Remediation and Deterrence: The Real Requirements of the Vindication Doctrine

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ABSTRACT

The vindication of statutory rights doctrine, first set forth by the Supreme Court almost three decades ago, has been applied by many courts in deciding whether to invalidate class action waivers located in arbitration clauses. Recently, courts have focused primarily on whether class action waivers violate the doctrine by requiring that named plaintiffs pay prohibitively high costs to arbitrate their claims. The jurisprudence surrounding the vindication doctrine indicates, however, that attention must also be paid to whether full remediation and deterrence can be achieved in the face of a class action waiver.

The key question is whether all putative class members will have their claims vindicated through individual arbitration as opposed to a class action lawsuit. This Essay argues that, in certain situations, federal statutory claims must be pursued as class actions to achieve full vindication through remediation and deterrence. This Essay will highlight the claims that fall into this category and explain which case characteristics render a class action indispensable for the achievement of both goals.

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INTRODUCTION

The vindication of statutory rights doctrine, which was first set forth by the Supreme Court almost three decades ago, has been applied by many courts considering whether to invalidate class action waivers located in arbitration clauses.[1] Class action waivers—found in an increasing number of contracts—deprive parties of their right to bring class actions against one another when a dispute arises.[2] Such terms are frequently part of contracts arbitration clauses—contract provisions that require the parties to resolve any disputes through a private, out-of-court procedure, for which they must pay themselves, rather than the public court system. Today, arbitration clauses exist not only in contracts between large businesses, but also in

[1] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985).

[2] This Essay does not deal with situations in which class arbitration is available.

consumer contracts of just about every stripe—such as cell phone contracts between individuals and large carriers like AT&T.[3] These clauses also exist in contracts between small businesses and international credit card companies, like American Express.[4]

Recently, courts have focused primarily on whether class action waivers violate the vindication of statutory rights doctrine by requiring that named plaintiffs pay prohibitively high costs to arbitrate their claims. One such case, *American Express Co. v. Italian Colors Restaurant*,[5] was decided by the Supreme Court last year.[6] That case, which has received a significant amount of attention from conservative and liberal groups alike, focused on the issue of whether the named plaintiffs were deprived of their ability to vindicate their rights under the Sherman Act[7] by being required to engage in an individual arbitration in which they could not share expenses.[8] The Supreme Court held that the requirement that parties relinquish access to the class action mechanism did not "eliminate[] those parties' right to pursue their statutory remedy."[9]

The jurisprudence surrounding the vindication doctrine indicates, however, that attention must also be paid to whether remediation and deterrence can be achieved in the face of a class action waiver.[10] The focus of a class action waiver analysis must be broader than the one undertaken in *American Express Co.* Namely, a court must consider whether, not only named plaintiffs, but also putative class members will be able to adequately resolve their claims through arbitration. This remediation and deterrence inquiry looks not just at the issue of whether resolution of a claim in individual arbitration is economically feasible for named plaintiffs, but rather at whether issues such as time, expense, and the size of the putative class prevent potential class members as a whole from vindicating their claims in arbitration. An analysis of this issue demonstrates that, in certain situations, federal statutory claims must be pursued as class actions to achieve full vindication through remediation and deterrence.

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3 *See* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

4 *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013).

5 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

6 The authors of this Essay note that they authored an amicus brief submitted to the Supreme Court in support of respondents in *American Express Co.* on behalf of the Committee to Support the Antitrust Laws. Brief for the Committee to Support the Antitrust Laws as Amicus Curiae Supporting Respondents, Am. Express. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 355746.

7 Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

8 *American Express Co.*, 133 S. Ct. at 2308.

9 *Id.* at 2311.

10 *See infra* Part III.

Part I of this Essay will set forth the history and current status of the Federal Arbitration Act ("FAA")[11] and the defenses to a motion to compel arbitration. Part II will review the Supreme Court cases that established and honed the vindication of statutory rights doctrine. Part III of this Essay will explore a decision in the United States Court of Appeals that applied the vindication doctrine to arbitration agreements containing a class action waiver and considered the argument that such a waiver renders the named plaintiff unable to vindicate her statutory rights. Part IV will put forth the reasons why, in some instances, full remediation and deterrence cannot be achieved unless all putative class members in a class action are able to vindicate their statutory rights. Finally, Part V will explore the causes of action for which a class action is necessary to achieve full remediation and deterrence.

I. THE FEDERAL ARBITRATION ACT AND CHALLENGES TO ARBITRATION CLAUSES

The FAA, enacted in 1925,[12] requires that arbitration agreements be placed on equal footing with other contracts[13] and that they be enforced according to their terms.[14] The FAA states, in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[15]

There are two categories of arguments with which arbitration agreements subject to enforcement under the FAA may be challenged: (1) "such grounds as exist at law or in equity for the revocation of any contract,"[16] such as "fraud, duress, or unconscionability,"[17] and (2) the federal substantive law of arbitrability.[18]

A. Such Grounds as Exist at Law or in Equity for the Revocation of any

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[11] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

[12] *See* Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925).

[13] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

[14] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[15] 9 U.S.C. § 2.

[16] *Id.*

[17] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996).

[18] *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

Contract

Like any other contract, an arbitration agreement can be invalidated on the basis of state law theories requiring revocation. These include "generally applicable contract defenses, such as fraud, duress, or unconscionability."[19] Thus, arbitration agreements can be found invalid because, for instance, the provisions governing arbitration are unconscionable as a result of unequal bargaining power between the parties and harsh or one-sided terms.[20]

The application of state laws requiring invalidation of arbitration clauses has been significantly circumscribed by the Supreme Court's decision in *AT&T Mobility L.L.C. v. Concepcion*.[21] The *Concepcion* Court struck down a Ninth Circuit decision holding an arbitration clause unconscionable based on California law, which required courts to invalidate all arbitration clauses prohibiting class adjudication of low-value disputes alleging schemes to defraud large numbers of consumers.[22] The Supreme Court held that this rule, set forth in the California Supreme Court's opinion in *Discover Bank v. Superior Court*[23], was inconsistent with the FAA. The Court found that the rule was "applied in a fashion that disfavor[ed] arbitration" and prevented the arbitration agreement at issue from being interpreted according to its terms, which required arbitration to proceed on a nonclass basis.[24] The *Discover Bank* rule was therefore preempted:

> 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. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.[25]

After *Concepcion*, plaintiffs can no longer challenge an arbitration agreement with "defenses that apply only to arbitration or that derive their

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[19] *Casarotto*, 517 U.S. at 687.

[20] Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170–73 (9th Cir. 2003). Courts will also apply rules of contract interpretation to invalidate improper arbitration procedures. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62–63 (1995) (construing standard form contract against drafter to invalidate prohibition on punitive damages).

[21] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[22] *Id.* at 1753.

[23] Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

[24] *Concepcion*, 131 S. Ct. at 1747–48.

[25] *Id.* at 1748.

meaning from the fact that an agreement to arbitrate is at issue,"[26] as such defenses "stand as an obstacle to the accomplishment of the FAA's objective[]"[27] that arbitration agreements be applied according to their terms. Nevertheless, after *Concepcion* arbitration agreements can still be invalidated on the same basis that any other agreement would be invalidated.[28]

B. The Federal Law of Arbitrability

Unlike challenges based on theories of contract invalidation, challenges derived from the substantive law of arbitrability are based on federal law. Arguments based on the federal substantive law of arbitrability focus on conflicts between achievement of the objectives of two different federal laws: the FAA and another federal law which cannot be applied in its intended fashion if claims arising under it are required to be arbitrated. In these situations "the FAA's mandate has been 'overridden by a contrary congressional command.'"[29]

One such category of laws consists of those laws as to which "Congress intended to preclude a waiver of judicial remedies."[30] This intention can be discerned from a law's text, its legislative history, or "an 'inherent conflict' between arbitration and the [law's] underlying purposes."[31] For a challenge under this theory to be successful, a court must find that Congress, in enacting the law at issue, did not intend for claims arising under it to be arbitrated.[32] Arguments under this theory have had little success in the higher courts.[33]

Another type of challenge based on the federal law of arbitrability that

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[26] *Id.* at 1746.

[27] *Id.* at 1748.

[28] *See, e.g.*, Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 963–64 (9th Cir. 2012).

[29] CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012) (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

[30] *McMahon*, 482 U.S. at 227.

[31] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (citing *McMahon*, 482 U.S. at 227).

[32] *McMahon*, 482 U.S. at 227–28.

[33] *See, e.g.*, *CompuCredit Corp.*, 132 S. Ct. at 669–73 (holding that the Credit Repair Organization Act's requirement that all credit repair organizations provide a disclosure to their customers stating "[y]ou have a right to sue a credit repair organization that violates the Credit Repair Organization Act," and the Act's statement that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter" was void and did not demonstrate a congressional intent to preclude waiver of judicial remedies (internal quotation marks omitted)); *Gilmer*, 500 U.S. at 27 (rejecting the argument that compulsory arbitration was inconsistent with the statutory framework and purposes of the Age Discrimination in Employment Act).

has been invoked with much greater success employs the vindication of federal rights doctrine.[34] This challenge relies on the argument that the objectives of a given federal law cannot be achieved if claims made under the law are required to be resolved through arbitration. This doctrine, which has been employed for several decades, is the subject of this Essay. The history of discussions of this doctrine by both the Supreme Court and various courts of appeals sheds light on its proper application.

II. THE VINDICATION DOCTRINE IN THE SUPREME COURT

A. 1985: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.[35]

The vindication doctrine found its beginnings in a 1985 Supreme Court opinion involving a Sherman Act counterclaim brought by a franchisee, Soler, against a franchisor, Mitsubishi, which had initiated an arbitration against Soler for nonpayment for vehicles sold to the dealership.[36] Mitsubishi sought to compel arbitration of the entire dispute between the parties pursuant to an arbitration clause in the parties' supply contract.[37] The First Circuit held that Soler's antitrust claims could not properly be resolved through arbitration.[38]

The Supreme Court evaluated Soler's argument that a federal antitrust claim cannot be resolved through arbitration.[39] First, the Court discussed the importance of the antitrust laws in protecting competition:

> Without doubt, the private cause of action plays a central role in enforcing this regime. As the Court of Appeals pointed out:
>
> > A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.
>
> The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.[40]

The Court then examined the purposes of Section 4 of the Clayton

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34 *See infra* Part III.

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

36 *See id.* at 619.

37 *Id.* at 618–19.

38 *Id.* at 623.

39 *Id.* at 624.

40 *Id.* at 635 (citations and internal quotation marks omitted).

Act,[41] under which Soler was seeking damages for its antitrust claims:

> Section 4 . . . is in essence a remedial provision. It provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.[42]

Finally, the Court analyzed whether the purposes of the antitrust laws could be achieved through arbitration.[43] After reviewing the parties' agreement, the Court determined that treble damages under the Clayton Act would still be available in arbitration, and that there was no indication at the time that Soler's antitrust claims would not be resolved in accordance with the Sherman Act if adjudicated through arbitration, as such a departure would be contrary to the parties' agreement.[44] The Court stated that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and deterrent function."[45]

B. 1991: Gilmer v. Interstate/Johnson Lane Corp.[46]

The plaintiff in *Gilmer* brought an action against his former employer under the Age Discrimination in Employment Act of 1967 ("ADEA").[47] The defendant moved to compel arbitration of the claims, pursuant to an arbitration clause in the plaintiff's application for registration with the New York Stock Exchange.[48]

The Court determined that arbitration of the plaintiff's claims was not inconsistent with the ADEA's goal of "further[ing] important social policies," such as "'promot[ing] employment of older persons based on their ability rather than age; . . . prohibit[ing] arbitrary age discrimination in

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41 Clayton Act § 4, 15 U.S.C. § 15 (2012).

42 *Mitsubishi*, 473 U.S. at 635–36 (alterations in original) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485–86 (1977)).

43 *See id.* at 636–37.

44 *See id.*

45 *Id.* at 637.

46 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

47 Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012).

48 *Gilmer*, 500 U.S. at 23–24.

employment; [and] . . . help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment.'"[49] The Court stated that the achievement of these goals in arbitration would be no different than in litigation.[50] The Court also disagreed with the argument that requiring arbitration prevented the Equal Employment Opportunity Commission ("EEOC") from enforcing the ADEA, because an EEOC complaint could be filed even if a civil complaint could not be.[51] Despite the Act's provision for resolution of disputes in a judicial forum, the Court determined that arbitration was consistent with the procedures envisioned by the Act. It emphasized that the statute contemplated the EEOC's use of a variety of formal and informal methods to resolve disputes arising under the ADEA.[52]

Justice White, writing for the majority, repeated the vindication test from *Mitsubishi* and deemed that it had been met: "'[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'"[53]

C. 2000: Green Tree Financial Corp.-Alabama v. Randolph[54]

Randolph marked the first time that the Supreme Court was confronted with a permutation of the most frequently invoked vindication argument—that the plaintiff's inability to bring the claim in a judicial forum renders pursuit of the claim prohibitively expensive.

Randolph was brought as a putative class action under the Truth in Lending Act ("TILA"),[55] alleging that the defendant illegally failed to disclose a finance charge.[56] The plaintiff's contract for purchase of the mobile home at the center of the dispute contained a compulsory arbitration clause.[57] The plaintiff argued that she lacked resources to arbitrate and that she would have to relinquish her claim if required to arbitrate.[58] The Eleventh Circuit held that the arbitration agreement's silence as to

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[49] *Id.* at 27 (quoting 29 U.S.C. § 621(b)).

[50] *Id.* at 27–28.

[51] *Id.* at 28, 32.

[52] *Id.* at 29; 29 U.S.C. § 626 (directing the EEOC to pursue "informal methods of conciliation, conference, and persuasion").

[53] *Gilmer*, 500 U.S. at 28 (alterations in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

[54] Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

[55] Truth in Lending Act, 15 U.S.C. §§ 1601–1667 (2012).

[56] *Randolph*, 531 U.S. at 83.

[57] *Id.* at 82–83.

[58] *Id.* at 83–84.

"payment of filing fees, arbitrators' costs, and other arbitration expenses" meant that the costs of arbitration could prove insurmountable, and that the "arbitration agreement failed to provide the minimum guarantees that respondent could vindicate her statutory rights under the TILA."[59]

Evaluating Randolph's defense against arbitration, the Supreme Court held that a cost-related vindication argument was one that could potentially invalidate an arbitration clause: "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."[60] However, the Court found that Randolph had not introduced sufficient evidence to demonstrate that arbitration would be so expensive as to prevent her from being able to vindicate her statutory rights under TILA.[61] The plaintiff had only introduced several facts based on assumptions about which arbitral organization would perform the arbitration and how much the arbitrator would charge:

> [T]he record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.[62]

The Court concluded as follows: "[W]e believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden."[63]

D. 2013: American Express Co. v. Italian Colors Restaurant

In *American Express Co.*, the plaintiffs, a number of small merchants, brought claims against American Express alleging an illegal tying arrangement in violation of the Sherman Act.[64] The plaintiffs brought a

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59 *Id.* at 84.

60 *Id.* at 90.

61 *Id.*

62 *Id.* at 90–91 (footnote and citation omitted).

63 *Id.* at 92.

64 *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013).

putative class action on behalf of all other merchants subject to American Express's tying arrangement.[65] The plaintiffs presented evidence that while their expert fees might exceed $1 million, the median recovery would only be $5,252 after trebling.[66]

The Second Circuit reviewed *Mitsubishi*'s holding that "[a]rbitration is also recognized as an effective vehicle for vindicating statutory rights, but only 'so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum.'"[67] It then applied to the plaintiffs' facts the *Randolph* finding "that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[68]

Applying *Randolph*, the Second Circuit determined that "[t]he evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws."[69] When the case went to the Supreme Court, the Solicitor General submitted a brief for the Department of Justice and Federal Trade Commission urging affirmance, not reversal, of the Second Circuit's ruling.[70]

The Supreme Court recognized the existence of the vindication doctrine, citing *Mitsubishi*, *Gilmer*, and *Randolph*, and gave several examples of obstacles to claim resolution that would satisfy the vindication doctrine (such as a clause forbidding assertion of a statutory right or prohibitive filing and administrative fees).[71] The Court nevertheless held that the expert fees the named plaintiffs would incur to prove their claims did not themselves prevent the parties from vindicating their statutory rights under the Sherman Act.[72] Justice Kagan, joined by Justice Ginsburg and Justice Breyer, dissented, arguing that the private antitrust cause of action was created "not solely to compensate individuals, but to promote the public interest in vigilant enforcement of the antitrust laws."[73] Justice

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65 *Id.*

66 *In re* Am. Express Merchs.' Litig., 667 F.3d 204, 218 (2d Cir. 2012), *rev'd sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

67 *Id.* at 214 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

68 Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

69 *In re Am. Express Merchs.' Litig.*, 667 F.3d. at 217.

70 *See* Brief of the United States as Amicus Curiae Supporting Respondents, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133).

71 *American Express Co.*, 133 S. Ct. at 2310–11.

72 *Id.* at 2311.

73 *Id.* at 2313.

Kagan also emphasized the practical problems of proceeding without any ability to share or shrink costs.[74]

III. APPLICATION OF THE VINDICATION DOCTRINE IN THE CLASS ACTION CONTEXT

Having seen the vindication doctrine evaluated in the Supreme Court in the context of costs attendant to arbitration, plaintiffs began invoking it to challenge arbitration agreements containing waivers of plaintiffs' rights to bring their claims against defendants in a class action.[75] Such challenges were mounted in practically every circuit,[76] though the most definitive example surfaced in the First Circuit.

In *Kristian v. Comcast Corp.*,[77] the plaintiffs brought Sherman Act claims in a putative class action. They objected to the invocation of an arbitration clause containing a class action waiver[78] and argued that the costs of experts, depositions, and other necessary elements of their action were too high to be assumed by one plaintiff, and that, given the amount of their likely recovery, the plaintiffs could only afford to bring the action as a class action in which they could share the costs with numerous other plaintiffs.[79] The First Circuit agreed:

> The class mechanism ban—"particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements"—forces the putative class member "to assume financial burdens so prohibitive as to deter the bringing of claims. . . . And these costs . . . will exceed the value of the recovery she is seeking."[80]

The court explained that the vindication doctrine can be applied to procedural obstacles to the enforcement of substantive rights, such as class action waivers: "While Comcast is correct when it categorizes the class action (and class arbitration) as a procedure for redressing claims—and not a substantive or statutory right in and of itself—we cannot ignore the

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[74] *Id.* at 2316.

[75] *See, e.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90–91 (2000); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624 (1985).

[76] *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003); *In re* Elec. Books Antitrust Litig. No. 11 MD 2293(DLC), 2012 WL 2478462, at *2 (S.D.N.Y. June 27, 2012).

[77] Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

[78] *Id.* at 31.

[79] *Id.* at 52.

[80] *Id.* at 54–55 (quoting Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 407 (2005)).

substantive implications of this procedural mechanism."[81] The *Kristian* court thus determined that "[i]f the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law."[82]

IV. VINDICATION OF PUTATIVE CLASS MEMBERS' RIGHTS

The arguments against individual arbitration made in cases such as *Kristian* and *American Express Co.* addressed the question of whether the prohibitions on class actions in the waivers prevented the named plaintiffs—those who were parties in the action—from vindicating their statutory rights. However, those cases did not address whether the arbitration provisions prevented the silent putative class members—those who were not named parties in the action, but who would recover damages from any settlement reached or judgment issued in the class action—from vindicating *their* statutory rights, preventing the achievement of the statutory objectives of deterrence and remediation discussed by the *Mitsubishi* Court.

A complete vindication analysis requires exploration of these issues. Full remediation of all potential claimants' disputes necessitates a class action in certain cases. In situations involving certain types of illegal conduct, a defendant must be forced to compensate all claimants affected by its misconduct in order to be deterred from wrongdoing.

Though not broached in most cases involving class action waivers, this issue was correctly taken up by the Sixth Circuit in *Morrison v. Circuit City Stores, Inc.*[83] In that case, the panel stated that "[t]he issue is not only whether an individual claimant would be precluded from effectively vindicating his or her rights in an arbitral forum by the risk of incurring substantial costs, but also whether other similarly situated individuals would be deterred by those risks as well."[84] The court explained that it was necessary to view the arbitration clause from the perspective of the entire putative class to determine whether the clause prevented a federal law from achieving its objectives:

> [E]mployers should not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from seeking any forum for the vindication of their rights. To

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81 *Id.* at 54.

82 *Id.* at 61.

83 Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003).

84 *Id.* at 661.

> allow this would fatally undermine the federal anti-discrimination statutes, as it would enable employers to evade the requirements of federal law altogether.[85]

The court explained that this analysis was supported by the Supreme Court's statements in *Gilmer*:

> *Gilmer* . . . held that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." As *Gilmer* makes clear, federal anti-discrimination statutes play both a remedial and deterrent role. Although the former role is largely a matter of the rights of particular aggrieved individuals, the latter is a question of "broader social purposes." The deterrent function of the laws in question is, in part, that employers who engage in discriminatory practices are aware that they may incur liability in more than one case. If, however, a cost-splitting provision would deter a substantial number of potential litigants, then that provision undermines the deterrent effect of the anti-discrimination statutes. Thus, in order to protect the statutory rights at issue, the reviewing court must look to more than just the interests and conduct of a particular plaintiff.[86]

Morrison provides an appropriate framework for analyzing the effect a class waiver will have on class members other than just the named plaintiff. This Essay contemplates that this analysis will be utilized in more cases, as set forth below.

A. Achieving Remediation

In class action litigation, silent class members do not need to participate in or contribute funds or time to the action in order to be compensated.[87] In individual arbitration, on the other hand, each putative class member must go through every step of the adjudication to even have a chance at recovery. These silent class members would, if required to participate in an individual arbitration, have to invest time, resources, and funds that they would not be required to expend if they were putative class members in a class action.

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[85] *Id.* at 658.

[86] *Id.* at 663 (citations omitted) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)).

[87] *See* 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 8:1 (4th ed. 2002).

Class action defendants' conduct is often wide-ranging and affects large groups of victims.[88] Without a class action mechanism, numerous putative class members would be deprived of compensation for the damages they have sustained. In all likelihood, recovery would be limited to the original named plaintiffs—the only victims who would likely participate in the arbitration.[89] This does not constitute remediation in a situation with a large number of injured parties.

1. Individual Arbitration Lacks a Mechanism for Providing Notice to Putative Class Members

In situations where many victims have been injured and are not easily located, they cannot be compensated absent some procedure for notice. In class actions, class members can find out that they have claims against the defendants due to the national publicity the actions receive, or by receiving notice of their status as a class member once a settlement is achieved.[90] If a case is resolved through individual arbitration, however, an injured claimant will not receive information through either of these sources. An arbitration—especially an individual one—is usually low profile, if not confidential. Moreover, an arbitration that prohibits class procedures will most likely also prohibit, or will certainly not require, notification of other putative class members, or even production of the names of putative class members. Putative class members who have valid claims will thus not discover those claims and will not know to initiate their own arbitrations. Putative class members will also not learn of the outcomes of the arbitrations or settlements. Individual arbitration thus prevents putative class members from receiving notice of their claims or a share of the recovery.[91]

2. Individual Arbitration Requires a Time Commitment from Every Claimant Who Would Have Been a Silent Class Member

As in litigation, adjudication in arbitration can take a prolonged amount of time depending on the number of issues involved, the amount of evidence and discovery needed, and the number of defendants included (all

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88 *See, e.g.*, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (noting class size of 17 million).

89 *See* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 464–66 (2011).

90 *See* CONTE & NEWBERG, *supra* note 87, § 8:1.

91 *See* Cole, *supra* note 89, at 505–06.

of whom may require separate arbitrations).[92] It stands to reason that the many putative class members, who would each be required to expend a significant amount of time to participate in an individual arbitration, would generally be discouraged from participating.

Even if one individual arbitration takes less time than one class action, that savings comes at the expense of all the putative class members who would have to individually arbitrate their own claims. Thousands or even millions of individual arbitrations would almost certainly be more time consuming than a single class action.

Additionally, if individual arbitrations last a significant amount of time, other similarly situated plaintiffs would be unable to increase their efficiency and decrease their costs by utilizing filings and any favorable rulings from previous arbitrations, a problem that would not arise in a class action. Lengthy arbitrations would also prevent plaintiffs from relying on evidence or judgments obtained in earlier arbitrations by other claimants. Because they would need to assert their claims before the statute of limitations runs (which may also be shortened by the agreement), other plaintiffs may not be able to wait for the earlier arbitrations to be completed before initiating their own.

3. Individual Arbitration Requires a Significant Labor Investment on the Part of Every Claimant Who Would Otherwise Be a Silent Putative Class Member

The amount of effort that has to be expended by each putative class member is an additional deterrent to pursuing a claim, preventing remediation. In an arbitration prohibiting class procedures, each and every potential claimant who would have been a putative class member must personally produce discovery, be deposed, interface with attorneys (if he or she has attorneys) and review documents. The majority of potential claimants will be deterred by these costs and burdens.

4. Individual Arbitration Is Too Expensive for Putative Class Members

The cost of individual arbitration, requiring numerous expert reports and a large amount of complex discovery, will also serve as a deterrent to

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[92] Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. Lab. & Emp. L. 227, 232 (2010) ("A recent review conducted by a major U.S. employer that shared its data with the author suggests that arbitration . . . actually takes longer to resolve a dispute than does litigation." (footnote omitted)); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 14 ("[A]rbitration may be no less costly or lengthy than litigation.").

many putative class members.[93] It would not be worthwhile for most putative class members or lawyers to each invest the thousands or millions of dollars that could be required to bring an individual arbitration claim.[94] Such expenses only make sense in a class action, where silent class members are represented by named plaintiffs and attorneys often advance the cost of these expenses.[95] Costs often cannot be reduced through sharing discovery and expert reports due to confidentiality requirements in the arbitration proceedings.[96]

If the parties have not already agreed to confidential arbitration proceedings, plaintiffs could, in theory, band together to share some of the costs—assuming they are aware of each other's claims and decide to pursue arbitration at the same time. But putative class members who are not connected to this group of plaintiffs or even aware of their arbitrations certainly could not take advantage of these jointly funded efforts. The sums required for discovery and expert reports would also be too high for an attorney to advance if the profit he could expect to recover would only consist of fees for representing the named plaintiffs—and which would only be available if the claimants prevailed.

B. Achieving Deterrence

Preventing class procedures in certain cases will also prevent the achievement of the second statutory objective mentioned in *Mitsubishi*: deterrence.[97] To effectively deter violations of federal law, violators must be required to compensate all victims affected by their misconduct, especially in cases with a large number of claimants.[98] Given that, as discussed above, many silent class members will not pursue arbitration against a violator, permitting claims to be resolved only through mandatory individual arbitration prevents a defendant from being deterred from committing future violations. With regard to a case brought under Title VII of the Civil Rights Act of 1964,[99] the Sixth Circuit stated: "The deterrent function of the laws in question is, in part, that employers who engage in discriminatory practices are aware that they may incur liability in

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93 *See* Kristian v. Comcast Corp., 446 F.3d 25, 54–55 (1st Cir. 2006).

94 *See id.*

95 *See id.* at 54–55.

96 *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) (noting that confidentiality provision of arbitration clause prevents parties from sharing costs of expert report).

97 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).

98 *See id.*

99 42 U.S.C. §§ 2000e–2000e-17 (2006).

more than one case."[100]

The cost of engaging in illegal conduct is a factor considered by a potential violator. As a recently published law review article states:

> The dominant law-and-economics model of crime posits that rational choices drive corporate decisions (including the decisions of the individuals involved) to commit crimes—a "cost/benefit analysis" of the decision. Consequently, there exists a bundle of sanctions that the legal system can (at least in theory) calculate that optimally will deter the crime.[101]

Such sanctions include, among others, government fines and private damages.[102] "The standard optimal deterrence formula shows that the total amount of cartel sanctions should equal the cartel's 'net harm to others' divided by the probability of detection and proof of the violation."[103] Being insulated from having to pay full compensation to all victims will encourage a violator of federal laws to strike again.

The above-cited study found that, even under the current system, violators of antitrust laws are underdeterred.[104] It determined that, out of the seventy-five illegal price-fixing conspiracies evaluated, only two were optimally deterred.[105] Thus, seventy-three cartels would have economic motivation for recidivism.

A violator that knows it can avoid liability to the majority of victims by invoking its arbitration clause to prevent a class action has little financial motivation to refrain from repeating its illegal conduct. What "matters for optimal deterrence is that the judgment or settlement accounts for the total aggregate tortious harm."[106]

V. WHAT KINDS OF CASES DOES A REMEDIATION AND DETERRENCE ANALYSIS PREVENT FROM BEING SUBJECT TO MANDATORY ARBITRATION?

A. Factors to Consider

For the reasons described above, certain statutory causes of action are

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100 Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003).

101 John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 438 (2012).

102 *Id.* at 449.

103 *Id.* at 455.

104 *Id.* at 474.

105 *Id.*

106 David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1893 (2002).

unsuitable for bilateral arbitration.[107] These actions meet certain criteria that make the achievement of remediation and deterrence impossible unless said actions are adjudicated through a class action proceeding.

First, the actions are ones in which there is a large number of putative class members. These are generally cases where the defendants engage in uniform conduct with regard to a product or practice that touches the lives of many potential claimants. These will often involve a defendant that operates nationally or internationally. One example is a price-fixing cartel that inflates the prices of all liquid-crystal displays used in laptops, smart phones, and other items.[108] Such conduct injures millions of victims, who will not all be able to vindicate their claims through individual arbitration.

Second, the case will be one that requires one or more expert reports that deal with fairly complex issues, takes up a considerable amount of time and resources, or involves a high volume of discovery. A case where complicated and expensive expert work is required is one where proof of damages is complicated, an industry expert is required, special issues such as the relevant market must be proven, or the expert required is one with a particularly expensive specialty.[109] A case where voluminous discovery is required is one where there are many defendants, a long class period, wide-ranging effects of the violative conduct, or many issues attendant to proving damages or elements of the claim.[110]

Third, the case will be one that will likely be time consuming. Cases can be time consuming for a variety of reasons, including the number of issues involved, the amount of evidence and discovery needed, the number of defendants included, the amount of proof required to establish that a claimant suffered damages, the relief sought (including injunctive and declaratory relief), and the number of challenges the defendants will mount. These can be cases where, for instance, the claimant has to prove facts about a defendant's state of mind, the defendant is accused of engaging in numerous instances of misconduct, or the defendant raises particularly complex defenses.

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107 *See supra* Part IV.

108 *See, e.g.*, *In re* TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583 (N.D. Cal. 2010).

109 *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 58 (1st Cir. 2006) (detailing the extensive costs of necessary experts).

110 *See id.*

B. Causes of Action Meeting the Criteria

1. Antitrust Cases

Antitrust cases will often meet the criteria described above. Because of their complexity, the voluminous discovery required to adjudicate them, and the amount of time required for their resolution, remediation for all putative class members and deterrence cannot be achieved in certain antitrust cases without the use of a class mechanism.

Antitrust actions concerning conspiracies and abuse of market power related to products used by a large number of purchasers all over the country, such as laptop computer components, require a class action for their resolution. Such actions involve not only a large number of claimants, but also complicated issues, including establishment of the relevant market and the impact of a price-fixing conspiracy on the price of a given item.[111] Antitrust cases concerning widespread conspiracies or abuses of market power always require at least one expert report from the plaintiffs, which is usually met with an expert report from the defendants.[112] Such cases may also require reports from experts in the relevant industry regarding issues such as pricing and procurement practices.

Additionally, antitrust cases require a large amount of discovery.[113] They often have numerous defendants—sometimes an entire industry can be involved in a conspiracy—and often cover long time periods.[114] Antitrust cases also frequently require discovery from third parties. Additionally, antitrust cases involve damage analysis requiring the production of a large amount of transactional data.[115] In price-fixing cases, such data is needed from periods during, before, and after the conspiracy. Antitrust cases usually last approximately three times as long as other cases, due to the large number of defendants, complicated theories of recovery, and requests for injunctive relief that accompany demands for damages.[116]

Furthermore, as the Supreme Court emphasized in *Mitsubishi*, "[t]he treble-damages provision wielded by the private litigant is a chief tool in

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[111] *See generally* Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 Antitrust L.J. 1501 (1980).

[112] *See Kristian*, 446 F.3d at 58.

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See* Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 692 (2010).

the antitrust enforcement scheme, posing a crucial deterrent to potential violators."[117] Thus, all injured claimants must be compensated in order for the antitrust laws to achieve their goals.

2. Securities Actions

Actions arising under Section 10(b) of the Securities Exchange Act of 1934[118] will also often meet the criteria set forth above due to the need for experts, the complex analyses required for proof of damages, and the number of defendants in such cases. These actions are often aimed at misrepresentations concerning securities marketed to a large number of investors on a public exchange. Such cases usually involve the same misrepresentations made to a broad range of purchasers. Actions under section 10(b) often require financial experts to evaluate the violation and opine on issues such as materiality, loss, causation, and damages.[119] Just like antitrust experts, securities experts will often need to perform regression analyses and evaluate price movements.

Such actions are also often time-consuming and involve a large amount of discovery. Discovery may last several years alone due to the presence of numerous defendants and numerous complex issues, such as materiality and the varying amounts of liability borne by different defendants.[120] The defendants will often consist of not only the violators and their parent companies, but also individual inside and outside directors and accounting firms. With respect to the Securities Exchange Act of 1934, the Supreme Court has also recognized the "deterrent value of private rights of action, which . . . provide a most effective weapon in the enforcement of the securities laws and are a necessary supplement to Commission action."[121]

3. RICO Actions

Actions brought as class actions under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[122] also are not often proper for

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117 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 635 (1985).

118 Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

119 *See* Randall v. Loftsgaarden, 478 U.S. 647, 669 n.2 (1986).

120 James J. Hagan & Joseph M. McLaughlin, *Fairness in the Balance: The Use of Bar Orders and Judgment Reduction in the Settlement of Multi-Defendant Securities Litigation*, 1 STAN. J.L. BUS. & FIN. 29, 41 (1994). Discovery in such cases is often also very expensive. Cameron S. Matheson, *Transvestite Cowboys, Thieving Brokers, and the Securities Litigation Uniform Standards Act: SLUSA's Trap for the Unwary Plaintiff*, 35 MCGEORGE L. REV. 121, 126 (2004).

121 *Randall*, 478 U.S. at 664 (internal quotation marks omitted).

122 Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968

arbitration.[123] Such actions, typically aimed at large fraudulent or deceptive schemes perpetuated on a national scale, sometimes through marketing targeted at the general public, frequently involve a large number of plaintiffs.[124]

RICO actions require at least two predicate illegal acts over the course of ten years and can involve numerous substantive allegations arising out of antitrust and fraud claims, to name a few.[125] These claims often give rise to complex litigation, involving proof of the predicate acts (such as mail and wire fraud), a pattern of racketeering activity, and the existence of an enterprise—consisting often not only of the defendants, but also of numerous other persons and entities involved in carrying out the illegal conduct.[126]

These types of actions, based on the conduct of all persons and entities involved in the enterprise and the predicate acts, will often involve many defendants, as well as a vast amount of both standard and third-party discovery.[127] The numerous illegal acts involved in a pattern of racketeering activity could take place over a prolonged period of time and result in voluminous discoverable materials.

Proving many of the underlying claims in RICO actions, which, like antitrust claims, are often related to anticompetitive conduct such as price fixing, or deceptive and fraudulent conduct, such as failure to adequately disclose the liquidity of annuities, will often require expensive experts and may involve expert testimony, including from actuaries and financial experts.[128] Finally, as with securities and antitrust actions, deterrence is

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(2012).

123 The Supreme Court has found a RICO action to be arbitrable. *See* Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 242 (1987). That action was not brought as a class action, however, and no class action waiver was at issue. Therefore, the Court did not consider the question of whether arbitration would permit remediation of all putative class members' claims and deterrence against further RICO violations.

124 Leah Bressack, Note, *Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under RICO*, 61 VAND. L. REV. 579, 586–87 (2008).

125 18 U.S.C. § 1961.

126 *See* Mark C. Weber, *Taking Subrogation Seriously: The Blue Cross-Blue Shield Tobacco Litigation Reconsidered*, 67 BROOK. L. REV. 381, 390–91 (2001) (discussing the numerous claims plaintiffs might make under RICO, and noting that one congressional purpose of the RICO statute was to "combat organized crime" (quoting H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 248 (1989))).

127 *See* Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 297 (2004) (noting that the "demanding pleading requirements" for RICO claims often require "extensive pre-trial discovery").

128 *See* Kristian v. Comcast Corp., 446 F.3d 25, 58 (1st Cir. 2006) (discussing the use of experts); Gross v. Waywell, 628 F. Supp. 2d 475, 481–82 (S.D.N.Y. 2009) (discussing the similarities in the legal structure and policy goals between the RICO statute and the

one of the main objectives of RICO: "[B]oth the antitrust and RICO statutes 'share a common congressional objective of encouraging civil litigation to supplement Government efforts *to deter* and penalize the respectively prohibited practices.'"[129]

CONCLUSION

Having stated in 1985 that an agreement to arbitrate must still allow for vindication of statutory rights so as to achieve remediation and deterrence,[130] the Supreme Court has never changed its position on this issue.[131] Thus, the achievement of these two goals still must be considered whenever an arbitration clause is being evaluated, especially one with a class action waiver.

As *Randolph* and *American Express Co.* have both held, certain obstacles, such as high filing fees, can prevent the named plaintiffs in a given lawsuit from being able to vindicate their statutory rights.[132] The Supreme Court, however, has never opined on the issue of how remediation and deterrence can be achieved for a large class of injured victims who are being represented by the named plaintiffs. As the Sixth Circuit stated in *Morrison*, "the reviewing court must look to more than just the interests and conduct of a particular plaintiff."[133]

The reality is that these goals cannot be achieved through individual arbitration. In certain types of actions, resolving the disputes of named plaintiffs will not lead to remediation and deterrence. For claims based on violations of the Sherman Act, Section 10(b) of the Securities Exchange Act of 1934, and the RICO statute, as well as perhaps other claims, the class mechanism is necessary for remediation of putative class members' claims and the deterrence of further violations. The question of how to properly achieve resolution of the claims held by putative class members in large, time-consuming, and expensive cases remains to be answered.

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federal antitrust laws).

[129] Bressack, *supra* note 124, at 598 (quoting Rotella v. Wood, 528 U.S. 549, 557 (2000)). Thus, the *Rotella* Court determined that RICO's "provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity." *Rotella*, 528 U.S. at 558.

[130] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

[131] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

[132] *See id.* at 2310–11; Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

[133] Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003).