phenomenon involves the 1990s blood products litigation that led to the Seventh Circuit’s controversial decision in *In re Rhone-Poulenc Rorer Pharms., Inc.*, 138 F.3d 695 (7th Cir. 1998). Although plaintiffs prevailed in eighty-nine to ninety-two percent of cases when settlements were taken into account, the win rate dropped to approximately eight percent when settlements were excluded. See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 45 (2007).

that defendant corporations will settle individual proceedings rather than allow plaintiff-side firms to develop a portfolio of cases that can be used to attack an anti-aggregation agreement.

But again, the economic incentives facing plaintiff-side firms suggest these concerns are manageable. A corporate defendant's ability to pick off unfavorable cases reflects its ability to offer an attractive financial package to both the plaintiff (whose financial interest is in securing the maximum damage award possible) *and* her attorney (whose interest is in securing the largest fee possible).<sup>185</sup> For obvious reasons, this complicates defense-side efforts to pick off individual claims brought to establish the invalidity of an anti-aggregation agreement.<sup>186</sup> Furthermore, even if defendants succeed in settling individual claims, the fact of repeated settlements may serve as evidence of wider unremedied wrongdoing.<sup>187</sup>

Lastly, it might be objected that accepting settlements of prior claims is in tension with the “the presumption of privacy and confi-

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185 Indeed, the standard theoretical account of the client-lawyer relationship predicts that settlement will occur when a defendant's payment to the *attorney*, not client, is maximized. *See* Coffee, *supra* note 180, at 686 (concluding that once the agency costs that inhere in the attorney-client relationship between class action lawyer and client are accounted for, “it is not the plaintiffs’ damages but the attorney’s recovery that establishes the equilibrium level” at which settlement occurs).

186 As the Supreme Court’s decision in *Evans v. Jeff D.*, 475 U.S. 717 (1986), illustrates, an attorney sometimes has an ethical obligation to advise her client to settle litigation when what is offered by the defendant is all the client seeks. *See id.* at 722 (explaining attorney’s belief that he was ethically required to accept settlement that “offered virtually all of the injunctive relief [plaintiffs] had sought in their complaint”). In the anti-aggregation context, claimants can avoid this dilemma by demanding an injunction or declaration that the anti-aggregation provision is invalid in their statement of claim.

187 The use of settlements to establish the invalidity of an anti-aggregation agreement is not prohibited by the law of evidence. Although Federal Rule of Evidence 408 “prohibits the admission of a settlement . . . when offered to prove a defendant’s liability[, the Rule] does not prohibit evidence of settlements when offered for purposes not otherwise prohibited . . . .” *AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 646 F. Supp. 2d 385, 404 (S.D.N.Y. 2009). A court following the outcomes approach does not examine whether the defendant is liable for wrongdoing but the enforceability of a contractual restriction on aggregation. As a result, the introduction of settlements into evidence is not barred by Rule 408. *Cf.* *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 136 (2d Cir. 2008) (upholding admission of prior consent decree offered to prove that “defendant was aware of its legal obligations”); *Catullo v. Metzner*, 834 F.2d 1075, 1079 (1st Cir. 1987) (reversing trial court’s refusal to admit prior settlement offered to establish corporate mismanagement).

dententiality' that applies in many bilateral arbitrations."<sup>188</sup> That presumption, however, is created by the rules of arbitral fora.<sup>189</sup> It is not a limit on the admissibility of evidence in court, which in any event may be done *in camera* to preserve confidentiality.

#### D. *Concepcion Revisited*

The showing that an anti-aggregation agreement allows extensive, unremedied wrongdoing can thus be made in a number of ways. To illustrate, I conclude this Part by briefly revisiting *Concepcion* and considering whether plaintiffs challenging AT&T's anti-aggregation agreement could show the requisite wrongdoing.

As described above, the factual record in *Concepcion* was sparse. By the time the Supreme Court considered the case, the most damning evidence of wrongdoing plaintiffs could adduce was a finding by a district court in an unrelated case that AT&T was involved in fewer than 200 consumer arbitrations between 2003 and 2007 (during which time courts allowed class-action claiming against AT&T), and reports by two government agencies stating that consumers were generally unhappy with their cell phone service.<sup>190</sup> Plaintiffs did not otherwise demonstrate that the AT&T agreement had concrete negative effects.

This failure proved fatal to the California courts' efforts to invalidate the agreement using the *Discover Bank* rule, and it would likewise prove fatal to a court following the outcomes approach. A showing that a company's customers are unhappy and assert relatively few claims justifies viewing an anti-aggregation agreement with skepticism, but it does not prove that the agreement allowed the company to engage in substantial, unremedied wrongdoing.

From the perspective of the outcomes approach, however, this does not end the analysis. Because that approach considers an anti-aggregation agreement's broader effects, *Concepcion's* rejection of the *Discover Bank* standard would not preclude a later challenge on the ground that AT&T's agreement permits substantial, unremedied wrongdoing. Challengers could attempt to make this showing by gen-

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188 *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (quoting AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003) [hereinafter "Supplemental Class Rules"]).

189 *See, e.g.*, Supplemental Class Rule 1(a) ("These Supplementary Rules . . . shall apply to any dispute rising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ('AAA') where a party submits a dispute to arbitration on behalf of or against a class or purported class . . . .").

190 *See supra* text accompanying note 133.

eralizing from individual adjudications; if the undisclosed imposition of a charge to compensate AT&T for sales tax was shown to violate California consumer protection law and a substantial number of customers prevailed on a claim to this effect in arbitration, that would support a claim that the AT&T's aggregation ban allowed extensive unremedied wrongdoing. The same showing, however, could also be made through the kind of evidence developed in *Ting*.<sup>191</sup> In this respect, it is interesting to note that in the years immediately prior to *Concepcion*, AT&T settled class actions alleging numerous improper practices, involving data service, "out-of-cycle" billing, the Universal Connectivity Charge, and "mysterious charges for ringtones and other content."<sup>192</sup>

### CONCLUSION

Procedural doctrines are unavoidably informed by "value-loaded judgments about how the world operates" that "inhabit a grey area between the substantive law and propositions so obvious or widely accepted they may be judicially noticed."<sup>193</sup> Though these "judgmental facts" appear to describe how the world operates, they are "mixed with judgment, policy ideas, opinion, discretion or philosophical preference."<sup>194</sup>

Defenders of aggregate litigation have long maintained that it is necessary to effective enforcement of the law; and their arguments have been accepted by courts following the claiming approach. The approach assumes a regulatory environment wherein enforcement is largely delegated to private attorneys general, such that restrictions on private regulatory enforcement inevitably lead to unremedied wrongdoing. The Supreme Court's skepticism in *Concepcion* is a useful reminder, however, that the world is not necessarily so simple. Sometimes eliminating aggregation will have a substantial effect on compliance, sometimes it won't.

Where the claiming approach assumes a connection between restrictions on aggregation and the existence of unremedied wrong-

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191 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 319 F.3d 1126 (9th Cir. 2003).

192 See, e.g., *AT&T Announces the Proposed Settlement of Class Action Lawsuits Relating to AT&T Wireless*, PR NEWswire July 2, 2010, available at <http://www.prnewswire.com/news-releases/att-announces-the-proposed-settlement-of-class-action-lawsuits-relating-to-att-wireless-97660444.html>; Peter Svensson, *AT&T Settles Suit Over 3rd-Party Cell Phones Fees*, ASSOCIATED PRESS, June, 2, 2008.

193 David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 139 (2011) (citing KENNETH CULP DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 15.10, at 178 (2d ed. 1980)).

194 *Id.* (quoting DAVIS, *supra* note 193, § 15.10, at 178).



doing, the outcomes approach insists that it be shown. If that showing is made, it will do much to ensure the availability of aggregate litigation in a system increasingly open to private control of dispute resolution procedure. Unlike the *Concepcion* dissent's claim "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system[,]"<sup>195</sup> demonstrated wrongdoing is the kind of fact that sticks in the throat. Where established, it will prove fatal to the anti-aggregation agreement.

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195 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (characterizing the dissent).