"Integral" Decisionmaking: Judicial Interpretation of Predispute Arbitration Agreements Naming the National Arbitration Forum

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INTRODUCTION

As part of a settlement of a deceptive-trade-practices lawsuit, the National Arbitration Forum (NAF or "the Forum")—then the nation's largest administrator of consumer arbitration[1]—permanently ceased arbitrating consumer claims in July 2009.[2] The settlement has affected the millions of standard-form contracts that require the parties to submit to arbitration exclusively before the Forum. A great deal of litigation has recently forced state and federal courts to decide whether parties to these contracts can be compelled to arbitrate in a different forum or whether they must now litigate in court.[3] Section 5 of the Federal Arbitration Act[4] (FAA) gives a trial court judge the power to appoint a substitute arbitrator if the contractual method for naming an arbitrator fails for "any [ ] reason,"[5] but courts have divided on its applicability.[6] A judge-made rule has emerged from these cases: a court can sever the language naming an unavailable forum and enforce the contract with a substitute arbitrator only if the parties' choice of forum was an "ancillary logistical

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1 Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 Ariz L Rev 395, 428 (2010).

2 Consent Judgment, *Swanson v National Arbitration Forum, Inc*, No 27-CV-09-18550, *1–2 (Minn D Ct filed July 17, 2009) (available on Westlaw at 2009 WL 5424036) ("NAF Consent Judgment").

3 See, for example, *Brown v ITT Consumer Financial Corp*, 211 F3d 1217, 1222 (11th Cir 2000).

4 Pub L No 80-282, 61 Stat 671 (1947), codified at 9 USC § 5.

5 9 USC § 5.

6 See Part II.A.

concern" of the agreement and not "integral" to the agreement to arbitrate itself.[7]

A federal circuit split and a wide divergence in state court opinions have materialized over whether these contractual forum-selection provisions are integral or merely ancillary. Part I of this Comment establishes the background law and describes the evolution of the "integral-or-ancillary" doctrine. Part II provides the first comprehensive survey of these decisions, which employ strikingly different methodologies in their application of the doctrine, dividing primarily over whether to derive the parties' intent from the language of the contract or from external sources. Part III analyzes the effectiveness of the various interpretations applied by courts under the integral-or-ancillary test as attempts to protect the ex ante expectations of contracting parties and, implicitly, to protect consumers from the burden of predispute arbitration agreements in standard-form contracts. This Comment argues that these policy concerns are not well served by the binary integral-or-ancillary test. Given the lack of understanding of the causes of the "sticky-boilerplate" phenomenon as it relates to these arbitration terms, the policy concerns underlying the test are better addressed through § 5's discretionary mechanism for selecting a replacement arbitrator. This approach allows judges to select a mutually beneficial forum for contracting parties on a case-by-case basis. By soliciting the input of the parties to arrive at a tailored solution, a judge can approximate ex ante expectations and redistribute the benefits of the bargain if desired,[8] all while avoiding conflict with the common law of contracts and recent Supreme Court precedent that creates a presumption in favor of enforcement of arbitration agreements.

I. THE FEDERAL ARBITRATION ACT AND THE NATIONAL ARBITRATION FORUM

Standard-form agreements are ubiquitous in everyday consumer transactions. They are a staple of the modern economy, allowing the mass production and sale of consumer goods free of the tremendous transaction costs that would result from the

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[7] See, for example, *Brown*, 211 F3d at 1222, quoting *Zechman v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 742 F Supp 1359, 1364 (ND Ill 1990).

[8] See Part III.B.2.

individual negotiation of each contractual arrangement.[9] A common feature of standard-form contracts is an agreement to resolve any disputes arising out of the contract through private arbitration rather than by litigation in federal or state court. Compared to litigation, arbitration is faster and cheaper, in addition to being presided over by neutral experts rather than a comparatively unsophisticated jury.[10] Arbitration is particularly attractive to businesses that provide consumer goods and services because it avoids high discovery costs, class action exposure,[11] the possibility of injunctive relief, and the legal uncertainty associated with jury trials.[12] These advantages support the common understanding that, in a commercial transaction between a business and a consumer, the business will prefer arbitration to litigation.[13]

As arbitration agreements are governed by the law of contracts, contracting parties are free not only to choose arbitration as an alternative to litigation but also to specify a particular arbitrator or arbitration forum to administer their disputes.[14] Such provisions can range in scope from a referral to a large, general body of arbitrators,[15] to arbitration before an expert in a particular field or within a particular community,[16] to merely an agreement to agree on one or more arbitrators at a later time.[17] In standard-form agreements, this means that a business is free to maximize the procedural and substantive advantages of arbitration by

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9 See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv L Rev 529, 529–31 (1971).

10 See Thomas E. Carbonneau, *The Law and Practice of Arbitration* 2–4 (Juris 4th ed 2012).

11 While class action proceedings are generally available in arbitration, this right can be waived by contract. See *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304, 2310–12 (2013) (upholding the enforceability of class-action-waiver provisions in arbitration contracts).

12 See Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 Duke L J 745, 761–62 (2010) (describing the "flight from the courthouse" by businesses in favor of alternative dispute resolution).

13 See, for example, Christopher R. Drahozal, *Why Arbitrate? Substantive versus Procedural Theories of Private Judging*, 22 Am Rev Intl Arb 163, 183 (2011).

14 See *American Express*, 133 S Ct at 2309.

15 See, for example, American Arbitration Association, online at https://adr.org (visited Nov 3, 2014); JAMS, online at http://www.jamsadr.com (visited Nov 3, 2014).

16 See, for example, Writers Guild of America, *Screen Credits Manual* *7–8, online at http://www.wga.org/uploadedfiles/writers_resources/credits/screenscredits_manual10.pdf (visited Nov 3, 2014) (prescribing arbitration before a panel of anonymous screenwriters).

17 See, for example, Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 Harv J Sports & Enter L 105, 119 (2013) (noting that arbitrators are selected anew each year under Major League Baseball's collective bargaining agreement).

drafting a contract that names an arbitration forum with favorable procedural rules and includes a waiver of the consumer's right to bring a class action claim in arbitration.[18] Until recently, the dominant choice among drafters of consumer contracts was the NAF[19] and its Code of Procedure (the "Code")—the set of procedural rules that govern proceedings administered by an NAF arbitrator.[20] The abrupt exit of the NAF from the field of consumer arbitration has introduced an ambiguity into existing standard-form contracts that name the Forum or the Code. Judicial interpretation of these contracts is governed by the FAA and its state law analogues, but a conflict between two sections of the FAA has divided courts on its applicability.

A. The NAF

The Forum is a private, for-profit arbitration tribunal. Founded in 1986, the NAF grew to become the nation's largest arbitrator of consumer disputes, maintaining a network of 1,600 arbitrators nationwide.[21] The Forum was particularly successful in the area of consumer debt collection (in 2006 alone, the NAF

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[18] Many large arbitration forums will administer class action proceedings in the absence of a contractual waiver. See, for example, JAMS, *JAMS Class Action Procedures* *2–4 (May 1, 2009), online at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf (visited Nov 3, 2014); American Arbitration Association, *Supplementary Rules for Class Arbitrations* *1 (Jan 1, 2010), online at https://www.adr.org/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129~1.pdf (visited Nov 3, 2014). Limiting class action exposure in arbitration is important enough that businesses are often willing to offer more-consumer-friendly arbitration procedures in exchange for ensuring the enforceability of class-action-waiver provisions. See Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date* *13 (Dec 12, 2013), online at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (visited Nov 3, 2014) (finding that roughly 90 percent of all arbitration agreements and nearly 100 percent of arbitration agreements in consumer-credit-card, checking account, and prepaid-card agreements contain a class action waiver); Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses after* AT&T Mobility v. Concepcion, 88 Notre Dame L Rev 825, 850–59 (2012) (presenting an empirical study of the trend toward proconsumer provisions in arbitration agreements that contain class action waivers).

[19] See Complaint, *Swanson v National Arbitration Forum, Inc*, Docket No 27-CV-09-18550, ¶ 18 at *6 (Minn D Ct filed July 14, 2009) (available on Westlaw at 2009 WL 2029918) ("Swanson Complaint").

[20] See generally National Arbitration Forum, *Code of Procedure* (Aug 1, 2008), online at http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf (visited Nov 3, 2014).

[21] Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of* AT&T Mobility v. Concepcion, 35 Am J Trial Advoc 87, 97 (2011).

administered 214,000 debt-collection arbitration proceedings),[22] as well as in nursing home arbitration.[23] In 2007, the consumer-rights group Public Citizen profiled the NAF in an investigative report, alleging that the Forum was severely biased in favor of businesses.[24] The Public Citizen study was supplemented by a 2008 *BusinessWeek* article that revealed the NAF's history of marketing its services directly to debt collectors.[25] In July 2009, after a yearlong investigation, the attorney general of Minnesota filed a lawsuit against the NAF in Minnesota state court, alleging that the NAF's representation of itself as a neutral dispute-resolution forum was unlawfully deceptive in light of an ownership affiliation with a major debt-collection agency and the NAF's proactive marketing of services to creditors.[26] Three days later, the NAF settled the claims by entering into a consent judgment, in which it agreed to permanently discontinue the administration of any new consumer arbitrations nationwide.[27]

Suddenly, every existing form contract naming the NAF as the agreed arbitration forum became unenforceable as written. By the NAF's own accounting, it was the appointed arbitration forum in "hundreds of millions of contracts" at the time that the complaint was filed.[28] Although many businesses were quick to change the language of their form contracts, many others were not. For example, in a study of forum-selection provisions in credit card arbitration agreements six months after the NAF settlement, Professors Peter Rutledge and Christopher Drahozal found that more than 47.6 percent of outstanding credit card

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22 Christopher R. Drahozal and Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus L J 77, 77 (2011).

23 Tripp, 35 Am J Trial Advoc at 97 (cited in note 21) (noting that the NAF was the most frequently named arbitrator in nursing home contracts).

24 See John O'Donnell, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* *1–2 (Public Citizen Sept 2007), online at http://www.citizen.org/documents/ArbitrationTrap.pdf (visited Nov 3, 2014).

25 See generally Robert Berner and Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, Bus Week 72 (June 16, 2008). The article described a PowerPoint presentation aimed at creditors that promised "a marked increase in recovery rates over existing collection methods" and discussed the NAF's efforts to educate its clients on how to use the Code to more efficiently prevail against consumers in collection actions. See id at 72–75.

26 Swanson Complaint at *7–11 (cited in note 19).

27 NAF Consent Judgment at *1–2 (cited in note 2). The NAF continues to administer Internet domain name disputes on behalf of the Internet Corporation for Assigned Names and Numbers. See National Arbitration Forum, *Domain Name Disputes*, online at http://domains.adrforum.com (visited Nov 3, 2014). For a more detailed history of the NAF and the Minnesota lawsuit, see Welsh, 52 Ariz L Rev at 427–30 (cited in note 2).

28 Swanson Complaint at *6 (cited in note 19).

loans subject to arbitration continued to specify the NAF as the arbitral forum.[29] The authors noted the "persistence" of the term with small credit issuers at the conclusion of their study, which took place a year and a half after the settlement.[30] Paul Bland also observed the "surprising" prevalence of NAF terms in currently existing nursing home contracts.[31] The most recent edition of Bland's treatise on consumer arbitration estimates that the "NAF is still listed as the sole arbitration forum in *millions* of consumer contracts."[32]

Further, although this Comment will focus on contracts naming the NAF, the unavailable-arbitrator problem is not isolated to one forum; the NAF Consent Judgment came amidst a more general retreat from consumer debt and health care arbitration by other prominent forums. For example, the American Arbitration Association (AAA) issued a moratorium on arbitrating consumer debt-collection and health care disputes arising from prior agreements in the months following the NAF settlement.[33]

While it is impossible to know exactly how many active contracts currently name the NAF (or another unavailable forum), the effects of its unavailability are clear: as disputes have arisen from contracts entered into before—as well as after—the NAF Consent Judgment, a rash of litigation about the validity of these arbitration provisions has reached the courts.[34] Judges considering this issue face a choice: Should they compel arbitration before a different arbitrator (and if so, how should they select one?), or does the unavailability of the contract's intended forum mean that the parties must now litigate in court? The implications of this choice are substantial, particularly when the failure of the arbitration agreement gives the consumer the ability to form a class action or seek injunctive relief before a court,

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[29] Peter B. Rutledge and Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L Rev 1, 30.

[30] Id.

[31] Paul Bland, *Fighting Mandatory Arbitration Clauses*, 48 Trial 22, 24 (Oct 2012).

[32] F. Paul Bland Jr, et al, *Consumer Arbitration Agreements: Enforceability and Other Topics* § 5.8.1 at 140 (National Consumer Law Center 6th ed 2011) (emphasis added).

[33] See generally American Arbitration Association, *The American Arbitration Association Calls for Reform of Debt Collection Arbitration* (July 23, 2009), online at https://www.adr.org/cs/groups/marketing/documents/document/dgdf/mda0/~edisp/adrstg_004027.pdf (visited Nov 3, 2014). See also *GGNSC Tylertown, LLC v Dillon*, 87 S3d 1063, 1065–66 (Miss App 2011) (noting the withdrawal of the AAA and the American Healthcare Lawyers Association from predispute health care arbitration).

[34] See Part II.

though those rights would have been waived under the now-invalid agreement.

B. The FAA

Federal arbitration law is governed by the FAA.[35] The central tenet of the statute is contained in § 2, which creates a presumption of enforceability for both pre- and postdispute agreements to arbitrate, except "upon such grounds as exist at law or in equity for the revocation of any contract."[36] The Supreme Court has interpreted the language of § 2 as placing arbitration agreements on "equal footing"[37] with other contracts and requiring "rigorous[ ] enforce[ment]" of arbitration agreements according to their terms.[38] As with any other contract, a court's aim in interpreting an arbitration agreement is to effectuate the parties' intent.[39] Furthermore, the Court has frequently noted that the FAA was a legislative response to "judicial hostility to arbitration,"[40] and the Court has therefore concluded that the FAA creates a "liberal federal policy favoring arbitration agreements."[41] This liberal federal policy requires courts to resolve ambiguity in the contractual language of an arbitration agreement in favor of arbitration.[42]

The Court recently refined its interpretation of § 2 in *AT&T Mobility LLC v Concepcion*.[43] The Court determined that a California state court rule applying the unconscionability doctrine to class action arbitration waivers was preempted by the FAA and held that § 2 may not be used to apply common-law contract

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35 Pub L No 80-282, 61 Stat 670 (1947), codified as amended at 9 USC § 1 et seq. The United States Arbitration Act, Pub L No 68-401, 43 Stat 883 (1925), codified as amended at 9 USC § 1 et seq, was the FAA's predecessor, and it will be referred to in this Comment as the FAA.

36 9 USC § 2 (establishing that a contract "to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

37 *Rent-A-Center, West, Inc v Jackson*, 561 US 63, 67 (2010).

38 *American Express*, 133 S Ct at 2309, quoting *Dean Witter Reynolds, Inc v Byrd*, 470 US 213, 221 (1985).

39 See *Stolt-Nielsen SA v AnimalFeeds International Corp*, 130 S Ct 1758, 1774–75 (2010).

40 *CompuCredit Corp v Greenwood*, 132 S Ct 665, 668 (2012), citing *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740, 1745 (2011).

41 *CompuCredit Corp*, 132 S Ct at 669, quoting *Moses H. Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1, 24 (1983).

42 See *Equal Employment Opportunity Commission v Waffle House, Inc*, 534 US 279, 294 (2002).

43 131 S Ct 1740 (2011).

doctrines to arbitration agreements "in a fashion that disfavors arbitration."[44] Instead, only "generally applicable contract defenses, such as fraud, duress, or unconscionability" can be applied to invalidate an arbitration agreement.[45]

Section 5 of the FAA gives a trial court the power, on motion by a party, to appoint a substitute arbitrator "if for any [ ] reason there shall be a lapse in the naming of an arbitrator."[46] If a party petitions for a substitute arbitrator, the court "shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require," to serve in the capacity of the original arbitrator.[47] Therefore, a tension exists in the FAA between the substitution provision in § 5 and the language in § 2 that allows judges to apply general common-law contractual defenses to revoke an entire contract: the broad language of § 5 implies that substitution is the default if the parties' naming of an arbitrator lapses, but § 2 preserves common-law doctrines that would compel the opposite result. Part II examines how this tension has divided courts over whether § 5 permits replacement of an identified-but-unavailable arbitrator.

Although the FAA applies in state as well as federal court,[48] states have their own arbitration laws that are governed by the Uniform Arbitration Act[49] (UAA). The UAA contains a provision for adopting a substitute arbitrator that parallels the language in the FAA, dictating that the court "shall" appoint a new arbitrator

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44 Id at 1747–48. See also Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 Case W Res L Rev 91, 95, 123–38 (2012) (critiquing recent Supreme Court arbitration jurisprudence that is based on the Court's liberal federal policy favoring enforcement of arbitration agreements).

45 *Concepcion*, 131 S Ct at 1746, quoting *Doctor's Associates, Inc v Casarotto*, 517 US 681, 687 (1996).

46 9 USC § 5.

47 9 USC § 5:

> [I]f for any [ ] reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

48 See *Southland Corp v Keating*, 465 US 1, 16 & n 10 (1984) (holding that the FAA preempts conflicting state law).

49 UAA (2000), 7 Pt IA ULA 1 (West 2009). Forty-nine states have adopted the UAA or the revised UAA. Louisiana is the lone exception. See *Arbitration Act (2000) Summary* (Uniform Law Commission), online at http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20%282000%29 (visited Nov 3, 2014).

upon motion if the agreed arbitration method fails.[50] The UAA also shares the FAA's common-law foundation, allowing an exception to the presumption of enforceability "upon a ground that exists at law or in equity for the revocation of a contract."[51] Although there has been considerable discussion in other areas about the circumstances under which the FAA preempts state arbitration law,[52] this Comment will treat §§ 2 and 5 of the FAA and their state law analogues as functional equivalents and compare state and federal cases without regard to differences in substantive law. Because of the statutes' similar language, both federal and state courts routinely make this assumption in the context of § 5 motions.[53]

C. Judicial Interpretation of § 5: The Integral-or-Ancillary Test

Even before the enactment of the FAA in 1925, courts recognized their statutory authority to appoint a new arbitrator when the parties failed or refused to do so.[54] When the parties fail to name an arbitrator,[55] name multiple or conflicting arbitrators,[56] or specify an arbitrator that never existed,[57] courts have

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50 UAA § 11.

51 UAA § 6.

52 See generally William G. Phelps, Annotation, *Pre-emption by Federal Arbitration Act (9 USCS §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 ALR Fed 179 (1992) (collecting cases).

53 See, for example, *PaineWebber Inc v Hartmann*, 921 F2d 507, 510 n 3 (3d Cir 1990) ("[B]ecause the relevant federal and Pennsylvania case law [under the FAA and the Pennsylvania UAA] is so clearly established and has evolved essentially in unison, we will refer to them interchangeably where helpful."); *Employers Insurance of Wausau v Jackson*, 527 NW2d 681, 686 n 5 (Wis 1995) ("The parties recognize that the federal statutes on arbitration are substantively identical to the Wisconsin statutes on arbitration.").

54 See, for example, *Berkovitz v Arbib & Houlberg, Inc*, 130 NE 288, 292 (NY 1921) (remanding the case for appointment of an arbitrator under the New York Arbitration Law of 1920).

55 See, for example, *Younessi v Recovery Racing, LLC*, 88 S3d 364, 365 (Fla App 2012) (per curiam) ("Florida courts have the authority to appoint arbitrators when the agreement fails to name an arbitrator or provide a method for determining the arbitrator.").

56 See, for example, *HM DG, Inc v Amini*, 162 Cal Rptr 3d 412, 416–18 (Cal App 2013) (confirming a trial court's power to appoint an arbitrator when an agreement specifies multiple methods for selecting an arbitrator); *Lory Fabrics, Inc v Dress Rehearsal, Inc*, 434 NYS2d 359, 361–62 (NY App 1980) (affirming the appointment of an arbitrator when the parties' forms each named a different arbitrator). But see *Lea Tai Textile Co v Manning Fabrics, Inc*, 411 F Supp 1404, 1407 (SDNY 1975) (refusing to compel arbitration when the parties' forms differed in the choice of arbitrator).

57 See, for example, *Laboratorios Grossman, SA v Forest Laboratories, Inc*, 295 NYS2d 756, 757 (NY App 1968) (per curiam) (directing the trial court to appoint a substitute arbitrator when the parties' agreement named the nonexistent "Pan-American

been willing to appoint an arbitrator—as provided by statute—with little controversy.

When, however, the parties have properly named a then-existing arbitrator that is subsequently rendered unable or unwilling to administer a dispute, courts have recognized an exception to their otherwise-broad statutory authority to appoint a new arbitrator. Today, a judge-made test is employed by virtually all courts: when the parties' chosen arbitrator is unavailable, a court can appoint a substitute arbitrator and enforce the contract only if the choice of arbitration forum was not "integral" to the agreement but rather was merely an "ancillary logistical concern" of the agreement to arbitrate generally.[58]

This judicial carve-out traces its roots to a 1929 opinion authored by Judge Benjamin Cardozo, then of the New York Court of Appeals.[59] Interpreting an arbitration agreement that was silent as to whether arbitration would be conducted in New York or Massachusetts, Cardozo noted that, as matters of contract, agreements to arbitrate could be enforced in spite of a procedural defect only if the "dominant intent[ ]" of the parties was to arbitrate irrespective of the procedural details.[60] Distinguishing the case at bar, Cardozo suggested in dicta that "a promise to arbitrate through a named person, and no one else," could be an example of an arbitration agreement that is sufficiently "wedded to the means" to be rendered unenforceable in the absence of the named arbitrator.[61] Subsequent New York federal and state courts took hold of this example, treating the lack of such exclusive language as evidence of the parties' dominant intent to arbitrate in spite of an unavailable forum.[62]

Arbitration Association"); *Warnes, SA v Harvic International, Ltd*, 1993 WL 228028, *1–2 (SDNY).

58 *Brown v ITT Consumer Financial Corp*, 211 F3d 1217, 1222 (11th Cir 2000), quoting *Zechman v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 742 F Supp 1359, 1364 (ND Ill 1990). For a discussion of the Seventh Circuit's recent departure from the integral-or-ancillary test, see Part II.C.

59 See generally *Marchant v Mead-Morrison Manufacturing Co*, 169 NE 386 (NY 1929).

60 Id at 389.

61 Id at 390 ("[I]t is possible to phrase an arbitration clause with a method of selection so transparently essential as to leave no room whatever for the process of construction. This might be so, for illustration, if there were a promise to arbitrate through a named person, and no one else.").

62 See, for example, *Ballas v Mann*, 82 NYS2d 426, 427–28 (NY Sup 1948) ("The parties here did not agree to arbitrate through Isaac Shalon and no one else. . . . [T]hey must be deemed to have known that the vicissitudes of life are such that he was apt to become unavailable as time moved on."); *Delma Engineering Corp v K & L Construction*

The modern test emerged from language in *Zechman v Merrill Lynch, Pierce, Fenner & Smith, Inc*,[63] a 1990 decision from the Northern District of Illinois. The court cited an offshoot of the earlier New York cases[64] and a related Fifth Circuit decision[65] for the proposition that courts must look to the intent of the parties at the time that the contract was executed—"as determined from the language of the contract and the surrounding circumstances"—to decide whether the agreement can be enforced despite the failure of a term.[66] The court rephrased the Fifth Circuit's language to hold that the parties' arbitration clause would fail unless the forum-selection provision was merely an "ancillary logistical concern" of the agreement to arbitrate before the unavailable Chicago Board of Trade.[67] Concluding that the term was ancillary and not "integral" to the agreement to arbitrate generally, the court appointed another arbitrator.[68]

The Second Circuit extended this language in *In re Salomon Inc Shareholders' Derivative Litigation*,[69] applying *Zechman* to an employment agreement that required arbitration before the New York Stock Exchange (NYSE), which declined to hear the dispute.[70] Despite virtually identical language requiring arbitration "in accordance with" the rules of the NYSE, the Second Circuit distinguished *Zechman* and refused to appoint a substitute arbitrator under § 5, holding that the parties' decision to arbitrate before the NYSE was not an "ancillary logistical concern" but rather was "as important a consideration as the agreement to arbitrate itself."[71]

Co, 174 NYS2d 620, 621 (NY App 1958) (determining that the parties' "dominant intent was to arbitrate, with the machinery of selection of the arbitrators subordinate and incidental"). But see *Lea Tai Textile*, 411 F Supp at 1407 ("This Court will not impose its will on parties whose intentions are in clear conflict on this important issue.").

63 742 F Supp 1359 (ND Ill 1990).

64 See id at 1364, citing *Erving v Virginia Squires Basketball Club*, 349 F Supp 716 (EDNY 1972).

65 See *National Iranian Oil Co v Ashland Oil, Inc*, 817 F2d 326, 333 (5th Cir 1987) (holding that a choice-of-forum provision is severable from an entire arbitration agreement only if "the essence, the essential term, of the bargain was to arbitrate, while the situs of the arbitration was merely a minor consideration").

66 *Zechman*, 742 F Supp at 1364, quoting *National Iranian Oil Co*, 817 F2d at 333.

67 *Zechman*, 742 F Supp at 1364 (holding that an invalid term cannot be severed from an arbitration agreement if it is not "an ancillary logistical concern but rather is as important a consideration as the agreement to arbitrate itself").

68 Id at 1365–66.

69 68 F3d 554 (2d Cir 1995).

70 Id at 558.

71 Id at 558, 561, quoting *Zechman*, 742 F Supp at 1364.

In *Brown v ITT Consumer Financial Corp*,[72] the Eleventh Circuit formulated the language of *Zechman* and *Salomon* into the test cited by virtually all subsequent courts: "Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration."[73] Using this framework, the *Brown* court held that the choice of forum was ancillary, in contrast to the Second Circuit's holding in *Salomon*.[74] The *Brown* court glossed over its integral-or-ancillary analysis, merely stating that "there is no evidence" that the choice of the unavailable arbitration forum was an "integral part" of the arbitration agreement.[75]

The Ninth Circuit followed the Eleventh Circuit in *Reddam v KPMG LLP*,[76] also holding without elaboration that there was "no evidence" that the choice of arbitrator was integral to an arbitration agreement between an investor and a bank.[77] These three circuit court opinions cemented the integral-or-ancillary test and formed a common-law framework for subsequent courts facing the unavailable-arbitrator issue in the context of contracts naming the NAF after the NAF Consent Judgment in July 2009.

II. IS SELECTION OF THE NAF INTEGRAL OR ANCILLARY?

"[Y]ou and we agree that any and all claims, disputes or controversies . . . shall be resolved by binding individual (and not class) arbitration by and under the Code of Procedure of the National Arbitration Forum ('NAF') in effect at the time the claim is filed."[78]

Arbitration clauses like the one above continue to name the NAF in standard-form consumer contracts. As such, the past five years have witnessed an abundance of litigation in federal and state courts over the integrality of the designation of the

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72 211 F3d 1217 (11th Cir 2000).

73 Id at 1222, quoting *Zechman*, 742 F Supp at 1364.

74 See *Brown*, 211 F3d at 1222.

75 Id. The Eleventh Circuit affirmed its position after the NAF Consent Judgment. See *Pendergast v Sprint Nextel Corp*, 691 F3d 1224, 1236 n 13 (11th Cir 2012) (rejecting as "meritless" the argument that the parties' designation of the NAF was integral to the agreement to arbitrate). But see *Inetianbor v CashCall, Inc*, 2014 WL 4922225, *4 (11th Cir) (holding that the parties' chosen arbitration forum was integral to the contract under the integral-or-ancillary test).

76 457 F3d 1054 (9th Cir 2006).

77 Id at 1060–61.

78 Clear Loan Solutions, LLC, *Terms & Conditions*, online at https://www.clear-loans.com/Terms.aspx (visited Nov 3, 2014).

NAF. Part II.A surveys these decisions, which uniformly adopt the integral-or-ancillary test but divergently apply it. Part II.B brings this divergence into focus by illustrating how the language of a single contract has been interpreted oppositely under the integral-or-ancillary test as applied in different jurisdictions. Part II.C discusses a recent decision by the Seventh Circuit that opens the door for a reexamination of the test by holding that an integrality exception to § 5 is impermissible under the broad language of the statute and the Supreme Court's liberal pro-arbitration policy.

A. Surveying the Decisional Landscape

This Section examines recent cases considering the integrality of an unavailable arbitration forum.[79] The precise language in standard-form arbitration contracts varies from business to business, and this heterogeneity makes categorization difficult. Even small differences between the arbitration contracts of businesses minimize the precedential value of a judicial interpretation of any one contract. For example, in *Brown v Delfre*,[80] the Appellate Court of Illinois distinguished precedent from the Illinois Supreme Court by analogizing the contract at bar to the contract at issue in *Reddam*.[81] Additionally, courts have dealt not only with contracts naming the unavailable NAF but also with contractual defects arising from the discontinuation of certain dispute-resolution services previously provided by the AAA and other major forums.[82] Rather than categorize by outcome, then, this Section organizes the cases by interpretative methodology. The primary divide is between courts that constrain their integrality analysis to the contractual language itself and those that consider extrinsic evidence of the parties' ex ante intent.

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79 Other courts have declined to address the integrality issue by deciding the defendant's motion to compel on other grounds. See, for example, *Root v Emeritus Corp*, 2013 WL 2145193, *9 (Cal App).

80 968 NE2d 696 (Ill App 2012).

81 See *Delfre*, 968 NE2d at 705 ("We find this case more like *Reddam* than *Carr*."). See also *Carr v Gateway, Inc*, 944 NE2d 327, 335–37 (Ill 2011) (determining that the parties' choice of the NAF as the designated arbitration forum was integral to the agreement to arbitrate).

82 See note 33 and accompanying text.

1. Plain meaning: the four-corners approach.

The most frequently employed canon of contractual interpretation is some variation of a plain-meaning or four-corners approach, in which the court attempts to divine the integrality of the named forum solely from the language of the arbitration agreement. Courts draw support for this approach both from common-law–contract-interpretation doctrine and Supreme Court jurisprudence mandating that arbitration contracts be enforced "according to their terms."[83]

The primary indicium of integrality—dating back to Judge Cardozo's opinion in *Marchant v Mead-Morrison Manufacturing Co*[84]—is whether the writing indicates that the parties' chosen forum was *exclusive*; that is, whether the parties intended to preclude the use of any other arbitrator. The Second Circuit adopted a bright-line approach in *Salomon*: when the parties name an exclusive forum for arbitration, it is integral to the arbitration agreement as a matter of law and cannot be severed in favor of a different forum.[85] Courts in California,[86] Mississippi,[87] and South Carolina[88] have endorsed the Second Circuit's rule.

Most jurisdictions shy away from this extreme, however, and hold that exclusivity of forum is merely one factor weighing in favor of integrality.[89] The typical position is exemplified in

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83 *Rivera v American General Financial Services, Inc*, 259 P3d 803, 812 (NM 2011), quoting *Volt Information Sciences, Inc v Board of Trustees of Leland Stanford Junior University*, 489 US 468, 479 (1989) ("[A] fundamental purpose of the FAA is to require that courts enforce arbitration agreements 'according to their terms.'"). See also *Estate of Adair v THI of Kansas, LLC*, 2013 WL 653619, *2 (D Kan) ("Under Kansas law, the primary rule for interpreting contracts is to determine the parties' intent from the language of the written agreement.").

84 169 NE 386 (NY 1929).

85 *Salomon*, 68 F3d at 561 ("None of these cases [ ] stands for the proposition that district courts may use § 5 to circumvent the parties' designation of an exclusive arbitral forum.").

86 See, for example, *Provencio v WMA Securities, Inc*, 23 Cal Rptr 3d 524, 527 (Cal App 2005) ("When the parties to a contract agree to arbitrate any disputes before a particular forum, that provision becomes an integral part of their contract. If that forum is not available to hear the dispute, then a petition to compel arbitration may not be granted.").

87 See, for example, *Covenant Health & Rehabilitation of Picayune, LP v Estate of Moulds*, 14 S3d 695, 707 (Miss 2009) ("A court should not be used to reform a contract to select a forum not anticipated by either of the parties.").

88 See, for example, *Grant v Magnolia Manor-Greenwood, Inc*, 678 SE2d 435, 438 (SC 2009) (finding, in dicta, "great merit" in the Second Circuit's rule).

89 See, for example, *Rivera*, 259 P3d at 813 (stating that an "express designation of a single arbitration provider" merely supports a finding of integrality). Some courts, including the Ninth Circuit, go further and treat exclusivity as an explicit prerequisite for integrality. See, for example, *Apex 1 Processing, Inc v Edwards*, 962 NE2d 663, 666 (Ind

Ranzy v Tijerina,[90] an unpublished Fifth Circuit decision and the first of the post–NAF Consent Judgment cases to reach the federal circuit courts. In *Ranzy*, a payday lender moved to compel arbitration pursuant to an arbitration clause specifying that all claims "shall" be filed with the NAF and resolved under the Code.[91] The Fifth Circuit, relying on *Salomon*, held that this use of "shall" indicated that the choice of the NAF was integral to the parties' arbitration agreement and affirmed the district court's refusal to compel arbitration.[92] The word "shall" has been dispositive in many other cases as mandatory language indicating the parties' intent to name an exclusive—and therefore integral—arbitration forum.[93] For example, the New Mexico Supreme Court, in *Rivera v American General Financial Services, Inc*,[94] determined that the "pervasive" use of "mandatory" contractual language such as "shall" demonstrated the parties' intent to arbitrate before only the NAF.[95] In *Inetianbor v CashCall, Inc*,[96] the Eleventh Circuit distinguished its decision in *Brown* to hold that an arbitration forum was integral to a contract that used the

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App 2012) ("At a minimum, for the selection of an arbitrator to be 'integral' under our test the arbitration clause must include an express statement designating a specific arbitrator."); *Reddam*, 457 F3d at 1061 (emphasis added):

> [W]e cannot agree that the [arbitration] agreement involved here became unenforceable between the parties when the [arbitrator] bowed out. There is no evidence that naming of the [arbitrator] was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end. . . . Our decision is analogous to our approach to forum selection clauses which choose a particular court as the litigation arena. There we have not treated the selection of a specific forum as exclusive of all other fora, unless the parties have *expressly* stated that it was.

90 393 Fed Appx 174 (5th Cir 2010).

91 Id at 175 (emphasis omitted).

92 Id at 176.

93 See, for example, *Miller v GGNSC Atlanta, LLC*, 746 SE2d 680, 686 (Ga App 2013); *Inetianbor v CashCall, Inc*, 2013 WL 1325327, *4 (SD Fla), affd 2014 WL 4922225 (11th Cir) (finding integrality in a clause using "shall" because "the language of the agreement is mandatory, not permissive") (emphasis omitted); *Felts v CLK Management, Inc*, No 33,011, slip op at 10–11 (NM Aug 23, 2012); *Licata v GGNSC Malden Dexter, LLC*, 29 Mass L Rptr 467, 472 (Mass Super 2012); *Apex 1 Processing*, 962 NE2d at 667 ("[T]he use of mandatory, as opposed to permissive, contractual language demonstrates the parties intended NAF to be integral to the arbitration agreement."); *Geneva-Roth, Capital, Inc v Edwards*, 956 NE2d 1195, 1203 (Ind App 2011); *Klima v Evangelical Lutheran Good Samaritan Society*, 2011 WL 5412216, *4 (D Kan); *Carideo v Dell, Inc*, 2009 WL 3485933, *4 (WD Wash).

94 259 P3d 803 (NM 2011).

95 Id at 814.

96 2014 WL 4922225 (11th Cir).

word "shall" and referenced the chosen forum throughout the arbitration agreement.[97]

By contrast, when a contract uses a "permissive" word, such as "may," courts have deemed the choice of forum ancillary.[98] And when an agreement names multiple arbitration forums, courts are even less likely to view the absence of one of those forums as integral.[99] This is particularly true if one of the named arbitration forums is still available, or if the parties provided an alternate method for selecting an arbitrator—instances in which the court will compel arbitration in the available forum.[100] For example, in *Smith v ComputerTraining.com, Inc*,[101] the Sixth Circuit affirmed a district court decision that simply struck the unavailable NAF from an arbitration agreement naming two forums.[102] Some courts have gone further, holding that, when an arbitration agreement names two forums, the choice of any one forum remains ancillary to the overall agreement even if *both* of the named forums are unavailable.[103] At least one court has held that the failure of both forums rendered the agreement unenforceable, however.[104]

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97 Id at *4.

98 See, for example, *Anonymous, MD v Hendricks*, 994 NE2d 324, 330 & n 4 (Ind App 2013) ("[T]he agreement here stated in permissive terms that any dispute 'may' be filed with NAF, not that any dispute 'shall' be so filed."); *Clerk v Cash Central of Utah, LLC*, 2011 WL 3739549, *6 (ED Pa) (holding that an arbitration provision using "may" is ancillary because "[t]he language of the instant arbitration clause is permissive") (emphasis omitted).

99 See, for example, *Citraro v ComputerTraining.com, Inc*, 2013 WL 3894969, *3–4 (Ohio App) (striking a clause naming the NAF from a provision specifying two arbitrators).

100 See, for example, *Credit Acceptance Corp v Front*, 745 SE2d 556, 569 (W Va 2013) (holding that an integrality analysis is unnecessary when the contract named an alternate available forum); *Villalobos v EZCorp, Inc*, 2013 WL 3732875, *6 (WD Wis) ("Even taking NAF off of the table, plaintiff still has the choice between the other two organizations or a local arbitrator."); *Crewe v Rich Dad Education, LLC*, 884 F Supp 2d 60, 77 (SDNY 2012) (noting that an agreement to choose a new arbitrator in the absence of the NAF "emphatically indicates that the NAF is *not* integral to the agreement to arbitrate"); *Credit Acceptance Corp v Fortenberry*, 2012 WL 3095296, *5 (SD Miss); *Jackson v Payday Loan Store of Illinois, Inc*, 2010 WL 1031590, *4 (ND Ill) ("Where, as here, the arbitration agreement offers a choice of arbitrators, the selection of a single particular arbitrator cannot logically be so central to the agreement as to merit voiding it."); *Clerk v First Bank of Delaware*, 735 F Supp 2d 170, 180 (ED Pa 2010).

101 531 Fed Appx 713 (6th Cir 2013).

102 See id at 715–16.

103 See, for example, *In re Checking Account Overdraft Litigation*, 734 F Supp 2d 1294, 1301 (SD Fla 2010) (holding that a provision designating either the NAF or the AAA was not integral, despite the unavailability of both).

104 See *QuickClick Loans, LLC v Russell*, 943 NE2d 166, 174 (Ill App 2011).

The presence of an express severability clause in the agreement has divided courts as well.[105] In *Schuiling v Harris*,[106] the Virginia Supreme Court concluded that the broad language of a severability clause in the parties' arbitration agreement, which allowed a court to sever "any part of any provision" that it deemed unenforceable, indicated that the parties intended to arbitrate before the NAF only so long as it was available.[107] Their failure to name an alternate forum suggested only that they were aware of the statutory authority of the court to appoint a new one.[108] But in *Riley v Extendicare Health Facilities, Inc*,[109] the Wisconsin Court of Appeals refused to implement the parties' severance clause on the ground that it would require substantially rewriting the agreement in a manner "not contemplated by the parties"[110]—a conclusion also reached by the North Carolina Court of Appeals.[111]

Another major point of divergence between courts is whether an exclusive agreement to arbitrate under the Code is integral as a choice-of-forum provision when the contract does not specifically mention the NAF itself. This rationale is based on Rule 1 of the Code, which allows the Code to be administered only by the NAF or its hypothetical assignee.[112] A federal court in Kansas[113] and state courts in Georgia,[114] Illinois,[115]

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105 Compare *Jones v GGNSC Pierre LLC*, 684 F Supp 2d 1161, 1167–68 (D SD 2010) (construing a severance clause as evidence that the parties intended to arbitrate before an alternate forum), with *Rivera*, 259 P3d at 815 (refusing to "substantially rewrit[e] the contract" by severing a provision designating the NAF as the arbitration forum).

106 747 SE2d 833 (Va 2013).

107 Id at 835–37.

108 See id at 837.

109 826 NW2d 398 (Wis App 2012).

110 Id at 411.

111 See *Crossman v Life Care Centers of America, Inc*, 738 SE2d 737, 741 (NC App 2013) ("[S]evering the unenforceable provisions of the arbitration clause at issue in the instant case would require the Court to rewrite the entire clause, and we decline to do so here.").

112 National Arbitration Forum, *Code of Procedure* at *1 (cited in note 20). Some courts also consider Rule 48(D) of the Code, which provides, in relevant part: "If the Parties are denied the opportunity to arbitrate a dispute, controversy, or Claim before the Forum, the Parties may seek legal and other remedies in accord with applicable law." *Miller*, 746 SE2d at 687, quoting National Arbitration Forum, *Code of Procedure* at *66 (emphasis omitted).

113 See *Klima*, 2011 WL 5412216 at *5.

114 See *Sunbridge Retirement Care Associates LLC v Smith*, 757 SE2d 157, 160 (Ga App 2014); *Miller*, 746 SE2d at 686 (finding exclusive arbitration under the Code to be integral, as the Code allows only the NAF to administer it).

Massachusetts,[116] New Mexico,[117] Pennsylvania,[118] and Wisconsin[119] have held that the exclusivity of the Code makes a contractual reference to the Code synonymous with an expression of intent to arbitrate before only the NAF. A Wisconsin court analogized the Code to a strike zone in baseball: even if a court changes the "umpire" using § 5, to change the strike zone impermissibly changes the game.[120] A New York state court[121] and federal courts in Minnesota,[122] Missouri,[123] Pennsylvania,[124] and South Dakota,[125] however, have expressly held that the Code can be applied by a substitute arbitrator in spite of its self-proclaimed rule of exclusivity.

Finally, some courts frame their plain-meaning analysis around the Supreme Court's maxim that contractual ambiguity in arbitration agreements must be resolved in favor of arbitration.[126] The Third Circuit took this approach in *Khan v Dell Inc.*[127] In that case, the plaintiff brought a putative class action against Dell for alleged design defects associated with a line of

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115 See *Carr*, 944 NE2d at 336 (holding that the exclusivity of the NAF rules "militates in favor of a finding that the designation of the NAF and its rules was integral to the parties' agreement to arbitrate").

116 See *Licata*, 29 Mass L Rptr at 472 ("[T]he selection of NAF [is] integral to the parties' bargain in light of the emphatic language identifying NAF and incorporating the NAF Code of Procedure.").

117 See *Rivera*, 259 P3d at 813–14.

118 See *Stewart v GGNSC-Canonsburg, LP*, 9 A3d 215, 220–21 (Pa Super 2010).

119 See *Riley*, 826 NW2d at 412 (stating that it would be "nonsensical" for a trial court to determine which portions of the Code could be applied by a substitute arbitrator).

120 Id at 402.

121 See Short Form Order, *Vieyra v Penn Toyota, Ltd*, Civil Action No 10645/10, *3 (NY Sup filed May 29, 2012) ("Contrary to the plaintiff's contention a reading of the [arbitration agreement] does not direct that the arbitration between the parties be held before [the NAF] but that the arbitrator hearing the issues be bound by their rules.").

122 See *Meskill v GGNSC Stillwater Greeley LLC*, 862 F Supp 2d 966, 973 (D Minn 2012), quoting *Delfre*, 968 NE2d at 703 (noting that "the [A]rbitration [Agreement] selected only the rules to be applied in the event of an arbitration, *not* the arbitral forum that would conduct the arbitration") (brackets in original).

123 See *Davis v Sprint Nextel Corp*, 2012 WL 5904327, *4 (WD Mo).

124 See *Clerk*, 2011 WL 3739549 at *6 ("The plain language of the arbitration clause makes it clear that the parties agreed to arbitrate; it is not clear that the parties agreed to arbitrate only if a certain forum were available.").

125 See *Wright v GGNSC Holdings LLC*, 808 NW2d 114, 120–21 (SD 2011) ("We conclude that designation of the NAF Code of Procedure did not require an 'NAF arbitrator'; a substitute arbitrator could apply common procedural rules like those found in the NAF Code of Procedure and public domain.").

126 See notes 41–42 and accompanying text. Virtually all courts that have applied the FAA reference the Supreme Court's arbitration doctrine in some way. See, for example, *Rivera*, 259 P3d at 809–10; *Meskill*, 862 F Supp 2d at 970.

127 669 F3d 350 (3d Cir 2012).

computers.[128] The relevant terms of sale read that all disputes "shall be resolved exclusively and finally by binding arbitration administered by the National Arbitration Forum."[129] The Third Circuit found this language ambiguous: "exclusively" could reasonably be interpreted as modifying "binding arbitration," "the National Arbitration Forum," or both.[130] Considering the authority on both sides, the court turned to the "liberal federal policy in favor of arbitration," under which ambiguity must be resolved in favor of arbitration.[131] The Western District of Washington, on the other hand, found no ambiguity in this exact agreement, holding instead that the NAF provision was integral.[132]

A four-corners approach is consistent with the common law's deference to the written contract as the final and integrated measure of the parties' agreement.[133] It also avoids the proof problems associated with reliance on extrinsic evidence as a measure of the parties' intent, which threaten to eviscerate the integrality doctrine altogether.[134] It is important to note, however, that the decision of these courts to adhere to the writing is based on individual contract interpretation rather than differences in state contract law. Even states whose contract laws most strongly restrict extrinsic evidence still permit the admission of such evidence to explain contracts that are "facially ambiguous," including when the contract has "no provision relating to the contingency under which the dispute arises."[135] In other words, state contract law does not compel one result over another. The question facing courts is therefore not whether the relevant contract laws of a particular state compel the court to adhere to the writing, as some courts suggest, but rather the

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128 Id at 352.

129 Id at 351 (capitalization altered).

130 Id (capitalization altered).

131 *Khan*, 669 F3d at 356 ("Although courts are divided on the issue, we conclude that the 'liberal federal policy in favor of arbitration' counsels us to . . . . resolve this ambiguity *in favor* of arbitration.").

132 *Carideo*, 2009 WL 3485933 at *4 ("The court is not persuaded by Dell's arguments that the term 'exclusively' modifies only 'binding arbitration' or that the language is either ambiguous or nonsensical."). See also *Carr*, 944 NE2d at 330, 337 (finding a very similar provision to be integral).

133 See Restatement (Second) of Contracts § 211 (1979).

134 See Part II.A.2.

135 Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U Pa L Rev 533, 534–35 (1998) (discussing the traditional—or "hard"—parol-evidence rule).

threshold question whether the contract itself is complete or ambiguous on its face.[136]

Further, this unguided judicial interpretation comes at the expense of certainty and predictability in the law. As this Comment illustrates further in Part II.B, there is a great deal of variety in judicial interpretation even when contractual language is held constant. Interpreting contractual language without regard to extrinsic evidence increases the likelihood that courts will assign unique meanings to the same contractual provisions. For example, the Western District of Missouri held that a contractual provision requiring the NAF to *administer* the arbitration proceedings was not integral because a different arbitrator could *conduct* the arbitration proceedings—a distinction not made by other courts.[137] There is thus a normative concern that courts will reach unpredictable or undesired conclusions from a purely textual interpretation. The relative attractiveness of a four-corners approach depends on one's confidence in the ability of judges to consistently interpret parties' contractual language as well as one's confidence that parties will be sophisticated enough to clearly express their ex ante intent in contracts.[138]

2. Appeal to extrinsic evidence.

A large group of the courts that determine that the parties' choice of forum is merely ancillary base their analysis on the absence of extrinsic evidence suggesting that the choice of forum was integral. This was the method used by the Ninth and Eleventh Circuits in *Reddam* and *Brown*, respectively: both courts merely remarked that the plaintiff had offered no evidence demonstrating the integrality of the forum.[139] This conclusory methodology has also been employed to support the appointment of a new arbitrator by federal courts in Alabama,[140] California,[141]

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[136] See Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 Ind L J 339, 342 (2013).

[137] See *Davis*, 2012 WL 5904327 at *4 ("[T]he agreement states that the arbitration will be administered by NAF under its rules, but as to what entity will actually *conduct* the arbitration, it only requires that 'a single neutral arbitrator' conduct the proceedings.") (emphasis added).

[138] See Eric A. Posner, *Contract Law and Theory* § 6.7 at 145 (Wolters Kluwer 2011).

[139] See *Reddam*, 457 F3d at 1060; *Brown*, 211 F3d at 1222.

[140] See *Stinson v America's Home Place, Inc*, 108 F Supp 2d 1278, 1285 (MD Ala 2000) ("Although the arbitrator specified in Stinson's contract with AHP is not now available to resolve their dispute, there is no indication that the choice of that particular arbitrator was central to the arbitration clause.").

Florida,[142] Minnesota,[143] and Washington,[144] as well as state courts in Alabama,[145] Arizona,[146] Connecticut,[147] Idaho,[148] South Dakota,[149] Tennessee,[150] and Texas.[151]

Implicit in an appeal to extrinsic evidence is the assumption that whether a given forum was integral cannot be decided on the face of the contract since the writing does not address this contingency directly. In light of this ambiguity, the traditional parol-evidence rule—which bars consideration of extrinsic evidence—is lifted, allowing the court to look outside the four corners of the contract to determine the parties' intent.[152] Noting a lack of guidance from the contractual language or extrinsic evidence, courts engaging in this analysis often invoke the "liberal federal policy favoring arbitration agreements" set forth by the

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[141] See *Selby v Deutsche Bank Trust Co Americas*, 2013 WL 1315841, *11 (SD Cal) ("[T]here is no evidence suggesting the designation of NAF as the forum for arbitration was anything more than a [sic] 'ancillary logistical concern.'").

[142] See *New Port Richey Medical Investors, LLC v Stern*, 14 S3d 1084, 1087 (Fla D App 2009) ("Ms. Stern did not present any evidence in the circuit court that the choice of the AAA as the forum for any arbitration proceedings was an integral part of the agreement to arbitrate.").

[143] See *Meskill*, 862 F Supp 2d at 975 ("Meskill has offered no evidence that the 'exclusive' designation of the NAF was an important consideration to either [party].").

[144] See *Estate of Eckstein v Life Care Centers of America, Inc*, 623 F Supp 2d 1235, 1238 (ED Wash 2009) ("Plaintiff has not convinced the Court that the designation of AAA as arbitrator was a material term.").

[145] See *Ex parte Warren*, 718 S2d 45, 49 (Ala 1998) (appointing a replacement arbitrator given that "no evidence" demonstrated that the chosen arbitrator was integral); *GGNSC Montgomery, LLC v Norris*, 2013 WL 627114, *3 (MD Ala) ("[T]here is no evidence before the court that the NAF was an integral part of either Arbitration Agreement.").

[146] See *Mathews v Life Care Centers of America, Inc*, 177 P3d 867, 872 (Ariz App 2008) ("[T]he record contains no evidence that an AAA arbitration panel was a significant or material term to Vyntrice when she executed the Agreement.").

[147] See *DeOliveira v Liberty Mutual Insurance Co*, 2003 WL 25429112, *11 (Conn Super) (finding no evidence that the choice of arbitrator was integral to the agreement).

[148] See *Deeds v Regence Blueshield of Idaho*, 141 P3d 1079, 1081–82 (Idaho 2006) ("[T]here is no evidence the AAA itself is central to the agreement to arbitrate.").

[149] See *Wright*, 808 NW2d at 122 (concluding that the Code was not an important part of the agreement in question because the Code was raised sua sponte by the court rather than by the parties).

[150] See *Owens*, 263 SW3d at 886 (finding "simply [ ] no factual basis" to support a theory of integrality).

[151] See *In re Brock Specialty Services, Ltd*, 286 SW3d 649, 655–56 (Tex App 2009) ("There is no indication or evidence herein that the choice of [forum or rules] for conducting arbitration was an integral or essential part of the agreement to arbitrate.").

[152] See *Miller v Miller*, 700 SW2d 941, 951 (Tex App 1985) ("If the intention expressed on the face of the contract is doubtful, resort may be had to parol evidence of the situation and the surroundings of the parties to resolve the doubt.").

Supreme Court and, mirroring the Third Circuit in *Khan*, hold that such ambiguity should be resolved in favor of arbitration.[153]

These cases therefore adopt the exact opposite interpretative methodology from the cases taking a plain-meaning approach: while the plain-meaning cases treat the contractual writing as conclusive of whether a term was integral, here the courts look beyond the writing, finding it devoid of meaningful information about the parties' intent. While some of these decisions come from jurisdictions that are traditionally more amenable to considering extrinsic evidence,[154] others are from jurisdictions that embrace a more traditional parol-evidence rule that calls for the exclusion of extrinsic evidence in the absence of contractual ambiguity.[155] Taken together, these cases could be seen as part of the movement away from plain-meaning interpretation in modern contract law, but at least some of these decisions push beyond the existing boundaries of contract-interpretation jurisprudence in their own jurisdictions by assuming the applicability of extrinsic evidence without first reaching the issue whether the language is facially ambiguous.[156]

The prevalence of extrinsic-evidence interpretation suggests that courts feel compelled to consider the reality of these transactions as departures from the classic contractual model. These standard-form contracts are likely not understood or even read by the consumers who sign them, so how could the choice of arbitration forum ever be integral to consumer consent to arbitrate generally?[157] Courts might be particularly skeptical of a plaintiff's integrality arguments with respect to the NAF, a forum that allegedly was so anticonsumer that it violated deceptive-trade-practices law.[158] The logical conclusion of this commonsense

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[153] See, for example, *GGNSC Montgomery*, 2013 WL 627114 at *2, quoting *CompuCredit Corp v Greenwood*, 132 S Ct 665, 669 (2012); *Meskill*, 862 F Supp 2d at 970, quoting *Moses H. Cone Memorial Hospital v Mercury Construction Corp*, 420 US 1, 24 (1983).

[154] See Posner, 146 U Pa L Rev at 538 n 9 (cited in note 135) (listing Alabama, Arizona, California, Oregon, Texas, and Washington as jurisdictions with a "soft" parol-evidence rule).

[155] See, for example, *Jacobs v Pickands Mather & Co*, 933 F2d 652, 657 (8th Cir 1991) (applying Minnesota law, which looks to extrinsic evidence only when "a contract's terms are ambiguous or incomplete"); *Pauley v Simonson*, 720 NW2d 665, 668 (SD 2006) (applying the "hard" parol-evidence rule under South Dakota law).

[156] See Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as opposed to Virtual Reality*, 74 Or L Rev 643, 659–63 (1995) (describing the trend toward admission of extrinsic evidence in modern contract interpretation).

[157] See Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law*, 5 Eur Rev Cont L 1, 2 (2009) ("Real people don't read standard form contracts.").

[158] See text accompanying notes 2, 24.

analysis is to devalue the writing as a measurement of the parties' intent and to instead interpret the contract in favor of the business, as each court taking an extrinsic-evidence approach has done.

But however logical this conclusion may be, it comes at the expense of a bedrock of common-law contractual interpretation: deference to the written terms of the agreement, which are "less subject to the vagaries of memory and the risks of fabrication."[159] Furthermore, reliance on extrinsic evidence places a heavy burden of proof on the plaintiff, who would need to produce some manner of evidence indicating the integrality of the forum-selection provision. It is unclear what such evidence would even consist of; these courts have not elaborated on this conclusion and none has reached a finding of integrality on an evidentiary basis.[160] On remand from the Third Circuit in *Khan*, the plaintiff motioned to compel limited discovery on the integrality of the parties' choice of the NAF, but the district court denied the motion, holding that the question had already been settled by the Third Circuit's judgment that the forum was ancillary.[161]

3. Consideration of fault or good faith.

A smaller group of the courts taking a four-corners approach to the integral-or-ancillary test has also considered facts that might show fault or bad faith in the context of arbitration agreements entered into after the NAF Consent Judgment. For example, in *Klima v Evangelical Lutheran Good Samaritan Society*,[162] the District of Kansas noted that the defendant had litigated two other cases on the viability of its form contract—which named the NAF as arbitrator—but did not inform the plaintiff of the Forum's unavailability.[163] The court nonetheless set this point aside and held the contract unenforceable using a four-corners approach.[164] The Georgia Court of Appeals did the

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159 *Rissman v Rissman*, 213 F3d 381, 384 (7th Cir 2000) (Easterbrook).

160 In *McGuire, Cornwell & Blakey v Grider*, 771 F Supp 319 (D Colo 1991), a case predating the integral-or-ancillary test, the district court considered the record of an earlier trial between the parties over the enforceability of the arbitration contract. Id at 320. The court held that the "evidence at trial" established that the choice of forum was ancillary to the parties' agreement but similarly offered no elaboration. Id.

161 *Khan v Dell Inc*, 2013 WL 1792525, *2–4 (D NJ).

162 2011 WL 5412216 (D Kan).

163 Id at *1.

164 Id at *3, 6.

same in *Miller v GGNSC Atlanta, LLC*,[165] noting that the business furnished its arbitration contract to the plaintiff six months after the NAF Consent Judgment, but nevertheless evaluating the integrality of the contract on a purely textual basis.[166] What remains mysterious is *why* intentionally or negligently naming an unavailable forum should negatively influence the court's interpretation, as the opinions imply, or what role this information should play in a plain-meaning analysis at all.

A more explicit case for a good faith test was suggested in Judge Dolores Sloviter's dissent in *Khan*, which asserts that the court should not reward Dell with a new arbitrator when Dell contracted to arbitrate before a biased and unfair forum such as the NAF.[167] This reasoning is similarly mysterious: Should every business that contracted for arbitration with the NAF be foreclosed from seeking application of § 5? In the absence of such a bright-line rule, it is unclear how businesses would prove a good faith motive, or if that is even where the burden of proof would lie. By asserting that Dell's choice of forum "cannot be insignificant" in light of the anticonsumer allegations against the Forum, Sloviter's dissent suggests that the burden would lie with the defendant to prove that it contracted in good faith.[168] A trial of fact is a possibility to resolve issues of good faith, although this would add to the complexity and expense of § 5 proceedings.

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While the number of contracts naming the NAF will eventually abate, the amount of litigation may be slower to respond, as the pro-plaintiff rulings in many of the cases will empower other potential litigants to challenge the validity of their arbitration contracts. The uncertainty in this area of law will continue absent direction from the Supreme Court, which has declined four certiorari petitions seeking clarification of the integral-or-ancillary standard in NAF cases .[169] The parties in *Marmet Health Care Center, Inc v Brown*[170] addressed the issue

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165 746 SE2d 680 (Ga App 2013).

166 See id at 683 n 6, 684–88.

167 See *Khan*, 669 F3d at 358–59 (Sloviter dissenting).

168 Id at 359 (Sloviter dissenting).

169 See generally *Felts*, No 33,011, slip op, cert denied 133 S Ct 1461 (2013); *Griffin v ABN Amro Mortgage Group, Inc*, 517 Fed Appx 240 (5th Cir 2013), cert denied, 134 S Ct 789 (2013); *Geneva-Roth Capital*, 956 NE2d 1195, cert denied, 133 S Ct 650 (2012); *Apex 1 Processing*, 962 NE2d 663, cert denied, 133 S Ct 650 (2012).

170 132 S Ct 1201 (2012) (per curiam).

in their certiorari briefs, but the Court issued a per curiam opinion remanding the case on alternate grounds without hearing oral argument.[171]

B. GGNSC: An Illustration

This Section offers an illustration of the breadth and diversity of the contract-interpretation methodologies discussed above by comparing various courts' interpretations of a single nursing home contract. GGNSC Holdings, LLC, doing business as Golden Living, operates over three hundred independent skilled-nursing facilities nationwide (known as LivingCenters).[172] Before the NAF Consent Judgment, and for some time after it,[173] an incoming resident (or, more often, the individual holding the resident's power of attorney) would execute a two-page Resident and Facility Arbitration Agreement ("Arbitration Agreement") as part of the intake process, consenting to submit any disputes to arbitration "in accordance with the National Arbitration Forum Code of Procedure."[174] The Arbitration Agreement provided as follows:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies . . . shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement[ ], and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C., Sections 1–16.[175]

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171 See Brief in Opposition, *Marmet Health Care Center, Inc v Brown*, No 11-391, *15–20 (US filed Dec 5, 2011) (available on Westlaw at 2011 WL 6094899); Reply Brief for Petitioners, *Clarksburg Nursing Home & Rehabilitation Center, LLC v Marchio*, No 11-394, *9–10 (US filed Dec 13, 2011) (available on Westlaw at 2011 WL 6257236); *Marmet*, 132 S Ct at 1203–04.

172 Golden LivingCenters, *Golden LivingCenters by State*, online at http://www.goldenlivingcenters.com/locations-staff/centers-by-state.aspx (visited Nov 3, 2014).

173 See note 204 and accompanying text.

174 Resident and Facility Arbitration Agreement, *Myers v GGNSC Holdings, LLC*, Civil Action No 11-133, *1 (ND Miss filed June 30, 2011). See also *Jones*, 684 F Supp 2d at 1163 (providing a brief overview of the plaintiff's facility-admission process).

175 Arbitration Agreement at *1 (cited in note 174).

The Arbitration Agreement contained an explicit severance clause, which provided that any unenforceable portion should be severed from the rest of the contract.[176] After the NAF Consent Judgment, a number of plaintiffs bringing negligence lawsuits against GGNSC challenged the continued enforceability of the Arbitration Agreement. While both state and federal courts professed to adopt the integral-or-ancillary test, they diverged in applying it.[177]

Consider first *Jones v GGNSC Pierre LLC*,[178] a wrongful-death lawsuit brought against a South Dakota GGNSC LivingCenter.[179] Opposing GGNSC's motion to compel arbitration, the plaintiff argued that the NAF's unavailability rendered the entire Arbitration Agreement unenforceable.[180] The district court sided with GGNSC and granted the motion.[181] Adopting the integral-or-ancillary test, the court noted the presence of the severability provision in the Arbitration Agreement as evidence that the choice of the NAF was not integral to the parties' agreement to arbitrate any disputes.[182] However, the court then veered outside of the four corners of the contract and considered the plaintiff's testimony that she did not negotiate the standard-form Arbitration Agreement, nor did she remember signing it.[183] The court ordered further proceedings to appoint a new arbitrator under § 5.[184]

Compare this with the approach taken by the Superior Court of Pennsylvania to interpret the same Arbitration Agreement in

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176 Id.

177 Another group of cases to consider the Arbitration Agreement ignored the problem of the NAF's unavailability entirely. These cases instead focused on the separate issue whether plaintiffs' power of attorney was able to bind them to arbitration as a third-party beneficiary. See generally *Licata v GGNSC Malden Dexter LLC*, 2 NE3d 840 (Mass 2014); *GGNSC Omaha Oak Grove, LLC v Payich*, 708 F3d 1024 (8th Cir 2013); *GGNSC Batesville, LLC v Johnson*, 109 S3d 562 (Miss 2013); *Myers v GGNSC Holdings, LLC*, 2013 WL 1913557 (ND Miss); *Ping v Beverly Enterprises, Inc*, 376 SW3d 581 (Ky 2012); *GGNSC Stanford, LLC v Rowe*, 388 SW3d 117 (Ky App 2012); *Golden Gate National Senior Care, LLC v Roser*, 94 S3d 365 (Ala 2012); *Cook v GGNSC Ripley, LLC*, 786 F Supp 2d 1166 (ND Miss 2011).

178 684 F Supp 2d 1161 (D SD 2010).

179 Id at 1163.

180 See id at 1164.

181 Id at 1168.

182 See *Jones*, 684 F Supp 2d at 1167 ("The severance provision indicates that the intention was not to make the NAP [sic] integral, but rather to have a dispute resolution process through arbitration.").

183 See id at 1168.

184 Id at 1169.

Stewart v GGNSC-Canonsburg, LP.[185] The court rejected *Jones* for violating "cardinal contract principles" by relying on the severability provision and extrinsic evidence to determine integrality, rather than considering the express language of the contract.[186] Instead, the *Stewart* court reasoned that the use of the word "shall" in the Arbitration Agreement was dispositive of the parties' choice of the NAF as an exclusive—and integral—forum.[187]

Despite the reference to "cardinal contract principles," the cases differ primarily in their interpretive methods rather than in the substantive law concerned. While the *Stewart* court stringently adhered to the four corners of the contract as a matter of state contract law, Pennsylvania's version of the parol-evidence rule allows consideration of extrinsic evidence to clarify an ambiguous term "irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances."[188] And although the *Jones* court considered the plaintiff's testimony and circumstances without discussing the appropriateness of this analysis, South Dakota law prohibits consideration of extrinsic evidence when the intention of the parties is "clearly manifested by the language of the agreement."[189] Thus, the difference is in the courts' interpretations of the language of the Arbitration Agreement as an expression of the parties' intent, not in the courts' application of their respective state's laws—which, in this context, are essentially the same. To the *Stewart* court, the language was an unambiguous expression of the NAF's integrality to the contract. To the *Jones* court, the severability provision and extrinsic evidence clarified an otherwise-ambiguous provision.

Courts in Massachusetts and Mississippi followed the *Stewart* court's reasoning, concluding from the Arbitration Agreement's plain language that the choice of the NAF was integral to the agreement to arbitrate.[190] The Middle District of Alabama,

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185 9 A3d 215 (Pa Super 2010).

186 Id at 220–21 ("*Jones* and its predecessors placed undue focus on extrinsic and/or collateral evidence of the parties' intent.").

187 See id.

188 *Yocca v Pittsburgh Steelers Sports, Inc*, 854 A2d 425, 437 (Pa 2004), quoting *In re Estate of Herr*, 161 A2d 32, 34 (Pa 1960).

189 *Pauley*, 720 NW2d at 668, quoting *Jensen v Pure Plant Food International, Ltd*, 274 NW2d 261, 263–64 (SD 1979).

190 See *Licata*, 29 Mass L Rptr at 472 (finding the NAF to be integral to the Arbitration Agreement "in light of the emphatic language identifying NAF and incorporating the NAF Code of Procedure"); *GGNSC Tylertown, LLC v Dillon*, 87 S3d 1063, 1066 (Miss

however, reached the opposite conclusion in a plain-language analysis, holding that the words "shall be resolved exclusively by binding arbitration" were indicative of the parties' choice of arbitration to resolve any disputes—the choice of the NAF was merely ancillary to that general agreement to arbitrate.[191]

Other courts have considered the significance of the Code in light of its rule that only NAF arbitrators may apply it. While *Stewart* found the Code's exclusivity to be persuasive,[192] in *Wright v GGNSC Holdings LLC*,[193] the South Dakota Supreme Court held that the NAF's unavailability to administer the Code was a "point of little significance."[194] The court noted that the NAF would have applied the same substantive law as a substitute arbitrator, and therefore the parties' ex ante expectations could be met by appointment of a substitute arbitrator "apply[ing] common procedural rules like those found in the NAF Code of Procedure and public domain."[195] The Georgia Court of Appeals took the opposite position in *Miller*, holding that the exclusivity of the Code meant that the designation of the NAF was integral to the Arbitration Agreement.[196] As in *Stewart*, the *Miller* court criticized the South Dakota cases for disregarding the "cardinal rule" of contract construction: "to ascertain the intent of the parties as evidenced by the terms of the written agreement."[197]

The District of Minnesota considered all these approaches in *Meskill v GGNSC Stillwater Greeley LLC*,[198] concluding that the choice of forum was not integral to the Arbitration Agreement.[199] The court first rejected the position, adopted by *Stewart* and *Miller*, that the NAF's unavailability also rendered the Code unavailable.[200] The court then looked to the plain language of the Arbitration Agreement, which specified arbitration "in accordance with" the Code and concluded that, "if the parties had contemplated the NAF would be their exclusive arbitral forum, they

App 2011) ("The arbitration agreement before us clearly reflects that Tylertown sought to have its disputes resolved exclusively by arbitration in accordance with the NAF.").

191 *GGNSC Montgomery*, 2013 WL 627114 at *1, 3.

192 See *Stewart*, 9 A3d at 220.

193 808 NW2d 114 (SD 2011).

194 Id at 120–21.

195 Id at 121.

196 *Miller*, 746 SE2d at 686.

197 Id at 687.

198 862 F Supp 2d 966 (D Minn 2012).

199 Id at 976–77.

200 See id at 972–74.

could have easily said so."[201] The court noted that the plaintiff had not presented any evidence suggesting that "the 'exclusive' designation of the NAF was an important consideration" to the parties ex ante, or "that Meskill was even aware of the NAF (or its Code)."[202] The court also rejected a bad faith argument, holding that, in light of the federal policy favoring arbitration, merely naming the NAF as an arbitrator six months after the NAF Consent Judgment did not raise the inference of bad faith—thereby implying that the plaintiff bears the burden of proof for establishing the defendant's bad faith.[203]

GGNSC apparently replaced its Arbitration Agreement as of February 2012; a recent arbitration dispute in the Eastern District of Kentucky between a GGNSC LivingCenter and an injured resident revolved around a contemporaneously executed agreement, which specifies JAMS as the exclusive arbitration forum.[204] The new Arbitration Agreement contains a footnote clearly aimed at preventing this type of litigation in the future: "In the event that JAMS is unable or unwilling to administer arbitration, a substitute arbitrator will be appointed pursuant to section 5 of the Federal Arbitration Act."[205] In the meantime, litigation over the terms of the original Arbitration Agreement remains ongoing in other courts.[206]

C. The Seventh Circuit's Rejection of the Integral-or-Ancillary Test

The Seventh Circuit recently broke from the integral-or-ancillary line of cases in *Green v U.S. Cash Advance Illinois, LLC*,[207] holding that the entire concept of an integrality analysis is impermissible in light of § 5's language enabling judges to appoint a new arbitrator if the parties' designated forum is unavailable "for any [ ] reason."[208] Reversing the district court's application of the integral-or-ancillary test, Judge Frank Easterbrook

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201 Id at 972–73.

202 *Meskill*, 862 F Supp 2d at 975.

203 See id at 977–78.

204 See Alternate Dispute Resolution Agreement, *GGNSC Vanceburg, LLC v Taulbee*, Civil Action No 5:13-cv-00071-KSF, *3 (ED Ky filed Apr 17, 2013).

205 Id at *3 n 1.

206 See, for example, *Gdowski v Pothuloori*, Docket No A-13-0484 (Neb App 2014) (appealing the trial court's refusal to enforce the Arbitration Agreement); *GGNSC Frankfort, LLC v Tracy*, Docket No 3:14-cv-00030 (ED Ky 2014).

207 724 F3d 787 (7th Cir 2013).

208 Id at 791 (quotation marks omitted).

reasoned that language compelling arbitration "by and under" the Code does not render the agreement unenforceable, because another arbitrator could still apply the Code in spite of its exclusivity provision.[209] Easterbrook then considered the cases applying the integral-or-ancillary test and concluded that such a test defies Congress and the broad language of § 5.[210] In light of that broad language, the opinion remarked that "no court has ever explained what part of the text or background of the Federal Arbitration Act requires, or even authorizes" the integral-or-ancillary test.[211] The opinion further expressed doubt that designation of the NAF as a forum could *ever* be integral in the way that considerable case law suggests, asking rhetorically whether even a single merchant *removed* the arbitration clause from its standard-form contracts after the NAF became unavailable—that is, whether any merchant wanted "the National Arbitration Forum or no arbitration at all."[212]

Easterbrook reasoned that, in order to determine whether the parties' choice of the NAF was integral in this way, the district court would need to make findings of fact at trial—including evaluating the testimony of the parties about their ex ante expectations and empirical evidence on the change of dispute-resolution terms in the market after the NAF Consent Judgment—and the burden of such a "lengthy, expensive, and inconclusive" proceeding would run afoul of federal arbitration policy seeking to promote expedient arbitration.[213] By focusing on the undesirability of a trial to determine the parties' intent, Easterbrook implicitly assumed that consideration of extrinsic evidence is not only permissible but is also the only way to evaluate whether a contractual term was integral. The opinion did not consider the method utilized in cases like *Stewart*, in which the contractual language is used as the sole means of discerning what was integral to the parties ex ante.[214]

A strongly worded dissent written by Judge David Hamilton criticized the majority for overreaching in its analysis and ignoring

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209 Id at 789–90 (emphasis omitted).

210 See id at 791 (asserting that any court that holds an arbitration agreement unenforceable based on the integrality of a failed term "is effectively disagreeing with Congress, which provided that a judge can appoint an arbitrator when for 'any' reason something has gone wrong").

211 *Green*, 724 F3d at 792.

212 Id at 790.

213 Id at 792.

214 See notes 185–87 and accompanying text.

the language of the contract in order to "rescue" a payday lender "from its own folly."[215] The dissent pointed out that, unlike in *Khan* or *Brown*, the present dispute involved an agreement that was entered into three years *after* the NAF Consent Judgment and asserted without elaboration that this raises a presumption of at least negligence and possibly fraud.[216] Hamilton agreed with the majority's criticism of the integral-or-ancillary test but advocated instead for the Second Circuit's bright-line rule, whereby an agreement to arbitrate exclusively before an unavailable forum is per se unenforceable.[217]

Recently, a North Carolina court cited *Green* and suggested that the integral-or-ancillary test might be impermissible, potentially setting the stage for a wider reconsideration of the standard as litigation over these contracts continues.[218]

III. DEFAULT RULES, GOOD FAITH, AND "STICKINESS"

The issue presented by the unavailable arbitration forum is one of default rules. Even courts that emphatically refuse to disturb a contract by naming a substitute forum "not contemplated by the parties"[219] are doing precisely that—altering the agreement by invoking the common-law default rule of litigation as the dispute-resolution forum. Courts must make an initial choice between arbitration and litigation, and they have competing sources of authority on which to base that decision. Courts might rely on the statutory default rule for appointing an arbitrator

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215 *Green*, 724 F3d at 793 (Hamilton dissenting).

216 See id at 793–94, 798–99 (Hamilton dissenting).

217 See id at 799 (Hamilton dissenting).

218 See *Torrence v Nationwide Budget Finance*, 753 SE2d 802, 806–07 (NC App 2014) ("[T]he key aspect of the analysis of an agreement to arbitrate is the intent of the parties to arbitrate, not the identity of the arbitrator."). The *Green* and *Torrence* courts were persuaded by the Supreme Court's opinion in *CompuCredit Corp v Greenwood*, 132 S Ct 665 (2012)—in which the Court upheld the enforceability of an arbitration agreement naming the NAF on other grounds—as evidence that the Court considers the choice of an unavailable forum to be ancillary. See *Green*, 724 F3d at 790; *Torrence*, 802 SE2d at 806–07. This inference is misplaced, however, as the contract at issue in *CompuCredit* contained an express substitution provision and as such does not fall within the ambit of the integral-or-ancillary test: "If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure." *Greenwood v CompuCredit Corp*, 615 F3d 1204, 1206 (9th Cir 2010).

219 See, for example, *Riley*, 826 NW2d at 411 (refusing to rewrite the arbitration agreement to "devise a new form and mode of arbitration" that was "not contemplated by the parties"); *Perri v Manorcare Health Services*, 2012 WL 9051038, *5 (Pa Com Pl) (refusing to "rewrite the Agreement to effectuate a result clearly not contemplated by the parties").

found in § 5 of the FAA and the corresponding "liberal federal policy favoring arbitration" that guides its interpretation.[220] On the other hand, courts might turn to § 2, which allows courts to hold arbitration agreements unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[221] The text of the FAA supports either outcome.

The reasoning put forward by Judge Easterbrook and others—that the language of § 5 indicates a congressional mandate to appoint a substitute arbitrator in these situations—similarly tells only half the story given the simultaneous enactment of § 2. The FAA was modeled after the New York Arbitration Law of 1920,[222] which contained analogues to §§ 2 and 5 and was accompanied by a body of case law supporting the application of § 5 to revoke incomplete arbitration contracts.[223] Moreover, a study of the legislative history of the FAA conducted by Professor Ian Macneil revealed "no foundation for a belief that . . . Congress had any intention of enacting anything but an integrated statute, either applicable in its entirety to any given proceeding in any given court or not at all."[224] Therefore, in addition to enacting a broad § 5, Congress also intended to allow courts to apply common-law contract doctrines to the same extent as judges interpreting the New York Arbitration Law of 1920.

The integral-or-ancillary test, as a common-law rule for revoking a contract, is textually permissible under § 2. If taken alone, the test would likely fall into the category of anti-arbitration–common-law doctrines prohibited by the Supreme Court's holding in *Concepcion* and its progeny,[225] as Easterbrook suggests.[226] But the test can also convincingly be incorporated into the doctrine of *impracticability*, which focuses on whether the now-impracticable portion of a contract was a "basic assumption" of the entire agreement ex ante.[227] While not specifically sanctioned

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[220] *Moses H. Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1, 24 (1983).

[221] 9 USC § 2.

[222] Act of Apr 19, 1920, ch 275, 1920 NY Laws 36, 36–38. See also Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 106 (Oxford 1992) (describing the FAA's origins in the New York Arbitration Law of 1920).

[223] See Part I.C.

[224] Macneil, *American Arbitration Law* at 106 (cited in note 222).

[225] See text accompanying notes 43–45.

[226] See *Green*, 724 F3d at 792.

[227] Restatement (Second) of Contracts § 261 (1979). Some courts have equated the integral-or-ancillary test to the impracticability doctrine and the related doctrine of impossibility of performance. See, for example, *Miller*, 746 SE2d at 684–86 (applying the

by *Concepcion*, the impracticability doctrine by all appearances resembles a "generally applicable contract defense[ ]" permissible under the Court's interpretation of § 2.[228] Therefore, it is improperly conclusory to dispose of arbitration agreements calling for arbitration before an unavailable forum without considering the parties' intent in entering the agreement—an objective that forms the bedrock of contractual interpretation.[229]

The remainder of this Part, however, argues that the challenges associated with determining parties' intent via a common-law test predicated on § 2 merits the rejection of the integral-or-ancillary test altogether—not for lack of statutory permissibility, but for lack of practical utility. Instead, judges should rely on § 5's discretionary mechanism for selecting a substitute arbitrator—thereby protecting the expectations of parties to these defective contracts—and redistribute the bargaining power between the parties if desired. Part III.A discusses the difficulty of discerning the ex ante intentions of contracting parties to these "sticky" boilerplate agreements and argues for the application of § 5 as a tailored default rule analogous to those used in other areas of contract law. Part III.B discusses how the selection of an arbitrator using § 5 is also a superior mechanism for judges to address concerns with procedural inequality in the formation of the contract compared to the integral-or-ancillary test or an alternate test based on good faith. Part III.C demonstrates the utility of § 5 tailoring by incorporating examples from the cases discussed in Part II.

A. Approximating Parties' Intent under § 2

On its own, the integral-or-ancillary test is of little use as a measure of the parties' ex ante expectations. The contractual language in these agreements does not convincingly suggest one outcome over another; as Part II.B demonstrates, even identical language can be interpreted to reach opposite, reasonable conclusions.

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integral-or-ancillary test to void an arbitration agreement for impossibility of performance); *Crossman v Life Care Centers of America, Inc*, 738 SE2d 737, 741 (NC App 2013) (holding that provisions relating to the parties' choice of arbitrator were, as stated by the trial court, "important, integral, and material terms of the agreement to arbitrate and the impossibility of performing these terms render the Arbitration Agreement unenforceable").

[228] *Concepcion*, 131 S Ct at 1748.

[229] See *Stolt-Nielsen SA v AnimalFeeds International Corp*, 130 S Ct 1758, 1774–75 (2010).

The alternative is a consideration of extrinsic evidence to discern the parties' expectations, which would seemingly be impossible without a trial of fact. Requiring such a trial is not ideal; the associated costs of time and judicial resources would be high in the aggregate and would likely violate the Supreme Court's pro-arbitration doctrine, as Easterbrook suggests.[230] The Ninth and Eleventh Circuits, in addition to the cases discussed in Part II.A.2, have developed a shortcut: these courts shift the burden of proof for establishing integrality to the plaintiff. This approach appears to rely on two underlying presumptions: (1) consumers have not read the contract and therefore cannot have a preference for the NAF that is "as important a consideration as the agreement to arbitrate itself,"[231] and (2) businesses using arbitration agreements categorically prefer arbitration over litigation. But contrary to Easterbrook's assertions to that effect, there is evidence that certain businesses *have* removed their arbitration clauses after the NAF Consent Judgment. For example, a report from the 2012 National Roundtable on Consumer Arbitration noted that "very few" debt-collection claims are currently arbitrated and that the current status of the cases that would have been arbitrated before the NAF in the past is now "unclear."[232] It is uncertain, then, whether a binary solution can accurately reflect the expectations of all parties to a problem this widespread. This Section argues that, given the impracticality of unveiling the ex ante expectations of the parties, courts can more effectively respect the parties' interests by discarding the integral-or-ancillary test in favor of a more discretionary approach to choosing a substitute arbitrator using § 5.

1. The "sticky-boilerplate" problem.

There is no obvious insight into parties' expectations in the existing literature on "sticky boilerplate"—the phenomenon of contracts remaining "stuck" in a default rule despite the availability of a more beneficial one.[233] The sticky-boilerplate problem

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230 See *Green*, 724 F3d at 792.

231 *Carr v Gateway, Inc*, 944 NE2d 327, 331 (Ill 2011).

232 Nancy A. Welsh and David B. Lipsky, *"Moving the Ball Forward" in Consumer and Employment Dispute Resolution: What Can Planning, Talking, Listening and Breaking Bread Together Accomplish?*, 19 Disp Res Mag 14, 16 (Spring 2013).

233 See Rutledge and Drahozal, 2013 BYU L Rev at 30 (cited in note 29) ("The persistence of the NAF in some credit card arbitration agreements for at least a year and a half after it was no longer available suggests that the costs of updating the issuer's arbitration clauses exceed the benefits, or that the provision for some other reason is

manifests when parties maintain the same contractual language even after an adverse judicial interpretation of that provision—much like the arbitration contracts discussed in this Comment.[234] Scholarly works on the stickiness of boilerplate terms attempt to reconcile the null hypothesis that boilerplate contracts are economically efficient for the drafting party with the persistence of contractual terms that appear to be inefficient.[235] If hidden transaction costs are to blame, notions of culpability can be set aside in favor of relying on courts to reduce these costs by making agreements more efficient through default rules.[236] But the existing interfirm explanations for sticky-boilerplate terms do not appear to apply to the unavailable arbitrator. There are, for example, no network externalities or collective action problems associated with naming an unavailable arbitration forum, as each firm individually has an incentive to update its boilerplate if the benefits outweigh the costs.[237]

A potentially more convincing theory is that the production of contracts is part of an organizational routine that becomes standardized and embedded within the drafting firm.[238] In an organizationally complex business such as GGNSC, which is composed of many independent LivingCenters,[239] change might be expected to be slow. However, information about a business's organizational practices is inaccessible to a court without a trial of fact—or potentially even with one. Any theory that requires a fact-specific determination does no better from a judicial-efficiency standpoint than a trial over which terms were integral

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'sticky.'"). For a broader description of the sticky-boilerplate phenomenon, see Omri Ben-Shahar and John A.E. Pottow, *On the Stickiness of Default Rules*, 33 Fla St U L Rev 651, 651 (2006) ("In settings where [transaction] costs are high, parties might find themselves 'stuck' in a default, unable to reach the outcome that they prefer.").

234 See generally Stephen J. Choi and G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 Emory L J 929 (2004) (presenting a study on the sticky-boilerplate phenomenon in the sovereign-bond market).

235 See, for example, Mitu Gulati and Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* 33–43 (Chicago 2013) (discussing the tension between theories of sticky-boilerplate terms and the baseline assumption of efficient contracts).

236 See Richard A. Posner and Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J Legal Stud 83, 117–18 (1977).

237 See Tara J. Wortman, *Unlocking Lock-in: Limited Liability Companies and the Key to Underutilization of Close Corporation Statutes*, 70 NYU L Rev 1362, 1386–89 (1995) (discussing the role of network effects in the "lock-in" of inefficient contractual terms across firms).

238 See Gulati and Scott, *The Three and a Half Minute Transaction* at 38–39 (cited in note 235).

239 See note 172 and accompanying text.

to the agreement. For example, there is an abundance of anecdotal evidence suggesting that many defective contracts stem from the inefficient incentives that drafting attorneys face, but there is no effective means to translate this insight empirically.[240] A more unified theory is missing; the causes of sticky boilerplate are still not well understood except on a case-by-case basis.[241] This leaves courts with no practical way to discern which contracts resulted from cut-and-paste drafting—meaning that neither party had an ex ante preference for a particular arbitration forum—and which contracts were carefully drafted as a reflection of the firm's preferences. The language is the same in either circumstance.

2. Section 5 as a tailored default rule.

Because an arm's-length understanding of parties' ex ante intentions regarding the substitutability of an unavailable arbitrator is difficult to achieve, the work that the integral-or-ancillary test hopes to accomplish is best left to firms, which can divulge their preferences through better contract drafting. Instead, courts facing disputes over an unavailable arbitrator should rely on the discretion afforded them by § 5 to select an arbitration forum based on the circumstances of the parties. Although § 5 specifies that the trial court "shall"[242] appoint a new arbitrator on motion, the statute is entirely silent as to *how* the court should appoint one, which courts have long interpreted as affording wide latitude to appoint a substitute arbitrator.[243] This is often done with the input of the parties themselves. For example, the district court in *Jones* gave the parties the opportunity to agree on an arbitrator without judicial oversight, but if the parties failed to agree by a specified deadline, the court advised that it would nominate three potential arbitrators, allowing each party to strike one and appointing the remaining arbitrator.[244] An earlier case contemplated a similar method:

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[240] See, for example, Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 Chi Kent L Rev 59, 70–75 (2001).

[241] See Gulati and Scott, *The Three and a Half Minute Transaction* at 1–8 (cited in note 235).

[242] 9 USC § 5.

[243] See, for example, *Laboratorios Grossman, SA v Forest Laboratories, Inc*, 295 NYS2d 756, 757 (NY App 1968) (per curiam) (allowing the trial court, after a hearing, to compel arbitration "before such tribunal as it may determine would be the most appropriate in the circumstances").

[244] See *Jones*, 684 F Supp 2d at 1169.

allowing the parties to agree on an arbitrator outside of court, with court intervention only as a fail-safe.[245] Soliciting the parties' input in selecting an arbitrator is a superior mechanism for protecting their expectations—compared, that is, to undoing the entire agreement in favor of litigation based on the uncertain interpretive principles of the integral-or-ancillary test.[246] And to the extent that the parties truly intended to arbitrate before only one forum and to litigate if that forum were unavailable, they would remain free to express this preference in the contract; under § 5, the parties' chosen method for naming an arbitrator "shall be followed."[247]

This approach accords with the common-law preference for "tailored" default rules, which "govern a relationship between contracting parties based on the specific characteristics and circumstances of those parties."[248] The Restatement (Second) of Contracts is guided by a principle that, if the parties have not agreed to an essential term of an otherwise-enforceable contract, "a term which is reasonable in the circumstances is supplied by the court."[249] The common law further allows for variation of judicial relief from an unenforceable contract on a case-by-case basis "as justice requires."[250] A pragmatic example is the doctrine of "cure by concession," in which the counterparty to an indefinite or otherwise-unenforceable contract can "concede" an interpretation most favorable to the other side, allowing the defect in the contract to be "cured" and the contract enforced.[251] Tailored default rules are favored by the common law under the belief that they will generally be less costly than a "nonenforcement default"—such as invalidating an arbitration agreement in favor of litigation.[252] Unlike litigation, which is governed by rigid, "untailored" procedural rules, arbitration is flexible and can be tailored

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[245] See *Hawaii Teamsters and Allied Workers, Local 996 v Honolulu Rapid Transit Co*, 343 F Supp 419, 425 (D Hawaii 1972) (discussing available methods for appointing a substitute arbitrator).

[246] See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi L Rev 1203, 1286 (2003) (arguing that reformation of an unenforceable contractual term is less disruptive to the parties than striking the entire contract).

[247] 9 USC § 5.

[248] Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L Rev 608, 670 (1998).

[249] Restatement (Second) of Contracts § 204 (1979).

[250] Restatement (Second) of Contracts §§ 15, 87(2), 90 (1979).

[251] See Omri Ben-Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 Wis L Rev 389, 421–24.

[252] Korobkin, 83 Cornell L Rev at 676 (cited in note 248).

to the individual case. This makes arbitration an especially attractive solution to the unavailable-arbitrator problem, since the parties are not homogeneously situated.[253]

B. Bargain Leveling and Judicial Hostility

Another possible factor guiding contractual interpretation under the integral-or-ancillary test is left unstated by courts: a hostility by some courts toward predispute arbitration agreements as unfair products of the superior bargaining power of lenders over borrowers, nursing homes over residents, and so on. The integral-or-ancillary test potentially gives courts an end run around the Supreme Court's restriction of the unconscionability doctrine in *Concepcion* by allowing sympathetic plaintiffs the opportunity to litigate in court. To this end, it is perhaps significant that the courts concluding that the NAF was integral to the parties' contracts are largely state courts—the tension between federal and state jurisdictions over predispute arbitration agreements did not end with *Concepcion*.[254] Some commentators have made this connection, labeling the integral-or-ancillary doctrine the latest form of judicial hostility to arbitration in state court.[255]

It is not difficult to see a redistributive motive at play in an opinion like *Brocco v Manor Care, Inc*,[256] in which the trial court pledged its deference to the express language of the contract even while detailing the plaintiff's "shocking" allegations of nursing home abuse.[257] This type of ostensibly strict deference to the language of an arbitration agreement by a court ultimately revoking that contract has been recognized as a veiled attempt to correct ex ante bargaining inequality.[258]

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[253] See Part III.C.

[254] See, for example, *Marmet*, 132 S Ct at 1203–04 (holding that the FAA preempts West Virginia public policy disfavoring a particular class of arbitration agreements).

[255] See, for example, John Allgood, *Court of Appeals Gets It Wrong on Enforcement of the Arbitration Agreement*, Alternative Dispute Resolution in Georgia Blog (Sept 17, 2013), online at http://georgiaadr.wordpress.com/2013/09/17/court-of-appeals-gets-it-wrong-on-enforcement-of-the-arbitration-agreement (visited Nov 3, 2014) (expressing concern that Georgia courts were "backslid[ing] into judicially-hostile arbitration territory characteristic of other jurisdictions").

[256] 2011 WL 9133793 (Pa Com Pl).

[257] Id at *3–6.

[258] See Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 Stan L Rev 869, 893–94 (2011) (arguing, in the context of an arbitration unconscionability case, that the court's holding was not truly reached by "formalistic minimalism" but rather by "the drive to

But to the extent that *Brocco* and the decisions detailed in Part II.A.1 use a strict, four-corners version of the integral-or-ancillary test as a means to invalidate arbitration contracts, those courts' application of the integral-or-ancillary test falls within the scope of *Concepcion*, which prohibits the application of state law contractual doctrines that are "applied in a fashion that disfavors arbitration."[259] While *Concepcion* preserves "generally applicable contract defenses" under § 2,[260] the strictly textualist approach to gap filling employed by courts that find the NAF to be integral from the language of the contract alone does not resemble a "generally applicable" defense; as a general principle of contract law, courts are free to consider extrinsic evidence to clarify a facially ambiguous contract.[261]

Instead, the plain-meaning approach to the integral-or-ancillary test resembles the obsolete blue pencil doctrine once prevalent in common-law contract interpretation, under which the interpreting court would simply cross out any unenforceable terms in a contract and discard the entire agreement if this rendered the contract unintelligible.[262] The blue pencil doctrine no longer plays any gap-filling role in contract law, which suggests that a similarly formalistic application of the integral-or-ancillary test applied specifically to arbitration agreements is preempted under *Concepcion* as a common-law doctrine "applied in a fashion that disfavors arbitration."[263]

This is not to say that the integral-or-ancillary test is itself preempted, nor that courts cannot use plain meaning to interpret arbitration agreements under *Concepcion*. A contract that identifies the parties' desire to arbitrate before a specific forum—and *only* that forum—will be respected, both as a method for selecting an arbitrator under § 5 and under the common-law foundations of the integral-or-ancillary test that date to Judge Cardozo, who contemplated an arbitration agreement designed around the specialization or expertise of a particular arbitrator.[264] And courts are free to discern the parties' intent under the

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reform the contract . . . to attain a result that is more balanced and fair, rather than one that comports with bargaining power").

[259] *Concepcion*, 131 S Ct at 1747.

[260] Id at 1748.

[261] See text accompanying notes 135–36.

[262] See Ben-Shahar, 63 Stan L Rev at 887 (cited in note 258) (describing the blue pencil doctrine as an "archaic" predecessor to modern partial-enforcement gap filling).

[263] *Concepcion*, 131 S Ct at 1747.

[264] See text accompanying notes 59–62.

integral-or-ancillary test through consideration of extrinsic evidence, to the extent feasible.

1. Good faith and penalty defaults.

Assuming the impermissibility of the subversive plain-meaning interpretation discussed above, one alternate avenue for bargain redistribution is to follow the logic of Judge Sloviter's and Judge Hamilton's dissents and use good faith to distinguish between cases. Assuming that the NAF as it existed before 2009 was an unfair or unconscionable arbitration forum, businesses that purposefully named the Forum to take advantage of its biases could be forced to litigate as a type of "penalty default"—an unfavorable default rule designed to give the drafter an incentive to contract around the rule ex ante.[265] This argument shapes judicial policy in certain areas of contract law. For example, in the case of an overbroad liability waiver, the incentive to continue to use a term that a court has struck as unfair is strong if there is a sufficiently low probability that a potential plaintiff will challenge the provision in court.[266] Applying this logic, courts should use § 5 to enforce arbitration agreements that name the NAF—an unconscionable or overbroad arbitration forum—only when the agreement was drafted in good faith, so as to avoid the problem of intentional overreaching.[267]

However, this approach does not readily map onto the issue of the unavailable arbitration forum. Rather than deterring new suits, the success that plaintiffs have had in this area may well lead to *more* disputes arising from an ambiguous contract than from one naming an available arbitrator. Given this sizeable deterrent, any ill-gotten benefits would need to be significant to justify the intentional introduction of an ambiguous contractual term. Such a benefit is difficult to imagine even in theory. Any

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[265] See Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87, 91 (1989) ("Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.").

[266] When the benefit of overreaching is sufficiently great, however, judicial nonenforcement may not be enough of a deterrent; stronger sanctions such as punitive damages or criminal penalties could be imposed as a supplement. See Ben-Shahar, 63 Stan L Rev at 901–04 (cited in note 258).

[267] See id at 903 ("When the boundary of permissible terms is known and nevertheless crossed, the term should be replaced in a way that provides deterrence. . . . But if the boundary is fuzzy and was violated without bad faith, the law should only reduce the excessive term back to the boundary.").

intentional wrongdoers—businesses that chose the NAF specifically to take advantage of its anticonsumer biases—would likely have updated their boilerplate and modified their existing contracts after the NAF Consent Judgment.

Even assuming that those defendants that continue to name the NAF after the NAF Consent Judgment are at least negligent (as Hamilton suggests), and assuming that a plaintiff can impose enough costly, unwanted litigation on a business to deter negligent use of the term in the future, the beneficiaries would at best be limited to the few plaintiffs empowered to proceed in court by the judicial ruling. New customers would be required to arbitrate under the company's new contract, which would likely be less favorable and less discretionary than a judge-appointed arbitrator in light of the business's superior bargaining power. Further, the additional cost to the company of litigating these disputes might be shifted to all consumers in the form of higher interest rates, lower-quality care, more-restrictive nonarbitration contractual terms, and so forth. This would in effect create a cross-subsidy of plaintiffs with disputes by consumers without disputes and potentially nullify any net consumer gain from the rule.[268] The complexity of standard-form contracts reduces the ability of consumers to substitute away from onerous terms; consumers can make valuation decisions based only on terms about which they are informed.[269]

Hamilton argues in his *Green* dissent that, by reforming arbitration agreements that continue to name the NAF, courts are "rescu[ing]" businesses "from [their] own folly," leaving plaintiffs to bear the additional costs of litigating over the ambiguous agreements.[270] But neither party is truly being "rescued" by an approach that requires protracted litigation over the enforceability of a contract before the merits of the dispute can be reached. For example, even without discovery or other fact-finding, the parties in *Green* litigated for seventeen months before a substitute arbitrator was ultimately chosen.[271] The associated attorneys' fees alone make this type of "rescue" an unattractive

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[268] See Christopher R. Drahozal, *Arbitration Innumeracy*, 4 Yearbook Arb & Mediation 89, 100–01 (2012); Ben-Shahar, 63 Stan L Rev at 904 (cited in note 258) ("Deterrence of one kind of overreaching can divert rent-seeking behavior to other areas of the contract without producing the desired redress for consumers.").

[269] See Korobkin, 70 U Chi L Rev at 1216–44 (cited in note 246) (arguing that buyers' decisionmaking is "bounded" by the inaccessibility of form contracts).

[270] *Green*, 724 F3d at 793 (Hamilton dissenting).

[271] See notes 291–95 and accompanying text.

proposition for businesses and consumers alike. Therefore, if litigation is a penalty default for the drafting party, then the mere existence of litigation means that the business has, at least in part, already lost. To the extent that a business chooses arbitration to avoid the time and money costs, negative publicity, and legal uncertainty associated with litigation, it surrenders those benefits when it is forced to participate in litigation over the validity of its form contract.[272] Even if it ultimately succeeds in compelling arbitration, the contracting business loses the advantage of choosing its own forum.

The integral-or-ancillary test is therefore unproductive in this area. To the extent that an arbitration clause is fraudulent or has been drafted in bad faith, a court can still revoke the agreement on common-law grounds such as fraud or unconscionability, subject to the limit provided by *Concepcion* that the doctrine not be "applied in a fashion that disfavors arbitration."[273] By placing the onus of litigation on whether the choice of forum was integral, courts have forced plaintiffs into a disingenuous argument: they must explain on the one hand how the NAF closed its consumer-arbitration business amid striking allegations of anticonsumer bias, and on the other that their agreement to arbitrate exclusively before that very forum was "as important . . . as the agreement to arbitrate itself."[274]

Although resorting to litigation to make these decisions is indeed wasteful compared to drafting better contracts ex ante, there is no evidence that judicial regulation through penalty defaults will correct the defective-contract problem any better than market mechanisms without an understanding of *why* so many firms have failed to change their boilerplate.[275] Without this understanding, courts are merely facilitating even more litigation by opportunistic plaintiffs seeking a more advantageous forum—a result that is surely out of keeping with the liberal federal policy favoring arbitration.

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[272] See Jack M. Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 Wm & Mary Bus L Rev 227, 267–68 (2011) (arguing that judicial determination of arbitrability should be a "last resort," because "when the parties go to court, many of the specific benefits they sought in choosing arbitration in the first place are lost").

[273] *Concepcion*, 131 S Ct at 1747.

[274] *Zechman*, 742 F Supp at 1364.

[275] Penalty defaults are most effective when transaction costs are low and contracts can easily be changed. See Graves, 2 Wm & Mary Bus L Rev at 241 (cited in note 272).

2. Section 5 as a bargain-leveling tool.

To the extent that a court hopes to correct perceived unfairness and redistribute the benefits of the bargain, this can be done in a much less binary fashion through the discretion afforded by § 5 for the appointment of a new arbitrator. Since § 5 does not detail a method for selecting an arbitrator, a trial court has broad discretion to fashion a solution. The judge could level the parties' bargaining power, as the court offered to do in *Jones*, by choosing three potential arbitrators and allowing each side to strike one.[276] Or the judge could opt for the available forum that is most similar to the NAF and approximate the bargain that the parties would have reached had they known of the Forum's unavailability.[277]

Judicial discretion is preferable to a bright-line rule in this case because, as Part II sets out, parties are not homogeneously situated. A repeat player with many similar contracts might warrant less favorable treatment as an incentive for it to monitor its boilerplate in order to prevent litigation over future transactions.[278] For example, the district court in *GGNSC Montgomery, LLC v Norris*[279] appointed a substitute arbitrator under § 5 but took away some of the benefits of a private proceeding by requiring the parties to file status updates with the court on the state of the arbitration proceeding every sixty days.[280] This type of bargain leveling can be substantive as well: for example, a New York state court appointed as an arbitrator a local state assemblyman who previously cosponsored an arbitration reform bill that called for the vacating of arbitration awards made by an arbitrator with a financial stake in the proceedings.[281] Arbitration itself is not inherently unfair or unconscionable—arbitration before a consumer-friendly forum can be just as effective a penalty

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[276] See *Jones*, 684 F Supp 2d at 1169.

[277] Professor Omri Ben-Shahar refers to this methodology as "minimally tolerable" gap filling. Ben-Shahar, 63 Stan L Rev at 878–85 (cited in note 258).

[278] See id at 904 ("[A] legal rule that induces [a repeat actor] to be more cautious and to spend more on acquiring information about the boundary is less of a waste, as this knowledge would be used more often.").

[279] 2013 WL 627114 (MD Ala).

[280] See id at *4.

[281] See Short Form Order, *Vieyra v Penn Toyota, Ltd*, Index No 10645/10 (NY App filed Aug 3, 2012) (appointing Michael A. Montesano as arbitrator). See also An Act to Amend the Civil Practice Law and Rules, in Relation to Grounds for Vacating an Arbitration Award on the Basis of Partiality of the Arbitrator, New York State Assembly, 2011–12 Reg Sess (Apr 7, 2011), online at http://assembly.state.ny.us/leg/?default_fld=&bn=A07002&term=2011&Summary=Y&Memo=Y&Text=Y (visited Nov 3, 2014).

default as litigation for a business that would have named a large commercial forum had it updated its boilerplate ex ante.[282]

C. Advantages and Application of § 5 Tailoring

The use of § 5's open-ended selection mechanism harmonizes the FAA, the Supreme Court's arbitration policy, and the principles of the common law of contracts. The § 5 selection process shares the precise aims of the integral-or-ancillary test: a judge appointing a new arbitrator in a § 5 proceeding must "respect the intentions of the parties, as demonstrated in their arbitration agreement, while at the same time, pay heed to the principle that each party should be treated fairly, if not equally, in the appointment process."[283]

In the absence of a clear dividing line between the cases, § 5 gives courts a more nuanced tool than the integral-or-ancillary test, allowing them to achieve both their interpretive and bargain-leveling ends. It also creates more certainty in the law and hence more predictability for drafting businesses. Unlike the integral-or-ancillary test, in which the same contract can be interpreted differently across jurisdictions, the application of § 5 will ensure uniformity in the disposition of these disputes—arbitration instead of litigation—even if the specific arbitrator varies on a case-by-case basis. This is because substitution preserves the other bargained-for elements of the contract, whereas nonenforcement disrupts the entire contract.[284] The procedural details of the original agreement (such as a class action waiver) will be enforced by a substitute arbitrator; even a consumer-friendly forum must respect the terms of the contract under the language of § 5.[285] Limiting the scope of judicial discretion to the choice of arbitrator maintains an incentive for businesses to update their boilerplate contracts while avoiding conflict with *Concepcion*'s preemption doctrine.

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[282] See Eric J. Mogilnicki and Kirk D. Jensen, *Arbitration and Unconscionability*, 19 Ga St U L Rev 761, 762–69 (2003) (describing the advantages of arbitration for individuals).

[283] *BP Exploration Libya Ltd v ExxonMobil Libya Ltd*, 689 F3d 481, 495 (5th Cir 2012).

[284] See Ben-Shahar, 63 Stan L Rev at 893 (cited in note 258) ("[P]artial enforcement [of a contract term] involves much less of a variation from the effects intended by the parties than total non-enforcement would.") (quotation marks and brackets omitted).

[285] See 9 USC § 5 (providing that a substitute arbitrator "shall act under the said agreement with the same force and effect as if he or they had been specifically named therein").

Hamilton's *Green* dissent spells out the flexibility of this approach:

> [I]t is worth pointing out just how much freedom the majority's approach leaves the district judge in appointing an arbitrator. . . . The judge could select an arbitrator, for example, who is familiar with the practices of the payday loan industry. The judge could also select an arbitrator who is open to considering the use of claimant classes in arbitrations. . . . Having forced the case out of the federal courts and into arbitration, U.S. Cash Advance will have to live with its choice.[286]

This solution accommodates all the approaches contained in the case law. The bargain-leveling judge can compel arbitration before the hypothetical arbitrator amenable to class actions, since the defendants in the case did not include an express waiver of these proceedings. A different judge could choose to mirror the practices of other payday lenders. Because the other bargained-for elements of the contract would remain in force under a § 5 substitution regime, the enforcement of a given arbitration contract—even under a different arbitrator—would be more predictable ex ante than total nonenforcement. At the same time, this approach would grant courts the flexibility to tailor the outcome to the ex post circumstances of the parties.

Returning to the example of GGNSC illustrates the variety of judicial solutions possible under a substitution regime.[287] In *Jones*, the court supervised the appointment of an arbitrator by implementing a mechanical selection method as a fail-safe.[288] In *Meskill*, in which the court found no evidence of bad faith on the part of GGNSC, the court allowed the parties to reach an agreement on a substitute arbitrator outside of court, and the parties agreed to arbitrate before a local Minnesota lawyer experienced in alternative dispute resolution.[289] In *Norris*, a case in which the court noted the defendant's citation to *Stewart* and presumably had knowledge of the prior litigation over the GGNSC contract, the court elected to take greater control over the proceedings by requiring status updates every sixty days,

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[286] *Green*, 724 F3d at 800–01 (Hamilton dissenting).

[287] See Part II.B.

[288] See *Jones*, 684 F Supp 2d at 1169.

[289] See *Meskill*, 862 F Supp 2d at 978. See also generally Notice of Parties' Selection of an Arbitrator, *Meskill v GGNSC Stillwater Greeley LLC*, Civil Action No 0:12-cv-00851-RHK-JJG (D Minn filed June 25, 2012).

thereby stripping GGNSC of some of the benefits of private dispute resolution.[290] Section 5 allows a judge to take a pragmatic approach to honoring parties' expectations and regulating bargaining power—as opposed to the formalistic and often arbitrary approach of the integral-or-ancillary test.

A good example of this type of pragmatism developed in the Northern District of Illinois when the parties in *Green* sought a new arbitrator after the case was remanded from the Seventh Circuit. Judge Joan Gottschall initially put the choice of forum in the hands of the plaintiff, who submitted a list of proposed arbitrators to the court in January 2014.[291] The defendants objected to the neutrality of the proposed arbitrators: one for serving on a board of directors with a partner whose firm represented the plaintiff; another for being married to a former Illinois legislator who had sponsored a bill on payday-loan reform.[292] The defendants submitted their own list of arbitrators, to which the plaintiff objected. Gottschall, noting that the parties' objections "range[d] from the substantial to the less than substantial," instead nominated three arbitrators of her own.[293] Noting that the three proposed arbitrators were all affiliated with JAMS, Gottschall allowed the parties an opportunity to object, but both sides filed statements approving the court's list, with the defendants agreeing to waive any inconsistencies between the procedural rules of JAMS and those of the Code in an example of cure-by-concession pragmatism.[294] Gottschall selected former circuit judge Julia Nowicki to arbitrate the dispute,[295] thus arriving at a choice that both sides could "live with,"[296] by virtue of the court weighing the parties' objections ex post rather than guessing at their intentions ex ante.

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[290] See *Norris*, 2013 WL 627114 at *3–4.

[291] Defendants' Response to Plaintiff's List of Proposed Arbitrators, and Defendants' List of Proposed Arbitrators, *Green v US Cash Advance Illinois, LLC*, Civil Action No 12-8079, *1 (ND Ill filed Jan 27, 2014).

[292] Id at *2–3.

[293] Order, *Green v US Cash Advance Illinois, LLC*, Civil Action No 12-8079, *1 (ND Ill filed Feb 12, 2014) ("Green Order").

[294] Defendants' Response to This Court's March 19, 2014, Minute Order, *Green v US Cash Advance Illinois, LLC*, Civil Action No 12-8079, *1 (ND Ill filed Mar 26, 2014) ("Defendants are willing to waive NAF Rules to the extent they may be inconsistent with JAMS rules.").

[295] Green Order at *1 (cited in note 293).

[296] *Green*, 724 F3d at 801 (Hamilton dissenting).

CONCLUSION

The abrupt exit of the NAF from the consumer-arbitration field created an exogenous shock to the established dispute-resolution procedures of businesses in many industries and rendered millions of form contracts ambiguous and unenforceable as written. The former ubiquity of the Forum as an arbitrator of consumer disputes has tasked courts in the majority of states and federal circuits with arriving at a gap-filling methodology. These courts have converged on a single test to decide between litigation and arbitration—the integral-or-ancillary test—but have varied in their application of this test, leading to divergent conclusions. The result is a severe disuniformity in this area of the law, in which the same contract can be interpreted differently in different jurisdictions, and the decision of one court has little binding effect on the interpretation of another.

A recent Seventh Circuit decision invited criticism of the integral-or-ancillary test and argued for a bright-line rule: the majority contended that the choice of an unavailable forum should always be substituted by the trial court under § 5 of the FAA, and the dissent argued that the choice of an exclusive forum should *never* be substituted.[297] The ideal choice is somewhere in between, and the integral-or-ancillary test is therefore a crude and ineffective tool given the heterogeneity of contracting parties and the general lack of understanding of this species of sticky boilerplate. Instead, parties would be better off deferring to the broad authority of judges to appoint a substitute arbitrator under § 5. Judges can use § 5 as a bargain-leveling tool to correct ex ante unfairness and better effectuate a stated policy of honoring the parties' agreement, while avoiding tension with the emphatic pro-arbitration policy set forth in the FAA as interpreted by the Supreme Court.

This gap-filling methodology is not forum specific. It applies equally to contracts naming other unavailable arbitration forums such as the AAA, which scaled back its operations concurrently with the NAF.[298] The rationale for tailored gap filling under § 5 similarly applies when a court strikes an arbitration term through use of the unconscionability doctrine or another common-law revocation doctrine sanctioned under § 2. As with the unavailable forum, substituting the stricken arbitration

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[297] See Part II.C.

[298] See text accompanying note 33.

term with an enforceable alternative is less disruptive to the intentions of the contracting parties than total nonenforcement of the contract.[299] In this context, courts have already been willing to exercise their discretionary power to reform and enforce an otherwise-unconscionable arbitration provision, often with input from the parties, such as a cure by concession from the drafting party to waive the unconscionable elements of the contract.[300] In the absence of express guidance from the Supreme Court, this type of pragmatism is less costly to businesses, consumers, and courts than the arbitrary formalism of the integral-or-ancillary test.

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[299] See text accompanying note 284.

[300] See Ben-Shahar, 63 Stan L Rev at 892–93 (cited in note 258) (collecting cases that adopt a "minimally tolerable" gap-filling approach to reform arbitration clauses with unconscionable elements).