Fighting a mandatory arbitration clause is not for the lazy, the meek, or those exclusively inclined to broad abstractions. The key to success for a consumer advocate who wishes to avoid having her client forced into a particularly unfair arbitration system is both simple and difficult: one should put a powerful factual record before the court. The case law is riddled with pro-arbitration decisions in cases where the plaintiffs did not offer a single piece of evidence to support their arguments that a given arbitration clause was particularly unfair.

Beginning with the premise that having an empty factual record is a poor approach, this article will suggest several ways that enterprising counsel can prove that a given arbitration clause is unconscionable. In most states, a person attempting to prove that a contract provision such as an arbitration clause is unconscionable must establish two factors: (a) that it was adopted in a manner that is procedurally unconscionable; and (b) that it includes provisions that are so one-sided or unfair as to be substantively unconscionable. In many cases, both factors can only be established with admissible evidence of facts.

PROVING PROCEDURAL UNCONSCIONABILITY

In most states, it is much easier to prove procedural unconscionability than it is to prove substantive unconscionability, and courts regularly enforce procedurally unconscionable contracts. Nonetheless, it is important that counsel for consumers do not forget to prove that this required element is present in a given case.

While the nomenclature and sometimes the doctrine varies from state to state, most states look at two factors in determining if a contract is procedurally unconscionable: oppression and surprise. It is not always necessary to prove both factors, however, as many states require only that one of the two be present.

"Oppression" is sometimes defined as the absence of meaningful choice. This is often interpreted as merely requiring a showing that a provision fits into the category of a "contract of adhesion." All that this phrase means in most states is that a contract was promulgated on a take-it-or-leave-it basis (such as a standard form contract where the consumer may not change or negotiate about any of the printed terms), and that the contract was drafted by the more powerful party. In some states, it is enough to show that a contract is a contract of adhesion to establish that it is also procedurally unconscionable.

Some courts have held that consumer lawyers must prove — not merely allege — this point. Some courts will not assume that a standard form contract is a contract of adhesion, and some plaintiffs have been compelled into arbitration solely because their counsel did
not realize that it was necessary in that court to prove this point with admissible evidence. Many defendants will simply stipulate that a given contract was not negotiable — this is, in fact, generally true in consumer contracts, and many companies do not want to go through discovery to prove something that they cannot seriously deny. If a defendant will not stipulate to this fact, however, a consumer attorney must establish through a Request for Admission, an Interrogatory, or by deposition that the company does not allow, and has never allowed, a consumer to refuse or re-write the arbitration clause.¹

Some courts also look to a second factor in considering oppression or “meaningful choice”: whether a consumer could have gotten the same service or product from another company in the area. Consumer lawyers should spend time and effort to prove this fact when possible. In American General Finance v. Branch, 793 So.2d 738 (Ala. 2000), cert. denied, 122 S.Ct. 342 (2001), NACA members Barry Ragdale and Garve Ivey built up a substantial factual record to establish that all but two sub-prime lenders in the consumer’s home city required borrowers to agree to arbitration clauses, and thus “the market was virtually closed to consumers seeking comparable financing without agreeing to arbitration provisions.” This showing helped the plaintiffs win the first ruling ever from the Alabama Supreme Court that an arbitration clause was unconscionable.²

In Ting v. AT&T, 182 F. Supp.2d 902 (N.D. Cal. 2002), Jim Sturdevant and I proved that Spring, MCI, Quest and Working Assets Long Distance all had arbitration provisions similar to AT&T’s clause. We also discovered that AT&T customer service would write to customers who questioned the arbitration clause “[a]ll of the other major long distance carriers have included an arbitration provision in their service agreements.” The court looked closely at the “meaningful choice” factor in finding that AT&T’s arbitration clause was procedurally unconscionable: “Finding a carrier who did not contain such a provision was not easy.” 182 F. Supp.2d at 929.

As I mentioned above, many courts evaluating procedural unconscionability also look at whether consumers are likely to be “surprised” by a contract provision. Some consumer lawyers, who have not put on any evidence on this issue, have lost motions to compel arbitration from courts whose opinions stress that no one is excused from a contract merely because he or she did not bother to read it. Where possible, consumer attorneys should attempt to prove that an arbitration clause was presented to their clients in a way that made it unlikely that they would read it; a way that made it reasonable and predictable that they would not see it. It is important to recognize, however, that proving this fact by itself generally does not demonstrate that a given arbitration clause is unconscionable, it only helps to show that one element of procedural unconscionability is present.

How can surprise be proven? Here are several illustrations of ways I have seen consumer lawyers establish that a particular arbitration clause was a surprise to consumers. NACA members Dan Hedges and Bren Pomponio demonstrated in one case that a closing agent held the pages of an agreement curled up so that their clients could not see anything but the signature lines. In another case, NACA members Tom Domonoske and Dale Pittman got a car salesman to admit that his normal practice is to tell buyers that the arbitration clause is just an option they have, proving that the consumers would be surprised to later be told that it was mandatory. In yet another case, NACA member Suzanne Keys used a readability expert to demonstrate that an arbitration clause was written in a manner that made it likely that most people with a college education could not understand the clause.

In the Ting case we proved that (a) AT&T’s own documents showed that it did not want its customers to become concerned about the details of the arbitration clause; (b) AT&T’s own internal marketing studies showed that it knew that few of its customers would read the clause; (c) a well respected marketing expert, Todd Hilsee of Hilsoft Notifications, Inc., opined that the mailing that enclosed the arbitration clauses was ineffective from a communications standpoint and that the arbitration clause itself was not likely to be noticed; and (d) one of the most renowned pollsters in the country, Celinda Lake of Lake Snell & Perry, conducted a survey that established that only a small percentage of AT&T’s customers had noticed the arbitration clause, and fewer still believed that they had agreed to it. The court’s opinion reflects that this evidence was helpful in varying degrees to prove that the clause was procedurally unconscionable. 182 F. Supp.2d at 930.

SUBSTANTIVE UNCONSCIONABILITY

Mike Quirk of TLPI, Jon Sheldon of the National Consumer Law Center, and I have written a manual entitled Consumer Arbitration Agreements: Enforceability and Other Options. As that manual demonstrates in great detail, there are quite a few factors that may
be involved in establishing that a given arbitration clause is substantively unconscionable in a given jurisdiction. Because there is not room in this article to address each of these factors, I will focus on just two of them: arbitration clauses that impose prohibitively expensive costs upon consumers, and arbitration clauses that bar consumers in certain types of cases from effectively vindicating their rights by prohibiting consumers from bringing their claims on a class-wide basis.

**FIVE POINTS TO CONSIDER IN PROVING THAT AN ARBITRATION CLAUSE IMPOSES EXCESSIVE FEES**

More courts have refused to enforce arbitration clauses on the grounds that they imposed prohibitive costs upon individuals than on any other grounds. Nonetheless, there are all too many cases where courts enforced arbitration clauses that would in fact impose prohibitive costs upon consumers because the consumer attorneys failed to build an adequate factual record. This article will offer several suggestions of how to avoid this problem.

First, it is important to recognize that the vast majority of arbitration systems imposed two types of fees: filing fees that are paid to the arbitration service provider (e.g., the American Arbitration Association, JAMS, or the National Arbitration Forum) for their administrative services, and the fees that are paid to the actual arbitrator(s) for handling and deciding the case. The second category of fees — the arbitrators' fees — are generally much greater than the filing fees, but a number of judicial opinions reflect a mistaken impression that the only fees that a court needs to consider are the filing fees.

Second, consumer attorneys should realize that while filing fees can often be ascertained from the official rules of the arbitration service provider, the arbitrators' fees generally cannot be determined without discovery. Even with discovery, it is usually impossible to ascertain the precise fees likely to be charged in a case because different arbitrators charge different amounts. Nonetheless, consumers can usually obtain data from arbitration service providers as to the range of fees charged by arbitrators in a given area and the average fees charged by those arbitrators. Generally speaking, it takes the service of a subpoena or at least the threat of formal discovery processes to get the arbitration service providers to cough up this kind of information. I have received in discovery documents from the AAA, for example, that demonstrate that for Chicago, for example, the fee range for AAA arbitrators is $750 to $5000 for a day of hearings; the average (mean) is $1800; and the median is $1598. Similar statistics appear in affidavits from AAA officials for a half a dozen other cities. This kind of information is likely to prove extremely important in demonstrating that a given arbitration clause will impose significant costs upon a consumer.

Third, consumer lawyers should recognize that the amount of arbitration fees are likely to depend upon the amount of time required to arbitrate a case. All too often no evidence or argument is made on this point, and courts have several times assumed in opinions that relatively complex matters would be arbitrated in a single day. If a given consumer’s case poses factual or legal complexities that will cause it to take several days or more to arbitrate, counsel needs to find a way to establish this fact to the court. I have seen courts base their findings as to the cost of arbitration upon the assumption that the arbitration can be completed in a single hour, in settings where that assumption almost certainly seemed to be untrue, but where counsel had not made any kind of showing on the point to the court.

Fourth, some (but not all) courts look to the personal wealth of the consumer to determine whether arbitration fees will be prohibitive in a given case. Accordingly, where a consumer has a relatively modest means and cannot easily afford to pay significant arbitration fees, these facts should be established through an affidavit. The Third Circuit has even suggested that the affidavit should be supported by documents such as tax returns and records of expenses, assets, etc. See Blair v. Scott Specialty Gas, 283 F.3d 595 (3d Cir. 2002).

Fifth, counsel should pay close attention to address the current version of the rules of arbitration service providers. The AAA, for example, has recently amended its rules for some consumer disputes in a manner that it claims will greatly reduce the fees that are paid by consumers and will shift those fees to businesses. It is not yet clear whether those changes are as significant as AAA claims, but they establish that practitioners need to focus upon the correct set of rules.

**CHALLENGING ARBITRATION CLAUSES THAT PROHIBIT CLASS ACTIONS**

A number of consumers have argued that arbitration clauses may not be enforced where they prohibit class actions (either explicitly
or effectively). Unfortunately, the majority of these challenges have failed. The two most prominent of these failed challenges are Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), cert. denied, 121 S. Ct. 1081 (2001); and Randolph v. Green Tree Fin. Corp., 244 F.3d 814 (11th Cir. 2001), but there are quite a few others. One common thread of most of these cases is that the plaintiffs treated the cases principally as positing legal rather than factual issues. Typically, the plaintiffs in these cases argued that Congress intended that class actions be available under a given statute (such as the Truth in Lending Act), and argued that, in principle, prohibiting class actions would undermine the effectiveness of these statutes. While I am extremely sympathetic to these arguments, they have failed far more often than they have succeeded.\footnote{1}

There is another way of pursuing this issue, however, and that is to weave an argument from generally applicable principles of state contract law and a rich factual record, and to stay away from broad generalities of federal law. In Ting v. AT&T, Jim Sturdevant and I argued that based on the facts of that particular case, requiring plaintiffs to proceed on an individual basis will prevent them from effectively vindicating their legal rights. This argument is consistent with the Federal Arbitration Act – the Supreme Court has stated that the reason that arbitration clauses are generally to be enforced is that they generally permit parties to effectively vindicate their legal rights. In addition, most states do not permit exculpatory clauses that would deny individuals any meaningful remedy for wrongs done to them, and contracts that would have such an effect are regularly found to be unconscionable. Accordingly, if the facts in a particular case show that the plaintiffs cannot pursue their statutory claims unless they are permitted to proceed on a class action basis, then a contract provision barring class actions will be found unconscionable in that case.

How does one prove that barring class actions will deny consumers any meaningful remedy? In Ting v. AT&T, Jim Sturdevant and I took discovery against AT&T relating to other class actions that had previously been filed against the company. We also gathered information about successful class actions that had been prosecuted against some other major long distance carriers. We then contacted the attorneys who had represented the plaintiffs in those cases, and learned that virtually all of them would be willing to testify that they would not have been able to pursue the claims at issue in those cases — even if the claims were valid — if they were unable to proceed on a class action basis. In one of those cases, for example, NACA member Seth Lessor had obtained a class-wide settlement worth 100 cents on the dollar against AT&T, and in another case NACA members Robert Green and Eric Gibbs had obtained a settlement of more than $80 million from MCI. None of these witnesses ultimately had to testify at the trial, as AT&T stipulated to what they would have said rather than face this litany of damaging testimony. We also produced expert testimony from a number of experienced consumer attorneys familiar with what kinds of cases are and are not brought, who had reviewed a number of the complaints in other class actions that had been brought against AT&T. These experts each testified that all or nearly all consumers with such claims would not have been able to find competent counsel to handle their claims on an individual basis, in or out of arbitration, even if their claims were entirely valid.

The approach ultimately succeeded, and the court held that "the prohibition on class actions will prevent class members from effectively vindicating their rights in certain categories of claims, especially those involving practices applicable to all members of the class but as to which any consumer has so little at stake that she cannot be expected to pursue her claim." 182 F. Supp. 2d at 931. The key here is to develop a very strong factual record, and not to rely upon common sense (which tragically has not been the governing force in the development of arbitration jurisprudence) or upon generalities of federal law.

**CONCLUSION**

When the U.S. Supreme Court decided to enforce the arbitration clause in Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000), many consumer advocates lamented the decision as a disaster for the civil justice system. Surprisingly, the opposite has happened, as several dozen courts have refused to enforce arbitration clauses in particular cases for a variety of reasons. As one illustration of how the Court's emphasis on the plaintiff's burden of proof in the Randolph case has proven to be a stimulating dose of discipline for consumer attorneys, it has driven counsel to prove to court after court the reality that forced arbitration is very often far more expensive to consumers and employees than litigating claims in court. If more consumer lawyers follow this trend, the results are likely to be much brighter for their clients.
It is important to note that these facts will simply not be present in many cases. While the points discussed in this article do not begin to exhaust the arguments that are available to resist the enforcement of an arbitration clause, it is important to understand that not all arbitration clauses are unconscionable.

Some companies have begun to address this issue by including arbitration clauses in fine print under the statement to the effect that the consumer may refuse the arbitration clause and still receive the product or service addressed in the remainder of the contract. To the extent that marketing experts or other data combined with the testimony of the consumers in a case, can demonstrate that such "choices" are not meaningful because the "option" is presented in a manner designed to ensure that consumers are not aware of it, many courts may not give much weight to such language.

I should disclose that I was involved in that case. Barry and Gave gave the author and TIP an opportunity to join them as co-counsel in resisting the bank's petition to the U.S. Supreme Court for certiorari, and the Supreme Court ultimately denied that petition.

The Court stated "AT&T characterized the de-tariffing process as a non-event, thereby imposing on its customers the artificial notion that they would be unaffected by the changes resulting from detariffing." 182 F. Supp.2d at 910.

It is often pointed out to me that companies can write their arbitration clauses in ways that evade each of these problems, such as by paying all the fees and expenses of arbitration. My answer is simple: that has to be true. When one studies the U.S. Supreme Court's many opinions expansively interpreting the Federal Arbitration Act, it becomes clear that no argument can be made under the current law that all arbitration clauses are unconscionable.

The only argument that can be made is that some clauses that are drafted to be particularly one-sided and unfair are unconscionable.
