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HOW CHAPTER 93A CONSUMERS LOST THEIR DAY IN COURT: ONE LEGISLATIVE OPTION TO LEVEL THE PLAYING FIELD

I. INTRODUCTION

The zeitgeist of 1960s Massachusetts produced broad and powerful consumer protection legislation known as the Massachusetts Consumer and Business Protection Act (Chapter 93A).¹ Inspired by federal law, Massachusetts became the first state to pass such far-reaching consumer protection legislation.² Chapter 93A provides consumers with a cause of action when businesses engage in “unfair or deceptive acts or practices.”³ That phrase is now “heavy artillery” in Massachusetts and is the most widely used statute in the Commonwealth’s civil litigation.⁴ The statute aims to put consumers on a more level playing field with businesses who supply needed goods and services.⁵

The Federal Arbitration Act of 1925 (FAA)⁶ is now a means for large businesses to avoid facing consumers in the courtroom under statutes

¹ See MASS. GEN. LAWS ch. 93A, §§ 1-11 (2007); Dwight E. Golann, *Evolution of Chapter 93A: National and Local Authority*, in CHAPTER 93A RIGHTS AND REMEDIES §§ 1.1, 1.5, at 1-2, 6 (Hon. Margot G. Botsford ed., Mass. Continuing Legal Educ., 2d. 2007) (explaining evolution and prevalence of Chapter 93A); Katerina S. Callahan, Note, *Massachusetts General Laws Chapter 93A, Section 11: The Evolution of the “Raised Eyebrow” Standard*, 36 SUFFOLK U. L. REV. 139, 139-46 (2002) (same).

² Callahan, *supra* note 1, at 142-45 (describing Federal Trade Commission Act of 1914 and progeny of state “little FTC” acts); Golann, *supra* note 1, §§ 1.1, 1.3, at 1, 3 (describing statutory origin). This federal law established the Federal Trade Commission and made “unfair methods of competition” unlawful. Callahan, *supra* note 1, at 142; *see also* 15 U.S.C. §§ 41-58 (1995). The language was amended to make “unfair or deceptive acts or practices in or affecting commerce” unlawful. *Id.* § 45 Callahan, *supra* note 1, at 142. Chapter 93A’s language is identical, making “unfair or deceptive acts or practices” by anyone engaged in “trade or commerce” unlawful. MASS. GEN. LAWS ch. 93A, § 2 (2007).

³ MASS. GEN. LAWS ch. 93A, § 2 (2007).

⁴ Cassano v. Gogos, 480 N.E.2d 649, 651 (Mass. App. Ct. 1985); Golann, *supra* note 1, § 1.1, at 1 (describing usage of Chapter 93A in Massachusetts); *see also* 52 MICHAEL C. GILLERAN, THE LAW OF CHAPTER 93A § 1.1, at 1-6 (Mass. Prac. Series, 2d ed. 2008) (outlining background of Chapter 93A).

⁵ See G. Richard Shell, *The Power to Punish: Authority of Arbitrators to Award Multiple Damages and Attorneys’ Fees*, 72 MASS. L. REV. 26, 27 n.5 (1987) (“[M]erchants might abuse their superior bargaining position in consumer transactions . . .”); GILLERAN, *supra* note 4, § 1.1, at 6 (describing Chapter 93A as “[creating] some haven in our heartless commercial life”).

⁶ 9 U.S.C. §§ 1-14 (1995).

like Chapter 93A.⁷ Congress passed this legislation to overcome judicial hostility towards arbitration agreements.⁸ The FAA declares arbitration clauses “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁹ This language requires any court to stay judicial proceedings in favor of a valid arbitration clause.¹⁰ Unbeknownst to its drafters, the subsequent expansion of the FAA’s reach into state courts transformed it into a means to preempt conflicting state laws providing for judicial or administrative remedies.¹¹ The FAA’s preemptive power is in tension with Chapter 93A and other consumer protection statutes designed to provide a day in open, public court.¹²

Where defendant businesses often pay for the arbitration of consumer disputes, some believe that the arbitrators are more concerned with maintaining their clients than reaching fair results.¹³ Members of Congress wish to address this concern by passing the Arbitration Fairness Act of 2009.¹⁴ This bill would render pre-dispute arbitration agreements unenforceable in consumer, employment, franchise and civil rights

⁷ See discussion *infra* Part III (illustrating how arbitration clauses preempt state legislation providing non-arbitration remedies).

⁸ Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 389 (1992) (explaining FAA origins).

⁹ 9 U.S.C. § 2 (1995).

¹⁰ *Id.* § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”).

¹¹ See *infra* Part III.B (explaining how FAA can preempt state legislation).

¹² See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (acknowledging conflict between FAA and state consumer protection statutes); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (describing open, public nature of court compared to arbitration); *Warfield v. Beth Israel Deaconess Med. Ctr., Inc.*, 910 N.E.2d 317, 326 (Mass. 2009) (recognizing conflict between Chapter 93A and FAA). “The United States Supreme Court strongly favors arbitration as a method of dispute resolution. It has interpreted the FAA expansively, nullifying most of the state laws and public policies that formerly excluded many types of transactions, such as consumer and employment transactions, from arbitration.” Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1421-22 (2008).

¹³ Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 2(4) (2009) (articulating influence on arbitration companies); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(4) (2009) (same). This would not have been an issue under the original intent of the FAA, which was to resolve disputes between merchants. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101-06 (2006) (articulating intended application of FAA).

¹⁴ See Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009) (articulating changes to FAA); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (same); see also *infra* note 177 and accompanying text (evidencing ninety-five cosponsors for 2007 version).

disputes.¹⁵ This revision would prevent businesses from utilizing arbitration clauses buried in sales agreements to insulate themselves from litigating statutory consumer claims in open court.¹⁶ Consumers would have a meaningful choice and could still agree to use cost-effective, efficient arbitration to resolve their disputes after they arose.¹⁷ This legislation would protect consumers from binding boilerplate arbitration clauses that were not the product of fair and equal bargains.¹⁸

II. LEGISLATION TO HELP BUSINESSES AND CONSUMERS

A. *The Federal Arbitration Act of 1925*

Common law hostility towards arbitration was no secret.¹⁹ Courts considered it a threat to their dispute-resolving authority, especially pre-dispute agreements that promised to cut courts out from the beginning.²⁰ Some common law jurisdictions considered such agreements revocable by either party up until an award.²¹ Arguing for freedom to contract,

¹⁵ Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3 (2009) (nullifying pre-dispute arbitration clauses in these types of disputes). *But see* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009) (excluding civil rights claims).

¹⁶ Moses, *supra* note 13, at 155 (“The new FAA has substantially reduced access to the court system, particularly for consumers, workers, and those with little economic power. Any . . . [business] can prevent those with less economic power from ever having access to court to hold them accountable.”) (footnote omitted).

¹⁷ *See infra* note 162 and accompanying text (explaining how bill would change law).

¹⁸ Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 2 (2009) (explaining problem “between parties of greatly disparate economic power”); *see also* Bruhl, *supra* note 12, at 1422 (describing boilerplate provisions for “consumers or employees who have signed nonnegotiated arbitration agreements embedded in standard-form contracts”); Recent Proposed Legislation, *Arbitration -- Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees. -- Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007), 121 HARV. L. REV. 2262, 2264 (2008) [hereinafter *Congress Considers Bill*] (describing lack of meaningful choice for consumers due to unequal bargaining power).

¹⁹ *See* Strickland, *supra* note 8, at 389 (explaining common law hostility to arbitration); *Congress Considers Bill*, *supra* note 18, at 2262 (noting historical suspicion of arbitration). *But see* Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 272-78 (2003) (suggesting that common law hostility to arbitration is a fallacy). Of course, arbitration is substantially older than the common law. *See* 1 Kings 3:16-28.

²⁰ *See* Strickland, *supra* note 8, at 389 (noting increased judicial suspicion of pre-dispute arbitration agreements compared to similar post-dispute agreements).

²¹ *See* Moses, *supra* note 13, at 101-13 (explaining common law approach to arbitration); *see also* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1309 (1985) (“This treatment of arbitration began in the seventeenth century, when English courts analogized the parties’ appointment of an arbitrator to an agency, revocable at the will of either principal, rather than to a contract.”).

disaffected business interests sought to resolve commercial disputes privately.²² They lobbied Congress to help assure them that they would be able to arbitrate disputes by agreeing to do so ahead of time.²³

Congress adopted the FAA in 1925 as a nod to these concerns.²⁴ In declaring arbitration agreements “valid, enforceable, and irrevocable,” Congress lifted Section Two’s language from a 1920 New York statute designed to enforce pre-dispute arbitration agreements between merchants.²⁵ However, Congress drafted the FAA to apply in any dispute “involving commerce.”²⁶ Section Three required a court to stay any judicial proceeding upon either party presenting a valid arbitration clause.²⁷ Enforcing contracts to resolve disputes quickly and privately outside of the courtroom became a clear federal policy.²⁸

The FAA’s language was ambiguous as to whether it applied to both diversity and federal question jurisdiction and whether it applied in

²² Leroy & Feuille, *supra* note 19, at 279 (“Congress’s main concern was with businesses who wanted freedom to enter into contracts to resolve their commercial disputes privately.”); Strickland, *supra* note 8, at 389-90 (noting “pressure from business interests” to enforce arbitration agreements); *see also* Moses, *supra* note 13, at 101-13 (explaining full history of FAA).

²³ *See* Strickland, *supra* note 8, at 389-90 (describing business interests’ hopes for FAA). At the time, businesses were using arbitration to privately resolve disputes with other businesses. Moses, *supra* note 13, at 101.

²⁴ *Congress Considers Bill*, *supra* note 18, at 2262 (describing FAA origins); Robert O. Sheridan, Note, *All Almost Quiet on the Expanded Review Front: Supreme Court Rejects Expansion of Judicial Review of Arbitration Awards*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 93, 96 (2008) (explaining congressional intent behind FAA); *see also* 9 U.S.C. §§ 1-14 (1995) (codifying FAA).

²⁵ *See* 9 U.S.C. § 2 (1995); Moses, *supra* note 13, at 101 (explaining FAA’s history). The New York Assembly aimed to enforce these clauses in commercial contracts. *Id.* at 108. Subsequent revision to the 1920 New York statute omitted the three-word phrase used in the FAA. *See* N.Y. C.P.L.R. § 7501 (McKinney 1998). Under the FAA, arbitration agreements are enforced whether free-standing or a clause to a contract. Bruhl, *supra* note 12, at 1426.

²⁶ *See* 9 U.S.C. § 2 (1995) (including maritime transactions). Congress exerted this degree of federal control over state contract law using Commerce Clause power and the effect-on-commerce rationale. *See* U.S. CONST. art. I, § 8, cl. 3; *Wickard v. Filburn*, 317 U.S. 111, 123-24 (1942) (establishing effect-on-commerce rationale for federal commerce power).

²⁷ 9 U.S.C. §§ 3-4 (1995) (establishing court procedure for handling valid arbitration clause).

²⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (“[The FAA’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (“Congress’s clear intent, in the Arbitration Act, [is] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”). The FAA reserved a court’s right to strike down an arbitration agreement under contract or equity principles. *See* Shell, *supra* note 5, at 28; *see also* *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 767-69 (Mass. 2009) (using public policy exception to restrain FAA in Chapter 93A class action).

state courts at all.²⁹ Legal scholars of the 1920s believed that the FAA applied to both types of subject matter jurisdiction, but only in federal courts.³⁰ *Swift v. Tyson*,³¹ then-existing Supreme Court precedent giving federal courts the power to develop federal common law, undoubtedly shaped their thinking.³² These legal minds viewed the FAA as part of federal contract law, but subject matter jurisdiction needed reexamination after *Erie Railroad Co. v. Tompkins*.³³ That decision ended the era of federal common law and vitiated the rationale for applying the FAA in diversity cases.³⁴ Continued inapplicability in state courts would leave the FAA only enforcing agreements in federal question disputes.³⁵

In *Bernhardt v. Polygraphic Company of America, Inc.*,³⁶ the Supreme Court first addressed the FAA's post-*Erie* diversity question.³⁷ In this 1956 case, a federal district court and the Second Circuit Court of Appeals disagreed over whether an arbitrator could interpret a pre-dispute arbitration clause in an employment contract based on Vermont law.³⁸ The Supreme Court held that Section Two of the FAA did not apply because the employment contract did not "[involve] commerce."³⁹ The Court was able to avoid deciding whether the FAA applied in diversity cases after *Erie* because only Section Two agreements required Section Three stays.⁴⁰

²⁹ Hirshman, *supra* note 21, at 1312-18 (articulating FAA's unclear scope); Strickland, *supra* note 8, at 391 (explaining early questions of FAA applicability); *see also* 28 U.S.C. §§ 1331-32 (1995) (codifying federal question and diversity subject matter jurisdiction).

³⁰ Strickland, *supra* note 8, at 391 (explaining prevailing early view of FAA). The scope of federal commerce power was also much narrower at the time. Bruhl, *supra* note 12, at 1428.

³¹ 41 U.S. 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

³² *Id.* at 12 (articulating state law did not bind federal courts); Hirshman, *supra* note 21, at 1314 (explaining federal common law era).

³³ 304 U.S. 64 (1938) (holding that federal courts were bound by state law in diversity cases); Strickland, *supra* note 8, at 391 (describing scholarly view of pre-*Erie* FAA).

³⁴ Strickland, *supra* note 8, at 392 (explaining *Erie* decision's effect on FAA). Professor Strickland explained why *Erie* threatened diversity jurisdiction for the FAA: "Erie ended the power of federal courts to make substantive rules of decision in diversity cases, and cast doubt on Congress' power to do so. If the FAA were deemed to regulate substantive contract rights, therefore, *Erie* arguably precluded its application in diversity cases." *Id.* (footnote omitted).

³⁵ Moses, *supra* note 13, at 114-23 (writing on "the Post-*Erie* Dilemma"); *see also* Hirshman, *supra* note 21, at 1318-24 (articulating how *Erie* changed scope of FAA).

³⁶ 350 U.S. 198 (1956).

³⁷ *See id.* at 200-02 (addressing FAA applicability in diversity case); *see also* Moses, *supra* note 13, at 115 (discussing Supreme Court's post-*Erie* dilemma).

³⁸ *Bernhardt*, 350 U.S. at 202 ("The question remains whether, apart from the [FAA], a provision of a contract providing for arbitration is enforceable in a diversity case.").

³⁹ *Id.* at 200-01 ("There is no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.").

⁴⁰ *Id.* at 203-05 (holding FAA did not apply). The Court was able to avoid the difficult question:

Justice Frankfurter's concurrence speculated on the potential trouble that lay ahead when he wrote, "avoidance of the constitutional question [of preemption] is for me sufficiently compelling to lead to a construction of the [FAA] as not applicable to diversity cases."⁴¹

Eleven years later, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁴² the Supreme Court again considered the FAA in a diversity case; however, unlike in *Bernhardt*, the Court could not avoid the constitutional question that worried Justice Frankfurter in 1956.⁴³ The *Prima Paint* dispute arose out of a contract for the sale of paint, unquestionably "involving commerce," and the Court invoked the FAA to affirm a stay for arbitration under New York contract law.⁴⁴ Justice Fortas defended the decision as not making federal substantive contract law in a diversity case, which would have violated *Erie*.⁴⁵ Instead, the FAA was a regulation of interstate commerce, applying to diversity cases through the Commerce Clause.⁴⁶

Prima Paint meant that the FAA applied in all federal cases, regardless of how they got into federal court.⁴⁷ Still, *Erie* required arbitration agreement interpretation under state law.⁴⁸ The combination of *Prima Paint* and *Erie* could mean that the FAA was enforceable in state courts, which would allow it to preempt state law.⁴⁹ Justice Black's *Prima Paint* dissent echoed Justice Frankfurter's concerns in 1956, as he lamented

The Supreme Court interpreted the FAA in such a way [in *Bernhardt*] as to avoid deciding the difficult issues surrounding the application of *Erie* to the FAA. The Court ruled that section 3 of the FAA . . . applies only to arbitration agreements governed by section 2 Since the contract before the Court [in *Bernhardt*] did not involve a maritime transaction nor interstate commerce, the FAA was inapplicable by its own terms. The Court interpreted the statute this way *expressly to avoid deciding whether application of the FAA in a diversity case was unconstitutional under Erie*.

Strickland, *supra* note 8, at 394 (emphasis added) (footnote omitted).

⁴¹ *Bernhardt*, 350 U.S. at 208 (Frankfurter, J., concurring).

⁴² 388 U.S. 395 (1967).

⁴³ Compare *id.* at 401 (describing issue before Court), with *Bernhardt*, 350 U.S. at 208 (Frankfurter, J. concurring) (warning of trouble ahead for the FAA); see also Moses, *supra* note 13, at 116 ("[T]he Court faced that question head-on in *Prima Paint*.").

⁴⁴ *Prima Paint*, 388 U.S. at 401, 406-07 (affirming district court's ruling by reasoning contract within FAA's scope).

⁴⁵ *Id.* at 405 ("The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases.").

⁴⁶ *Id.* (explaining mechanics and reach of FAA).

⁴⁷ See Moses, *supra* note 13, at 122 (explaining reach of FAA as of 1967); Strickland, *supra* note 8, at 395 (describing FAA post-*Prima Paint*).

⁴⁸ Strickland, *supra* note 8, at 395-96 (explaining impact of *Erie* on federal arbitration law).

⁴⁹ *Id.* (explaining potential reach of FAA in 1967).

that holding the FAA to be a regulation of interstate commerce would require application in state courts and preemption of state law.⁵⁰ After the decision came down, various state courts cited *Prima Paint* and started applying the FAA.⁵¹ The 1967 *Prima Paint* decision coincided with Massachusetts' enactment of Chapter 93A, which made it the first state to give aggrieved consumers a statutory right to go to court.⁵²

B. The Massachusetts Consumer and Business Protection Act of 1967

At common law, proving elements such as intent, reliance and privity often stood in the way of recovery for aggrieved consumers.⁵³ The law paid no attention to their disparate bargaining power because the prevailing “laissez-faire” economic theory suggested that market forces would determine the optimal level of respect for them.⁵⁴ Massachusetts was especially severe because the Commonwealth is a non-punitive damages jurisdiction, making even the most egregious examples of tortious consumer exploitation result in an award of no more than actual economic

⁵⁰ *Prima Paint*, 388 U.S. at 424-25 (Black, J., dissenting). Justice Black opined:

The Court here does not hold today . . . that the body of federal substantive law created by federal judges under the [FAA] is required to be applied by state courts. A holding to that effect – which the Court seems to leave up in the air – would flout the intention of the framers of the [FAA]. Yet under this Court's opinion today – that the [FAA] supplies not only the remedy of enforcement but a body of federal doctrines to determine the validity of an arbitration agreement – failure to make the [FAA] applicable in state courts would give rise to ‘forum shopping’ and an unconstitutional discrimination that both *Erie* and *Bernhardt* were designed to eliminate. *These problems are greatly reduced if the [FAA] is limited, as it should be, to its proper scope: the mere enforcement in federal courts of valid arbitration agreements.*

Id. (emphasis added) (footnotes omitted).

⁵¹ Hirshman, *supra* note 21, at 1326 (“[A] substantial number of state courts held that they were bound to apply the FAA.”); *see also, e.g.,* Episcopal Hous. Corp. v. Fed. Ins. Co., 239 S.E.2d 647, 649-52 (S.C. 1977) (applying FAA in South Carolina state court); *Miller v. Puritan Fashions Corp.*, 516 S.W.2d 234, 238-39 (Tex. Civ. App. 1974) (applying FAA in Texas state court); *Allison v. Medicab Int'l, Inc.*, 597 P.2d 380, 381-83 (Wash. 1979) (applying FAA in Washington state court).

⁵² *Compare Prima Paint*, 388 U.S. at 395 (deciding case in 1967), with Callahan, *supra* note 1, at 144 (describing passage of Chapter 93A in 1967).

⁵³ Golann, *supra* note 1, § 1.3, at 3 (describing common law consumer remedies); *see also* GILLERAN, *supra* note 4, § 1.1, at 1-6 (articulating limitations of common law remedies); Callahan, *supra* note 1, at 141 (describing pre-Chapter 93A era).

⁵⁴ Callahan, *supra* note 1, at 141-42 (describing “laissez-faire” economic theory's justification for not further protecting consumers). The idea was to allow the market to determine the optimal treatment of consumers without considering the unequal bargaining power between the parties. *Id.* at 142; *see also* GILLERAN, *supra* note 4, § 1.1, at 2-3 (articulating “laissez-faire” theory on consumer protection).

loss.⁵⁵ Additionally, successful consumer plaintiffs would still have to pay for their own attorney, fees and costs.⁵⁶

As the United States industrialized and suburbanized, consumers became a powerful voice for reforming an out-of-touch “laissez-faire” approach.⁵⁷ As early as the turn of the twentieth century, courts outside Massachusetts started awarding punitive damages to consumers for intentional torts.⁵⁸ On the legislative side, Congress passed the Federal Trade Commission Act in 1914 (FTC Act).⁵⁹ The statute made “unfair or deceptive acts or practices in or affecting commerce” unlawful, and it gave the Federal Trade Commission authority to independently police the marketplace.⁶⁰ The consumer class continued to expand in the post-World War II economic boom, and states considered passing their own consumer protection legislation.⁶¹ States referred to these analogous statutes as “little FTC” acts.⁶²

In 1967, Massachusetts became the first state to pass such legislation and codified its “little FTC” under Chapter 93A of the Massachusetts General Laws.⁶³ Chapter 93A created a statutory cause of action for consumers, which ended their reliance on difficult to prove tort and contract theories.⁶⁴ The focus shifted from discerning a defendant’s bad motives or the nature of the relationship to protecting consumers by

⁵⁵ See GILLERAN, *supra* note 4, § 1.1, at 2 n.2 (quoting *Burt v. Advertiser Newspaper Co.*, 28 N.E. 1, 5 (1891) (showing origin of Massachusetts’ rule against punitive damages); Shell, *supra* note 5, at 28 (describing absence of punitive damages in Massachusetts).

⁵⁶ GILLERAN, *supra* note 4, § 1.1, at 1-4 (describing consumer restraints prior to Chapter 93A).

⁵⁷ *Id.* § 1.1, at 1-6 (explaining transition away from “laissez-faire”). Gilleran also credits the Progressive Era and the decline of legal formalism for this transition. *Id.*

⁵⁸ Callahan, *supra* note 1, at 142 (“Gradually, a more interventionist approach replaced the laissez-faire attitude First, in the late nineteenth century and the early twentieth century, courts began awarding multiple damages for intentional deceit in the marketplace.”) (footnote omitted).

⁵⁹ See 15 U.S.C. § 45 (1995); Callahan, *supra* note 1, at 142 (explaining FTC Act origins).

⁶⁰ 15 U.S.C. §§ 41, 45 (1995) (establishing Federal Trade Commission and making such actions unlawful). The statute was part of the trust-busting era. See Callahan, *supra* note 1, at 142; see also sources cited *supra* note 2 (explaining evolution of FTC Act language).

⁶¹ GILLERAN, *supra* note 4, § 1.1, at 4 (explaining growth of consumer class following World War II); Callahan, *supra* note 1, at 142 (explaining states’ contemplation of consumer legislation).

⁶² Callahan, *supra* note 1, at 142 (describing enactment of “little FTC” acts by states); Golann, *supra* note 1, § 1.3, at 3 (describing FTC Act-based state consumer statutes).

⁶³ Golann, *supra* note 1, § 1.3, at 3 (describing Chapter 93A history); see also MASS. GEN. LAWS ch. 93A, §§ 1-11 (2007) (codifying Chapter 93A).

⁶⁴ GILLERAN, *supra* note 4, at § 1.1, at 5-6 (explaining departure from common law with Chapter 93A).

“attack[ing] marketplace abuses.”⁶⁵ Following the Commonwealth’s lead, all other states passed “little FTC” acts to protect consumers.⁶⁶

Chapter 93A became “potent weaponry” in Massachusetts.⁶⁷ Just like the FTC Act, Chapter 93A made “unfair or deceptive acts or practices” unlawful.⁶⁸ The initial version authorized only the Attorney General to sue on behalf of consumers, which paralleled the authority of the Federal Trade Commission.⁶⁹ The drastic increase in litigation quickly overwhelmed the Attorney General’s office, and the state legislature amended Chapter 93A in 1969 to give consumers a private cause of action under Section Nine.⁷⁰ Shortly after, the Massachusetts legislature granted businesses a cause of action against other businesses, when it added Section Eleven in 1972.⁷¹ While Chapter 93A provided consumers and businesses with a new means to address grievances in open court, neither section guaranteed the right to a jury trial.⁷²

Chapter 93A claims represented a significant departure from Massachusetts common law.⁷³ After the addition of Section Nine, consumer plaintiffs could recover multiple damages, attorney’s fees and costs.⁷⁴ For “knowing or willful” violations, courts had to double and could treble the actual damages.⁷⁵ In addition, demand letters became a

⁶⁵ Golann, *supra* note 1, § 1.3, at 3. Chapter 93A was an attempt to provide “a more equitable balance in the relationship of consumers to persons conducting business activities.” *Commonwealth v. DeCotis*, 316 N.E.2d 748, 752 (Mass. 1974).

⁶⁶ Callahan, *supra* note 1, at 142 (explaining impact of Chapter 93A nationally); *see also* Shell, *supra* note 5, at 26 n.2 (describing spread of “analogous” legislation).

⁶⁷ *Levings v. Forbes & Wallace Inc.*, 396 N.E.2d 149, 152 (Mass. App. Ct. 1979).

⁶⁸ MASS. GEN. LAWS ch. 93A, § 2(a) (2007) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”).

⁶⁹ Callahan, *supra* note 1, at 145 (explaining initial Chapter 93A modeling after FTC Act).

⁷⁰ MASS. GEN. LAWS ch. 93A, § 9 (2007) (establishing consumer cause of action); Golann, *supra* note 1, § 1.3, at 4 (explaining 1969 amendment to provide consumers with private cause of action).

⁷¹ MASS. GEN. LAWS ch. 93A, § 11 (2007) (establishing private cause of action for businesses under Chapter 93A); Golann, *supra* note 1, § 1.3, at 4 (describing origin of § 11).

⁷² *Town of Norwood v. Adams-Russell Co., Inc.*, 519 N.E.2d 253, 254 n.3 (Mass. 1988) (“There is no right to trial by jury for [Chapter 93A] actions”); *Nei v. Burley*, 446 N.E.2d 674, 679 (Mass. 1983) (“In all, the equitable nature of the relief permitted and the silence of the Legislature leads us to conclude that there is no right to a trial by jury for actions cognizable under [Chapter 93A].”); *see also* MASS. GEN. LAWS ch. 93A, §§ 9, 11 (2007) (providing no right to jury trial).

⁷³ *See infra* notes 74-79 and accompanying text (explaining augmentation of consumer rights).

⁷⁴ MASS. GEN. LAWS ch. 93A, § 9(3A) (2007) (“Said damages may include double or treble damages, attorney’s fees and costs”). The rationale is that Chapter 93A violations are “more closely analogous to tort violations than to breaches of contract.” Shell, *supra* note 5, at 34.

⁷⁵ GILLERAN, *supra* note 4, § 11.9, at 544-67 (explaining statutory multiple damages); Shell,

prerequisite for consumers filing suit.⁷⁶ This requirement served several purposes: to put offending businesses on notice; to provide information about the nature of the claim; to encourage negotiations towards settlement; and to act as a control on damages.⁷⁷ Although defendants could avoid multiple damages by making reasonable offers of settlement, bad faith responses to demand letters could also give rise to multiple damage liability.⁷⁸ Perhaps the most important departure from common law was that aggrieved consumers no longer needed to address elements such as intent, reliance or privity.⁷⁹

Consumer arbitration clauses were supposed to receive different treatment in light of Chapter 93A.⁸⁰ The Supreme Judicial Court of Massachusetts (SJC) made this distinction in 1982, when it decided *Hannon v. Original Gunitite Aquatech Pools, Inc.*⁸¹ Joseph Hannon sued Aquatech Pools, Inc. (Aquatech) for breach of contract and a Chapter 93A violation after a pool installation was more expensive than expected.⁸² Aquatech counterclaimed for the money due and asked the court to stay the proceedings under a broad, pre-dispute arbitration clause signed by Mr. Hannon.⁸³ The superior court stayed the case in favor of arbitration, and

supra note 5, at 27 (describing statutory remedies).

⁷⁶ MASS. GEN. LAWS ch. 93A, § 9(3) (2007) ("At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent."); *see also* *Entrialgo v. Twin City Dodge, Inc.*, 333 N.E.2d 202, 204 (Mass. 1975) (holding demand letter to be a prerequisite for § 9 claims). *But see* MASS. GEN. LAWS ch. 93A, § 11 (2007) (requiring no demand letter for claims under § 11).

⁷⁷ *See* *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 779 (Mass. 1975) (describing function and purposes of demand letter).

⁷⁸ MASS. GEN. LAWS ch. 93A, § 9 (2007) (articulating grounds for multiple damages); *Whelihan v. Markowski*, 638 N.E.2d 927, 930 (Mass. App. Ct. 1994) (awarding multiple damages for bad faith settlement offer).

⁷⁹ Golann, *supra* note 1, § 1.3, at 3 (describing changes from common law).

⁸⁰ *See* GILLERAN, *supra* note 4, § 13.2, at 688 ("A different rule governs the enforceability of arbitration clauses agreed to by § 9 consumer plaintiffs versus those agreed to by § 11 business plaintiffs. A § 9 plaintiff will be able to avoid arbitration while a § 11 plaintiff probably will not be able to avoid arbitration."); *see also* *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182, 187-88 (Mass. 1990) (holding only § 11 rights can be waived).

⁸¹ 434 N.E.2d 611, 613 (Mass. 1982).

⁸² *Id.* at 612-13 (describing facts of case). Mr. Hannon alleged misrepresentations, "low-balling" and "commercial bribery." *Id.* Mr. Hannon signed Aquatech's "excavation approval form" prior to commencing the work, which made him responsible for additional expenses associated with the excavation and included a minimum \$250 fee in the event Aquatech encountered water. *Id.* at 614-15. Aquatech encountered water along with buried stumps while excavating and substantial additional work was necessary to pump the water to complete the job. *Id.* at 615. Aquatech's \$1,375.25 additional charge on top of the \$7,000 contract price caused the dispute. *Id.*

⁸³ *See id.* at 613 (describing procedural background of case). The arbitration clause between

the arbitrator awarded damages to Aquatech on their counterclaim without Hannon even raising his Chapter 93A claim.⁸⁴ After arbitration, Hannon brought his claim in superior court, where Aquatech argued that he had missed his chance by not raising the Chapter 93A claim in the arbitration.⁸⁵

Hannon pointed to part of Chapter 93A's Section Nine that read, "[a]ny person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any . . . statute or the common law."⁸⁶ The SJC agreed and held, "consumers need not submit to arbitration as a precondition to asserting their rights under [Chapter 93A]."⁸⁷ The SJC further held that Hannon could still bring his Chapter 93A claim in court, even after arbitration.⁸⁸ As of 1982, Massachusetts consumers could not be forced to arbitrate Chapter 93A claims even with a pre-dispute arbitration clause.⁸⁹

Hannon and Aquatech read, "[i]n the event of a dispute arising [sic] between the customer & [Aquatech], the customer shall submit to arbitration by the Better Business Bureau of Mass. before any legal action can be brought against [Aquatech]." *Id.* at 614. As the case was in state court, between two Massachusetts residents, Aquatech asked for the stay pursuant to the Massachusetts Arbitration Act. *Id.*; see also MASS. GEN. LAWS ch. 251, § 2 (2007) (codifying Massachusetts Arbitration Act).

⁸⁴ *Hannon*, 434 N.E.2d at 613 (describing procedural background of case).

⁸⁵ *Id.* (describing trial level procedural arguments of dispute). Aquatech argued that only Hannon's claim for attorneys' fees remained. *Id.*

⁸⁶ *Id.* at 618 (quoting MASS. GEN. LAWS ch. 93A, § 9(6) (2007)). The full text of § 9(6) reads:

Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

MASS. GEN. LAWS ch. 93A, § 9(6) (2007).

⁸⁷ *Hannon*, 434 N.E.2d at 613 (describing holding of case).

⁸⁸ *Id.* at 618-19 (holding Massachusetts Arbitration Act "permits a stay of [Chapter 93A] actions only in certain limited circumstances not present here"). "While arbitration pursuant to a contract does not fall neatly into the categories of remedies listed in [Chapter 93A § 9(6)], we think it comprehended within either 'common law' or statutory remedies." *Id.*; see also Shell, *supra* note 5, at 27 (referencing *Hannon*, "[t]he arbitrator's decision on the [Chapter 93A] claim was a nullity").

⁸⁹ GILLERAN, *supra* note 4, § 13.2, at 688 n.1 (listing cases standing for this proposition); see also *Simas v. House of Cabinets, Inc.*, 757 N.E.2d 277, 282 (Mass. App. Ct. 2001) (holding § 9 claims are arbitrable at "election" of consumer).

III. HOW ARBITRATION CLAUSES CAME TO PREEMPT CONSUMER FORUM CHOICE

A. The Supreme Court's Expansion of the Federal Arbitration Act

By the early 1980s, the FAA enforced nearly all arbitration clauses in federal court, but the Supreme Court had not directly confronted the question of whether the statute reached state courts.⁹⁰ In 1984, the Supreme Court finally answered this question in *Southland Corp. v. Keating*.⁹¹ The issue was whether a California state statute, that invalidated certain arbitration agreements “involving commerce,” directly conflicted with the FAA and therefore required preemption.⁹²

Southland Corp. (Southland) was the owner and franchisor of the 7-Eleven convenience store chain in California.⁹³ The company assisted franchisees with the ownership and operation of their own stores in exchange for a fixed percentage of gross profits.⁹⁴ Each franchise agreement included a broadly-worded, pre-dispute arbitration clause.⁹⁵ Approximately 800 franchisees filed a class action against Southland in California state court alleging breaches of contract and fiduciary duties, misrepresentation and violation of the California Franchise Investment Law.⁹⁶ The California Supreme Court previously interpreted the franchise statute to be capable of invalidating arbitration clauses in unlawful franchise agreements.⁹⁷

⁹⁰ See discussion *supra* Part II.A (describing remaining question of FAA applicability in state courts).

⁹¹ 465 U.S. 1 (1984).

⁹² *Id.* at 3 (explaining one issue before Court). The other issue was “whether arbitration under the [FAA] is impaired when a class action structure is imposed on the process by the state courts.” *Id.*; see also KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 229-40 (Foundation Press 2007) (1937) (describing preemption doctrine); sources cited *infra* notes 105-08 and accompanying text (detailing constitutional doctrine of preemption).

⁹³ *Southland*, 465 U.S. at 3 (describing facts of case).

⁹⁴ *Id.* at 3-4 (describing facts of case). Franchisee assistance included using registered trademarks, subleasing space directly from Southland, subsidizing financing inventory and helping with advertising and marketing expenses. *Id.*

⁹⁵ *Id.* at 4 (describing arbitration clause in all Southland franchising contracts). The arbitration clause stated that, “[a]ny controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.” *Id.* (alteration in original).

⁹⁶ *Id.* (relaying background of case).

⁹⁷ *Id.* at 10 (describing California precedent requiring judicial consideration of claims under franchise statute); see also CAL. CORP. CODE § 31512 (2006), *invalidated by* Discover Bank v. Superior Court, 129 Cal. Rptr. 2d 393 (Cal. Ct. App. 2003) (“Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any

The California courts did not agree on whether the claim under the franchise statute could go to the arbitrator along with the other claims.⁹⁸ The Supreme Court granted certiorari to address whether the FAA could reach the state court.⁹⁹ Chief Justice Burger, writing for the Court, held that the FAA conflicted and, therefore, preempted the California Franchise Investment Law.¹⁰⁰ The Chief Justice explained that *Prima Paint* indicated that the FAA was an exercise of Congress' power under the Commerce Clause, which "clearly implied that the substantive rules of the Act were to apply in state as well as federal courts."¹⁰¹ The opinion continued, "there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts."¹⁰² Since the FAA was now federal substantive law, Section Two applied to enforce an arbitration agreement in either state or federal court if it "[involved] commerce."¹⁰³

By imposing the FAA on state courts, the Supreme Court drastically expanded the preemptive effect of arbitration clauses on state statutes providing for non-arbitration remedies.¹⁰⁴ Since the Constitution's

provision of this law or any rule or order hereunder is void.").

⁹⁸ *Southland*, 465 U.S. at 4-5 (describing procedural history). The trial court compelled arbitration on all claims except the claim brought under the California Franchise Investment Law. *Id.* at 4. The California Court of Appeal reversed, holding that § 2 of the FAA preempted any arbitration clause invalidation by the state franchise statute. *Id.* at 5. The California Supreme Court agreed with the trial court. *Id.*

⁹⁹ *Id.* at 3 (describing issue before Court). This was the remaining post-*Erie* question. See discussion *supra* Part II.A.

¹⁰⁰ *Southland*, 465 U.S. at 10 ("So interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.").

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* The Supreme Court referenced Justice Black's dissent in *Prima Paint*, which stated in part:

Finally, there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts or to provide an independent federal-question basis for jurisdiction in federal courts apart from diversity jurisdiction. The absence of both of these effects – which normally follow from legislation of federal substantive law – seems to militate against the view that Congress was creating a body of federal substantive law.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 420 (1967) (Black, J., dissenting) (footnotes omitted).

¹⁰³ Hirshman, *supra* note 21, at 1307 (explaining *Prima Paint* "characterized the FAA as federal substantive law enacted pursuant to Congress' powers over interstate commerce and admiralty"); see also Shell, *supra* note 5, at 26 n.3 ("The [FAA] is fully enforceable in both state and federal courts in appropriate cases."). "[The FAA] creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate" Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1983).

¹⁰⁴ Hirshman, *supra* note 21, at 1346 (explaining FAA's post-*Southland* reach into state

Supremacy Clause makes federal law the “supreme Law of the Land,” the FAA will supersede conflicting state law under the constitutional doctrine of preemption.¹⁰⁵ The Supreme Court recognizes both expressed and implied preemption of state law.¹⁰⁶ In the absence of specific language superseding state law, implied preemption can occur where the federal government chooses to occupy a particular field or where state law is in conflict with federal law.¹⁰⁷ Implied conflict preemption occurs where compliance with both laws would be impossible or where the state law frustrates the federal law’s purpose.¹⁰⁸

Since *Southland*, the Supreme Court has repeatedly relied on implied conflict preemption to strike down state statutes that impair the FAA.¹⁰⁹ The Supreme Court first relied on *Southland* and the FAA to preempt a California labor statute that ignored pre-dispute arbitration clauses in employee actions for lost wages.¹¹⁰ Then, in a 1995 case, *Allied-Bruce Terminix Cos. v. Dobson*,¹¹¹ the Supreme Court struck down an Alabama statute making pre-dispute arbitration clauses unenforceable.¹¹² The Alabama Supreme Court did not consider this contract between Alabama homeowners and exterminators as one involving interstate

courts). “The United States Supreme Court has encouraged this transformation through expansive interpretations of the Federal Arbitration Act.” Bruhl, *supra* note 12, at 1420. The Court has not been “shy about enforcing its pro-arbitration preferences.” *Id.* at 1424.

¹⁰⁵ See U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; see also SULLIVAN & GUNTHER, *supra* note 92, at 229 (explaining doctrine of preemption).

¹⁰⁶ See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983) (“It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. Absent explicit preemptive language, Congress’ intent to supersede state law altogether may be found . . .”) (citation omitted).

¹⁰⁷ *Id.* (explaining two forms of implied preemption).

¹⁰⁸ *Id.* at 204 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (describing two types of implied conflict preemption).

¹⁰⁹ See sources cited *infra* notes 110-19, 127-31 and accompanying text (evidencing FAA’s preemption of conflicting state statutes).

¹¹⁰ See *Perry v. Thomas*, 482 U.S. 483, 489-92 (1987) (explaining that FAA preempts state law). The dispute arose between an employer and former employee, regarding commissions from the sale of securities. *Id.* at 484. The relevant statute allowed the former employee to disregard an arbitration clause in the employment contract if he was seeking lost wages. *Id.* at 486.

¹¹¹ 513 U.S. 265 (1995).

¹¹² *Id.* at 268 (holding state statute preempted by FAA).

commerce.¹¹³ The Supreme Court found Alabama's reading too narrow, holding instead that it would be "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it."¹¹⁴

The *Allied-Bruce* holding arguably extends the FAA's reach as far as the Commerce Clause permits.¹¹⁵ Critics of the FAA's expansion lament this combined result of *Erie*, *Prima Paint* and *Southland*.¹¹⁶ In the year following *Allied-Bruce*, the Supreme Court struck down a Montana statute that made arbitration clauses enforceable only by meeting certain limited criteria.¹¹⁷ The FAA now preempts any state statute that attempts to limit the enforceability of arbitration clauses.¹¹⁸ Such state laws frustrate the federal purpose of the FAA when they seek to limit the enforcement of mandatory arbitration.¹¹⁹

Even while expanding its reach, the Supreme Court expressed concern for what a post-*Southland* FAA meant for consumers.¹²⁰ Because

¹¹³ *Id.* at 269 (describing Alabama Supreme Court's reading of involving commerce in FAA's § 2).

¹¹⁴ *Id.* at 275.

¹¹⁵ See *id.* at 279 (describing congressional intent to pass, in the FAA, a law to "make arbitration agreements universally enforceable"). Prior to *Allied-Bruce*, scholars were concerned that the FAA would extend as far as the powerful Commerce Clause would permit. See Strickland, *supra* note 8, at 412-16.

¹¹⁶ See Moses, *supra* note 13, at 133-34 (articulating Court's misconstruction of FAA); see also Strickland, *supra* note 8, at 391-97 (exploring evolution of FAA through *Erie*, *Prima Paint* and *Southland*).

¹¹⁷ See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682-89 (1996) (striking down Montana state statute). The statute required arbitration clauses to be in capital letters, underlined and on the first page of any contract to be enforceable. *Id.* at 684.

¹¹⁸ See Moses, *supra* note 13, at 133-34 (articulating how misconstruction of FAA has left little room for state legislation).

¹¹⁹ *Allied-Bruce*, 513 U.S. at 281 (holding states are limited to contractual doctrines in invalidating arbitration clauses). Justice Breyer wrote:

What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress' intent.

Id. (emphasis added). "The 'goals and policies' of the FAA, this Court's precedent indicates, are antithetical to threshold limitations placed specifically and solely on arbitration provisions The State's prescription is thus inconsonant with, and is therefore preempted by, the federal law." *Doctor's Assocs.*, 517 U.S. at 688; see also, e.g., *id.* (preempting Montana law with first-page notice requirement for arbitration clauses); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)) (describing purpose of FAA to put arbitration clauses on "same footing as other contracts"); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (holding federal purpose behind the FAA was "in unmistakable conflict" with California labor statute).

¹²⁰ See sources cited *infra* notes 121-25 and accompanying text (evidencing judicial concern

anything within the scope of the Commerce Clause could now be preempted, one contract clause could potentially deprive consumers of their right to go to court under state consumer protection statutes.¹²¹ The *Allied-Bruce* decision addressed this argument by contending that the FAA was also consumer-minded because it reduced the financial burden of dispute resolution.¹²² Justice O'Connor disagreed with that contention and wrote separately to express her concern.¹²³ Although she concurred with the Court, she opined, "[t]he reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers."¹²⁴ The displaced state statutes are presumably the "little FTC" acts, such as Massachusetts' Chapter 93A.¹²⁵

The post-*Southland* FAA continues to impact plaintiffs by making arbitration mandatory.¹²⁶ In a decision published in February 2008, the Supreme Court addressed whether the FAA preempted a California employment statute that provided exclusively for an administrative remedy in *Preston v. Ferrer*.¹²⁷ In reversing the California courts for following

for consumers); see also *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 996-99 (Cal. 2003) (Brown, J., concurring and dissenting) (expressing displeasure with *Southland*).

¹²¹ See Bruhl, *supra* note 12, at 1430-31 (explaining that full Commerce Clause scope for FAA meant preemption of conflicting state consumer statutes).

¹²² *Allied-Bruce*, 513 U.S. at 280 ("We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."). Justice Breyer opined:

In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of *any* contract."

Id. at 281 (quoting 9 U.S.C. § 2). This statement refers to doctrines such as unconscionability that courts have used with limited success to restrain the expanded FAA. See Bruhl, *supra* note 12, at 1436-43; see also *Feeney v. Dell Inc.*, 908 N.E.2d 753, 767-69 (Mass. 2009) (using public policy exception to restrain FAA in Chapter 93A class action).

¹²³ *Allied-Bruce*, 513 U.S. at 282-84 (O'Connor, J., concurring) (addressing need for uniform standard, effect on consumers and following *Southland*).

¹²⁴ *Id.* at 282.

¹²⁵ See *Moses*, *supra* note 13, at 99, 101, 138-45 (including consumers in groups adversely impacted by FAA's expansion); sources cited *supra* note 66 and accompanying text (describing legislation analogous to Chapter 93A passed in all fifty states).

¹²⁶ See cited *infra* notes 127-31 and accompanying text (describing recent cases); see also Press Release, Senator Russell Feingold, U.S. Senate, Feingold Introduces Consumer Justice Legislation (April 29, 2009) (on file with author) (advocating for reform).

¹²⁷ 128 S. Ct. 978, 982-83 (2008) (presenting issue before Court). Preston sought legal fees from Ferrer under a pre-dispute arbitration clause, but Ferrer argued the entire agreement was invalid under the California Talent Agencies Act. *Id.* at 981-82. This statute gave exclusive

their state statute over an arbitration clause, Justice Ginsburg wrote, “when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”¹²⁸ The Court held that both granting exclusive jurisdiction to an administrative agency and establishing prerequisites to enforcement of arbitration clauses were specific conflicts between that state law and the FAA.¹²⁹ In April 2009, the Court held, in *14 Penn Plaza LLC v. Pyett*,¹³⁰ that employees could not bring their individual age discrimination claims in court where their union’s collective bargaining agreement provided for arbitration of discrimination claims.¹³¹ The FAA’s power to negate forum choice is particularly alarming in situations generally associated with disproportionate bargaining power, such as civil rights, consumer, employment and franchise disputes.¹³² Among other concerns, the private arbitration settings replace the public American courts, allowing abuses of disparate bargaining power that result in litigation to remain a secret.¹³³

original jurisdiction to the state’s Labor Commissioner. *Id.* at 982.

¹²⁸ *Id.* at 981.

¹²⁹ *Id.* at 985 (describing specific conflicts between FAA and California law). Granting exclusive jurisdiction with another body where the parties agreed to arbitrate was previously held to conflict with the FAA. *See* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006). In 1996, the Court held that prerequisites to enforcing arbitration agreements conflict with the FAA. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

¹³⁰ 129 S. Ct. 1456 (2009).

¹³¹ *Id.* at 1461, 1465 (explaining enforcement of provision). The clause plainly required arbitration of all discrimination claims. *See id.* at 1461. The employees, however, argued that for their union to bargain away their individual, non-economic statutory rights was “outside the permissible scope of the collective-bargaining process.” *Penn Plaza*, 129 S. Ct. at 1464. Justice Thomas wrote for the Court and responded, “[p]arties generally favor arbitration precisely because of the economics of dispute resolution.” *Id.*

¹³² *See id.* at 1465 (contracting away for civil rights claims); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995) (contracting away for consumer disputes); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (contracting away for employment disputes); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (contracting away for franchise disputes).

¹³³ *See, e.g., Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (“People who want secrecy should opt for arbitration. When they call on courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.”); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 360-62 (Cal. Ct. App. 1981) (representing type of consumer exploitation that would remain secret in private arbitration); Press Release, *supra* note 126 (explaining concerns with mandatory arbitration). Openness is fundamental to the American governmental design. *See* THE FEDERALIST NO. 49 (James Madison).

B. The Preemption of Chapter 93A Court Rights

After the SJC's 1982 *Hannon* decision, Massachusetts courts and scholars believed that Chapter 93A consumers had the right to choose court over arbitration for their claims.¹³⁴ This understanding of Chapter 93A limits the enforcement of arbitration clauses against consumers.¹³⁵ The *Hannon* rule is that businesses cannot force consumer plaintiffs to exhaust other remedies, such as enforcement of pre-dispute arbitration clauses in sales agreements.¹³⁶ Therefore, consumer plaintiffs could avoid enforcement of pre-dispute arbitration clauses for their Chapter 93A claims.¹³⁷ It was clear, however, that *Hannon* did not extend to Section Eleven claims, where both the plaintiff and defendant were engaged in trade or commerce.¹³⁸ The only way that Chapter 93A consumers would

¹³⁴ See *Gargano & Assocs., P.C. v. John Swider & Assocs.*, 770 N.E.2d 506, 510 (Mass. App. Ct. 2002) (“[A] consumer is under no obligation to exhaust other remedies, including arbitration provisions provided by contract.”); *Simas v. House of Cabinets, Inc.*, 757 N.E.2d 277, 282 n.8 (Mass. App. Ct. 2001) (citing *Hannon* as standing for this proposition); *Greenleaf Eng'g & Constr. Co. v. Teradyne, Inc.*, 447 N.E.2d 9, 12 (Mass. App. Ct. 1983) (stating *Hannon* held that “[Chapter 93A] precluded the issuance of a stay of court proceedings during arbitration in an action under § 9 by a consumer”); William C. Athanas & Bruce A. Singal, *Defenses and Exemptions*, in CHAPTER 93A RIGHTS AND REMEDIES § 6.5.1, at 13 (Hon. Margot G. Botsford ed., Mass. Continuing Legal Educ., 2d ed. 2007) (“Consumers seeking relief under Section 9 are not required to submit their claims to arbitration before filing suit, even if there is a contractual arbitration clause in the parties’ agreement.”).

¹³⁵ See *supra* notes 87-89 and accompanying text (articulating SJC’s *Hannon* decision on Chapter 93A § 9(6)).

¹³⁶ See *Hannon v. Original Gunitite Aquatech Pools, Inc.*, 434 N.E.2d 611, 620 (Mass. 1982) (holding in favor of the consumer). Justice Lynch wrote:

Nonetheless, the public policy expressed by the Legislature in [Chapter 93A] of allowing consumers access to the courts to vindicate their rights, without first exhausting other remedies, moves us to disallow recovery by Aquatech under the contract for attorney’s fees and expenses incurred in forcing Hannon into arbitration as a precondition to asserting his rights under [Chapter 93A].

Id. “The Supreme Judicial Court has held, however, that consumers seeking to assert rights under Section 9 cannot be *required* to arbitrate their claims if they prefer a judicial forum.” Shell, *supra* note 5, at 27. Of course, they may still elect to do so. *Id.*; see also *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182, 187-88 (Mass. 1990) (holding only § 11 rights can be waived).

¹³⁷ GILLERAN, *supra* note 4, § 13.2, at 688 (“A § 9 [consumer] plaintiff will be able to avoid arbitration . . .”); Athanas & Singal, *supra* note 134, § 6.5.1, at 13 (citing *Hannon* for same proposition); Shell, *supra* note 5, at 27 (describing consumer choice to arbitrate as voluntary despite existence of arbitration clause).

¹³⁸ See *Drywall Sys., Inc. v. ZVI Constr. Co.*, 761 N.E.2d 482, 484-85 (Mass. 2002) (evidencing no *Hannon* right under § 11); *Schoenhardt v. Augustus Constr., Inc.*, 2008 WL 2277597, at *1 (Mass. App. Ct. June 5, 2008) (evidencing *Hannon* applies only to § 9); see also GILLERAN, *supra* note 4, § 13.2, at 688 (“A different rule governs the enforceability of arbitration

not have a guaranteed judicial remedy was if they chose to foreclose that remedy by agreeing to arbitrate after the dispute arose.¹³⁹

Chapter 93A conflicts with the FAA by frustrating the purpose of enforcing arbitration agreements.¹⁴⁰ Congress passed the FAA to reduce judicial hostility toward arbitration and to honor contractual agreements for its use.¹⁴¹ In passing the FAA, Congress made freedom to contract into private dispute resolution a clear federal policy.¹⁴² Once the Supreme Court expanded the FAA into state courts with *Southland*, it effectively neutralized any state statutes limiting the enforcement of arbitration clauses.¹⁴³ The only remaining restriction on the FAA's reach is the "involving commerce" requirement; however, the interpretation of the modern Commerce Clause in *Allied-Bruce* indicates that this is a weak restraint at best.¹⁴⁴ Chapter 93A consumers would frustrate the FAA's purpose by invoking *Hannon*, and arbitration would be mandatory.¹⁴⁵

clauses agreed to by § 9 consumer plaintiffs versus those agreed to by § 11 business plaintiffs."); Athanas & Singal, *supra* note 134, § 6.5, at 13 (pointing out "clear distinction between Section 9 and Section 11 cases"); Shell, *supra* note 5, at 28 (acknowledging distinction between §§ 9 and 11).

¹³⁹ Compare *Simas*, 757 N.E.2d at 282 (articulating Chapter 93A consumer's right to a judicial remedy), with *Gargano*, 770 N.E.2d at 511 (holding arbitrator ruling on § 9 claim forecloses same claim in court); see also GILLERAN, *supra* note 4, § 13.2, at 688-90 (evidencing support for *Hannon*).

¹⁴⁰ See *infra* notes 141-45 and accompanying text (describing Chapter 93A conflict with FAA).

¹⁴¹ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) ("Congress's clear intent, in the Arbitration Act, [is] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."); *Congress Considers Bill*, *supra* note 18, at 2262 (describing FAA origins); Sheridan, *supra* note 24, at 96 (explaining congressional intent behind FAA).

¹⁴² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (describing enforcement of arbitration clauses as policy behind FAA); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

¹⁴³ See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (striking down Alabama statute making pre-dispute arbitration clauses unenforceable); *Allied-Bruce*, 513 U.S. at 281 (holding states are limited to contractual doctrines in invalidating arbitration clauses); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (holding federal purpose behind the FAA was "in unmistakable conflict" with California labor statute).

¹⁴⁴ See *Allied-Bruce*, 513 U.S. at 279 (describing the FAA's goal as to make arbitration clauses "universally enforceable"); Strickland, *supra* note 8, at 412-16 (expressing pre-*Allied-Bruce* concern that FAA would reach full extent of Commerce Clause). "With the Supreme Court's encouragement, [the FAA] has grown into the broadly sweeping, muscular statute we know today." Bruhl, *supra* note 12, at 1429.

¹⁴⁵ See *Doctor's Assocs.*, 517 U.S. at 688 ("The 'goals and policies' of the FAA . . . are antithetical to [state law] threshold limitations specifically and solely on arbitration provisions."); *Allied-Bruce*, 513 U.S. at 281 (declaring anything that puts arbitration clauses "on an unequal

The last hope for consumers' *Hannon* right came in *Wolff v. Fidelity Brokerage Services, LLC*,¹⁴⁶ a case that presented an illustration of the direct interplay between the *Hannon* decision and the FAA.¹⁴⁷ The Wolff family brought a Chapter 93A claim against their securities dealers pertaining to the allocation of their shares in the initial public offering of stock in Qwest Communications International, Inc.¹⁴⁸ This securities transaction involved interstate commerce, and the court stayed the proceedings under the FAA.¹⁴⁹ The court distinguished *Hannon* as applying only to arbitration agreements involving wholly intrastate commerce and enforced under the Massachusetts Arbitration Act.¹⁵⁰ "This Court does not read *Hannon* . . . as State law that can preclude arbitration in a circumstance covered by the FAA."¹⁵¹

In July of 2009, the SJC decisively extinguished the possibility of any distinguishing between the two arbitration statutes.¹⁵² In *Warfield v. Beth Israel Deaconess Medical Center, Inc.*,¹⁵³ the SJC held that the plaintiff's gender discrimination claim did not need to go to arbitration because it fell outside the scope of the employment contract's arbitration clause.¹⁵⁴ Justice Botsford's majority opinion stated that both arbitration statutes applied and are to be treated substantially the same, which ran contrary to the *Wolff* concept.¹⁵⁵ The SJC expunged any hope of the *Hannon* rule surviving the FAA's expansion: "We recognize that where the FAA applies, it would preempt a conflicting State law-one that might, for example, bar arbitration or authorize a party to proceed in a judicial forum regardless of the party's [sic] having entered into an agreement to arbitrate."¹⁵⁶

'footing,' [as] directly contrary to the [FAA's] language and Congress' intent."); GILLERAN, *supra* note 4, § 13.2, at 688 (citing *Hannon* to allow consumers to avoid arbitration); Athanas & Singal, *supra* note 134, § 6.5.1, at 13 ("Consumers seeking relief under Section 9 are not required to submit their claims to arbitration before filing suit [under *Hannon*], even if there is a contractual arbitration clause in the parties' agreement.").

¹⁴⁶ 2002 WL 31382606 (Mass. Super. Ct. Sept. 5, 2002).

¹⁴⁷ *See id.* at *2 (deciding between *Hannon* and FAA).

¹⁴⁸ *Wolff*, 2002 WL 31382606, at *1 (describing nature of dispute).

¹⁴⁹ *Id.* at *2-3 (describing applicability of FAA).

¹⁵⁰ *See id.* (describing holding). The Massachusetts Arbitration Act is a version of the Uniform Arbitration Act passed in many states. *See* MASS. GEN. LAWS ch. 251, §§ 1-18 (2007).

¹⁵¹ *Wolff*, 2002 WL 31382606, at *3.

¹⁵² *See infra* notes 153-56 and accompanying text (describing July 2009 SJC decision).

¹⁵³ 910 N.E.2d 317 (Mass. 2009).

¹⁵⁴ *Id.* at 320 (explaining holding).

¹⁵⁵ *Id.* at 322-23 (comparing Massachusetts Arbitration Act with FAA); *Wolff*, 2002 WL 31382606, at *2-3 (attempting to keep *Hannon* for Massachusetts Arbitration Act).

¹⁵⁶ *Warfield*, 910 N.E.2d at 326 n.14.

IV. THE ARBITRATION FAIRNESS ACT OF 2009

The FAA's expansion led to a response on Capitol Hill from Senator Russell Feingold of Wisconsin.¹⁵⁷ On July 12, 2007, Senator Feingold first introduced the Arbitration Fairness Act (AFA) of 2007, which would have made all pre-dispute arbitration agreements unenforceable in consumer, employment and franchise contracts.¹⁵⁸ The bill described the FAA as a statute originally designed to apply to two commercial entities, but instead it "now extends to disputes between parties of greatly disparate economic power, such as consumer[s]."¹⁵⁹ In studying the issue, Congress found that consumers lack a choice when their agreements with larger businesses include arbitration clauses.¹⁶⁰ Concurrently, Representative Henry Johnson Jr. of Georgia introduced matching legislation in the House of Representatives.¹⁶¹ Representative Johnson argued that the bill "would not take arbitration off the table as an alternative dispute resolution process, [but] it would simply require that the parties be able to decide which way they want to go."¹⁶²

Those who view the current state of the law as an "Arbitration Trap" praise the AFA.¹⁶³ Senator Feingold describes his bill as giving citizens a "true choice" between arbitration and a traditional court proceeding.¹⁶⁴ He argues that the bill addresses the "repeat players" problem, where arbitrators are under pressure to favor client companies who provide extensive, repeat and lucrative business.¹⁶⁵ Supporting this

¹⁵⁷ *Congress Considers Bill*, *supra* note 18, at 2262 (describing Arbitration Fairness Act of 2007 and Senator Feingold's authorship).

¹⁵⁸ *Id.* at 2264-65 (explaining AFA); *see also* Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4 (2007) (attempting change to arbitration law).

¹⁵⁹ Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 2(1)-(2) (2007).

¹⁶⁰ Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 2(3) (2007) (describing "little or no meaningful option" for consumers); Interview by Will Hinton with Representative Henry Johnson Jr., Congressman, Georgia's Fourth Congressional District (July 2, 2008) [hereinafter Johnson Interview], http://www.goodwillhinton.com/good_will_hinton_interviews_us_congressman_hank_johnson_ga4th#part4 ("[I]n many consumer transactions, we have found big business is imposing these contractual provisions on consumers often who do not know that these clauses are in the agreements.").

¹⁶¹ *See* Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007) (proposing same text in House of Representatives).

¹⁶² Johnson Interview, *supra* note 160.

¹⁶³ *See* JOHN O'DONNELL, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 3* (Laura MacCleery & Taylor Lincoln eds., Public Citizen 2007) (praising AFA).

¹⁶⁴ Senator Russell Feingold, United States Senate, Fact Sheet – The Arbitration Fairness Act of 2007, http://feingold.senate.gov/issues_arbitration_fact.html.

¹⁶⁵ Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 2(4) (2009) (articulating "repeat

contention are consumer groups like Public Citizen, who contend that arbitrators side with businesses ninety-four percent of the time.¹⁶⁶ Proponents argue that the AFA is a fairer alternative because arbitration cannot guarantee the procedural rights of a traditional courtroom due to limitations on written findings, the discovery process and the lack of openness and judicial review.¹⁶⁷ Public Citizen argues that fine-print, boilerplate clauses in contracts of adhesion often bind consumers to contracts not produced through fair and equal bargains.¹⁶⁸

However, the AFA has its fair share of critics as well.¹⁶⁹ The United States Chamber of Commerce (Chamber) is particularly critical of the legislation.¹⁷⁰ The Chamber supports pre-dispute arbitration clauses by arguing that arbitration is quicker, cheaper and increases the chance of an amicable resolution.¹⁷¹ Moreover, the Chamber cites statistics of favorable decisions for consumers in more than seventy percent of arbitrations.¹⁷² Finally, the Chamber even advances a political argument, asserting that

players" problem).

¹⁶⁶ O'DONNELL, *supra* note 163, at 2 (outlining arguments for reforming consumer protection). In credit card disputes with arbitrators, "94 percent of decisions were for business." *Id.* Support for the AFA has come from many sources; according to Senator Feingold, "[a] coalition of consumer and employment rights groups supports the measure. Included in the coalition are Consumers Union, Consumer Federation of American [sic], Public Citizen, National Consumer Coalition for Nursing Home Reform, American Association for Justice, National Employment Lawyers Association, and National Association of Consumer Advocates." Feingold, *supra* note 164.

¹⁶⁷ O'DONNELL, *supra* note 163, at 4-5 (articulating procedural concerns with consumer arbitration process); Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 2 (describing other problems with mandatory arbitration under FAA).

¹⁶⁸ O'DONNELL, *supra* note 163, at 6 (explaining problem of fine print provisions).

¹⁶⁹ See *infra* notes 170-74 and accompanying text (articulating opposition to AFA).

¹⁷⁰ U.S. Chamber of Commerce, Equal Employment Opportunities: Issues of Employment Disputes, <http://www.uschamber.com/issues/index/labor/eo.htm> (opposing Senator Feingold's AFA).

¹⁷¹ *Id.* (expressing Chamber's opposition to AFA). The Chamber declares:

The Chamber supports the right of employers and employees to enter into pre-dispute binding arbitration agreements that obligate either party to resolve . . . disputes through arbitration as opposed to litigation Arbitration agreements have proven to be an *effective means to resolving disputes* and are typically *quicker and less expensive* than litigation. Prohibiting binding arbitration would only continue to move *more disputes into courts, increase costs, and decrease the chances of amicable settlement.*

Id. (emphasis added).

¹⁷² Letter from R. Bruce Josten, Executive Vice President of Government Affairs, U.S. Chamber of Commerce, to Representatives Linda T. Sanchez, Chairwoman, & Chris Cannon, Ranking Member, House of Representatives Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary (July 14, 2008) (on file with author) (opposing AFA).

seventy-one percent of likely voters oppose the AFA.¹⁷³ The Chamber describes the bill as an “attempted overhaul of the arbitration system that is being spearheaded by the trial lawyers’ lobby.”¹⁷⁴

The AFA has the potential to become law in 2010 if President Obama signs a version of the bill passed by both the House of Representatives and the Senate.¹⁷⁵ On July 15, 2008, the House version of the AFA passed the House Judiciary Subcommittee on Commercial and Administrative Law, leaving only a vote in the full Judiciary Committee before the entire House of Representatives could vote on the AFA.¹⁷⁶ Despite its ninety-five cosponsors, the House version never faced a full Judiciary Committee vote.¹⁷⁷ Anticipating the end of the 110th Congress, Representative Johnson promised to “reintroduce [the AFA] in the 111th Congress [and to] continue to fight to level the playing field between consumers and [large business].”¹⁷⁸ Early in the 111th Congress, Representative Johnson did reintroduce the bill on February 12, 2009, and Senator Feingold reintroduced his version on April 29, 2009.¹⁷⁹ Senator Feingold’s new version differed from the House version by including arbitration of civil rights claims, which was in response to the *Penn Plaza* case decided earlier that month.¹⁸⁰ If the 111th Congress passes the AFA, some believe that President Obama supports and would sign this change in federal arbitration law.¹⁸¹

¹⁷³ *Id.* (citing statistics from U.S. Chamber Institute for Legal Reform).

¹⁷⁴ *Id.*

¹⁷⁵ See *infra* notes 176-81 and accompanying text (describing developments on AFA).

¹⁷⁶ Press Release, Congresswoman Linda Sanchez, U.S. House of Representatives, Congresswoman Sanchez Welcomes Subcommittee Passage of Arbitration Reform Measures (July 15, 2008) (on file with author) (announcing AFA subcommittee passage).

¹⁷⁷ Johnson Interview, *supra* note 160 (articulating support for AFA in 110th Congress).

¹⁷⁸ *Id.*

¹⁷⁹ See generally: Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009) (proposing AFA in 111th Congress); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (same).

¹⁸⁰ Press Release, Senator Russell Feingold, U.S. Senate, Feingold Introduces Consumer Justice Legislation (April 29, 2009) (on file with author) (explaining civil rights addition to AFA).

¹⁸¹ Posting of Bob Lian to Washington Labor & Employment Wire, <http://washlaborwire.com> (November 5, 2008, 17:56 EST) (“Obama will likely support this dramatic overhaul of the [FAA] if it is reintroduced in the 111th Congress.”); see also James E. Berger & Victoria Lai, *Congress Considers “Arbitration Fairness Act of 2009,”* STAY CURRENT (Paul Hastings, New York, NY), Mar. 19, 2009, at 1 (on file with author) (explaining changes if President Obama signs the AFA).

V. CONCLUSION

The AFA would make the FAA inapplicable in consumer, employment, franchise and civil rights claims. This change would restore the FAA to its intended scope of only applying in commercial disputes. The AFA would reconcile the policies of both Chapter 93A and the FAA. The bill would effectively restore a fundamental aim of Chapter 93A and its progeny that the FAA's expansion eroded. A fundamental aim of the "little FTC" acts was to level the playing field between businesses and consumers. Allowing businesses to unilaterally decide the forum for all consumer claims runs contrary to this purpose. Failure to amend the existing law would leave the problems of the boilerplate provisions and "repeat players" unaddressed. The AFA would allow businesses to continue to agree with each other to use arbitration in advance, while consumers would have the option to either use efficient, cost-effective arbitration after their disputes arise or decide to proceed in court.

Although the AFA is one legislative option to level the playing the field, there might be another approach. Some might argue that Congress should allow the states to decide the effect of arbitration provisions on state law claims. One may reasonably question the appropriateness of federal law mandating the forum for determining state law claims in state court. Whatever the merits of this alternative approach, there is no bill pending in Congress that would let states decide this issue for themselves.

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