Kristian v. Comcast Corp.[*]

I. INTRODUCTION

Courts in recent years have been struggling to deal with the tension building between the widespread public policy that supports arbitration and Supreme Court precedent that continues to emphasize the importance of class wide actions in "small-stakes" claims.[1] Although support for arbitration continues to grow based on the influence of the Federal Arbitration Act (FAA),[2] courts are also cognizant that class wide action may be the only viable option for the vindication of a claim in many cases.[3] In 2004, the Seventh Circuit explained, "the *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits as only a lunatic or fanatic sues for $30."[4]

One issue in these cases that remains unanswered is when are the costs for a single claim so prohibitive so as to make it unconscionable to forbid a class action claim? Also, where does the answer to that question leave the mandate to arbitrate? A recent case decided in the First Circuit attempted to address these questions.[5]

II. FACTS AND PROCEDURAL HISTORY

On April 20, 2006, the First Circuit, in *Kristian v. Comcast Corp.*, held that a class action waiver in an antitrust[6] claim was unenforceable.[7] The court

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

[1] Samuel Estreicher & Steven C. Bennett, *Recent Rulings on Class-Action Waivers in Arbitration Agreements*, N.Y.L.J. ONLINE, June 10, 2005, http://www.nylj.com.

[2] The Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000). "The Federal Arbitration Act provides for enforcement in federal courts of agreements made to arbitrate future disputes arising in maritime transactions, and in disputes growing out of interstate or foreign commerce." 4 AM. JUR. 2D *Alternative Dispute Resolution* § 115 (2006).

[3] Estreicher & Bennett, *supra* note 1.

[4] Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original).

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

[6] Antitrust law deals with "[t]he body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination. The principal federal antitrust laws are the Sherman Act (15 U.S.C.A. §§ 1–7) and the Clayton Act (15 U.S.C.A. §§ 12–27)." BLACK'S LAW DICTIONARY 38 (2d pocket ed. 2001).

[7] *Kristian*, 446 F.3d at 29.

explained that the class action ban was "invalid because [it] prevent[ed] the vindication of statutory rights under state and federal law."[8]

The plaintiffs in the case were a group of cable subscribers in the Boston area[9] who received their cable service from the defendant company, Comcast Corporation.[10] The plaintiffs claimed that the defendant had violated both state and federal antitrust laws, which attempt to control grossly inflated prices, by participating in "anticompetitive practices."[11] They alleged that Comcast had engaged in conduct that "exclude[d], prevent[ed] or interfere[ed] with competition."[12] Plaintiffs specifically noted Comcast's refusal to provide programming access to competitors in the area.[13] The plaintiffs attempted to initiate a class action claim to represent Comcast customers in the Boston area from December 1999 to the present.[14]

When the plaintiffs first subscribed for cable services, their agreement with Comcast contained no arbitration provision.[15] A provision to arbitrate was not added to the terms of the agreement until 2001.[16] Notice of the new provision was contained in the "terms and conditions" information given to subscribers at the time of installation and also provided annually thereafter.[17]

The plaintiffs were sent information regarding the new addition to the terms and conditions section with their subscriber's invoice during the November 2001 billing cycle.[18] Another arbitration clause, with significant changes from the original provision, was sent in 2002.[19] The arbitration provision remained essentially unchanged from 2002 to 2003.[20] When sued,

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[8] *Id.*

[9] *Id.* at 30. The plaintiffs included Boston area Comcast Corporation customers James D. Masterman, Paul Pinella, Jack Rogers, and Martha Kristian.

[10] *Id.* The plaintiffs subscribed for cable services through Comcast Corporation predecessors in 1987, 1991, 1994, and 1999, respectively.

[11] *Id.*

[12] *Id.*

[13] *Kristian*, 446 F.3d at 30.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* The "terms and conditions" of the subscriber's policy (including changes and additions made to the original agreement) are included in the "Policies & Practices" section. *Id.* Copies of this section are included in the subscriber's invoice as a billing stuffer during the November–December billing cycle. *Id.*

[18] *Id.*

[19] *Kristian*, 446 F.3d at 30.

[20] *Id.*

Comcast sought to enforce the mandate to arbitrate pursuant to the terms of the agreement contained in the 2002–2003 provisions.[21]

Two of the plaintiffs involved in the present action filed a complaint against Comcast and AT&T Broadband in Massachusetts State Court.[22] They alleged that the defendants had violated the Massachusetts Antitrust Act.[23] Comcast removed the action to the U.S. District Court for the District of Massachusetts.[24] The two other plaintiffs also filed a claim against Comcast in the same district court alleging that Comcast violated provisions of the Clayton Antitrust Act.[25]

Comcast filed motions to compel arbitration in both cases.[26] Ultimately, the district court refused to enforce the arbitration agreement set forth in the "Policies & Practices" section sent to plaintiffs in 2002 and 2003.[27] The trial court decided that the arbitration provision did not apply because the alleged actions by the defendant that gave rise to the plaintiffs' claim preceded the notification of the new policy in 2002.[28]

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[21] *Id.*

[22] *Kristian*, 446 F.3d at 30. Jack Rogers and Paul Pinella filed the complaint against Comcast and AT&T Broadband in Massachusetts State Court. *Id.*

[23] *Id.* MASS. GEN. LAWS ch. 93, §§ 1–14A (2006).

[24] *Kristian*, 446 F.3d at 30.

[25] *Id.* at 30–31. Plaintiffs Martha Kristian and James D. Masterman filed the claim against Comcast alleging violations of the Clayton Antitrust Act. *Id.*

[26] *Id.* at 31.

[27] *Id.*

[28] *Kristian*, 446 F.3d at 31–32. Based on the language of the arbitration provision in the 2002 and 2003 mailings, the court decided that the provision did not apply retroactively to actions by Comcast before the new arbitration provision was introduced. The language of the agreement at issue was the following:

> IF WE ARE UNABLE TO RESOLVE INFORMALLY ANY CLAIM OR DISPUTE RELATED TO OR ARISING OUT OF THIS AGREEMENT OR THE SERVICES PROVIDED, WE HAVE AGREED TO BINDING ARBITRATION EXCEPT AS PROVIDED BELOW. YOU MUST CONTACT US WITHIN ONE (1) YEAR OF THE DATE OF THE OCCURRENCE OF THE EVENT OR FACTS GIVING RISE TO A DISPUTE . . . OR YOU WAIVE THE RIGHT TO PURSUE A CLAIM BASED UPON SUCH EVENT, FACTS OR DISPUTE. THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT BY A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS SIMILARLY SITUATED UNLESS YOUR STATE'S LAWS PROVIDE OTHERWISE.

Comcast then filed an appeal in both cases based upon the denial of its motion to compel arbitration.[29] The two cases, both concerning the enforceability of arbitration provisions, were consolidated on appeal and brought before the U.S. Court of Appeals for the First Circuit.[30]

III. THE COURT'S HOLDING AND REASONING

A. *The Arbitration Clause's Applicability to the Present Dispute*

The first task of the First Circuit was to decide whether the arbitration clause was applicable to the present dispute.[31] The district court held that the provision did not apply retroactively and therefore did not apply to the plaintiffs' claim.[32] The First Circuit evaluated the district court's holding.[33]

The lower court's first argument supporting the proposition that the provision did not apply retroactively dealt with the language of the arbitration provision itself.[34] The provision referred to "any claim or dispute related to or arising out of this agreement or the services provided."[35] The phrase, "the services provided," following the phrase, "this agreement," led the district court to believe that any disputes about service were limited to those covered in that particular agreement and any disputes that arose before the provision would not be covered by this language.[36] The district court

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Id. at 32. To bolster its interpretation of the provision, the trial court distinguished several cases where the language in an agreement was meant to have retroactive effect. *Id.* at 32. The court reasoned that because the language of the Comcast contract did not resemble the language of any of the other provisions named, it should be considered ambiguous and "interpreted against Comcast in light of the policy of construing adhesion contracts strictly against the drafter." *Id.* The district court found that the arbitration provision was a contract of adhesion. *Id.*

[29] *Kristian*, 446 F.3d at 31.

[30] *Id.* at 31. The First Circuit evaluated the district court's refusal to compel arbitration de novo. *Id.* The court stated, however, that in forming its decision it was "not wedded to the lower court's rationale, but, rather, may affirm its order on any independent ground made manifest by the record." *Id.*

[31] *Kristian*, 446 F.3d at 31.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 31–32.

[36] *Id.* at 32. In addition, the district court found that the use of "the" directly before "services provided" supported the idea that it referred to services provided under "this agreement." *Id.* The court found that the phrase "the services provided" referred to

further supported this interpretation of the language of the provision by distinguishing other cases where the language of the provision in question was explicitly intended to have retroactive effect.[37] For example, in *Belke v. Merrill Lynch*, the agreement specifically applied to "any controversy between us arising out of your business."[38]

The district court then noted the presence of the statute of limitations provision in the agreement following the "services provided" language.[39] The district court reasoned that if the arbitration provision was retroactively effective, then the one-year statute of limitations would automatically block any claims that related to actions occurring within the year prior to the new arbitration provision.[40] The court found this was unlikely the intention of the parties, as they had never before included an arbitration agreement in their contract.[41]

The First Circuit disagreed with the conclusion of the district court on the retroactivity of the provision.[42] The First Circuit held that the arbitration agreement applied retroactively.[43] To support its holding, the court first noted a large number of cases that dealt with arbitration agreements that specifically excluded a retroactive effect.[44] One example of a provision found to have no retroactive effect was in *Security Watch, Inc. v. Sentinel Systems, Inc.*[45] The arbitration provision in that case stated "the parties shall follow these dispute resolution processes in connection with all disputes, controversies or claims . . . arising out of or relating to the Products furnished pursuant to this Agreement or acts or omissions of Distributor or AT&T under this Agreement."[46] The *Kristian* court reasoned that if the parties

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"specific services provided under the particular subscriber agreement at issue, and [did] not refer to services in a general sense." *Id.*

[37] *Kristian*, 446 F.3d at 32 (citing Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1028 (11th Cir. 1982), *overruled on other grounds by* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)); Boulet v. Bangor Sec. Inc., 324 F. Supp. 2d 120, 125 (D. Me. 2004).

[38] *Kristian*, 446 F.3d at 32 (citing *Belke*, 693 F.2d at 1028).

[39] *Kristian*, 446 F.3d at 32–33.

[40] *Id.*

[41] *Id.* at 33.

[42] *Id.*

[43] *Id.*

[44] *Id.*; *see, e.g.*, Security Watch, Inc. v. Sentinel Systems, Inc., 176 F.3d 369 (6th Cir. 1999); Choice Security Systems, Inc. v. AT&T Corp., 141 F.3d 1149 (1st Cir. 1998).

[45] *Kristian*, 446 F.3d at 33 (citing *Security Watch, Inc.*, 176 F.3d at 372).

[46] *Id.* (citing *Security Watch, Inc.*, 176 F.3d at 372).

wanted to prevent the provision from having retroactive effect, they could have easily made that clear in the language of the agreement.[47]

The First Circuit also dismissed the district court's argument relating to the statute of limitations.[48] The circuit court noted that the provisions regarding the statute of limitations had not changed significantly between the 2001 and 2002–2003 agreements.[49] Therefore enforcing the agreement retroactively would not represent "a significant shift in the contractual relationship."[50] The court also found that the 2001 version of the agreement actually contained language that supported the idea of retroactivity: "Any and all disputes . . . must be resolved by final and binding arbitration. This includes any and all disputes based on any product, service or advertising connected to the provision or use of the service."[51]

B. *Denial of Statutory Rights Through the Enforcement of the Arbitration Agreement*

The plaintiffs further argued that the arbitration provision prevented them from "vindicating their statutory rights."[52] Although federal public policy strongly supports the use of arbitration, the court held that it is only a viable alternative to traditional litigation if it remains "a fair and adequate mechanism for enforcing statutory rights."[53] Plaintiffs claimed that their statutory rights were violated because the arbitration agreement (1) provided for limited discovery, (2) shortened the statute of limitations, (3) barred recovery of treble damages, (4) prevented the recovery of attorney's fees, and (5) prohibited the use of class action mechanisms.[54]

In order to appropriately analyze each of the plaintiff's alleged statutory rights violations, the court had to first decide whether the courts or the

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[47] *Id.*

[48] *Id.* at 33–34.

[49] *Id.*

[50] *Id.* at 34.

[51] *Kristian*, 446 F.3d at 34.

[52] *Id.* at 37.

[53] *Id.* (citing Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 14 (1st Cir. 1999)). The court further explained that "[u]nless the arbitral forum provided by a given agreement provides for the fair and adequate enforcement of a party's statutory rights, the arbitral forum runs afoul of this presumption [of arbitration as a fair mechanism for enforcing statutory rights] and loses its claim as a valid alternative to traditional litigation." *Id.*

[54] *Kristian*, 446 F.3d at 37.

arbitral forum provided the appropriate venue for the resolution of the plaintiff's claims.[55] The court looked to the precedent established in *Howsam v. Dean Witter Reynolds, Inc.* to shed light on this question.[56]

In *Howsam*, the United States Supreme Court held that although there is a strong federal policy favoring arbitration, "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is an 'issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'"[57] The appellate court looked at each of the plaintiff's arguments to decide if there was in fact a "question of arbitrability" or if the parties had clearly provided for the resolution of each issue by the contract terms.[58]

1. *Limiting Discovery and Shortened Statute of Limitations*

The plaintiffs first argued that language in the contract limited the amount of discovery that they could obtain compared to the amount of discovery that they could receive if their dispute were handled in litigation.[59] The court quickly disposed of this argument by citing the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[60] In *Gilmer*, the Court addressed an analogous issue in the context of an age discrimination case.[61] Ultimately, the Court held that limited discovery could not be used "as a ground for opposing the enforcement of an arbitration clause."[62] The appellate court applied *Gilmer* to the plaintiffs' argument and decided that based on this precedent, there was "no need to decide anew whether limited discovery raises a question of arbitrability. It does not."[63]

The plaintiffs also argued that the statutes of limitations in both the federal and state antitrust acts,[64] which provided for a four-year limit, were in direct conflict with the statute of limitations contained in the arbitration

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[55] *See id.*

[56] *Id.* at 37–38; *see* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

[57] *Howsam*, 537 U.S. at 83 (quoting AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)).

[58] *Kristian*, 446 F.3d at 42.

[59] *Id.*

[60] *Id.* at 42–43, *see* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[61] *See Gilmer*, 500 U.S. at 20.

[62] *Kristian*, 446 F.3d at 42 (citing Gilmer, 500 U.S. at 31).

[63] *Kristian*, 446 F.3d at 42–43.

[64] The Clayton Antitrust Act, § 15(b), 15 U.S.C. §§ 12–17 (2000); The Massachusetts Antitrust Act, MASS. GEN. LAWS ch. 93, § 13 (2006).

agreement, which provided for a one-year limit.[65] The plaintiffs opposed the defendant's motion to compel arbitration based upon the conflict between the antitrust statutes and the arbitration agreement provisions.[66]

The First Circuit held that this conflict did not raise a question of arbitrability.[67] The court decided that a factual inquiry was required to determine whether the plaintiffs had suffered from an ongoing injury based upon the actions of the defendant, and whether such injury actually tolled the statute of limitations provided for in the agreement.[68] This factual inquiry dealing with the "merits of the case" was, according to the court, within the "province of the arbitrator."[69] The court therefore concluded that since the issues to be decided with regards to the statute of limitations were squarely within "the purview of the arbitrator," the plaintiffs' challenge on these grounds did not raise a question of arbitrability for the court.[70]

2. *Barring Recovery of Treble Damages*

The plaintiffs also argued that there was a direct conflict between the federal and state antitrust acts and the arbitration provision.[71] The arbitration agreement contained a clause that specifically stated that "In no event shall we [Comcast] or our employees or our agents have any liability for punitive, treble, exemplary, special, indirect, incidental or consequential damages . . . ."[72] At first blush, the clause appeared to be in direct conflict with both antitrust statutes, which specially provided for the recovery of treble damages.[73] The court analyzed the federal and state antitrust statutes separately due to a significant difference in language.[74] The federal law used

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[65] *Kristian*, 446 F.3d at 43.

[66] *Id.*

[67] *Id.* at 43–44.

[68] *Id.*

[69] *Id.* at 44. The court also held the statute of limitations in this case was an affirmative defense that would also touch on the "merits of the case," again putting the issue "in the purview of the arbitrator." *Id.*

[70] *Kristian*, 446 F.3d at 44.

[71] *Id.* at 44–45.

[72] *Id.* at 44.

[73] *Id.* at 44–45. Treble damages are "[d]amages that, by statute, are three times the amount that the fact-finder determines is owed." BLACK'S LAW DICTIONARY 171 (2d pocket ed. 2001).

[74] *Kristian*, 446 F.3d at 45.

the term "shall" in its provision regarding the award of treble damages.[75] The Massachusetts law, however, stated that the court "may" award treble damages.[76]

Following a lengthy analysis regarding the distinct language in both statutes, the court held that with regard to the state antitrust statute claim there was no question of arbitrability for the courts.[77] The First Circuit concluded that based upon the language in the state statute, the awarding of treble damages was a matter of discretion and not "an indispensable element of Massachusetts' antitrust scheme."[78] It would be the arbitrator's ultimate decision whether the recovery of treble damages in the state antitrust claim was waivable.[79]

With regard to the federal antitrust statute, the court held that a question of arbitrability existed because the language of the federal law clearly conflicted with the language of the arbitration provision.[80] There was no ambiguity to be deciphered by an arbitrator.[81] The court also stated that "the award of treble damages under the federal antitrust statutes cannot be waived."[82]

If the two provisions were found to conflict, the plaintiffs may have prevailed on their statutory rights claim.[83] The court, however, found a "savings clause" in the arbitration agreement.[84] The savings clause stated that

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[75] *Id.* The Clayton Act states in part:

> [a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover* threefold the damages by him sustained . . . .

15 U.S.C. § 15(a) (2000) (emphasis added).

[76] *Kristian*, 446 F.3d at 45. The Massachusetts antitrust statute states in part: "[I]f the court finds that the violation was engaged in with malicious intent to injure said person, the court *may award* up to three times the amount of actual damages sustained, together with the costs of suit." MASS. GEN. LAWS ch. 93, § 12 (2006) (emphasis added).

[77] *Kristian*, 446 F.3d at 50.

[78] *Id.* at 49–50.

[79] *Id.* at 49–50.

[80] *Id.* at 47.

[81] *Id.* at 45.

[82] *Id.* at 48.

[83] *Kristian*, 446 F.3d at 48.

[84] *Id.*

even if the law did not permit the waiver of one of the statutory remedies, that portion could essentially be ignored and the rest of the agreement would remain enforceable.[85] Therefore the court decided that although there was a question of arbitrability with regard to the federal antitrust law, and the provisions of that law and the arbitration agreement were clearly in conflict, the savings clause nullified the provision and allowed the appellate court to enforce the remainder of the document.[86] This result essentially provided the plaintiffs with the right to receive treble damages.[87]

3. *Preventing Recovery of Attorney's Fees*

The plaintiffs next argued that they were unable to vindicate their statutory rights because the arbitration agreement contained a provision that disallowed their recovery of attorney's fees.[88] The First Circuit found this provision was in direct conflict with both the federal and state laws that provided for plaintiffs' recovery of attorney's fees and costs in antitrust cases.[89]

The court delved into the policies behind this provision, including the potentially prohibitive costs involved in arbitrating an antitrust claim on an individual basis.[90] In the district court, the plaintiffs brought in witnesses to attest to the extraordinarily high costs associated with an antitrust claim.[91] The court decided that the declarations by the plaintiffs' witnesses "establish[ed] that the pursuit of Plaintiffs' antitrust claims will require a

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> A 'savings clause' preemptively resolves conflicts between contract language and applicable law in order to preserve the remaining, non-conflicting contract language. 'Savings clause' is somewhat of a misnomer. The contractual language in conflict with applicable law is not saved. The non-conflicting language is saved . . . . In essence, a savings clause serves as an expression of the intent of the parties that limits the remedies an arbitrator or court may use in situations of conflict between contract terms and applicable law.

Id. at 48 n.16.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Kristian*, 446 F.3d at 50. The provision also disallows the recovery of expert witness fees. *Id.*

[89] *Id.*; *see* 15 U.S.C. § 15(a) (2006); MASS. GEN. LAWS ch. 93 § 12 (2006).

[90] *Kristian*, 446 F.3d at 51–52.

[91] *Id.* at 52.

huge outlay of financial resources."[92] The court noted that if "the plaintiff cannot afford to arbitrate because of an inability to recover attorney's fees and costs, the plaintiff is essentially deprived of any dispute resolution forum whatsoever."[93]

The First Circuit decided that, with regards to the attorney's fees, the plaintiffs had raised a question of arbitrability.[94] The court, however, again looked to a savings clause in the agreement.[95] In the contract, a section entitled "Enforceability and Survival" stated that "if any portion of these Policies and Practices is determined to be illegal or unenforceable, then the remainder of such Policies and Practices shall be given full force and effect."[96] The court ultimately decided that the plaintiffs were able to recover attorney's fees and costs in arbitration because the savings clause severed this unenforceable section and "saved" the rest of the document mandating arbitration.[97]

4. *Prohibiting the Use of the Class Action Provision*

The plaintiffs' final argument supporting their claim that the arbitration agreement had taken away their ability to vindicate their statutory rights dealt with the class action waiver contained in the agreement.[98] The language of the arbitration agreement stated that: "There shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis or on bases involving claims brought in a purported representative capacity on behalf of the general public . . . ."[99]

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[92] *Id.*

[93] *Id.* at 51.

[94] *Id.* at 52–53. Comcast argued that more evidence of prohibitive costs was needed regarding the plaintiff's burden in an antitrust case and that the language in the arbitration provision did not disallow the plaintiff from recovering attorney's fees. *Id.* The court rejected both of these arguments based on the plethora of evidence offered regarding the exorbitant fees involved in antitrust cases and that the language in the arbitration agreement clearly denied the plaintiff the opportunity to recover attorney's fees. *Id.*

[95] *Id.* at 53.

[96] *Kristian*, 446 F.3d at 53. This language was located in the 2002 and 2003 version of the Policies & Practices section sent to the plaintiffs. *Id.*

[97] *Id.* The court held that "[their] conclusion on Plaintiff's vindication of statutory rights claim based on the bar against attorney's fees and costs parallel[ed] [their] conclusion [with] regards to Plaintiff's vindication of statutory rights claim based on treble damages mandated by federal antitrust law."

[98] *Id.*

[99] *Id.*

Comcast claimed that this provision, which serves as a class action waiver, should be viewed as a procedural issue, and thus should be left for the arbitrator to interpret.[100] The First Circuit, however, disagreed with that assessment.[101] The language in the agreement explicitly forbade the use of a class action mechanism.[102] As a result, there was no ambiguity for the arbitrator to decide as to whether the agreement definitively barred the use of class wide arbitration.[103]

After deciding that the dispute regarding the class action mechanism was not within the purview of the arbitrator, the court turned to the question of whether it violated any of the plaintiffs' statutory rights.[104] The court found that the class action waiver did not violate the state or federal antitrust laws, which do not mention the class action mechanism.[105] The court did find, however, that the waiver violated the Federal Rules of Civil Procedure, which do provide for class actions.[106]

The court further noted the usefulness of a class action mechanism, stating that "[t]he bar on class arbitration threatens the premise that arbitration can be 'a fair and adequate mechanism for enforcing statutory rights.'"[107] It noted that the plaintiffs' expert's fees could be in the hundreds of thousands of dollars, and attorney's fees could easily reach millions of dollars in an antitrust case.[108] The court reasoned that with these extraordinarily high costs, it was extremely unlikely that a plaintiff could or would be able to bring a claim alone.[109] Therefore, with the class action ban

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[100] *Id.*

[101] *Id.* at 53–54.

[102] *Kristian*, 446 F.3d at 53–54.

[103] *Id.* (citing Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 451 (2003)). The First Circuit distinguished the present case from *Bazzle* because in *Bazzle* the agreement was silent with regards to the class action mechanism. *Kristian*, 446 F.3d at 53. Therefore, it was within the duties of the arbitrator to decide whether the agreement did, in fact, forbid the use of the class wide arbitration. In the present case, however, the language in the arbitration agreement clearly and unmistakably prohibited the use of the class action mechanism in arbitration. *Kristian*, 446 F.3d at 53–54.

[104] *Kristian*, 446 F.3d at 54.

[105] *Id.*

[106] *Id.*; *see* FED. R. CIV. P. 23.

[107] *Kristian*, 446 F.3d at 54 (citing Rosenberg, 170 F.3d at 14).

[108] *Kristian*, 446 F.3d at 54–55.

[109] *Id.*

in place, the plaintiff was essentially unable to "vindicate [their] statutory rights in arbitration."[110]

Although the First Circuit found that the class action ban did conflict with the Federal Rules of Civil Procedure, it nonetheless found a way to separate this ban from the rest of the provisions and enforce the rest of the agreement.[111] The court looked again to a savings clause in the language of the agreement.[112] The provision, added in the 2002 version of the arbitration agreement, stated that "there shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis . . . unless your state's laws provide otherwise."[113] Essentially, this language allowed the court to sever the class action ban from the rest of the document while still enforcing the mandate to arbitrate.[114]

C. *Summary of the Court's Decision*

The First Circuit first decided that, contrary to the conclusion of the district court, the arbitration agreement did apply retroactively and therefore covered the dispute in this case.[115] The court then evaluated the plaintiffs' other arguments regarding the vindication of their statutory rights.[116] With regard to their limited discovery, statute of limitations, and state law treble damages claims, the court decided that a question of arbitrability was not ultimately raised.[117] The court then turned to the federal treble damages, attorney's fees, and class action ban claims, deciding that there was, in fact, a question of arbitrability.[118] The court found in each case, however, that the

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[110] *Id.* at 55 (quoting Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 90 (2000)).

[111] *Kristian*, 446 F.3d at 61.

[112] *Id.*

[113] *Id.*

[114] Comcast argued that although the language seemed clear, it did not attempt to make the class action ban severable from the rest of the agreement. *Id.* The court, however, dismissed this argument, finding that the language was clear and the ban was severable. *Kristian*, 446 F.3d at 62. The court further explained, "[a]pparently, Comcast has simply changed its mind about the severability of the class arbitration bar. We are unaware of any principle of contract law that permits disregard of a contract provision on the basis of second thoughts by a contracting party." *Id.* at 62.

[115] *Id.* at 64.

[116] *Id.*

[117] *Kristian*, 446 F.3d at 64.

[118] *Id.*

unenforceable provision was severable from the rest of the arbitration agreement by a savings clause also found in the document.[119]

Therefore, based upon the decision of this court, the plaintiffs were still obliged to arbitrate, but could do so on a class action basis.[120] Additionally, they would have an opportunity to recover treble damages and attorney's fees and costs.[121] The First Circuit ultimately held that "the district court's holding that the arbitration clause in the 2002/2003 Policies & Practices, in its entirety, does not apply to Plaintiffs' antitrust claims is reversed."[122] The court then remanded for further proceedings.[123]

IV. THE IMPACT OF THE COURT'S HOLDING

A. *Departure from Precedent*

The decision in *Kristian* serves as a great departure from the precedent set in most circuits.[124] In rendering its decision, the First Circuit noted that the Third, Fourth, Seventh, and Eleventh Circuits have all enforced consumer arbitration agreements barring the use of a class action mechanism.[125] The *Kristian* court, however, noted two important distinctions.[126] One distinction was that in the other cases, the attorney's fees and costs were either recoverable by the plaintiff or a moot issue.[127] For example, in *Johnson v. West Suburban Bank*, the Third Circuit stated, "nor will arbitration necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors."[128]

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 64–65.

[123] *Kristian*, 446 F.3d at 65.

[124] *Id.* at 55.

[125] *Id.*

[126] *Id.* at 55–56.

[127] *Id.* at 56. Ultimately, the court also decided that attorney's fees and costs should be recoverable by the plaintiffs. It enforced this provision by utilizing a "savings clause" located in the Policies & Practices section to remove the unenforceable provision regarding attorney's fees. *Id.*

[128] *Id.* (quoting Johnson v. West Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000)). In another case, the defendant had already agreed to pay all arbitration costs. Livingston v. Associates Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003).

The second distinction was that the other cases that chose to enforce the bar on class actions all dealt with plaintiffs' claims against banks or other financial lenders under the Truth in Lending Act (TILA).[129] *Kristian* found that distinction particularly important because of the "sheer complexity" of arbitrating an antitrust case as opposed to a TILA case.[130] The court noted that a TILA claim typically deals with one transaction.[131] On the other hand, to determine whether there has been an antitrust violation, a court must often answer a "complicated question of fact."[132]

The First Circuit also emphasized the extraordinary expense of prosecuting an antitrust case.[133] The court estimated that expert's fees could cost between $300,000–$600,000 and attorney's fees could go into the hundreds of thousands of dollars.[134] With the high costs of antitrust arbitration it would be nearly impossible for a plaintiff to bring a suit alone.[135] Based on the cost and complexity of an antitrust case, the *Kristian* court concluded that the rationale for enforcing a class action ban in this case did not exist as it may have in the other circuit court cases involving primarily TILA violations.[136]

Although *Kristian* seemed to depart from the precedent on the issue of class action bans, the First Circuit did cite a few cases that were in line with its reasoning.[137] Although the cases mentioned concerned the refusal to compel arbitration on state unconscionability grounds, *Kristian* held that much of the reasoning behind those decisions was applicable to the current context.[138] The court primarily relied on the decisions in *Discover Bank v.*

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[129] *Kristian*, 446 F.3d at 57. The Truth in Lending Act of 1968, 15 U.S.C. §§ 1601–1693 (2000), was seen as a great victory for consumers. The Act was designed to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a).

[130] *Kristian*, 446 F.3d at 57.

[131] *Id.*

[132] *Id.* at 58.

[133] *Id.*

[134] *Id.*

[135] *Id.* In addition, the plaintiffs' experts testified that if the plaintiffs went alone, an individual recovery in this case, despite the extraordinary costs, would only "range from a few hundred dollars to a few thousand dollars." *Id.*

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

[137] *Id.* at 60.

[138] *Id.*

Superior Court and *Ting v. AT&T*.[139] In *Discover Bank*, the California Supreme Court observed "class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights."[140]

In *Ting*, the plaintiffs brought a claim against AT&T.[141] According to their consumer service agreement, the plaintiffs were barred from bringing the action on a class wide basis.[142] *Kristian* cited approvingly to the Ninth Circuit's rationale that the extraordinary costs in these types of cases supported a class action mechanism.[143] The *Kristian* court stated that "it would not have been economically feasible to pursue the claims in these cases on an individual basis, whether the case was brought in court or arbitration."[144]

Essentially, *Ting* held that without the class action mechanism, the plaintiffs would have no feasible way to redress their dispute.[145] This is in line with the conclusion of *Kristian*: "[I]f the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law. Plaintiffs will be unable to vindicate their statutory rights."[146]

B. *Effect of the Decision*

The ultimate effect of this proconsumer case is difficult to predict.[147] Much of its effect will be determined by the interpretation of its scope in the future.[148] Some argue that *Kristian* represents a significant departure in the case precedent enforcing class action waivers and will change the direction of the decisions in these consumer arbitration cases.[149] Others argue that this decision invites a case-by-case analysis of whether the particular dispute "precludes the effective vindication of statutory claims if the case is

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[139] *See* Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).

[140] *Kristian*, 446 F.3d at 60 (citing *Discover Bank*, 36 Cal. 4th at 161).

[141] *Ting*, 319 F.3d at 1126.

[142] *Kristian*, 446 F.3d at 60 (citing *Ting*, 319 F.3d at 1130).

[143] *Kristian*, 446 F.3d at 60.

[144] *Id.* at 60 (citing Ting v. AT&T, 182 F. Supp. 2d 902, 918 (N.D. Cal. 2002).

[145] *Kristian*, 446 F.3d at 60–61.

[146] *Id.* at 61.

[147] Estreicher & Bennet, *supra* note 1.

[148] *Id.*

[149] *Id.*

arbitrated on an individual basis."[150] This analysis would depend on the complexity of the issues and the possible cost of expert testimony and attorney's fees.[151]

Kristian critics argue that if future courts adopt the case-by-case analysis, the additional inquiry may incur costs that negate the low-cost benefits of arbitration.[152] Furthermore, if this additional inquiry is added to the formalities, the shortened time frame of arbitration, which is also appealing to the parties, may be extended.[153] Critics wonder if the cost and time of arbitration increases will reduce the incentive for parties, particularly large corporations, to include these arbitration agreements in their contracts.[154] Does this go against the federal public policy supporting arbitration?[155]

The U.S. Chamber of Commerce stated in an amicus brief that: "Superimposing a class action requirement onto contractual agreements to arbitrate individually will effectively eliminate the virtues of arbitration, while multiplying the stakes exponentially. The risk to businesses of litigating a class action in the arbitral forum is simply too high . . . ."[156]

Yet some argue that it would actually be in the best interest of large corporations to insist on going to court because of the dependability of the rules of evidence and the ability to appeal.[157] However, even if the benefits of arbitration—namely cost and a shorter time commitment—remain intact, some argue that there are still benefits in bringing the case to court.[158] As one commentator recognized, "some of the biggest cases with the greatest social importance were class actions. What would the world be like if these cases couldn't be brought or if they were brought privately, with no opinion issued, and no understanding of exactly what happened or why?"[159]

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] Estreicher & Bennett, *supra* note 1.

[154] *Id.*

[155] *Id.*

[156] Allison Torres Burtka, *Courts Weigh in on Class Action Bans in Arbitration* (Sept. 1, 2006), http://thepeoplesfirm.com/news/news_item.asp?NEWSID=907 (citing Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, Cingular Wireless v. Mendoza, *cert. denied*, 126 S.Ct. 2353, (mem.) (2006) (No. 05-1119), 2006 WL 1267576).

[157] *Id.* Myriam Gilles, a professor at Cardozo School of Law in New York City, adds "[t]hat's a hard thing to explain to your shareholders: why you've lost a huge judgment that you can't appeal." *Id.*

[158] *Id.*

[159] *Id.*

V. CONCLUSION

As many commentators have noted, the law in this area is far from decided, and the impact of *Kristian* is far from realized. On the one hand, the decision is seen as a great victory for consumers, allowing them to bring claims that financially they may not have been able to bring with the class action ban in place.[160] However, many critics argue that the possible downside of this decision is its strain on the process of arbitration.[161] Will this decision serve to increase the costs and time commitment of arbitration to such a level that the benefits of arbitration are overshadowed?[162] What about the future of this decision? Some observers speculate that this landmark decision, which sided the First Circuit with the minority circuit position on this issue, will serve as the catalyst for an appeal to the Supreme Court.[163] One thing is certain in dealing with class action waivers, "[t]he stakes of this issue are huge."[164]

Kate Reichert

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[160] Burtka, *supra* note 156.

[161] Estreicher & Bennett, *supra* note 1.

[162] *Id.*

[163] ADR Institute Editor, *First Circuit Relies on Preclusion of Statutory Remedy in Arbitration Clause to Prohibit Clause's Class Action Waiver for Antitrust Claims*, ADRInstitute.org, May 5, 2006, http://www.adrinstitute.org/edit/2006/May/050506Kristianv.ComcastCorp.htm.

[164] Burtka, *supra* note 156.