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## Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in *AT&T Mobility LLC v. Concepcion*

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**SEEKING A RATIONAL LAWYER  
FOR CONSUMER CLAIMS  
AFTER THE SUPREME COURT  
DISCONNECTS CONSUMERS IN  
*AT&T MOBILITY LLC V. CONCEPCION***

*Ann Marie Tracey\* & Shelley McGill\*\**

*Since Congress first enacted the Federal Arbitration Act (FAA) in 1925, arbitration agreements have become ubiquitous in consumer contracts. Although Congress intended for the FAA to promote arbitration, Congress preserved the applicability of common law and equitable defenses, such as unconscionability, to arbitration agreements through section 2 of the FAA. The California Supreme Court in Discover Bank v. Superior Court established parameters for finding unconscionability in arbitration agreements, specifically with respect to waivers of collective redress. In AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court, in a 5–4 decision, turned its back on consumers and section 2 of the FAA, holding that Congress intended to promote arbitration through the FAA. Therefore, the Court preempted any application of the Discover Bank rule to class action arbitration waivers.*

*This Article explores how the Court used faulty or inadequate analysis to reach its conclusion, failed to account for the importance of collective consumer redress in the modern era, and likely invalidated unconscionability as a defense to any arbitration agreement. Achieving its desired result of enforcing class arbitration waivers, the Court essentially eliminated one of the few methods, if not the only method,*

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*that consumers have to adjudicate legitimate claims that likely could not or would not be brought on an individual basis. This decision insulates companies from any meaningful liability that may result from poor practices or even fraudulent schemes. After Concepcion, only congressional action can balance the scales between the enforceability of arbitration agreements and the protection of consumers through equitable contract defenses. Congress must act now to clarify the intent and scope of the FAA; this Article offers several recommendations for such legislation.*

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*“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”*

—Justice Stephen Breyer<sup>1</sup>

## I. INTRODUCTION

The Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion*<sup>2</sup> abruptly disconnects consumers from a previously available forum to collectively resolve common claims through class arbitration. Notwithstanding the presence of a class arbitration waiver in a consumer contract, some preceding jurisprudence preserved access to collective redress when the waiver formed part of an adhesion contract and was harsh, oppressive, or unconscionable.<sup>3</sup> In a 5–4 decision authored by Justice Scalia,<sup>4</sup> the Court held that section 2 of the Federal Arbitration Act (FAA)<sup>5</sup> preempts a California state rule allowing consumers to pursue collective redress.<sup>6</sup> This decision foreclosed class arbitration not only for the subject parties<sup>7</sup> but also for millions of other consumers who are parties to contracts of adhesion containing class arbitration waivers.

Section 2 of the FAA provides for enforcement of arbitration agreements, “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>8</sup> California law recognized “such grounds” when a contract fit certain parameters of unconscionability, which the California Supreme Court described in *Discover Bank v. Superior Court*.<sup>9</sup> The Ninth Circuit, in applying the *Discover Bank* rule, held that the arbitration agreement in the adhesion contract in *Concepcion*, which contained a class arbitration waiver, was

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1. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting).

2. 131 S. Ct. 1740 (2011).

3. See discussion *infra* Part II.

4. Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Concepcion*, 131 S. Ct. at 1743.

5. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

6. *Concepcion*, 131 S. Ct. at 1753.

7. *Id.*

8. 9 U.S.C. § 2.

9. 113 P.3d 1100 (Cal. 2005). “[T]here is no suggestion that the quoted language in section 4 overrides the principle embodied in section 2 that state courts can refuse to enforce arbitration agreements or portions thereof based on general contract principles.” *Id.* at 1112.

unconscionable.<sup>10</sup> The Ninth Circuit also held that, as the *Discover Bank* rule applied to contracts generally, and not just to those containing arbitration agreements or waivers, the FAA did not preempt the rule.<sup>11</sup>

The issue before the Court in *Concepcion* was whether California law targeted contracts with arbitration clauses and thereby unduly interfered with section 2 of the FAA.<sup>12</sup> In considering this issue, the Court was not persuaded by the argument that the rule and state law applied to all contracts that were unconscionable and concluded that the *Discover Bank* rule impermissibly targeted arbitration.<sup>13</sup>

In so doing, the Court rejected what California deemed to be unconscionable contracts: those contracts where companies set out “to deliberately cheat large numbers of consumers out of individually small sums of money.”<sup>14</sup> The Court also gave a cold shoulder to the *Concepciones*’ argument that as questions of fairness or unconscionability implicate “only questions of California law and no genuine issue under the FAA, it presents no issue for this Court to resolve.”<sup>15</sup> As a result, where state laws address unconscionability and contract provisions, at least as they may be applied to arbitration agreements, *Concepcion* likely eviscerates them.

The Supreme Court’s split decision in *Concepcion*<sup>16</sup> reflects the deeply and fundamentally divided range of judicial opinions on consumer arbitration that exist across the United States and around the world.<sup>17</sup> Led by Justice Scalia, the majority delivered a severe

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10. Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009), *rev’d sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

11. *Id.* at 856–57.

12. *Concepcion*, 131 S. Ct. at 1746. For a report of the oral argument in this regard see Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration*, N.Y. TIMES, Apr. 27, 2011, at B3, available at <http://www.nytimes.com/2011/04/28/business/28bizcourt.html>.

13. *Concepcion*, 131 S. Ct. at 1747–48.

14. *Discover Bank*, 113 P.3d at 1110; Liptak, *supra* note 12.

15. Brief for Respondents at 39, *Concepcion*, 131 S. Ct. 1740 (No. 09-893) (citing *Volt Info. Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)). However, the apparent reference in *Volt* was to the Court’s statement “that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.” *Volt*, 489 U.S. at 474. Contract interpretation was not at issue in *Concepcion*. See 131 S. Ct. at 1746.

16. See 131 S. Ct. at 1756 (Breyer, J., dissenting, joined by Ginsberg, Sotomayor, and Kagan, JJ.).

17. See, e.g., *Seidel v. TELUS Commc’ns Inc.*, [2011] 1 S.C.R. 531 (Can.). This was a 5–4 split decision with pro-arbitration policy reasoning in the dissent rather than in the majority

blow to consumers with monetarily small disputes. Already denied access to the courts, both individually and collectively, consumers will now be exclusively confined to individual arbitration. Class arbitration, the court-created solution to the class action litigation waiver,<sup>18</sup> is now endangered, if not extinct, with a click of the mouse. It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.

This Article examines the implications of the Court's sweeping decision in *Concepcion*. In Part II, it reviews the preexisting legal context in which the decision occurred. Part III discusses the majority, concurring, and dissenting opinions delivered in *Concepcion* and contrasts their positions on the policy of arbitration and its application to class redress. It also examines the contrasting positions on the role of state law with respect to arbitration agreements, especially relating to the doctrine of unconscionability. In Part IV, this Article analyzes *Concepcion* in light of *Discover Bank* and the language and purposes of the FAA. This Part also explores the practical impact of *Concepcion* on business, consumers, and fairness. Finally, in Part V, this Article calls for legislative intervention to address the significant static that the *Concepcion* decision generates.

## II. THE PREEXISTING LEGAL LANDSCAPE

The *Concepcion* decision caps a series of recent decisions in which the Court addressed the sanctity of arbitration agreements and class arbitration.<sup>19</sup> When the Court first considered the availability of class arbitration, it deferred to the arbitrator the question of scope

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opinion. See *id.*; Shelley McGill, *Consumer Arbitration After Seidel v. TELUS*, 51 CANADIAN BUS. L.J. 187, 202–03 (2011); Geneviève Saumier, *Consumer Arbitration in the Evolving Canadian Landscape*, 113 PENN ST. L. REV. 1203, 1217–21 (2009); see also Liptak, *supra* note 12 (discussing *Concepcion* and businesses' use of form contracts to prohibit class arbitrations).

18. *Keating v. Superior Court*, 645 P.2d 1192, 1206–10 (Cal. 1982), *appeal dismissed in part, rev'd in part on other ground sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

19. SIMPSON THACHER & BARTLETT LLP, REPORT FROM WASHINGTON: SUPREME COURT FINDS THE DISCOVER BANK RULE PREEMPTED BY FAA 3 (2011), available at <http://www.stblaw.com/content/Publications/pub1196.pdf>.

and the interpretation of the subject arbitration agreement.<sup>20</sup> The next time the question was presented, the Court answered it, finding class arbitration unavailable: “unless parties affirmatively authorize [it.] . . . silence on the issue is insufficient.”<sup>21</sup> Long before the ringing endorsement of contractual arbitration agreements in *Concepcion*, arbitration policy supported enforcement of contractual arbitration agreements.<sup>22</sup>

Enacted in 1925, the FAA<sup>23</sup> requires that courts enforce arbitration agreements according to their terms and stays any court action involving a dispute subject to an arbitration agreement.<sup>24</sup> Although the federal policy in favor of arbitration<sup>25</sup> preempts any state law that purports to limit arbitration or to frustrate Congress’s intent,<sup>26</sup> the FAA expressly preserves the application of common law and equitable defenses capable of revoking other contracts.<sup>27</sup> The

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20. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (applying the subject-matter jurisdiction rule and requiring that an arbitrator first rule on the scope and interpretation of the clause, where the subject arbitration agreement did not mention class arbitration, but the chosen arbitrator had certified the class arbitration and awarded over \$10 million in damages); see SIMPSON THACHER & BARTLETT LLP, *supra* note 19.

21. SIMPSON THACHER & BARTLETT LLP, *supra* note 19 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (finding the subject-matter jurisdiction rule did not apply because the arbitrator had already ruled on the interpretation of the clause and the Court was reviewing that decision).

22. The policy was applied beyond the consumer context to labor and employment as well as franchise genres. See generally Shelley McGill & Ann Marie Tracey, *Building a New Bridge over Troubled Waters: Lessons Learned from Canadian and U.S. Arbitration of Human Rights and Discrimination Employment Claims*, 20 CARDOZO J. INT’L & COMP. L. 1 (2011) (discussing the judicial policy favoring arbitration in labor disputes and in general).

23. 9 U.S.C. §§ 1–16 (2006). The FAA was enacted in 1925 to overcome judicial hostility toward arbitration. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (blaming an English attitude hostile to arbitration agreements that was transported to the United States).

24. 9 U.S.C. §§ 3–4.

25. *Id.* §§ 1–4 (covering key provisions including the mandatory stay of court proceedings). The supremacy of the federal policy in favor of arbitration is attributed to Congress’s authority over interstate commerce; the Commerce Clause has been broadly interpreted as applying to intrastate commerce as long as the activity substantially affects commerce in more than one state. See, e.g., *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57–58 (2003) (finding that the great impact of commercial lending on the national economy met the Commerce Clause requirement); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275–77 (1995); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

26. *Volt Info. Seis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477–78 (1989); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10–16 (1984) (ruling in the context of a dispute between franchisees and the franchisor).

27. 9 U.S.C. § 2 provides that an arbitration clause “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2; *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996) (specifically naming unconscionability); *Shroyer v. New Cingular Wireless Servs. Inc.*, 498 F.3d

continued availability of such defenses as offered under state law, specifically unconscionability, was at the foundation of the questions addressed in *Concepcion*.

Courts in California<sup>28</sup> and other states<sup>29</sup> embraced unconscionability as one of the traditional contract law defenses that could render unenforceable a harsh or oppressive arbitration clause contained in a consumer contract of adhesion. California has been a leader among states that limit the enforcement of unconscionable consumer arbitration clauses.<sup>30</sup> Various other courts across the United States, both state and federal, have also held that

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976, 981 (9th Cir. 2007); *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005) (finding that the FAA does not preempt California law); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 679 (Cal. 2000).

28. CAL. CIV. CODE § 1670.5(a) (West 2011); *see, e.g., Shroyer*, 498 F.3d 976; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 319 F.3d 1126 (9th Cir. 2003); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728 (Ct. App. 2005); *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229 (Ct. App. 2005); *Parrish v. Cingular Wireless, LLC*, No. A105518, 2005 WL 2420719 (Cal. Ct. App. Nov. 2, 2005); *Mandel v. Household Bank (Nev.)*, Nat'l Ass'n, 129 Cal. Rptr. 2d 380 (Ct. App. 2003); *Shea v. Household Bank (SB)*, Nat'l Ass'n, 129 Cal. Rptr. 2d 387 (Ct. App. 2003); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273 (Ct. App. 1998).

29. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006); *Posadas v. Pool Depot, Inc.*, 858 So. 2d 611, 614 (La. Ct. App. 2003); *Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 776 So. 2d 589 (La. Ct. App. 2000); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1218, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372–74 (N.C. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732 (Wis. Ct. App. 2007).

30. *See cases and statute cited supra note 28; see also Alan S. Kaplinsky & Mark J. Levin, The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (But Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 BUS. LAW 1289 (2003) (contending that the California courts' decisions in *Szetela*, *ACORN v. Household International, Inc.*, and *Ting* are fundamentally flawed for protecting social policies favoring class actions that are preempted under the FAA). Not all states consider consumer arbitration clauses with class action waivers unconscionable. For example, Texas and Delaware tend to enforce them. Among federal courts, before *Concepcion* the Ninth Circuit was much more likely to enforce such clauses than the Seventh Circuit was. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (upholding the Cingular Wireless and Sprint arbitration clauses while finding the Centennial clause unconscionable; Louisiana's generally reduced availability of consumer class actions was a key factor here); *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005); *Stenzel v. Dell, Inc.*, 870 A.2d 133 (Me. 2005); *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005).

unconscionability survived FAA preemption,<sup>31</sup> even while they have disagreed over whether any given clause was in fact unconscionable.<sup>32</sup>

Defining unconscionability is a matter of state law,<sup>33</sup> and although definitions vary depending on the state, most involve some combination of procedural and substantive unconscionability.<sup>34</sup> However, the U.S. Supreme Court has long been skeptical about the application of unconscionability to the arbitration context,<sup>35</sup> fearing

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31. *Doctor's Assocs.*, 517 U.S. at 686–87 (expressly preserving unconscionability as an available ground to invalidate an arbitration clause); *see, e.g.*, cases and statutes cited *supra* notes 27–29.

32. *See, e.g.*, *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005) (applying Texas law and compelling arbitration). *But see* *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) (refusing to apply Texas law and declining to apply an arbitration provision because its unconscionable class action ban was not severable). *See generally* *Iberia Credit Bureau*, 379 F.3d at 174–75 (finding that one clause was unconscionable and the other two were not); *Blaz v. Belfer*, 368 F.3d 501, 504–05 (5th Cir. 2004); *Livingston*, 339 F.3d at 557; *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Burden v. Check Into Cash of Ky. LLC*, 267 F.3d 483, 492–93 (6th Cir. 2001); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369, 373–74 (3d Cir. 2000).

33. *Doctor's Assocs.*, 517 U.S. at 686 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

34. The definition of unconscionability in California requires both procedural and substantive unconscionability in the form of a sliding scale. The more substantively unconscionable a term is, the less procedurally unconscionable it needs to be, and vice versa. *See* *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 866 (Ct. App. 2002); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 144–45 (Ct. App. 1997). For Texas law, *see* *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196 (C.D. Cal. 2006), and *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190 (Tex. App. 2003). For Wisconsin law, *see* *Wisconsin Auto Title Loans, Inc., v. Jones*, 714 N.W.2d 155 (Wis. 2006); *Deminsky v. Arlington Plastics Machinery*, 657 N.W.2d 411 (Wis. 2003); and *Discount Fabric House of Racine, Inc., v. Wisconsin Telephone Co.*, 345 N.W.2d 417, 424 (Wis. 1984). For Montana law, *see* *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931 (9th Cir. 2001). For Louisiana law *see* Ronald L. Hersbergen, *Unconscionability: The Approach of the Louisiana Civil Code*, 43 LA. L. REV. 1315 (1983).

35. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (ruling in the context of an employment relationship); *Doctor's Assocs.*, 517 U.S. 687; *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland v. Keating*, 465 U.S. 1, 10–16 (1984) (ruling in the context of a dispute between franchisees and the franchisor). The same arguments relating to the unconscionability of contracts of adhesion are advanced by consumers, employees, and franchisees, as they are typically large in number, in a position of unequal bargaining power, and unable to negotiate any change in terms. The same legislative protection has been proposed for all three groups. *See, e.g.*, Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); S. 1782, 110th Cong. (2007); Consumer Fairness Act of 2007, H.R. 1433, 110th Cong. (2007). The 2011 configuration drops franchise agreements in place of civil rights disputes. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); S. 987, 112th Cong. (2011).

that unconscionability was a device employed to undermine the policy in favor of arbitration.<sup>36</sup>

Typically, consumer arbitration clauses are buried within the standard form contract presented to the consumer on “a take it or leave it” basis at the time of purchase. Sometimes, they are even added after the purchase under the authority of a unilateral amendment clause.<sup>37</sup> In either event, few would suggest that the consumer was aware of the clause, had input into its provisions, or could have changed it if he or she had tried.<sup>38</sup> In this context, it is not difficult for courts to find procedural unconscionability arising from the unequal bargaining power between the business and the consumer.<sup>39</sup>

Substantive unconscionability, unlike procedural unconscionability, involves a finding that the result, outcome, or application of a particular clause is overly harsh or unfair to the weaker party,<sup>40</sup> and, in this context, California courts have identified particular features that make some arbitration clauses and class action waivers overly harsh or so unfair as to be substantively unconscionable.<sup>41</sup>

Arbitration as a forum for a particular type of dispute cannot be considered inherently unfair or harsh without obviously violating the

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36. “The cry of ‘unconscionable!’ just repackages the tired assertion that arbitration should be disparaged as second-class adjudication. It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms.” *Carbajal v. H & R Block Tax Servs. Inc.*, 372 F.3d 903, 906 (7th Cir. 2004). *But see* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J. L. & PUB. POL’Y 477, 490–91 (2008) (discussing pre-*Concepcion* judicial treatment of class arbitration waivers).

37. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744–46 (2011); *Iberia Credit Bureau*, 379 F.3d at 163–64, 173–74 (5th Cir. 2004) (finding the use of an amendment clause to add an arbitration clause was not sufficient on its own to render the arbitration agreement unconscionable).

38. The basic characteristics of any contract of adhesion are a standardized contract, which is drafted and imposed by the party of superior bargaining strength and gives the weaker party only the choice of agreeing or rejecting it. *ACORN v. Household Int’l, Inc.*, 211 F. Supp. 2d 1160, 1168 (N.D. Cal. 2002). Adhesion contracts are not per se invalid but are suspect. *Wis. Auto Title Loans*, 714 N.W.2d at 170–71.

39. *See, e.g.*, *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002) (finding made in one paragraph); *24 Hour Fitness, Inc., v. Superior Court*, 78 Cal. Rptr. 2d 553, 541 (Ct. App. 1998); *Wis. Auto Title Loans*, 714 N.W.2d at 167–71 (upholding the lower court’s finding of procedural unconscionability without holding an evidentiary hearing).

40. *See* *Blake v. Ecker*, 113 Cal. Rptr. 2d 422, 433 (Ct. App. 2001); *Wis. Auto Title Loans*, 714 N.W.2d at 171.

41. *See supra* notes 26–31, 33, and accompanying text.

FAA.<sup>42</sup> Merely denying consumers access to a judicial forum is not unfair when an alternate forum of arbitration remains available; however, denying consumers access to any forum is substantively unconscionable.<sup>43</sup> California courts have focused on specific aspects of the contractual arbitration procedures that appeared to discourage or prohibit a consumer from advancing a claim through arbitration and therefore contributed to a clause's unfairness because some procedural features effectively prevented a consumer from pursuing a claim at all.<sup>44</sup> Suspect features have included high consumer cost responsibility,<sup>45</sup> shortened limitation periods, limited discovery rights or remedies,<sup>46</sup> lack of mutuality,<sup>47</sup> and waiver of class proceedings.

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42. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 353–54 (2008) (dealing with attorney fees governed by the California Talent Agencies Act purporting to vest exclusive jurisdiction in the Labor Commissioner and applying the subject-matter jurisdiction rule to send a matter to an arbitrator); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123–24 (2001) (finding that the FAA applied to employment disputes because to find otherwise would undermine “the FAA’s proarbitration purposes”); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89–90 (2000); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987) (demonstrating that, absent congressional intent, arbitration agreements will be upheld even in the face of statutory administrative schemes to enforce the particular statutory claims).

43. *See, e.g.*, *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008) (“Evidence in the record indicates that no arbitrations have been brought under the clause that defendant has included in over 68,000 loan agreements in North Carolina. Based on this evidence and the above analysis, it appears that the combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation. We agree with the trial court that ‘[d]efendant’s arbitration clause contains features which would deter many consumers from seeking to vindicate their rights.’”).

44. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893–94 (9th Cir. 2002) (focusing on provisions that limited relief to employees, imposed arbitration costs on an employee, and imposed a strict statute of limitations when applying California law).

45. *Id.* at 894; *Delta Funding Corp. v. Harris*, 912 A.2d 104, 112–13 (N.J. 2006); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 949–54 (Or. Ct. App. 2007) (considering cost sharing, class action waiver, and mutuality). California codified cost protection for consumers. *See* CAL. CIV. PROC. CODE § 1284.3 (West 2007). International consumer protection policies also insulate consumers from the cost consequences of alternative dispute resolution. *See* ORG. FOR ECON. CO-OPERATION & DEV., RECOMMENDATION OF THE OECD COUNCIL CONCERNING GUIDELINES FOR CONSUMER PROTECTION IN THE CONTEXT OF ELECTRONIC COMMERCE 7–8 (1999), available at <http://www.oecd.org/dataoecd/18/13/34023235.pdf>; *see also Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658–59 (6th Cir. 2003) (requiring fairness of cost splitting provisions in an employment arbitration agreement to be determined on a case-by-case basis); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 492 (6th Cir. 2001) (holding that the party alleging burdensome costs has the burden of proof).

46. *Anderson v. Comcast Corp.*, 500 F.3d 66, 75–77 (1st Cir. 2007) (severing the arbitration agreement’s one-year limitation period and allowing arbitration to proceed under the four-year statutory limitation period); *Adams*, 279 F.3d at 894–95 (considering reduced remedies, as well as a shortened limitation period, decided in the employment rather than in the consumer context).

47. *Wis. Auto Title Loans, Inc., v. Jones*, 714 N.W.2d 155, 173–74 (Wis. 2006) (determining that lack of mutuality was the sole feature supporting substantive unconscionability).

Often, the presence of one of these features alone has not been enough to render an arbitration agreement unconscionable, but the collective impact of multiple features in the same clause has met the test.<sup>48</sup>

Class action waivers have been the exception. A contractual term that waives class proceedings has been one feature that California courts previously found individually harsh enough to render an otherwise acceptable arbitration clause unconscionable.<sup>49</sup> Courts first expressed concern in the context of judicial class action waivers. California courts recognized that some disputes were too small to warrant individual processing in any forum. For small disputes to remain viable, consumers needed collective redress.<sup>50</sup>

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and holding that “[t]he doctrine of substantive unconscionability limits the extent to which a stronger party to a contract may impose arbitration on the weaker party without accepting the arbitration forum for itself”); *see Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (finding unconscionability in the lack of mutuality of Centennial’s clause, while compelling arbitration under the Cingular Wireless mutually applicable arbitration clause); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931 (9th Cir. 2001) (applying Montana law); *E-Z Cash Advance, Inc. v. Harris*, 60 S.W.3d 436, 441 (Ark. 2001); *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 745 (Cal. 2000) (requiring a modicum of bilateralism); *Flores v. Transamerica Home First, Inc.*, 113 Cal. Rptr. 2d 376 (Ct. App. 2001); *Palm Beach Motor Cars Ltd., Inc. v. Jeffries*, 885 So. 2d 990, 992 (Fla. Dist. Ct. App. 2004); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866 (Ohio 1998); *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 861–62 (W. Va. 1998); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 381, nn.108–09 (2010).

48. *Kristian v. Comcast Corp.*, 446 F.3d 25, 53–61 (1st Cir. 2006); *Ting v. AT&T Mobility*, 319 F.3d 1126, 1149–50 (9th Cir. 2003) (finding the cumulative impact of the cost sharing provision, confidentiality, and class action waiver unconscionable); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (finding that a single feature is not sufficient to render an agreement unconscionable); *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1180–83 (W.D. Wash. 2002); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372–74 (N.C. 2008); *Vasquez-Lopez*, 152 P.3d at 949–51.

49. *See, e.g., Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002) (“The manifest one-sidedness of the no class action provision at issue here is blindingly obvious.”) This position did not always sit well with higher courts. The general availability of class actions in the particular state is a factor when deciding the importance of waiving it. *See Iberia Credit Bureau*, 379 F.3d at 174–75 (upholding a waiver because consumers in Louisiana have limited class action rights in any event).

50. The court noted in *Szetela*:

This provision is clearly meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the \$29 sought by Szetela. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.

118 Cal. Rptr. 2d at 867 (lamenting loss of forum, loss of collectivity, and lack of mutuality).The Seventh Circuit expressed a similar sentiment in *Carnegie v. Household International Inc.*, 376

As a result, courts considered waivers unconscionable when businesses required consumers in California to give up their rights to participate in judicial class actions in favor of individual arbitration only.<sup>51</sup> Out of respect for arbitration policy, courts severed waivers from the rest of their respective arbitration clauses and allowed disputes to proceed to arbitration in a collective form—class arbitration was born.<sup>52</sup> Other times, the entire arbitration clause failed.<sup>53</sup> Some (but not all) states have followed suit.<sup>54</sup> The Illinois Supreme Court, after surveying various state court decisions, concluded that generally, if the plaintiff had a “meaningful opportunity to reject” the class action waiver or if the plaintiff otherwise had a cost-effective opportunity to seek a remedy, the waiver was not unconscionable.<sup>55</sup>

Even as California courts have found class arbitration available as a means of saving an arbitration clause,<sup>56</sup> other courts have found that when a consumer agreement was silent on class claims, the choice of arbitration meant choosing only individual arbitration and did not include collective redress.<sup>57</sup> When this issue first made its way to the nation’s highest court, the Supreme Court deferred the interpretation of the scope of the arbitration clause to the arbitrator

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F.3d 656, 661 (7th Cir. 2004) (“The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”).

51. See, e.g., *Ting*, 319 F.3d at 1149–50; *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175–76 (N.D. Cal. 2002); *ACORN v. Household Int’l, Inc.*, 211 F. Supp. 2d 1160, 1170–71 (N.D. Cal. 2002).

52. *Anderson v. Comcast Corp.*, 500 F.2d 66, 71–72 (1st Cir. 2007); *Kristian*, 446 F.3d at 48; *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 794 (Ct. App. 1998) (holding that, absent an express class arbitration waiver, parties may be ordered to class arbitration under state law); *Dickler v. Shearson Lehman*, 596 A.2d 860, 867 (Pa. Super. Ct. 1991).

53. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 697–99 (Cal. 2000) (finding that severance would amount to redrafting so the arbitration clause failed in its entirety).

54. *Anderson*, 500 F.3d at 77 (holding that severance was applicable); *Kristian*, 446 F.3d at 55; *Dickler*, 596 A.2d at 866.

55. Mark M. Leitner & Joseph S. Goode, *Class Action Prohibitions and the Effect of Contract Rules on the Collective Pursuit of Common Claims*, 30 FRANCHISE L.J. 166, 168 (2011) (citing *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006)); see Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer Arbitration in Light of Stolt-Nielsen*, 23 LOY. CONSUMER L. REV. 265, 277–80 (2011) (discussing class arbitration waivers in light of state law).

56. *Keating v. Superior Court*, 645 P.2d 1192, 1206–10 (Cal. 1982); *Blue Cross*, 78 Cal. Rptr. 2d at 793.

57. See, e.g., *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 510 (7th Cir. 1999); *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 274–77 (7th Cir. 1995).

under the subject-matter jurisdiction rule.<sup>58</sup> Thereafter, some arbitrators interpreted arbitration clauses to include class arbitration where the agreements were silent.<sup>59</sup> Businesses moved quickly to block the possibility of collective redress in any forum, judicial or arbitral. In addition to adapting existing online arbitration clauses to expressly waive class-wide arbitration and specify individual arbitration only, businesses took advantage of the varying positions on unconscionability with choice-of-law provisions that targeted states most likely to reject the unconscionability defense.<sup>60</sup>

California legislation provides that a court may refuse to enforce a contract if it finds as a matter of law that the contract or a clause is “unconscionable at the time it was made.”<sup>61</sup> In addition to allowing a court to “enforce the remainder of the contract without the unconscionable clause,” California Civil Code section 1670.5(a) provides, in the same sentence, that a court “may so limit the

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58. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003); Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259 (2004). When answering the question in the business-to-business context, the Supreme Court confined the choice of arbitration to individual arbitration when the contract did not explicitly waive class arbitration. See *Stolt-Nielsen, S.A. v. Animal Feeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

59. See *Stolt-Nielsen*, 130 S. Ct. at 1780–81 (2010).

60. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (holding that the application of Delaware’s choice of law provision yielded a different result than when California law was applied), *remanded to* 36 Cal. Rptr. 3d 456 (Ct. App.); see also *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 937–41 (9th Cir. 2001) (applying Montana’s choice of law clause); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1218, 1222 (N.M. 2008) (refusing to apply Texas’s choice of law provision because it would require enforcement of a class action ban in violation of New Mexico public policy).

61. CAL. CIV. CODE § 1670.5(a) (West 2011) provides:

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Section (b) allows the parties an evidentiary hearing on this issue. This phraseology would provide support for Justice Thomas’s concurrence, which would require any court action to be founded upon unconscionability at the time of the contract formation. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (Thomas, J., concurring) (citing 9 U.S.C. §§ 2, 4 (2006)) (“As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.”). Justice Thomas noted that “a district court cannot follow both the FAA and the *Discover Bank* rule, which does not relate to defects in the making of an agreement.” *Id.*

application of any unconscionable clause as to avoid any unconscionable result.”<sup>62</sup>

The California Supreme Court’s 2005 decision in *Discover Bank*<sup>63</sup> established three parameters for satisfying a finding of unconscionability with respect to waivers of collective redress.<sup>64</sup> First, disputes would “predictably involve small amounts of damages.”<sup>65</sup> Second, one party must hold a superior bargaining position, and third, there must be an allegation that the stronger party “has carried out a scheme to deliberately cheat large numbers of consumers.”<sup>66</sup> If these three conditions are present, the waiver should be construed as exculpatory of the stronger party’s liability for fraud and should be found unconscionable. This analysis became known as the *Discover Bank* rule and was applied to determine the unconscionability of judicial and arbitral class proceedings waivers.<sup>67</sup> If an unconscionable class arbitration waiver was capable of being severed from an arbitration clause, the disputes were allowed to proceed to class arbitration.

Generally in this regard, consumer arbitration cases fall into two categories: the first category involves arbitration clauses that make no mention (waiver or authorization) of class proceedings. Cases in the second category involve clauses that expressly prohibit judicial and/or arbitral class proceedings. In the first category, the resulting question is whether the choice of arbitration implicitly includes class arbitration. Although not in the consumer context, the U.S. Supreme Court answered this question in 2010. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>68</sup> the Court held that class arbitration is not implicit when an agreement to arbitrate does not

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62. CAL. CIV. CODE § 1670.5(a).

63. *Discover Bank*, 113 P.3d at 1110; see *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 983 (9th Cir. 2007).

64. See, e.g., *Parrish v. Cingular Wireless, LLC*, 28 Cal. Rptr. 3d 802 (Ct. App. 2005) (finding—before the *Discover Bank* rule was articulated—that the waiver was not unduly harsh), transferred to No. A105518, 2005 WL 2420719 (Cal. Ct. App.) (reconsidering and finding the clause unconscionable under the *Discover Bank* rule), cert. denied sub nom. *Cingular Wireless v. Mendoza*, 547 U.S. 1188 (2006).

65. *Discover Bank*, 113 P.3d at 1110.

66. *Id.*

67. See, e.g., *Shroyer*, 498 F.3d at 983–86; *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 738–39 (Ct. App. 2005); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229, 238 (Ct. App. 2005).

68. 130 S. Ct. 1758 (2010).

mention it.<sup>69</sup> Agreement to submit to class arbitration must be found in the intention of the parties,<sup>70</sup> suggesting that the differences between individual and collective arbitration are too great to impose on parties without their agreement. It seems likely that *Stolt-Nielsen* will apply to the consumer context as well.

The Supreme Court had not considered the second category of consumer cases, those relating to class proceedings waivers, and the corresponding unconscionability question until *Concepcion*. In this second category, two questions arise with respect to inclusion of a class arbitration waiver. Does the loss of collectability alone or in conjunction with other one-sided features render a clause so unfair as to be unconscionable? If so, will severing an unconscionable waiver from an arbitration clause, thereby allowing class arbitration to proceed, violate a basic tenet of arbitration and the FAA by redesigning the process<sup>71</sup> for the parties? The severance question seems to be answered by *Stolt-Nielsen*; having demonstrated an intention to restrict class arbitration, it is unlikely to be implied into any redacted clause, as it would amount to redesigning the process for the parties. The remaining question relating to the application of the unconscionability doctrine to class arbitration waivers was placed before the Supreme Court in *Concepcion*.

### III. AT&T MOBILITY LLC V. CONCEPCION

Class action and arbitration issues have been at the forefront of the Supreme Court's docket of late.<sup>72</sup> Prominent among these cases was *AT&T Mobility, Inc. v. Concepcion*, where the Court tackled consumer class arbitration waivers in light of state law and the

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69. *Id.* at 1775.

70. *Id.*

71. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (holding that parties may "structure their arbitration agreements as they see fit" (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))).

72. *See, e.g., Stolt-Nielsen*, 130 S. Ct. at 1776 (holding a class action waiver must be contained within the language of the arbitration agreement); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010) (upholding a determination that a delegation provision in an arbitration agreement was itself an agreement to arbitration and was enforceable as severable); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (holding that a litigation waiver in a collective bargaining agreement precluded an individual union member from bringing a statutory discrimination claim in court).

FAA.<sup>73</sup> Rather than restricting itself to the questions before it—that is, the applicability of unconscionability and whether the *Discover Bank* rule impermissibly targeted arbitration—the Court primarily used the opportunity to criticize class arbitration’s ability to function as an effective tool for resolving common disputes and to promote the goals of individual arbitration.<sup>74</sup>

#### A. Background

A disputed sales-tax charge of \$30.22 for a “free phone” and the application of the *Discover Bank* rule were at the heart of the dispute in *Concepcion*.<sup>75</sup> Vincent and Liza Concepcion purchased a cellular telephone service through AT&T Mobility LLC (“AT&T”) in 2002; the service had been advertised as coming with a “free phone” as part of the agreement.<sup>76</sup> As subsequently amended in 2006, the contract required that all disputes between the Concepcions, as consumers, and AT&T be brought in small claims court or be resolved in arbitration.<sup>77</sup> It also mandated that a consumer bring any claim in his or her “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”<sup>78</sup> At the same time, the contract change contained some provisions quite favorable to customers.<sup>79</sup>

The Concepcions filed suit in the U.S. District Court for the Southern District of California; their claim was consolidated with a putative class action alleging fraud and false advertising by AT&T<sup>80</sup> AT&T moved to compel arbitration, which the district court denied after applying the *Discover Bank* rule.<sup>81</sup> The court reasoned that,

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73. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

74. *Id.* at 1746–53.

75. *Id.* at 1744.

76. *Id.*

77. *Id.*

78. *Id.* The contract also allowed unilateral amendments by AT&T, which did subsequently amend the contract, including adding the arbitration process at issue in this case. *Id.*

79. *See id.* These included a simple process for initiating claims, an ability of the consumer to invoke arbitration if AT&T did not settle within thirty days, AT&T bearing the cost of arbitration for any nonfrivolous claims, a convenient forum for the customer, and broad arbitrator discretion in terms of a remedy. *Id.* Most notably, if the arbitration award exceeded the last written AT&T settlement offer, the company was required to pay at least a \$7,500 recovery as well as twice the amount of the attorney’s fees the customer incurred. *Id.*; see SIMPSON THACHER & BARTLETT LLP, *supra* note 19, at 1 (dubbing these provisions of AT&T’s contract with the Concepcions “pro-consumer”).

80. *Concepcion*, 131 S. Ct. at 1744.

81. *Id.* at 1744–45.

although the arbitration agreement had many favorable aspects and even contained monetary incentives for the consumer to use arbitration, “AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.”<sup>82</sup> The Ninth Circuit affirmed, also applying the *Discover Bank* rule and finding the arbitration agreement unconscionable under California law.<sup>83</sup> The appellate court further “held that the *Discover Bank* rule was not preempted by the FAA because that rule was simply ‘a refinement of the unconscionability analysis applicable to all contracts generally in California.’”<sup>84</sup>

### B. *The Decision*

To say that the Justices’ opinions in the *Concepcion* decision were divided is an understatement; the concurrence was given reluctantly and was based on entirely different reasoning than that on which the Court’s majority opinion was based,<sup>85</sup> and the four dissenting judges delivered a strong minority opinion by speaking in a single, unified voice.<sup>86</sup> The three opinions reflect disparate views on three fundamental issues: (1) the purpose and objectives of the FAA; (2) the availability and application of the unconscionability defense; and (3) the importance of class arbitration in consumer redress.

#### 1. The Majority Opinion

The Supreme Court framed the issue before it as whether the *Discover Bank* rule categorized “most collective-arbitration waivers in consumer contracts as unconscionable”<sup>87</sup> and therefore unenforceable,<sup>88</sup> in violation of the FAA requirement that arbitration

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82. *Id.* at 1745 (citing *Laster v. T-Mobile USA, Inc.*, No. 05CV1167, 2008 WL 5216255, at \*14 (S.D. Cal. Aug. 11, 2008), *aff’d sub nom.* *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

83. *Id.* (quoting *Laster*, 584 F.3d at 855).

84. *Id.* (citing *Laster*, 584 F.3d at 857).

85. *Id.* at 1753–56 (Thomas, J., concurring).

86. *Id.* at 1756–62 (Breyer, J., dissenting).

87. *Id.* at 1746 (majority opinion).

88. *Id.*

agreements be enforced.<sup>89</sup> The Court then set the stage for its ultimate conclusion that the FAA preempted California law in this regard, trumpeting the themes of the sanctity of arbitration when it is contractually agreed on and the benefits it offers.

The Court took great pains to educate its audience on the background of the FAA and the Court's role in counteracting "judicial hostility to arbitration agreements."<sup>90</sup> The FAA's central feature, section 2, provides for the validity, irrevocability, and enforceability of contractually agreed-upon arbitration, "save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>91</sup> However, the Court underscored the statute's "fundamental principle that arbitration is a matter of contract"<sup>92</sup> and declared that it "was designed to promote arbitration."<sup>93</sup> This, combined with a "liberal federal policy favoring arbitration,"<sup>94</sup> required courts to "enforce [the arbitration agreements] according to their terms."<sup>95</sup> The resulting position of the Court was that if class arbitration conflicts with the goals of arbitration, it is therefore inconsistent with the FAA.<sup>96</sup>

In the face of the declared sanctity of arbitration goals and agreements, the question then was whether the *Discover Bank* rule and criteria for preserving class arbitration, when the arbitration agreement expressly prohibited it, fell within the FAA exemption from enforceability on legal or equitable grounds.<sup>97</sup> The Court noted that under the *Discover Bank* rule, procedural and substantive "elements" are essential to an unconscionability finding.<sup>98</sup> The procedural aspect focuses on oppression resulting from unequal bargaining power, while the substantive element examines "overly

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89. *Id.* at 1744. The Court introduced the central question as whether section 2 of the FAA "prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.*

90. *Id.* at 1745.

91. *Id.* (citing 9 U.S.C. § 2 (2006)).

92. *Id.* (citing *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)).

93. *Id.* at 1749.

94. *Id.* at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

95. *Id.* at 1745–46 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

96. *See id.* at 1746.

97. *See id.*

98. *Id.*

harsh,” surprising, or “one-sided” results.<sup>99</sup> In this vein the *Discover Bank* court described circumstances where a class action arbitration waiver would be unconscionable: when there is an adhesion contract, when the amount in controversy is small, and when “the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”<sup>100</sup>

Rather than focusing on whether the contract in question met the *Discover Bank* parameters of unconscionability or whether the criteria themselves constituted “grounds as exist at law or in equity for the revocation of any contract”<sup>101</sup> under the FAA exemption, the Court reverted to assessing the *Discover Bank* rule based on the outcome or disparate impact of the rule’s application. If after applying the *Discover Bank* rule courts find most collective arbitration waivers in consumer contracts unconscionable<sup>102</sup> and therefore unenforceable,<sup>103</sup> then the test must be targeting arbitration agreements. This characterization facilitated the Court’s use of a monocular lens—“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”<sup>104</sup>

Although the Court had already answered the issue to its satisfaction, it went on to note that the issue became “more complex” when a generally applicable doctrine, such as unconscionability, was applied in a “fashion that disfavors arbitration.”<sup>105</sup> The Court then resurrected a footnote from *Perry v. Thomas*<sup>106</sup> for the proposition that “a court may not ‘rely upon the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.’”<sup>107</sup>

As the Court had already described the *Discover Bank* rule as prohibiting “most collective-arbitration waivers in consumer

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99. *Id.* (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000); *accord Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005)).

100. *Id.* (citing *Discover Bank*, 113 P.3d at 1110).

101. *Id.* at 1745 (citing 9 U.S.C. § 2 (2006)).

102. *Id.* at 1746.

103. *Id.*

104. *Id.* at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

105. *Id.*

106. 482 U.S. 483 (1987).

107. *Concepcion*, 131 S. Ct. at 1747 (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

contracts as unconscionable,”<sup>108</sup> the next step in the Court’s analysis was an easy connection. When “[r]equiring the availability of classwide arbitration”<sup>109</sup> eviscerates FAA objectives,<sup>110</sup> the “conflicting rule is displaced by the FAA,”<sup>111</sup> as states may not adopt their own, differing analysis.<sup>112</sup> The Court then concluded that the *Discover Bank* rule was preempted because it “[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting the FAA,<sup>113</sup> which the Court had defined as promoting the goals of arbitration.<sup>114</sup>

## 2. Justice Thomas’s Concurrence

Justice Thomas reluctantly concurred in the judgment, but his reasoning was entirely different from that of the majority. Rather than finding, as did the majority, that the *Discover Bank* rule was a targeted attack on arbitration, Justice Thomas placed a narrow limit on the availability of FAA section 2 contract defenses. In his view, only successful challenges to the formation of an arbitration agreement should fall within the FAA exemption, a prerequisite that the *Discover Bank* rule did not impose.<sup>115</sup> Justice Thomas concluded that the language of section 2 suggests that the FAA exemption covers only defenses capable of *revoking* a contract, not defenses related to invalidity or unenforceability.<sup>116</sup> Although prior jurisprudence tended to use the concepts of invalidity, revocation, and unenforceability interchangeably, that was incorrect, according to Justice Thomas.

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108. *Id.* at 1746.

109. *Id.* at 1748.

110. *Id.*

111. *Id.* at 1747 (citing *Preston v. Ferrer*, 552 U. S. 346, 353 (2008)).

112. *Id.* at 1747–48.

113. *Id.* at 1753 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

114. *Id.* at 1749.

115. *Id.* at 1753 (Thomas, J., concurring). Justice Thomas cited that fraud or duress were such examples. *Id.* The Concepcions alleged fraud in the class action. Justice Thomas acknowledged that this was not an issue “fully developed by any party . . . and could benefit from briefing and argument in an appropriate case.” *Id.* at 1754.

116. *Id.* at 1753–54 (applying the statutory interpretation rules articulated in *Duncan v. Walker*, 533 U.S. 167, 174 (2001), and *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), to the language of section 2 where the enforcement phase refers to validity, revocation, and enforceability while the exemption references only revocation).

Under Justice Thomas's interpretation, a court must order arbitration if there is no issue with respect to the making or formatting of the agreement for arbitration and "defenses unrelated to the making of the agreement—such as public policy—could not be the basis of declining to enforce an arbitration clause."<sup>117</sup> Justice Thomas recognized only fraud, undue influence, mutual mistake, duress, and delusion as likely available defenses.<sup>118</sup> Noticeably missing is unconscionability, which is probably because of its substantive unconscionability component. Procedural unconscionability deals with the formation of a contract; substantive unconscionability focuses instead on the fairness of the provisions.<sup>119</sup> The *Discover Bank* rule, Justice Thomas noted, did not relate exclusively to formation of an agreement<sup>120</sup> but rather to exculpatory contractual terms contrary to public policy. Under the Thomas interpretation of section 2, these were not grounds for revoking the contract.<sup>121</sup>

### 3. Justice Breyer's Dissent

Justice Breyer challenged the majority and concurring opinions in their entirety. First, Justice Breyer and his fellow dissenters viewed the *Discover Bank* rule not as an obstacle to section 2 of the FAA but as a means to further its purposes.<sup>122</sup> The rule not only applied equally to class arbitration and class litigation alike<sup>123</sup>—thereby not disfavoring or targeting arbitration agreements as a dispute resolution mechanism<sup>124</sup>—but also was in keeping with the basic purpose of the FAA "to make *valid and enforceable* agreements for arbitration."<sup>125</sup>

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117. *Id.* at 1755.

118. *Id.* at 1754–56.

119. *See id.* at 1746 (majority opinion).

120. *Id.* at 1753 (Thomas, J., concurring).

121. However, the California law upon which the *Discover Bank* rule is founded does embrace contract formation as a requirement; there is nothing in the *Discover Bank* opinion to suggest that the court intended to eliminate it. CAL. CIV. CODE § 1670.5(a) (West 2011).

122. *Concepcion*, 131 S. Ct. at 1759–60 (Breyer, J. dissenting).

123. *Id.* at 1757.

124. *Id.* at 1759–60 (noting that the "*Discover Bank* rule imposes equivalent limitations on litigation" and therefore cannot violate the rule against targeting arbitration per se).

125. *Id.* at 1757 (quoting *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 274 n.2 (1932)).

Next, Justices Breyer, Sotomayor, Kagan, and Ginsburg found, without support, that the majority's contention that class arbitration was inconsistent with arbitration was a tool.<sup>126</sup> They challenged any suggestion that class arbitration was without merit<sup>127</sup> and highlighted its advantages, especially for small claims that offer little economic incentive to pursue individually.<sup>128</sup> The dissent found the majority's comparison of class arbitration to individual arbitration inapplicable and suggested the appropriate comparison was to judicial class proceedings.<sup>129</sup> Finally, the dissenting Justices found no precedent for the majority's striking down of a "state statute that treats arbitrations on par with judicial and administrative proceedings,"<sup>130</sup> especially in a way that interfered with the role of states with respect to arbitration agreements and contractual defenses that Congress preserved in the FAA.<sup>131</sup>

At the heart of these differences with the majority was the dissent's more neutral view of the FAA's purpose.<sup>132</sup> The dissenting Justices defined the purpose of the FAA as to enforce arbitration agreements just like other contracts, not to promote the expeditious resolution of claims through arbitration or to prefer arbitration agreements over other forms of contracts.<sup>133</sup> The dissenting Justices would have preserved the application of the traditional unconscionability rule, understanding that only some class arbitration waivers will fall below the standard set by the *Discover Bank* rule.<sup>134</sup>

### C. Analysis

The majority in *Concepcion* dropped its call in several key respects. First, the Court side-stepped the essence of the *Discover Bank* rule and applied its own myopic interpretation in order to achieve its desired result: enforcing the class arbitration waiver. In so doing, the Court failed to address adequately whether, through the FAA, Congress intended to allow such defenses as fraud and

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126. *Id.* at 1758.

127. *Id.* at 1758–62.

128. *Id.* at 1761.

129. *Id.* at 1759.

130. *Id.* at 1761.

131. *Id.* at 1761–62.

132. *See id.* at 1756.

133. *Id.* at 1757–58.

134. *Id.* at 1757.

unconscionability to block enforcement of an arbitration agreement. Further, the Court did not acknowledge a state's power to define unconscionability. Finally, it inadequately framed the purpose of the FAA as "promoting arbitration" and embarked on a dissertation on the benefits of arbitration, with at least two critical repercussions. Therefore, it failed to acknowledge the extent to which class arbitration is consistent with the terms and spirit of the FAA. And despite professing to be merely "plac[ing] arbitration agreements on an equal footing with other contracts,"<sup>135</sup> the Court actually tipped the scales in favor of enforcing arbitration contracts over all others. As a result, *Concepcion* undercuts the purposes of the FAA and effectively eliminates class arbitration as a means to collectively resolve consumer disputes. In so doing, it not only creates a deafening static that blocks out consumer and likely other concerns, but it also invites a congressional response.

#### 1. The Letter and Spirit of the FAA and the *Discover Bank* Rule

Congress enacted the FAA to counter judicial hostility to arbitration agreements<sup>136</sup> and to ensure that private agreements to arbitrate "are enforced according to their terms."<sup>137</sup> While in keeping with these purposes, the Court, in holding that the FAA preempted California law, made sweeping presumptions in two primary respects. First, it characterized the *Discover Bank* rule as an impermissible blanket prohibition of most class arbitration waivers. In the same breath, the Court dismissed unconscionability, as reflected in *Discover Bank* and other similar state jurisprudence, as a ground the FAA recognized as rendering an arbitration agreement unenforceable. Second, the Court read into the adhesion contract at issue traditional principles of contract formation, such as negotiation, and used these as a basis for its reasoning. As applied to consumer adhesion agreements and unconscionability, the Court's approach undermines the letter and spirit of the FAA and disregards well-established contract principles surrounding agreements and fairness.

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135. *Id.* at 1745 (majority opinion) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

136. *Id.* For a discussion of the purposes and processes under the FAA, see McGill & Tracey, *supra* note 22, at 13–16.

137. *Concepcion*, 131 S. Ct. at 1748.

*a. Class arbitration and  
the Discover Bank rule*

To the extent that state laws target and discriminate against arbitration, they are inconsistent with the FAA and are overridden by it.<sup>138</sup> On the other hand, to the extent that a state law does not block the enforceability of an arbitration agreement, the FAA does not preempt it “even if the law encumbers arbitration in other ways.”<sup>139</sup> Unfortunately, the Court adopted the view that the *Discover Bank* rule<sup>140</sup> condemned “most collective arbitration waivers in consumer contracts as unconscionable”<sup>141</sup> seemingly without examining whether the *Discover Bank* rule actually invalidated most consumer contracts. While application of the *Discover Bank* principles might indeed invalidate a class arbitration waiver, this result was far from a given. In reality, the rule was far from a sweeping ban targeting class arbitration.

The *Concepcion* majority seemed determined to ignore that the *Discover Bank* rule applied to more than just arbitration agreements and only within certain parameters and circumstances. At the same time, it dogmatically refused to assess the circumstances of the case before it. To pass *Discover Bank* muster, a contract must be both procedurally and substantively unconscionable. In the former category, because of the superior bargaining position of one party and the opportunity of the other party to either adhere to or reject a contract, such contracts “of adhesion” are procedurally unconscionable.<sup>142</sup> With respect to substantive unconscionability, the California Supreme Court explained that there is an oppressive or

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138. *See id.* at 1758 (Breyer, J., dissenting).

139. Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1243 (2011) (describing examples of laws that encumber arbitration, including procedural and ethical rules regarding arbitration and appeal provisions).

140. *Concepcion*, 131 S. Ct. at 1746.

141. *Id.* at 1746.

142. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005). As the *Discover Bank* court observed, adhesion contracts typically are one sided, providing benefits or protections to the stronger party and not to the consumer. *See id.* at 1108–09. However, that court’s decision did not invalidate all adhesion contracts, including those with waivers of class arbitration. *Id.* at 1109. As a result, those fall “within the FAA’s exception” permitting nonenforcement of arbitration agreements on grounds that would apply to any contract. Donald J. Friedman et al., *United States: Supreme Court Holds That Consumer Arbitration Agreements Can Bar Class Action Relief*, MONDAQ.COM (May 5, 2011), <http://www.mondaq.com/unitedstates/article.asp?articleid=131316&print=1>.

“surprise” element.<sup>143</sup> Such unfairness could render a “consumer contract[] of adhesion . . . unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration.”<sup>144</sup> The rule applied uniformly to arbitration, judicial, and administrative proceedings,<sup>145</sup> and “equally to class action litigation waivers in contracts without arbitration agreements and to class arbitration waivers in contracts with such agreements.”<sup>146</sup> As the rule did not target arbitration contracts, it fell directly within the FAA’s enforcement exceptions.<sup>147</sup>

Without analysis, the U.S. Supreme Court declared the *Discover Bank* principles so sweeping as to invalidate the class action waiver in the case before it and indeed in all such waivers, perhaps indicating of a rush to judgment. As such, the Court’s decision in *Concepcion* was a missed opportunity for it to address unconscionability in the context of the FAA. Before the Court issued its decision in *Concepcion*, contracts in California that effectively insulated parties from liability while not per se unconscionable, could be deemed unconscionable.<sup>148</sup> The Court’s elimination of such unconscionability defenses in California and elsewhere, at least where a contract contains an arbitration clause, is especially troublesome where the party with the superior bargaining power has “carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”<sup>149</sup>

Moreover, had the Court examined the AT&T contract at issue, it would have found significant support for an argument that the contract was not unconscionable. Indeed, the clause at issue had a good chance to pass such scrutiny. While it was an adhesion contract, the arbitration clause offered significant incentives for the

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143. *Discover Bank*, 113 P.3d at 1108.

144. *Id.* at 1103; *see Concepcion*, 131 S. Ct. at 1756 (Breyer, J., dissenting).

145. *See Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting); *Discover Bank*, 113 P.3d at 1112.

146. *Discover Bank*, 113 P.3d at 1112; *see* Friedman et al., *supra* note 142.

147. *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting).

148. *Discover Bank*, 113 P.3d at 1108. The *Discover Bank* court held that such may be the case under California law where the agreement at issue is an exculpatory contract; that is, the object of the contract clause is to directly or indirectly “exempt anyone from responsibility for his own fraud, or willful injury . . . or other violation of [the] law” against public policy. *Id.* (citing CAL. CIV. CODE § 1668 (West 2011)).

149. *Id.* at 1110.

consumer to pursue individual arbitration and substantial penalties against the company.<sup>150</sup>

Further, an approach directed at examining more broadly whether contract defenses provided by state law met the exemption of the FAA for “grounds as exist at law or equity” would have offered meaningful guidance to courts, businesses, and practitioners. At the same time, it may have raised numerous questions about state law, even opening “a floodgate of future litigation” with respect to individual class arbitration waivers and whether they were unconscionable.<sup>151</sup> If nothing else, the *Concepcion* decision was clear: class action waivers in consumer contracts are enforceable.

*b. Adhesion arbitration waivers and the  
FAA’s negotiated agreement presumption*

Including a class action waiver in a modern-day adhesion contract raises an unconscionability “red flag” that Congress hardly could have anticipated when it adopted the FAA. From that 1925 time frame and until computer use became common, as many may remember, the physical act of drafting and revising legal documents was no easy task. Now, in the twenty-first century, using carbon paper or Wite-Out would be ludicrous. In the past, disseminating contract amendments would have been by wheel, rail, or human delivery. Posting not only the contract itself but also changes and amendments through the Internet, may mean a party has never seen the provisions at issue. Nevertheless, the *Concepcion* Court turned a blind eye to the realities of today’s mass adhesion contracts and their lack of the attributes typically enjoyed in individually negotiated agreements.

Consumer arbitration agreements lack the fundamental foundation of contractual arbitration that Congress likely anticipated: equal bargaining power<sup>152</sup> and parties engaged in, and designing,

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150. Terms of the clause included the waiver of AT&T attorney fees, the obligation of AT&T to pay for all costs of nonfrivolous claims, and a penalty of \$7,500 plus double consumer attorney’s fees if the consumer is awarded an amount higher than AT&T’s last settlement offer. *Concepcion*, 131 S. Ct. at 1744, 1753.

151. Jean R. Sternlight, *Cert Granted in AT&T Mobility v. Concepcion*, TODAY’S WORKPLACE (May 26, 2010), <http://www.todaysworkplace.org/2010/05/26/cert-granted-in-att-mobility-v-concepcion>.

152. As Justice Breyer wrote in the dissent, Congress very well may have meant to enforce arbitration among merchants with factual, not legal, disputes, “under the customs of their

their own dispute resolution process. However, while professing loyalty to the basic tenets of arbitration and its contractual roots, the majority opinion in *Concepcion* refused to acknowledge that the dynamics of consumer and business arbitration agreements differ markedly in key respects. A consumer adhesion contract, unlike a unique or business-to-business contract, involves no negotiating between the parties. Rather, it is presented to the consumer on a “take it or leave it” basis. The practice is so common that there is no real alternative for consumers in the marketplace. While certainly parties are responsible for contracts that they enter into, the lack of meaningful negotiation or choice shifts the dynamics considerably: if you want a cellular phone, you must waive arbitration.<sup>153</sup>

Typically, consumers are unaware of any arbitration clause or, at best, are naïve about its implications. Consumers certainly are not conversant in negotiating arbitration processes. While the Court played up the advantages of negotiating,<sup>154</sup> it is far-fetched to suggest that the *Concepcions* or other consumers of electronic equipment or other mass-produced, non-custom goods play a role in designing arbitration procedures.<sup>155</sup> Bargaining and negotiating in such consumer agreements are relics of the past, and consumers have no opportunity to negotiate the terms of a contract. In this context, the Court, professing to honor the intentions of the parties, was incongruous. Consequently, though arbitration policy articulated in the FAA favors honoring parties’ expectations, in *Concepcion* the Supreme Court honored only AT&T’s expectations.<sup>156</sup> Until courts and Congress come to terms with the fallacy of consumer consent, arbitration policy, as framed by the *Concepcion* majority, will remain out of step with the modern marketplace.

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industries, where the parties possessed roughly equivalent bargaining power.” *Concepcion*, 131 S. Ct. at 1759 (Breyer, J., dissenting).

153. See Aragaki, *supra* note 139, at 1261–62 & n.154.

154. *Concepcion*, 131 S. Ct. at 1751–52. For example, the Court noted that parties can design “efficient, streamlined procedures tailored to the type of dispute,” even specifying designating a specialist arbitrator and requiring protection of trade secrets. *Id.* at 1749.

155. This is especially true where, as here, the contract was amended to revise arbitration provisions, albeit favorable ones, after the parties initially agreed to the contract. *Id.* at 1744.

156. This is underscored by the Court’s incongruous denunciation of California law allowing consumers to demand arbitration after the fact, *id.* at 1748, 1750; here, the arbitration procedures were added to the contract more than three years after the parties entered into it, a move that was likely designed to meet the criteria articulated the previous year in *Discover Bank*. *Id.* at 1744.

## 2. Class Arbitration: Viable, Meaningful, and in Keeping with FAA Purposes

The evaluation of the drawbacks of class-wide arbitration in *Concepcion*<sup>157</sup> was not unlike comparing landlines to cell phones only in terms of mobility. In its analysis, the Court compared individual arbitration to class arbitration rather than weigh the utility of class arbitration head on. It addressed speed to disposition on the merits (and not other means of resolution such as settlement, withdrawal, or dismissal). It observed that bilateral (individual claim) arbitration is faster than arbitrating a class claim, citing the need to certify the class and how discovery is conducted,<sup>158</sup> without examining issues with multiple individual claims. Its conclusion that individual, and not collective, arbitration is fundamental to the concept of arbitration<sup>159</sup> is disappointing. The dissent's comparison of class arbitration to class litigation, and not to individual bilateral arbitration, is more instructive.<sup>160</sup>

Class arbitration, if agreed to by the parties,<sup>161</sup> is in keeping with the letter and the spirit of the FAA,<sup>162</sup> as well as “the use of arbitration.”<sup>163</sup> While resolving an individual claim is certainly less time consuming and complex than completing a class claim is, the cumulative effort of resolving numerous, similarly situated individual claims can be enormous and reflect a comparable expenditure of time and money. Individual arbitrations also evoke the specter of different outcomes for essentially identical claims and have their own defects, especially when dealing with similarly situated claims.<sup>164</sup>

Chief among arbitration's benefits are party-designed “efficient, streamlined procedures tailored to the type of dispute.”<sup>165</sup> While the majority opinion deemed these advantages lost with class arbitration, in so doing, the majority implicitly rejected its own observation that

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157. *Id.* at 1750–53.

158. *Id.* at 1751.

159. *Id.* at 1759 (Breyer, J., dissenting).

160. *Id.* at 1751 n.7 (majority opinion).

161. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775–76 (2010).

162. *See Moritz & Fitch*, *supra* note 55, at 271.

163. *Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting).

164. These drawbacks include inaccessibility by other claimants or the public to the claims and outcome, discovery issues, and correctness and review issues. *See McGill & Tracey*, *supra* note 22.

165. *Concepcion*, 131 S. Ct. at 1749.

the arbitration agreement itself could simplify procedures.<sup>166</sup> After all, the American Arbitration Association deems “class arbitration to be ‘a fair, balanced and efficient means of resolving class disputes.’”<sup>167</sup>

Certainly, class arbitration is not without its drawbacks for businesses and consumers. For both, it is likely more time consuming and complex than resolving an individual claim is.<sup>168</sup> For businesses, it is much more expensive and perilous. Class arbitration “greatly increases risks,” and the prospect of a massive judgment is more than daunting for organizations.<sup>169</sup> For consumers, it presents a potential of attorney/client disparate interests with respect to settlement.<sup>170</sup> However, the Court disingenuously distilled its assessment of class arbitration in *Concepcion* by comparing its characteristics to those of individual arbitration.

The dissent rounded out the portrayal of class arbitration. In its view, a class approach is consistent with arbitration’s fundamental attributes and offers speed, efficiency, and cost advantages over judicial class actions.<sup>171</sup>

Certainly more structure is needed in class arbitration than in individually-brought arbitration.<sup>172</sup> However, especially for consumer claims arising from adhesion contracts, a class approach can provide access to justice that may otherwise be foreclosed.<sup>173</sup> A class approach also can help correct a power imbalance between business and consumers.<sup>174</sup> Only the dissenting opinion, grasps the import of preserving the right to collective consumer redress in the modern reality of consumer contracts of adhesion.

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166. *Id.*

167. *Id.* at 1758 (Breyer, J., dissenting) (quoting Brief for AAA as Amicus Curiae in Support of Neither Party, *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2896309, at \*25).

168. *Id.* at 1750–51 (majority opinion) (referring to class issues such as certification, discovery, and notice); see Moritz & Fitch, *supra* note 55, at 266–67.

169. *Id.* at 1752.

170. Moritz & Fitch, *supra* note 55, at 267.

171. See *Concepcion*, 131 S. Ct. at 1759–61 (Breyer, J., dissenting).

172. *Id.* at 1751 (majority opinion) (explaining that fairly formal procedures are necessary in order to notify and bind absent class members, and to provide an opportunity for class members to be heard).

173. See *id.* at 1760–61 (Breyer, J., dissenting).

174. See *id.* at 1759.

### 3. The *Concepcion* Decision's Impact on Business, Consumers, and Dispute Resolution

*Concepcion*'s eradication of the *Discover Bank* rule was only the tip of the iceberg. Early predictions that *Concepcion* would be a watershed event for contracts, arbitration, consumer protection,<sup>175</sup> and even employment arbitration<sup>176</sup> were realized. "This is a game-changer for businesses. It's one of the most important and favorable cases for businesses in a very long time."<sup>177</sup> The decision will revitalize business interest in arbitration agreements and perhaps even unconscionable practices. It will also make it less likely that consumers will pursue small, yet valid, claims.

#### *a. Business approach to arbitration agreements in consumer contracts*

Including waivers of class arbitration in consumer contracts is a widespread practice. One 2004 article reported that of fifty-two arbitration clauses in consumer contracts reviewed, 30.8 percent contained waivers of class actions.<sup>178</sup> The Searle Civil Justice Institute, in a different study, found that 36.5 percent of arbitration clauses examined included a class action waiver.<sup>179</sup> This percentage will only increase. Even "companies that calculated the pros and cons of arbitration and rejected arbitration may want to reevaluate their calculus and choose to require arbitration in their consumer

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175. See, e.g., Adam Liptak, *Supreme Court Weighs Class-Action Suits*, N.Y. TIMES, Nov. 10, 2010, at B3. Precluding class action would "gut the state's substantive consumer protection law." *Id.* (quoting *Concepcion* counsel Deepak Gupta in oral argument). On the other hand, allowing class claims would "sound a different sort of death knell . . . for the arbitration provisions that were common in many standard-form contracts." *Id.* (paraphrasing AT&T counsel Andrew J. Pincus).

176. Sternlight, *supra* note 151. Sternlight predicted that a favorable ruling for AT&T particularly could affect wage and hour claims, typically accumulated in class actions. *Id.*; see Friedman et al., *supra* note 142 ("Although this was a consumer case, it could significantly impact the development and enforcement of pre-dispute arbitration programs in the employment context.").

177. Liptak, *supra* note 12 (quoting Vanderbilt law professor Brian T. Fitzpatrick).

178. Aragaki, *supra* note 139, at 1261 (citing Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 65).

179. *Id.* at 1261-62 (citing SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 103 (2009), available at <http://www.adr.org/si.asp?id=6610>). Aragaki reports that this study found that while the use of class arbitration waivers varied with the industry, they appeared in 100 percent of the cellular telephone contracts surveyed. *Id.* at 1261 n.154.

agreements.”<sup>180</sup> While class arbitrations may persist post-*Concepcion*,<sup>181</sup> businesses may be able to avoid class action by making simple changes in consumer contracts.<sup>182</sup> The exception to this new possibility may be financial services companies, which “should consider the impact of possible rulemaking” by the Consumer Financial Protection Bureau pursuant to the Dodd-Frank Wall Street Reform and Protection Act on their standard consumer contracts.<sup>183</sup>

*b. Consumers and dispute resolution*

While counsel for AT&T heralded its win as “a victory for consumers,”<sup>184</sup> that assessment should be confined to agreements that contain earmarks of fairness. Unfortunately, the pro-consumer provisions that were added to the AT&T-*Concepcion* contract are “highly unusual.”<sup>185</sup> The availability of the unconscionability defense provided strong motivation for business to draft agreements fairly in the pre-*Concepcion* environment; that motivation does not exist in the post-*Concepcion* era. Consumers can look forward to unequal cost burdens, limited discovery, short limitation periods, and one-sided application of the clause. The inability to aggregate claims in

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180. Friedman et al., *supra* note 142.

181. With respect to labor-related arbitrations, the NLRB recently ruled that it is a “violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court.” *Board Finds That Certain Mandatory Arbitration Agreements Violate Federal Labor Law*, NLRB (Jan. 6, 2012), <http://www.nlr.gov/news/board-finds-certain-mandatory-arbitration-agreements-violate-federal-labor-law>; *see also* Steven Greenhouse, *Labor Board Supports Class Action for Workers*, N.Y. TIMES, Jan. 7, 2012, at B1 (describing the NLRB’s ruling that employers’ arbitration agreements cannot ban workers from pursuing collective or class action). With respect to whether class arbitrations persist generally, “[i]t remains to be seen whether, in practice, the Supreme Court’s holdings in *Stolt-Nielsen* and *Concepcion* sound a death-knell for class action arbitration in the United States.” SIMPSON THACHER & BARTLETT LLP, *supra* note 19, at 3–4.

182. *See* Liptak, *supra* note 12 (quoting Vanderbilt law professor Brian T. Fitzpatrick); *see also* Sternlight, *supra* note 151 (anticipating that “[a] broad decision in favor of AT&T Mobility could potentially allow companies in a variety of contexts to insulate themselves from class action exposure by including class action waivers in their arbitration clauses.”).

183. *The Impact of AT&T Mobility v. Concepcion on Financial Services Companies: Inclusion of Arbitration Clauses in Customer Contracts and the Impact of Dodd-Frank*, SUTHERLAND ASBILL & BRENNAN LLP (May 24, 2011), <http://www.sutherland.com/files/News/0adf7d33-90b9-449b-a0d5-d95d5f228713/Presentation/NewsAttachment/7e906c35-c8c6-44ef-8ac1-5d95b50221d6/TheImpactofATTMobilityvConcepcionMay2011.pdf>.

184. Liptak, *supra* note 12.

185. Sternlight, *supra* note 151.

arbitration will be just one of the hurdles for consumers to clear in order for arbitration to be a viable avenue of dispute resolution.

i. Efficacy of individual versus  
collective consumer dispute resolution

It is unlikely that companies with arbitration contracts will hear complaints of consumers with the same clarity as they did before *Concepcion*. After all, such waivers of class action in a consumer contract, whether through litigation or arbitration, eliminate a meaningful vehicle for consumers to seek redress for like grievances collectively. The *Discover Bank* court evoked the U.S. Supreme Court's decision in *Amchem Products, Inc. v. Windsor* in this regard:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.<sup>186</sup>

On the other hand, the aggregation of even small claims, when multiplied by as many as tens to hundreds of thousands of plaintiffs or more, can have a powerful impact on business. This, too, was a theme in the Court's consideration of class power in its October 2010 term. For instance, in *Wal-Mart Stores, Inc. v. Dukes*,<sup>187</sup> the Court blocked class certification of the employment discrimination claims of 1.5 million plaintiffs seeking class certification.<sup>188</sup> Had the Court

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186. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1105–06 (Cal. 2005) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)); see *Leitner & Goode, supra* note 55, at 166–67 (“Congress found in its 2005 enactment of the Class Action Fairness Act (CAFA) that class actions ‘are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties.’”). In this vein, the court in *Discover Bank* also noted:

The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness. . . . This is not only substantively unconscionable, it violates public policy by granting Discover a “get out of jail free” card while compromising important consumer rights.

*Discover Bank*, 113 P.3d. at 1108 (alteration in original) (citing *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002)). Ironically, the class action waiver in *Concepcion* may very well have been valid under *Discover Bank* principles, but was not addressed by the Court.

187. 131 S. Ct. 2541 (2011).

188. *Id.* at 2547, 2561.

affirmed class certification, the potential collective impact of their claims would have enhanced the plaintiffs' bargaining position astronomically. In *Concepcion*, in assessing the risks of class actions for defendants, the Court referred to "in terrorem" settlements "[b]ut when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."<sup>189</sup> This is especially troublesome when the claims lack substance or merit.

While undoubtedly class actions have a dark side, or at least negative side-effects that businesses want to avoid, they provide an avenue for consumers to pursue claims they otherwise would not file. There is little incentive for consumers to file a claim when the amount in controversy is small; only if claims are aggregated is there any meaningful remedy and deterrent. This is a "huge deal in the world of consumer litigations, as many consumer challenges are only brought through class actions."<sup>190</sup> Arguably, the AT&T arbitration process was "free, fair, fast, easy to use and consumer friendly," as its counsel described it.<sup>191</sup> However, even when this is the case, the inherent drawback of pursuing small claims individually creates a disincentive to proceed. Consumers will be even more discouraged from proceeding with arbitration if businesses view the *Concepcion* decision as an opportunity to revise contract arbitration processes to provide fewer safeguards for customers.

#### ii. Arbitration and unconscionable practices

In addition to discouraging the pursuit of legitimate claims, curtailing the availability of the class action arbitration vehicle effectively insulates companies that perpetrate poor practices or even downright fraudulent schemes. As the *Discover Bank* court noted:

The potential for millions of customers to be overcharged small amounts without an effective method of redress

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189. AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011).

190. Sternlight, *supra* note 151 (discussing this fact under an assumption that the Court would render "a broad decision in favor of AT&T," as turned out to be the case). Sternlight further noted that "[s]uch a ruling could also affect employment cases, particularly wage and hour claims, which are typically presented in class actions." *Id.*

191. Liptak, *supra* note 12.

cannot be ignored. Therefore, the provision violates fundamental notions of fairness. . . . This is not only substantively unconscionable, it violates public policy by granting Discover a “get out of jail free” card while compromising important consumer rights.<sup>192</sup>

Unethical practices with respect to consumers and arbitration agreements may increase post-*Concepcion*. Before the decision was issued, one study showed that 68.5 percent of all unconscionability cases over two years involved arbitration agreements, many times more than reported two decades ago.<sup>193</sup> During the same period, of the arbitration agreements courts examined, 50.3 percent were deemed unconscionable.<sup>194</sup> The result of *Concepcion* may be to “gut the state’s substantive consumer protection law because people will, in the context of small frauds, not be able to bring those cases,”<sup>195</sup> a concern echoed by Justice Breyer in the dissenting opinion.<sup>196</sup> With state laws policing unconscionability preempted by the FAA, there is good reason to believe that *Concepcion* will open the door to even more problems for consumers.

#### IV. A CALL FOR ACTION

The *Concepcion* Court emphasized the FAA’s provisions requiring enforcement of arbitration agreements including waiver agreements, as they are written. This certainly was consistent with the FAA’s purpose to countermand a perceived judicial hostility to arbitration.<sup>197</sup> However, it was never intended to promote arbitration over other dispute resolution mechanisms. To this end, from its inception, the FAA policy protecting contractually agreed-on arbitration was not without qualification; it explicitly preserves defenses capable of invalidating a contract in whole or in part. The Court glossed over these provisions and remained unimpressed by the respective lack of bargaining power or consent inherent in

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192. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005) (quoting *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002)).

193. *Aragaki*, *supra* note 139, at 1286.

194. *Id.*

195. Transcript of Oral Argument at 51, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893) (quoting *Concepcion* counsel Deepak Gupta in oral argument).

196. *Concepcion*, 131 S. Ct. at 1756 (Breyer, J., dissenting).

197. *Id.* at 1745 (majority opinion).

adhesion contracts. It was similarly unmoved by possible fraud schemes in the formation or application of a contract. The Court's approach should clearly speak to congressional ears: act now. While it is beyond the scope of this Article to prescribe the full text of a consumer arbitration legislative model,<sup>198</sup> a few recommendations must be made.

*A. Contract Defenses  
at Law or Equity*

That Congress preserved in section 2 of the FAA legal and equitable grounds capable of defeating an arbitration clause reflects Congress's original purpose to set boundaries around the enforcement of arbitration agreements.<sup>199</sup> The language of section 2 limiting the enforcement of arbitration agreements ("save upon such grounds as exist at law or in equity for the revocation of any contract") reflects congressional intent to retain an important role for states with respect to arbitration agreements,<sup>200</sup> unless the defenses are those only applying to arbitration or arbitration agreements.<sup>201</sup> Unfortunately, courts have downplayed the importance of this express limitation even while they have proclaimed allegiance to congressional intent. Although existing FAA exemptions should have been sufficient to shelter the criteria for unconscionability addressed by the *Discover Bank* rule, given the *Concepcion* ruling it is now incumbent upon Congress to act again to reinforce FAA consumer protections in a clear and unmistakable way, which at the same time would preserve the state role with respect to contracts.

In addition, Congress needs to clarify whether indeed defenses available at law and equity must only relate to the formation of the contract at issue. Ironically, both the *Discover Bank* rule and Justice Thomas's concurring rationale for meeting the FAA exemption emphasize that defenses asserted must arise from contract formation. While *Discover Bank* does not require fraud in the inducement and considers fraud in the substantive assessment of the impact of the

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198. For comprehensive recommendation of such a model, see McGill, *supra* note 47, at 390–412.

199. *See Concepcion*, 131 S. Ct. at 1754–55 (Thomas, J., concurring).

200. *Id.* at 1756 (Breyer, J., dissenting).

201. *Id.* at 1746 (majority opinion). For a discussion of state law with respect to unconscionable contracts and the FAA, see Moritz & Fitch, *supra* note 55, at 269, 277–78.

particular contract clause, Justice Thomas would only recognize a defense that relates to the formation of the contract. Implicit in his reasoning is the conclusion that Congress never intended to preserve substantive unconscionability as an available defense.<sup>202</sup> No matter how unfair the impact of the clause, only irregularities in its formation will defeat it. The recurrent flaw in this position, or perhaps in the FAA language itself, is that contract formation was markedly different in 1925 when Congress enacted the FAA. Online arbitration clauses drafted solely by one party and added to the contract after its formation could not have been within the contemplation of the drafters, not to mention such changes occurring in cyberspace.

*B. Consumers, Arbitration,  
and Class Action*

Previous legislative attempts<sup>203</sup> to contain mandatory consumer and other arbitration, dubbed as attempts to “shrink the FAA’s preemptive shadow,”<sup>204</sup> have died on the table.<sup>205</sup> But public reaction to the sweeping *Concepcion* decision has been swift, loud, and harsh;<sup>206</sup> as a result, renewed legislative efforts to exempt consumer and employment disputes from the application of the policy in favor of arbitration are well underway.<sup>207</sup> The Arbitration Fairness Act of 2011 (“AFA 2011”) was introduced in Congress on May 12, 2011,

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202. See *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring). This position was not fully argued or developed by the parties. *Id.* at 1754. Defects relating to the formation of a contract eliminate policy considerations surrounding the unfair, harsh, or surprising impact of a clause—important aspects of the *Discover Bank* rule. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005).

203. See Aragaki, *supra* note 139, at 1272 n.214 for a listing of several legislative proposals made in 2009 alone.

204. *Id.* at 1272.

205. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); S. 1782, 110th Cong. (2007).

206. See, e.g., *Gutting Class Action: The Five Conservatives of the Supreme Court Chose Corporations over Everyone Else*, N.Y. TIMES, May 13, 2011, at A26. The opinion piece describes the AFA 2011 as “a welcome effort to protect consumers, employees and others.” *Id.*

207. Senators Al Franken (D-Minn.) and Richard Blumenthal (D-Conn.) and Representative Hank Johnson (D-Ga.) announced the reintroduction of the Arbitration Fairness Act in a press release on May 17, 2011. See *Sens. Franken, Blumenthal, Rep. Hank Johnson Introduce Legislation to Protect Legal Rights of Consumers*, AL FRANKEN U.S. SENATOR FOR MINN. (May 17, 2011), [http://franken.senate.gov/?p=press\\_release&id=1514](http://franken.senate.gov/?p=press_release&id=1514).

and referred to committee.<sup>208</sup> As did its 2009 predecessor,<sup>209</sup> the AFA 2011 proposes the invalidation of pre-dispute consumer arbitration agreements and vests a court with subject-matter jurisdiction over questions of validity and scope.<sup>210</sup> However, the bill remains silent as to the fate of class action or class arbitration waivers and does not apply retroactively.<sup>211</sup> An approach that would permit a case-by-case determination of whether state law was in conflict with the FAA,<sup>212</sup> and one that would also examine substantive unconscionability (as opposed to coercion in the formation of an adhesion contract), should also be considered.<sup>213</sup>

At this juncture, more comprehensive and consumer-specific congressional action is needed. The AFA 2011 goes beyond consumer contracts and also purports to restrict arbitration of employment and civil rights disputes. Although employment and civil rights disputes share many of the same power imbalances that consumers face, combining these broad categories into a one-size-fits-all solution denies the opportunity to focus on the unique issues each presents. The omnibus approach also slows the approval process and increases the chances that support may be fragmented.<sup>214</sup> Specific legislation separately addressing the employment, civil rights,<sup>215</sup> and consumer contexts would be preferable.

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208. H.R. 1873, 112th Cong. (2011); S. 987, 112th Cong. (2011). The 2011 bills do not refer to franchise disputes as the 2009 versions did and now refer to civil rights disputes specifically. Compare S. 987 § 3 (referring to civil rights disputes but not franchise disputes), and H.R. 1873 § 3 (referring to civil rights disputes but not franchise disputes), with H.R. 1020, 111th Cong. § 3 (2009) (referring to franchise disputes), and S. 931, 111th Cong. § 3 (2009) (referring to franchise disputes).

209. H.R. 1020 § 4.

210. H.R. 1873 § 3.

211. H.R. 1873 § 4; S. 987 § 4 (“This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises on or after such date.”).

212. See Aragaki’s discussion of a more refined approach to a preemption analysis, *supra* note 139, at 1280–81.

213. See *id.* (advancing a pre-*Concepcion* discussion of this model).

214. The Arbitration Fairness Act of 2009 pooled consumer, employment, and franchise disputes into one bill. H.R. 1020 § 4. The 2011 incarnation drops franchise disputes and includes civil rights disputes and even some labor statutory rights. H.R. 1873 § 3. Categories that did not proceed through the hearings that were held in the fall of 2009 will undoubtedly slow the hearing process for the new bill. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

215. This is needed as a result of *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), in which the Court found that a collective bargaining agreement waived an individual bargaining unit member’s right to pursue a statutory discrimination claim in court. For a discussion of proposed legislation protecting a collective bargaining union member’s statutory discrimination claims, see McGill & Tracey, *supra* note 22, at 64–68.

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An effective approach must preserve collective redress in either the judicial or arbitral forum or both. This is noticeably absent from the proposed AFA 2011 legislation. Congress should invalidate waivers of collective consumer action along with pre-dispute arbitration agreements.

### *C. Retroactivity*

Other crucial consumer issues remain unresolved by the AFA 2011. Given the continuing nature of many consumer contracts, retroactive application is essential. Many consumers will be functioning under cell phone and credit card agreements entered into years ago; preexisting arbitration clauses should not be allowed to defeat congressional intent. Further, one-sided amendment rights, allowing a business to change the rules in the middle of a contract period, should not be applicable to dispute resolution. The proposed bill contemplates application to “disputes” arising after the AFA 2011 comes into force, so there is room to argue that the bill covers all new disputes regardless of the timing of an agreement. Still, many disputes will be continuous or will straddle the effective date. Clearer retroactivity is required.

### *D. Consumer Disputes Defined*

The AFA 2011 provides a very narrow definition of a consumer dispute, as a dispute that relates to property acquired for personal, family, or household purposes.<sup>216</sup> Missing is the word “primarily,” which appeared in the 2009 bill. Many consumers purchase mixed-use goods, such as computers and cell phones, that they use for both work and home application. Disputes relating to these products appear to not be covered by the proposed legislation. Finally, the AFA 2011 does not regulate post-dispute arbitration agreements in any way. The principles of unconscionability should apply to these agreements and clarification is necessary in the post-*Concepcion* world.

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216. H.R. 1873 § 3.

*E. Unconscionability*

It could be argued that the arbitration clause in *Concepcion*, when taken in its entirety, was not overly unfair to the consumer. It applied to both AT&T and the consumer, preserved the small-claims-court forum, and imposed penalties on AT&T for lowball offers; it is more balanced than many of its predecessors.<sup>217</sup> But the pre-*Concepcion* application of unconscionability must be credited for bringing a sense of fair play to the drafting of these clauses. Congress must preserve a comparable inducement to ensure that those drafting post-dispute agreements have the same incentive to be fair.

Even where contracts contain arguably “fair” class arbitration waivers, the concerns articulated in *Discover Bank* with respect to unconscionable contracts are far from resolved. For instance, preserving a small-claims-court forum for individual claims, as the AT&T clause did, inadequately addresses issues common to large groups of consumers, such as improper fees, service charges, time of crediting payments, or, in the *Concepcion*’s case, whether the phone they received was “free.” Without the notice feature of a class action, consumers may be unaware of the potential problem. In addition, requiring each consumer to bring a small claims or other individual action provides no deterrence to companies that engage in sloppy or illegal practices.<sup>218</sup> Further, the Court’s foray into state law defining and confining unconscionability leaves many questions unanswered with respect to whether and to what extent states can regulate unfair practices, or even fraud, when the specter of arbitration looms.<sup>219</sup>

Congress should amend the FAA explicitly to allow for the exemptions under the terms provided by the *Discover Bank* rule or to allow other substantive standards of fairness, such as mutual application of the choice of forum and cost protection for

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217. See, e.g., *Seidel v. TELUS Commc’ns, Inc.*, [2011] 1 S.C.R. 531, 25, 46 (Can.) (finding that where unconscionability was not available to defeat arbitration clauses, the TELUS clause applied only to consumers, not businesses; had no cost protection; and removed small claims court as an option).

218. See *Sternlight*, *supra* note 151 (stating that a possible rationale for such class actions is to deter companies from behaving fraudulently).

219. “ATT Mobility LLC did not entirely block courts from rejecting arbitration provisions as unconscionable.” *Friedman et al.*, *supra* note 142, at 3.

consumers.<sup>220</sup> Congress should also improve procedural fairness by requiring mandatory disclosure of terms, incorporating cancellation rights, and articulating base line arbitration safeguards.<sup>221</sup> At the same time, businesses should take responsibility for ensuring fair contract provisions in these respects.

#### V. CONCLUSION

The *Discover Bank* rule and other similar jurisprudence precluding enforcement of contractual provisions that are substantively and procedurally unconscionable fell by the wayside in *Concepcion*, at least with respect to class action arbitration waivers. The majority's flawed view, that it should promote the goals of arbitration rather than interpret the limits of arbitration policy established by the FAA, set it on a course that disregarded the realities of the consumer market. Unfortunately, the ruling reverses gains made toward protecting consumers in adhesion agreements, such as those protections embodied in decisions like *Discover Bank*.

The repercussions of *Concepcion* go much further than validating class arbitration waivers: the decision virtually eliminates the unconscionability defense from the FAA exemption. In an effort to prevent manipulation of unconscionability to perpetuate judicial bias against arbitration, the *Concepcion* majority dogmatically ignored the abuse delivered to consumers by one-sided and unfair arbitration clauses in which they had no input.

By restricting a court's ability to examine the specific aspects of a particular arbitration clause and to consider them when assessing the substantive unconscionability of a clause, the Court gave carte blanche to businesses seeking to insulate themselves from consumer complaints. So devout was the majority's allegiance to the policy in favor of arbitration that it overrode Congress's intent and completely removed unconscionability as an available ground for revoking an arbitration clause in any circumstance.

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220. EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT*, 181, 375–76 (Cambridge Univ. Press 2006); McGill, *supra* note 47, at 390–412.

221. The FAA does not address arbitration processes; this is left to the agreement of the parties. Compare McGill & Tracey, *supra* note 22, at 13–16 (commenting on the FAA's failure to discuss arbitration processes), with the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006) (failing also to discuss arbitration processes).

At this juncture, consumer-focused congressional action is necessary to protect consumers and to restore to them meaningful contractual bargaining power and remedies. A more balanced approach to the purposes of the FAA is needed; the legislation must be a vehicle to secure the enforcement of arbitration agreements, subject to legal and equitable defenses, and not merely a directive to promote the underlying objectives of arbitration. Congress must tip the scales of justice so that, as the Court before *Concepcion* said repeatedly, courts treat arbitration agreements “like all other contracts.”<sup>222</sup>

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222. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006)).