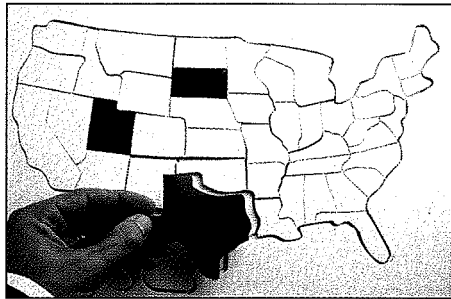


## Feature

### 40 A choice-of-law sleight of hand

LESLIE A. BAILEY AND F. PAUL BLAND JR.



Corporations have been putting choice-of-law provisions in their contracts, usually embedded in arbitration clauses. These provisions help immunize the corporations from liability by allowing them to remove lawsuits to states with weaker consumer-protection

laws. But courts are onto the ploy and increasingly are stopping corporations from evading accountability.

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## MISSION

The mission of the American Association for Justice is to promote a fair and effective justice system—and to support the work of attorneys in their efforts to ensure that a person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms, even when taking on the most powerful interests.

# A choice-of-law sleight of hand

LESLIE A. BAILEY AND  
F. PAUL BLAND JR.

*Many corporations have been slipping choice-of-law clauses into their contracts, denying justice to consumers by choosing states that favor class action bans. A growing number of courts are on to the ploy.*

Again and again, corporations have written fine-print clauses into their contracts intended to immunize them from legal liability. Sometimes the provisions blatantly strip individuals of the right to sue for punitive damages or similar legal rights. Those that ban class actions in court or arbitration fall into this category.

Sometimes the effect of a clause is more indirect. These include choice-of-law clauses, which typically provide that any dispute between the individual and the corporation will be governed by the law of a particular state (usually one with weak consumer protection or civil rights laws).

The legality of class action bans and the contractual choice-of-law clauses with which they are often linked is one of the most hotly contested consumer law issues in the courts today. With courts increasingly striking down exculpatory class action bans as unconscionable under state law, corporations have responded by including—or beefing up—choice-of-law clauses in their contracts.

Corporations use choice-of-law clauses in consumer and employment contracts in two ways. Some choose the laws of a state with weak consumer protection laws, particularly with respect to class action bans, to govern their contracts (as well as any causes of action against them). For example, Dell's consumer contracts specify that the laws of Texas apply. The reason is clear: Texas courts have been favorable to contrac-

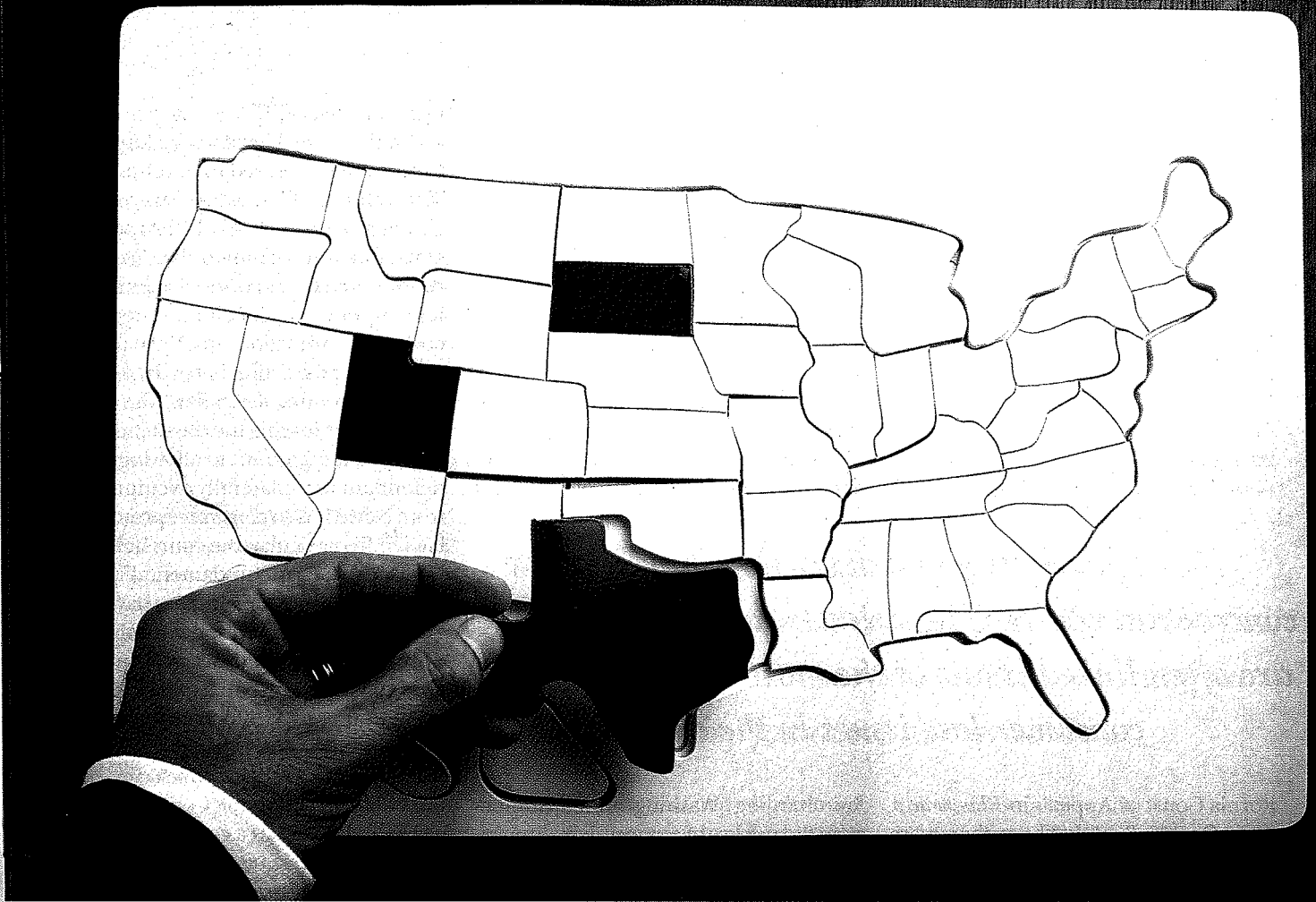
tual terms that ban class actions, and the state's deceptive trade practices act has an explicit reliance requirement that makes class actions virtually impossible to pursue.

Texas, unfortunately, isn't unique in this way. Utah and South Dakota are often chosen because of their friendliness to corporate residents.

Some corporations have taken choice-of-law clauses one step further, using "generic" choice-of-law clauses that provide that the laws of each customer's state will apply. When customers try to bring nationwide class actions against these companies, they argue that any claims must be brought not only on an individual basis but also on a state-by-state basis. The companies know, of course, that many states have laws that permit them to ban class actions.

Contractual class action bans are almost always embedded in mandatory arbitration clauses, which are governed by the Federal Arbitration Act (FAA).<sup>1</sup> Under the FAA, arbitration clauses—and terms embedded in them—are generally enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>2</sup> Federal courts determine the validity of class action bans in arbitration clauses by applying "ordinary state-law principles" such as unconscionability.<sup>3</sup>

A large body of state and federal law recognizes that, under some factual circumstances, a ban on class actions can function as an exculpatory clause, effectively immunizing the corporate drafter



ADAM PAINE

from liability.<sup>4</sup> When the contract at issue also contains a choice-of-law clause, the court must determine which state's law governs the question of whether the class action ban in the contract is unconscionable. Some courts have refused to enforce choice-of-law clauses when doing so would permit a corporation to impose an unconscionable class action ban on its customers.<sup>5</sup>

### Encouraging trend

In general, the validity of a choice-of-law provision is determined by the forum state's law.<sup>6</sup> Under the laws of many states, courts determining the enforceability of a contractual choice-of-law term apply the analytical approach articulated in the *Restatement (Second) of Conflict of Laws* §187(2), which provides:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their

agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. . . .<sup>7</sup>

Because courts generally hold that a company's residence or state of incorporation provides a reasonable basis for choosing that state's law, the enforceability of a choice-of-law clause is unlikely to turn on the first part of the test, §187(2) (a). The only circumstance under which this part of the test would arise is when neither the corporation nor any of the putative class members resides in the chosen state, which is a rare occurrence.<sup>8</sup>

The second part of the test, §187(2) (b), is the critical part. The party seeking to invalidate a choice-of-law clause bears the burden of demonstrating that

■ the chosen state's law is contrary to a fundamental public policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue

■ the other state's law would apply absent the choice-of-law clause.

Many courts using this or a similar test have invalidated choice-of-law clauses.

Increasingly, courts have held that a corporation may not select the law of a state that would permit the corporation to enforce an exculpatory class action ban. In states that have strong consumer protection policies and laws prohibiting exculpatory class action bans, courts have ruled that enforcing choice-of-law clauses would violate a fundamental policy by immunizing corporations from meaningful accountability for deceptive practices. These courts have also recog-

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nized that forum states have a stronger interest in applying their own laws to protect their consumers than any interest chosen states have in permitting corporate defendants to ban class actions.

Four recent cases involving putative statewide class actions are good examples of this trend: the Third Circuit's 2009 decision in *Homa v. American Express Co.*,<sup>9</sup> the Washington Supreme Court's 2008 decision in *McKee v. AT&T Corp.*,<sup>10</sup> the New Mexico Supreme Court's 2008 decision in *Fiser v. Dell Computer Corp.*,<sup>11</sup> and the 2005 decision of the Cal-

ifornia Court of Appeals in *Klussman v. Cross Country Bank*.<sup>12</sup> (The authors were among the prevailing appellate counsel in the first three of these cases.)

## ***The legality of class action bans and the contractual choice-of-law clauses with which they are often linked is one of the most hotly contested consumer law issues in the courts today.***

ifornia Court of Appeals in *Klussman v. Cross Country Bank*.<sup>12</sup> (The authors were among the prevailing appellate counsel in the first three of these cases.)

In *Homa*, *McKee*, and *Klussman*, the high court of the forum state had already struck down exculpatory class action bans as unconscionable under state law. In *Fiser*, the court announced a rule against these bans while striking down a choice-of-law clause that would have permitted the class action ban.

The plaintiffs in *Homa* were credit cardholders in New Jersey who claimed that American Express used a bait-and-switch scheme to cheat them out of cash rebates, in violation of the state's consumer protection laws. Despite the New Jersey Supreme Court's landmark 2006 decision in *Muhammad v. County Bank of Rehoboth Beach, Delaware*,<sup>13</sup> which held that class action bans that serve as exculpatory clauses are unconscionable and unenforceable under New Jersey law, the district court had enforced American Express's ban on class actions on the ground that American Express's contract specified that Utah law governed the case.

On appeal, the Third Circuit refused to enforce the choice-of-law provision, explaining that the "most important"

reason for invalidating the class action ban in the *Muhammad* ruling was "the public interest at stake in . . . consumers['] [ability to] pursue their statutory rights under [New Jersey's] consumer protection laws."<sup>14</sup> The court predicted that "the Supreme Court of New Jersey would find that the class-arbitration waiver at issue violates the fundamental public policy of New Jersey."<sup>15</sup>

The *McKee* court came to the same conclusion in a case involving allegations that AT&T Corp. violated Washington state's consumer protection law by charging Washington consumers who did not live in any municipality usurious interest rates and municipal utility taxes. Earlier, in *Scott v. Cingular Wireless*, the state's high court had struck down a class action ban in a consumer contract based on a factual record demonstrating that the members of the putative class would be unable as a practical matter to bring their claims individually. The court ruled that a class action ban under these circumstances is an "unconscionable violation of [the] state's policy to 'protect the public and foster fair and honest competition' because it drastically forestalls attempts to vindicate consumer rights."<sup>16</sup>

In *McKee*, AT&T argued that it could avoid the rule in *Scott* because it had contractually chosen the law of a less-protective state—New York—which would likely enforce its class action ban. The court rejected AT&T's argument and unanimously struck down the New York choice-of-law clause, explaining that permitting AT&T to ban Washington consumers from holding the company accountable through a class action would conflict with the "strong Washington state public policy in support of the use of class action claims to pursue actions for small-dollar damage claims

under [state law]."<sup>17</sup>

under [state law]."<sup>17</sup>

Similarly, the New Mexico Supreme Court in *Fiser* refused to enforce Dell's Texas choice-of-law clause in a putative class action on behalf of New Mexico consumers who claimed that Dell misrepresented the amount of memory in its computers, in violation of the state's consumer protection laws. Recognizing that Dell's class action ban would be enforceable under Texas law, the court held that "enforcing the class action ban would be tantamount to allowing [the] defendant to unilaterally exempt itself from New Mexico consumer protection laws."<sup>18</sup> In particular, the court held that New Mexico has a "fundamental" policy of ensuring that "consumers have a viable mechanism for dispute resolution, no matter the size of the claim," and that class actions are essential to this policy.<sup>19</sup>

A number of California courts have reached the same result. In the landmark 2005 case, *Discover Bank v. Superior Court*, the California Supreme Court held that a class action ban in a contract of adhesion that would exculpate its drafter from liability is unconscionable and unenforceable under California law.<sup>20</sup> In the wake of *Discover Bank*, corporations attempted to indirectly impose class action bans on California consumers by designating the laws of states that were less protective of consumers. But most courts evaluating such choice-of-law clauses in California have concluded that they would violate a fundamental policy of the state and thus, under the restatement test, cannot be enforced.<sup>21</sup>

In *Klussman*, which was the first case to address this issue under California law, a California appellate court invalidated a Delaware choice-of-law clause in a lender's consumer contract that banned class actions.<sup>22</sup> Applying the restatement test, the *Klussman* court recognized that *Discover Bank* "establishes the fundamental nature of California's concern with protecting consumers from unscrupulous practices, particularly when only small individual amounts are at issue."<sup>23</sup> Given the "fundamental nature of the policy favoring class actions" in such circumstances, the court concluded that "Delaware's approval of class action waivers, especially in the context of

a 'take it or leave it' arbitration clause, is contrary to fundamental public policy in California."<sup>24</sup>

These same principles have been embraced by courts across the country, including those in Illinois, Massachusetts, Missouri, and Wisconsin.<sup>25</sup> If an established state law rule invalidates exculpatory class action bans and a choice-of-law clause conflicts with that state law rule, the choice-of-law clause violates a fundamental policy of the state and cannot be enforced.

### Competing interests

The second prong of the restatement test requires the court to determine which state has the stronger interest: the state specified in the choice-of-law clause or the forum state. Many courts have held that the forum state's interest in permitting its consumers to seek redress is materially greater than any interest the chosen state could have in banning the class action.

For example, in *Homa*, the Third Circuit found that New Jersey's interest in "protecting its consumers' ability to enforce their rights under the Consumer Fraud Act" was stronger than Utah's interest in protecting American Express from a class action, given that the plaintiffs were New Jersey residents and had asserted only violations of New Jersey law.<sup>26</sup> Likewise, the Washington Supreme Court in *McKee* reasoned that "Washington's interest in protecting large classes of its consumers materially outweighs New York's limited interest in this matter."<sup>27</sup>

And in *Klussman*, after holding that enforcement of Cross Country Bank's Delaware choice-of-law clause would violate California's public policy, the court concluded that, "although Delaware's interest in uniform regulation of the business practices of banks incorporated under its laws is significant, when it is measured against California's interest in providing effective protection for California customers of out-of-state banks when they are overcharged, defrauded, abused, and harassed, Delaware's interest does not outweigh that of California."<sup>28</sup> Balancing these interests led the *Klussman* court to conclude that "Cal-

ifornia's fundamental public policy interest in protecting its residents is materially greater than Delaware's interest in uniformity among its corporate citizens."<sup>29</sup>

The upshot of these cases is straightforward: Where a state's high court has held that exculpatory class action bans are unconscionable, in considering whether that rule of law represents a "fundamental policy" of the state, courts in that state are clearly unwilling to allow a corporation to circumvent that law by selecting the law of another state.

Finally, courts in some jurisdictions

lawyers should be sure to determine which test applies in a given jurisdiction.

### Generic clauses

Courts should also refuse to enforce choice-of-law clauses that would permit a corporation based in the forum state to prevent out-of-state customers from participating in a class action against it. Some corporations that do business nationwide now include generic choice-of-law clauses in their consumer contracts. These generic clauses provide that the laws of each customer's home state gov-

*Some courts have ruled that enforcing choice-of-law clauses would violate a fundamental policy by immunizing corporations from meaningful accountability for deceptive practices.*

take a third analytical step to determine which state's law would apply absent an effective choice-of-law clause. In *Homa*, after noting that, under New Jersey law, "the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation" is the state whose law would apply absent a choice-of-law clause, the Third Circuit simply combined this rule with the "materially greater interest" prong of the restatement test to hold that New Jersey law applies.<sup>30</sup>

In *McKee*, the Washington Supreme Court concluded that Washington law would apply to AT&T's contract if there were no choice-of-law provision because Washington had the "most significant relationship" to the parties and the contract, whereas "New York's only tie to this litigation is that it is the state of incorporation of AT&T."<sup>31</sup>

Under California law, this final analytical step would be relevant in the "occasional case in which California is the forum, and the parties have chosen the law of another state, but the law of yet a third state, rather than California's, would apply absent the parties' choice."<sup>32</sup> The application of this third analytical step varies from state to state, both in importance and in form, so

ern that customer's contract.

While few courts have addressed the enforceability of such terms, it seems likely that they will be enforced in general. Many courts consider it reasonable to hold that consumer or employee rights should be governed by the law of the state where the person resides.

There is one notable exception. When a corporation is based in, or does business from, a particular state and has allegedly violated the laws of that state, courts can apply that state's laws to determine whether the corporation can bar its customers from participating in a class action against it.

At least two federal courts have recently invalidated generic choice-of-law clauses in putative nationwide class actions on these grounds. These courts recognized that the forum states had a strong interest in not allowing their own corporate citizens to cheat residents of other states.

One example of this comes from *Conneff v. AT&T Corp.*<sup>33</sup> In *Conneff*, AT&T Wireless customers from several states claimed that when Cingular Wireless and AT&T merged in 2004, AT&T's network was deliberately degraded to induce customers to switch to the more expensive Cingular plans. They alleged

violations of Washington's consumer protection laws and sought to represent a putative nationwide class.

AT&T, which was headquartered in Washington at the time of the alleged wrongdoing, argued that the plaintiffs were required to arbitrate their claims individually and that its choice-of-law clause—which provided that the laws of each customer's home state governed—barred the application of Washington state law to its contracts (except in cases brought by Washington customers). Rejecting this argument, a federal court in Washington held that the state's law applied and struck down the class action

AT&T's class action ban might be enforceable under the laws of several of the states in which AT&T's customers resided—even if it would exculpate AT&T from liability—the *Coneff* court recognized that enforcement of the choice-of-law clause would run afoul of *Scott* and *McKee*.<sup>37</sup>

Third and perhaps most important, the court recognized that Washington's interest in "regulating the conduct of businesses that reside in [that] state" was greater than the interests of other states, whose "only connection to [the] lawsuit is that the individually named plaintiffs reside there." Washington law would

the laws of the states where Masters and Murphy resided.<sup>40</sup> The court also concluded that "California indeed possesses a materially greater interest in determining the (in)validity of the class action waiver" at issue in both cases.<sup>41</sup>

The court reasoned that "all DirecTV entities have their principal places of business in California," that the alleged wrongs took place in California, and that the plaintiffs alleged violations of only California law.<sup>42</sup> The court concluded that the plaintiffs' home states did not have a greater interest than California had "in deterring fraudulent conduct by businesses headquartered within its borders and protecting consumers from fraudulent misrepresentations emanating from California."<sup>43</sup>

In November, the Ninth Circuit affirmed the district court's decision in *Masters*.<sup>44</sup> An appeal in *Coneff* is currently pending before the same court. Together, those two decisions will help shape the answer to a critical question for consumers: Can a corporation that is based in the forum state and that has allegedly cheated customers nationwide prevent out-of-state customers from participating in a class action against it merely by drafting a consumer contract that bans class actions and includes a choice-of-law clause? Under the principles of the restatement and the strong body of law applying it, the answer should be a resounding "no."

The tide has turned in favor of consumers and employees in their battle to be free of exculpatory class action bans. Now, corporations are looking to pick and choose among jurisdictions to use the laws that will let them ban class actions as often as possible. Fortunately, a growing number of courts have seen through this ruse and refused to enforce these abusive choice-of-law provisions. ■

### *Some corporations that do business nationwide now include generic choice-of-law clauses in their consumer contracts.*

ban in AT&T's wireless contract.

To reach this holding, the *Coneff* court first determined that Washington law would apply absent an effective choice-of-law clause. The court explained that, while some courts engage in a rote test involving a list of specific factors, "the reality of the situation presented by this case is that there is simply no place of contracting, no place of negotiation of the contract, no place of performance, and no central location of the subject matter of the contract."<sup>34</sup>

Rather, the court observed, "wireless phone use is a nationwide practice"—and because of this, the state where the defendant was based had a stronger relationship to the case than the disparate states where the plaintiffs lived.<sup>35</sup> Since AT&T did not dispute the plaintiffs' contention that AT&T Wireless was a Washington corporation—and the plaintiffs presented evidence that the conduct had occurred in Washington—the court concluded that "application of Washington law is the logical choice."<sup>36</sup>

Second, the court concluded that enforcement of AT&T's choice-of-law clause would violate Washington's public policy—established in *Scott* and reaffirmed in *McKee*—of refusing to enforce exculpatory class action bans. Because

govern the enforceability of AT&T's class action ban, even with respect to plaintiffs from other states.<sup>38</sup>

Similarly, in the companion cases of *Masters v. DirecTV* and *Murphy v. DirecTV*,<sup>39</sup> consumers from Georgia and Montana sued DirecTV on behalf of customers nationwide, alleging that the corporation violated California consumer protection laws by engaging in a bait-and-switch scheme. The plaintiffs claimed the company advertised satellite television receivers for purchase but that after the sale, customers found out that they had merely leased the equipment and had to pay additional long-term monthly fees or incur cancellation penalties.

Like AT&T, DirecTV had a consumer contract that banned class actions and specified that the laws of each customer's home state governed. But the plaintiffs argued that since DirecTV is based in California and had carried out the allegedly unlawful scheme there, California law should apply. The parties agreed that if California law applied, DirecTV's class action ban would be unenforceable.

A federal court found that it did, striking down DirecTV's choice-of-law clause on the ground that California's fundamental policy against enforcing exculpatory class action bans conflicted with

#### Notes

1. Even if a class action ban is not technically part of an arbitration clause, it will probably be coupled with one. Regardless of its placement in the contract, courts generally recognize that the ban limits the arbitrator's authority and thus is part and parcel of the clause. See e.g. *Muhammad v. Co. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 95-96 (N.J. 2006) (holding that the plaintiffs' challenge to a class action ban should be treated as a

challenge to the arbitration clause, even though the former was not technically located inside the latter). At least one federal court has held that a class action ban in a contract that does not contain an arbitration clause is invalid under Federal Rule of Civil Procedure 23. See e.g. *Martrano v. Quizno's Fran. Co.*, 2009 WL 1704469, at \*20 (W.D. Pa. June 15, 2009).

2. 9 U.S.C. §2 (2006).

3. See e.g. *Douglas v. U.S. Dist. Ct. for C. Dist. of Cal.*, 495 F.3d 1062, 1067 n.2 (9th Cir. 2007) (per curiam) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

4. For a thorough discussion of this case law and how to challenge an abusive class action ban, see F. Paul Bland Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 Cardozo J. Conflict Res. 369 (2009).

5. The question of the enforceability of a choice-of-law clause in a putative class action is likely to arise first when a defendant corporation whose contract bans class actions responds to the complaint by moving to compel individual arbitration. To determine whether to grant that motion, the court must decide whether the contractual class action ban is enforceable. If the contract also contains a choice-of-law clause, the court must determine whether that clause is enforceable to resolve which state's law governs the enforceability of the class action ban.

Even if the court invalidates the choice-of-law clause with respect to the class action ban and holds that the law of the forum state (or the consumer's state, if the consumer is not a resident of the forum state) applies, the defendant may still move to dismiss the underlying claims against it (or oppose nationwide class certification) on the ground that claims can be brought only under the laws of the contractually chosen state.

Although this article specifically addresses cases in which courts have invalidated choice-of-law clauses as applied to class action bans, the same arguments are relevant to any motion in which a corporation seeks to enforce a choice-of-law clause.

6. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Hoffman v. Citibank (S.D.)*, N.A., 546 F.3d 1078, 1082 (9th Cir. 2008) (per curiam).

7. *Restatement (Second) of Conflict of Laws* §187(2) (1988) [hereinafter *Restatement*]. Because not all states use the *Restatement* §187 test, it is essential to check the particular test in your state. For example, the Kentucky Supreme Court has held that, even when a contract contains a choice-of-law clause, "justice, fairness, and the best practical result may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Breeding v. Mass. Indem. & Life Ins. Co.*, 633 S.W.2d 717, 719 (Ky. 1982); see also *Lewis v. Am. Fam. Ins. Group*, 555 S.W.2d 579, 581-82 (Ky. 1977).

8. See e.g. *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1253 (W.D. Wash. 2009); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 734 (App. 2005).

9. 558 F.3d 225 (3d Cir. 2009). Public Justice's briefs in *Homa* are available at [www.publicjustice.net/Resources/Cases/Homa-v-American-Express.aspx](http://www.publicjustice.net/Resources/Cases/Homa-v-American-Express.aspx).

10. 191 P.3d 845 (Wash. 2008) (en banc). Public Justice's briefs in *McKee* are available at [www.publicjustice.net/Resources/Cases/McKee-v-ATT.aspx](http://www.publicjustice.net/Resources/Cases/McKee-v-ATT.aspx).

11. 188 P.3d 1215 (N.M. 2008). Public Justice's amicus brief in *Fiser* is available at [www.publicjustice.net/Resources/Cases/Fiser-v-Dell-Computer-Corp.aspx](http://www.publicjustice.net/Resources/Cases/Fiser-v-Dell-Computer-Corp.aspx).

12. 36 Cal. Rptr. 3d 728.

13. 912 A.2d 88. Public Justice's briefs in *Muhammad* are available at [www.publicjustice.net/Resources/Cases/Muhammad-v-County-Bank-of-Rehoboth-Beach.aspx](http://www.publicjustice.net/Resources/Cases/Muhammad-v-County-Bank-of-Rehoboth-Beach.aspx).

14. *Homa*, 558 F.3d at 230 (quoting *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 99-101 (Pa. Super. 2006)).

## Corporations are looking to pick and choose among jurisdictions to use the laws that will let them ban class actions.

15. *Id.* The decision also dismissed—as inapplicable dicta—language in an earlier Third Circuit decision that had suggested that state unconscionability law was preempted by the FAA. *Id.* at 230.

16. 161 P.3d 1000, 1006 (Wash. 2007) (en banc) (quoting Wash. Rev. Code §19.86.920 (1999)); see also *id.* at 1005 (noting that class actions are essential to "deter future similar wrongful conduct"). Public Justice's briefs in *Scott* are available at [www.publicjustice.net/Resources/Cases/Scott-v-Cingular-Wireless.aspx](http://www.publicjustice.net/Resources/Cases/Scott-v-Cingular-Wireless.aspx).

17. *McKee*, 191 P.3d at 852.

18. *Fiser*, 188 P.3d at 1221.

19. *Id.* at 1218. Under New Mexico law, this "public policy exception" was sufficient to invalidate Dell's choice-of-law clause without examining whether New Mexico had a materially greater interest in the issue than New York. *Id.* at 1220-21.

20. 113 P.3d 1100, 1108-09 (Cal. 2005); see also *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007).

21. See e.g. *Hoffman*, 546 F.3d at 1083; *Klussman*, 36 Cal. Rptr. 3d at 739-40.

22. 36 Cal. Rptr. 3d 728.

23. *Id.* at 741.

24. *Id.* at 739-40; see also *Tamayo v. Brainstorm USA*, 154 Fed. Appx. 564, 566 (9th Cir. 2005) (after *Discover Bank*, holding that "to the extent that Ohio law would enforce the class action waiver at issue... it would be contrary to California public policy and thus not applicable"); *Brazil v. Dell, Inc.*, 2007 WL 2255296, at \*4 (N.D. Cal. Aug. 3, 2007) (explaining that California courts have held that "when similar circumstances as those in *Discover Bank* are present, a fundamental public policy is implicated").

25. See *Doerhoff v. Gen. Growth Proprs., Inc.*, 2006

WL 3210502, at \*6 (W.D. Mo. Nov. 6, 2006) (applying *Restatement* §187(2) to hold unenforceable a New York choice-of-law clause where New York would enforce the defendant's class action ban because "application of New York law in this case would be contrary to the fundamental policy of Missouri"); *Wigginton v. Dell, Inc.*, 890 N.E.2d 541, 547-48 (Ill. App. 2008) (refusing to enforce a Texas choice-of-law clause where Texas would enforce a class action ban that was unconscionable under Illinois law); *Feeney v. Dell, Inc.*, 908 N.E.2d 753 (Mass. 2009) (refusing to enforce a Texas choice-of-law clause and striking down a class action ban under Massachusetts law); *Coady v. Cross Country Bank*, 729 N.W.2d 732, 737-41 (Wis. App. 2007) (striking down a class action ban in a lending contract as unconscionable under Wisconsin law despite a Delaware choice-of-law clause).

26. 558 F.3d at 232-33.

27. 191 P.3d at 852.

28. 36 Cal. Rptr. 3d at 741.

29. *Id.*

30. 558 F.3d at 231 (quoting *Gantes v. Kason Corp.*, 679 A.2d 106, 109 (N.J. 1996)).

31. 191 P.3d at 851-52 (quoting *Restatement* §188).

32. *Nedlloyd Lines B.V. v. Super. Ct.*, 834 P.2d 1148, 1152 n.5 (Cal. 1992) (en banc); see also *Wash. Mut. Bank, FA v. Sup. Ct.*, 15 P.3d 1071, 1078 n.5 (Cal. 2001) (holding that the restatement test could "in some instances necessitate consideration of the fundamental policy of a third state whose law would apply... in the absence of an effective choice of law").

33. 620 F. Supp. 2d 1248. Public Justice's brief in *Coneff* is available at [www.publicjustice.net/Resources/Cases/Coneff-v-ATT-Wireless.aspx](http://www.publicjustice.net/Resources/Cases/Coneff-v-ATT-Wireless.aspx).

34. *Id.* at 1254.

35. *Id.*

36. *Id.*

37. *Id.* at 1255-56.

38. *Id.* at 1256.

39. *Masters v. DirecTV, Inc.*, No. 2:08-cv-00906-FMC-VBK (C.D. Cal. May 9, 2008); *Murphy v. DirecTV*, No. 2:07-cv-06465-FMC-VBK (C.D. Cal. May 9, 2008). DirecTV appealed the decisions to the Ninth Circuit, and the cases were consolidated there. Public Justice's appellate brief in *Masters* is available at [www.publicjustice.net/Resources/Cases/Masters-v-DirecTV.aspx](http://www.publicjustice.net/Resources/Cases/Masters-v-DirecTV.aspx).

40. *Masters*, slip op. at 8-9; *Murphy*, slip op. at 8-9.

41. *Masters*, slip op. at 9-10; *Murphy*, slip op. at 10-11.

42. *Id.*

43. *Id.*

44. *Masters v. DirecTV*, No. 08-55825 (9th Cir. Nov. 19, 2009).