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The Irony of *AT&T v. Concepcion*

COLIN P. MARKS*

Irony is defined as "the use of words to express something other than and especially the opposite of the literal meaning."[1] Though many other definitions of the word exist, in light of the Supreme Court's majority opinion in *AT&T Mobility LLC v. Concepcion*, this definition comes to mind. Read broadly, the decision strikes a blow to the ability of consumers to bring suits against companies, both inside and outside of arbitration. But that was not the intent behind the federal act that the Court relied upon to justify its decision.

In 1925, when Congress passed the Federal Arbitration Act (FAA), its intended purpose was to promote enforcement of arbitration clauses.[2] Congress did not sweep away all state-created defenses to contract, however; quite the contrary, Congress inserted a savings clause that arbitration provisions, like any other contract, could be stricken "upon such grounds as exist at law or in equity . . . ."[3] It was upon this basis that the Ninth Circuit upheld a decision to strike down a clause in an agreement between AT&T and the Concepcions that required not only that the Concepcions submit all disputes to arbitration, but also forbade them from forming a class within that arbitration. The Ninth Circuit held that under California law, such clauses in take it or leave it contracts, as the one presented to the Concepcions, are unconscionable and unenforceable.[4]

On appeal to the Supreme Court, AT&T argued that the FAA preempted the unconscionability finding despite the savings clause, as California law discriminated against arbitration clauses in violation of the FAA.[5] Justice Scalia, writing for the majority, agreed that the unconscionability finding under California law was preempted by the FAA.[6] In overruling the Ninth Circuit, he repeated the theme of needing to promote arbitration. Throughout the majority opinion, he introduced, as a corollary, the desire to promote expedited resolution of disputes.[7]

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1. *Irony—Definition and More*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/irony.
2. *See* United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883, 883–86 (1925) (current version at 9 U.S.C. §§ 1–14 (2006)) (commonly referred to as the "Federal Arbitration Act").
3. 9 U.S.C. § 2.
4. Laster v. AT&T Mobility LLC, 584 F.3d 849, 854–55 (9th Cir. 2009).
5. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).
6. *Id.* at 1753.
7. *See id.* at 1748–49.

However, the majority opinion is itself open to multiple interpretations. Read narrowly, the opinion may do nothing more than restate the already established principle that states cannot strike down arbitration clauses simply by virtue of their existence. If this is true, then unconscionability may still offer parties a way to avoid arbitration clauses. But the decision can also be read much more broadly. A broad reading of the opinion suggests that any attempt by a court or state legislature to limit the method and means of arbitration in a way inconsistent with what Congress envisioned is preempted by the FAA. In *Concepcion*, this meant that an attempt by the California courts to force parties to permit class action arbitrations despite contractual provisions to the contrary was in violation of the FAA because Congress intended to promote bilateral arbitrations.[8] Thus, according to the majority opinion, Congress's desire to promote bilateral arbitrations preempted the California courts' rulings that clauses limiting the ability to form class actions are unconscionable.

And therein lies the irony.

If the opinion is read broadly, in striking down the defense of unconscionability to class action waivers as inconsistent with the purposes of the FAA, the majority opinion, in effect, denies a large swath of individuals the realistic opportunity to ever bring their claims, in arbitration or otherwise. In the aftermath of this decision, every corporation will be inserting class action waivers into their arbitration clauses (if they have not already), and may be emboldened to go much further. Thus, while the majority opinion cites, as the reason for its decision, to a broad policy of encouraging arbitration and the expeditious resolution of disputes, the effect will be quite the opposite.

This Essay explores the possible dual readings of *Concepcion* in light of the FAA and its interpretation, including Supreme Court precedents. Part I briefly discusses the development and scope of the FAA. Part II delves into the use of voidability defenses in arbitration clauses under state law doctrines with particular emphasis on unconscionability and also explores the Supreme Court's recent jurisprudence on the issue of the appropriateness of class actions in arbitrations. Part III dissects the *Concepcion* decision, putting forth both the narrow and broad interpretation of the ruling. This Essay concludes that although there is support for interpreting the *Concepcion* decision narrowly, it is more likely that a broader interpretation was intended. However, the metes and bounds of this opinion have yet to be explored. Nonetheless, under this broad interpretation, the effect on consumers will be to discourage individuals from seeking redress for their claims. The decision may actually encourage businesses to breach contractual obligations with impunity when the individual sums owed are too small to justify—in the mind of a reasonable consumer—the time and effort to seek a remedy.

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8. *See id.* at 1753.

I. THE FEDERAL ARBITRATION ACT AND ITS SCOPE

The Federal Arbitration Act (FAA) was passed by Congress in 1925 as a reaction to what was seen as judicial hostility toward arbitration agreements.[9] The Act reads, in relevant part, that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[10]

Prior to the FAA's passage, it was common for predispute arbitration clauses to be struck down on various grounds, including public policy.[11] The Supreme Court determined it was Congress's intent "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts."[12] Despite evidence that the FAA was originally envisioned to only encompass claims involving sophisticated parties of equal bargaining power,[13] the Supreme Court has held that the FAA is to be interpreted broadly to cover a number of different contractual contexts and claims in preemption of state law.[14] The Court has also held that the FAA applies in state as

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9. *E.g.*, *id.* at 1745.

10. 9 U.S.C. § 2 (2006).

11. *E.g.*, Charles Wolff Packing Co. v. Court of Indus. Rel. of Kan., 267 U.S. 552, 564–69 (1925) (striking down a compulsory arbitration claim as a violation of due process); Ins. Co. v. Morse, 87 U.S. 445, 450–52 (1874) (finding that an arbitration clause preempts an individual's constitutional right to have his matter heard in court and discussing numerous other cases that also invalidated contracts calling for arbitration), *recognized as overruled by statute*, Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148 (S.D. Cal. 1993); Kenneth F. Dunham, *Sailing Around* Erie*: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 202–07 (2006) (providing a detailed history of arbitration prior to the passage of the 1925 Act).

12. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

13. Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 729–30 (2001) (stating that the Act's legislative history evidences an intention that the FAA apply to sophisticated parties rather than to contracts of adhesion in contexts such as employment or insurance contracts); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreement Between Employers and Employees*, 64 UMKC L. REV. 449, 466 (1996). *But see* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 179–80 & n.76 (2004) (arguing that despite comments made in the legislative history regarding concerns over application of the FAA to contexts involving contracts of adhesion, these concerns never made their way into the statute).

14. *See* Southland Corp. v. Keating, 465 U.S. 1, 11, 16 (1984) (finding that the FAA is not limited on state grounds past that language contained in § 2); Moses H. Cone Mem'l

well as in federal courts.[15] Thus, courts have held that the FAA preempts countervailing state law in favor of enforcing arbitration clauses in a number of settings, including employment contracts and consumer contracts.[16]

In particular, the FAA prevents state legislatures and the judiciary from creating special rules limiting the effect of, or striking down, arbitration clauses with rules that are only applicable to arbitration clauses. The Supreme Court made this clear in *Doctor's Associates v. Casarotto*, a case involving a franchise dispute over a Subway sandwich shop.[17] The plaintiff, Paul Casarotto, sued the national franchisor of Subway, Doctor's Associates, Inc. (DAI), alleging state-law contract and tort claims involving a franchise agreement between the two.[18] The franchise agreement contained an arbitration clause, so DAI moved to stay the litigation pending arbitration.[19] Though the trial court granted the stay, the Montana Supreme Court reversed, finding that the arbitration clause violated a state statute requiring that such clauses be printed on the first page of the agreement and written in underlined capital letters. Though the Montana Supreme Court acknowledged § 2 of the FAA, it felt there was no preemption problem as striking the clause did not undermine the goals of the FAA; that is, the Montana law did not preclude arbitration agreements altogether.[20]

On appeal, the U.S. Supreme Court reversed and remanded.[21] Justice Ginsburg, writing for the majority, acknowledged that generally applicable contract defenses, such as fraud, duress, and unconscionability were still available to invalidate arbitration clauses, but state laws could not single out arbitration provisions for special treatment.[22] "By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"[23] As the statute at issue was only applicable to arbitration clauses, the Court held the statute was preempted by the FAA, noting that the goals of the FAA "are antithetical to threshold limitations placed specifically and solely on arbitration provisions."[24]

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("[9 U.S.C.] Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

15. *Southland Corp.*, 465 U.S. at 12.

16. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27–28 (1991) (holding that claims under the Age Discrimination and Employment Act and state discrimination laws are subject to arbitration clauses); Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559, 563 (6th Cir. 2008) (stating that arbitration clauses in employee contracts are valid when governed by the Uniformed Services Employment and Reemployment Rights Act of 1994 and by applicable state law); Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 904 (5th Cir. 2005) (overruling state law and subjecting an employment contract to the FAA).

17. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

18. *Id.*

19. *Id.*

20. *Id.* at 684.

21. *Id.* at 689.

22. *Id.*

23. *Id.* at 687 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

24. *Id.* at 688.

II. THE SURVIVAL OF UNCONSCIONABILITY WITH REGARD TO CLASS ACTION WAIVERS

Despite the broad policy in favor of enforcing arbitration clauses under the FAA, § 2 provides a savings clause for state common law voidability defenses. Section 2 states generally that arbitration clauses will be enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."[25] As noted above, these defenses cannot be tailored to just arbitration clauses. But if the same standards are applied to an arbitration clause as would be applied to a contract in general, then a defense such as fraud or unconscionability will stand. However, to avoid the arbitration provision, the defense must apply to the arbitration provision itself and not refer to the overall contract.[26] For example, if a party were to allege that he or she fraudulently was induced into entering into the agreement, it is not enough to allege that the fraud induced the party into entering into the entire contract; the fraud must be the inducement to agreeing to the arbitration clause for the court to adjudicate.[27]

One of the most common defenses brought to avoid the enforcement of arbitration clauses has been unconscionability.[28] A basic test for unconscionability has been set out under the comments to the Uniform Commercial Code as follows:

> [W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.[29]

Most courts generally apply the framework described by Professor Arthur Leff that unconscionability can be either procedural or substantive, with many courts requiring a showing of both.[30] Despite this formulation, many courts will apply a sliding scale to these elements that will forgive a weak showing of one aspect of unconscionability if a stronger showing of the other is made.[31] For instance, a weak

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25. 9 U.S.C. § 2.

26. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444–45 (2006); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 412–14 (1967) (Black, J., dissenting).

27. *Prima Paint*, 388 U.S. at 412–14.

28. *See* Susan Randall, *Judicial Attitudes Towards Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–95 (2004); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–49 (2006) (focusing on the defense of unconscionability in California).

29. U.C.C. § 2-302 cmt. 1 (2004).

30. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 (1967).

31. John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 950 (1969); *see also* Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer*

showing of procedural unconscionability, such as when there is only evidence of a contract of adhesion and nothing more, could be forgiven if there is a strong showing of substantive unconscionability.[32] As one commentator has noted, because of the open-ended nature of unconscionability doctrine, it gives judges "the power to hold, as a matter of common law, that a particular agreement is one-sided, oppressive, and unfair . . . and thus the power to circumvent the Federal Arbitration Act."[33]

Unconscionability has been used to successfully defeat arbitration clauses in a number of contexts, including imposing excessive costs on one party so as to limit a party's access to an arbitral forum,[34] limiting damages,[35] selecting forums,[36] requiring confidentiality,[37] and limiting the ability of a party to form a class.[38] As to the last of these, limitations on forming a class, some jurisdictions have permitted such arbitration clauses if statutes provided for the recovery of attorney's fees and if there was a likelihood of recovering such fees.[39] California, however, has taken a more hostile approach to such clauses.

Arbitration in Light of Stolt-Nielsen, 23 LOY. CONSUMER L. REV. 265, 281–82 (2011) (describing California law).

32. Spanogle, *supra* note 31, at 950.

33. Randall, *supra* note 28, at 194.

34. *Id.* at 198–99; Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999) (finding that a fee splitting provision caused the arbitration agreement to be unconscionable and deprived the plaintiff of the ability to successfully adjudicate a statutory claim).

35. Randall, *supra* note 28, at 210–11. Although the Supreme Court has not determined that the inability to collect punitive damages is unconscionable several state courts have upheld the proposition. *Id.*

36. *Id.* at 214–16. While Forum Selection Clauses are presumed to be valid under Supreme Court precedents, courts have refused to uphold them in arbitration agreements when the application of law would limit the ability of consumers to argue their claim. *See id.*; *see also* America Online, Inc. v. Superior Ct., 108 Cal. Rptr. 2d 699, 707–08 (Cal. Ct. App. 2001) (stating that upholding a contract's forum selection clause would violate California's public policy by undermining consumer protection laws).

37. Pokorny v. Quixtar, 601 F.3d 987, 1001–02 (9th Cir. 2010); Randall, *supra* note 28, at 218–19.

38. Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 864 (Ct. App. 2002).

39. *See* Cicle v. Chase Bank USA, 583 F.3d 549, 555–56 (8th Cir. 2009) (upholding a class-action waiver, in part because the relevant Missouri statute permitted an award of attorney's fees); Dale v. Comcast Corp. 498 F.3d 1216, 1221–24 (11th Cir. 2007) (holding that because attorney's fees were either not available or not likely to be awarded under the federal and state law at issue, a class-action waiver was unconscionable). The *Dale* court distinguished a previous case decided under Georgia law, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), as its enforcement of a class-action waiver involved statutes which mandated reasonable attorney's fees. *Id.*; *see also* Kristian v. Comcast Corp., 446 F.3d 25, 58, 61–63 (1st Cir. 2006) (finding that, due to the likelihood that any award of attorney's fees on an individual claim would be inadequate, a class-action waiver clause was unconscionable, as a consumer would not sue at all unless part of a class); Gordon v. Branch Banking & Trust Co., 666 F. Supp. 2d 1347, 1347 (N.D. Ga. 2009) (applying Georgia law and holding arbitration clause unconscionable when an award of attorney's fees was unlikely under the statute at issue); *cf.* Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 97–98 (Mo. Ct. App. 2008) (holding that an arbitration class-action waiver was unconscionable under Missouri law when, though attorney's fees were available, it was unlikely that an attorney would take the case absent the ability to aggregate claims); *see also* Jean R. Sternlight, *As*

In *Discover Bank v. Superior Court*, the California Supreme Court considered the use of class-action waivers in the context of an arbitration agreement.[40] The contract in dispute in *Discover Bank* involved the assessment of late fees under a credit card agreement.[41] The fees at issue were small as to each individual but large in the aggregate, so the plaintiffs sought to form a class action under California state law.[42] The cardholder agreements contained arbitration clauses that forbade the claimants from suing in a class-wide arbitration, so the defendant, Discover Bank, sought to compel arbitration.[43] Though the trial court struck the class-action waiver as unconscionable, the appellate court reversed, holding that the agreement was preempted by the FAA and thus could not be struck down by a rule that singled out for special treatment an arbitration provision.[44]

On appeal, the California Supreme Court first noted that, under some circumstances, California state courts had found class-action waivers to be unconscionable both inside and outside of the arbitration context.[45] It then turned to the issue at hand and found that a class-action waiver could in fact be unconscionable given the right circumstances, stating:

> [W]hen the [class] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of

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Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 WM. & MARY L. REV. 1, 106 (2000) ("In general, clauses which deprive claimants of adequate access to a forum, or which deny claimants relief to which they would ordinarily be entitled are among those provisions courts are most likely to strike down as unconscionable. Applying a similar analysis, courts should find unconscionable those arbitration clauses which, by precluding plaintiffs from joining together in a class action, effectively deny plaintiffs the opportunity to present their claims in any judicial or arbitral forum." (internal citations omitted)).

40. Discover Bank v. Superior Ct., 113 P.3d 1100, 1103 (Cal. 2005).

41. *Id.*

42. *Id.*

43. *Id.* at 1103–04.

44. *Id.* at 1104–05.

45. *Id.* at 1106–07 (discussing America Online, Inc. v. Superior Ct., 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) and Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002)). The *America Online* case involved class-action consumer claims that the internet provider continued to charge monthly fees to subscribers subsequent to contract termination. 108 Cal. Rptr. 2d at 702. America Online moved for a dismissal of the suit due to the Subscriber Agreement's Terms of Service, which stated that all claims were subject to jurisdiction in Virginia and also included a choice of law provision that stated Virginia law governed all suits. *Id.* at 702–03. The court of appeals found that the forum selection clause in the agreement was void as against public policy, as it would have the effect of stripping the consumers of their ability to file a class action. *Id.* at 702. In *Szetela*, the validity of class-action waivers in the context of arbitration was at issue. Discover had amended its cardmember agreements in 1999, notifying customers, via statement insert, that if either party elected to handle a dispute through arbitration, the other would be bound to do so. *Szetela*, 118 Cal. Rptr. 2d at 864. The only alternative offered to cardholders was cancellation of their account. *Id.* The court considered both the procedural and substantive unconscionability and determined that the prohibition of class actions as part of the arbitration clause was unconscionable. *Id.* at 867–68.

> individually small sums of money, then, at least . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[46]

The Court premised this statement, however, with the caveat that it was not holding that all class-action waivers were per se unconscionable.[47] The *Discover Bank* rule has been articulated as having three components:

> (1) is the agreement a contract of adhesion; (2) are disputes between the contracting parties likely to involve small amounts of damages; and (3) is it alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money.[48]

After laying out a framework to find whether class-action waivers are unconscionable, the California Supreme Court then addressed the possible FAA preemption issue.[49] The court held that it was not preempted as the rule it articulated did not require special scrutiny simply because it involved an arbitration agreement.[50] Distinguishing the United States Supreme Court's opinion in *Perry v. Thomas*, the *Discover Bank* court noted, "In the present case, the principle that class-action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally."[51] The court thus remanded the issue to the appellate court for further findings.[52] But if it was the California Supreme Court's conclusion that no per se rule regarding class-action waivers in an arbitration agreement had been created, this was not necessarily how the Court in *Concepcion* viewed the rule.[53]

Though the Supreme Court of the United States had not addressed the *Discover Bank* rule prior to *Concepcion*,[54] it had expressed its view of the appropriateness of limiting class-action arbitrations under the FAA in the *Stolt-Nielsen S.A. v.*

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46. *Discover Bank*, 113 P.3d at 1110 (last alteration in original) (internal citations omitted).

47. *See id.*

48. Laster v. AT&T Mobility LLC, 584 F.3d 849, 854 (9th Cir. 2009) (citing Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983 (9th Cir. 2007)), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

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

50. *See id.* at 1112.

51. *Id.*

52. *Id.* at 1118. Interestingly, the court did not resolve the issue but instead remanded for a determination as to whether a choice-of-law provision applying Delaware law should be applied; the application of Delaware law would likely have resulted in upholding the class-action waiver. *Id.* at 1117.

53. *See* discussion *infra* Part IV.A.

54. Indeed, the Court in *Concepcion* noted that it has had "little occasion to examine classwide arbitration." AT&T Mobility LLC. v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

AnimalFeeds International Corp. decision[55] (which the Court subsequently cited in support of its *Concepcion* holding).[56] In *Stolt-Nielsen*, a group of shipping parties were sued by AnimalFeeds International Corporation ("AnimalFeeds") in a putative class action for antitrust violations.[57] Post dispute, the parties agreed to submit to a panel of arbitrators the issue of whether their charter agreement, which contained an arbitration clause but was silent on the issue of class actions, would permit such an action to be brought.[58] The panel determined that the arbitration clause permitted class actions, and the shipping parties then sought to vacate the decision in the district court for the Southern District of New York.[59] The district court vacated the panel's award finding it was in "manifest disregard" of the law, but the Second Circuit reversed.[60]

In its decision, the Supreme Court first noted that AnimalFeeds had put forward before the arbitration panel three arguments explaining why a class action should be permitted:

> (a) the [arbitration] clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under [Supreme Court precedent]; (b) the clause should be construed to permit class arbitration as a matter of public policy; and (c) the clause would be unconscionable and unenforceable if it forbade class arbitration.[61]

The panel rejected the first argument and never addressed the third regarding unconscionability,[62] so only the second issue was before the Court. The Court then held that the panel had exceeded its authority in that it created a common law default rule based upon its best judgment rather than on the policy considerations of, among other things, the FAA.[63] The Court then cited to the fundamental concept

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55. 130 S. Ct. 1758 (2010).

56. *Concepcion*, 131 S. Ct. at 1750. Another decision, worth mentioning briefly, though it was not at issue in *Concepcion*, is *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). *Rent-A-Center* involved an employment arbitration agreement which also provided that an arbitrator would have the "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation" of the arbitration agreement. 130 S. Ct. at 2775. This delegation clause included issues of voidability such as unconscionability. *Id.* Though the Court recognized that courts may decide issues of voidability as to an arbitration provision, it held this power can freely be delegated to an arbitrator and such an agreement to arbitrate stands on equal footing with other contracts. *Id.* at 2778–79. Though Jackson claimed the arbitration agreement was unconscionable, his claim was with regard to the underlying arbitration agreement and not the delegation provision. *Id.* at 2779. Thus the Court held that had Jackson wished to have a court, rather than an arbitrator, decide the issue of unconscionability of the arbitration provision, he would first have to convince a court that the delegation provision itself was void, for instance because it was unconscionable. *Id.*

57. *Stolt-Nielsen*, 130 S. Ct. at 1764–65.

58. *Id.* at 1765.

59. *Id.* at 1766.

60. *Id.* at 1766–67.

61. *Id.* at 1768 (quoting AnimalFeeds' memorandum of law filed with the arbitration panel) (emphasis omitted).

62. *Id.* This third ground would have more directly impacted the *Concepcion* decision.

63. *Id.* at 1768–69.

that arbitration clauses should be enforced according to their terms.[64] As the agreement was silent on the issue of class actions, the Court determined that class actions should only be permitted if the parties agreed to do so, and, absent express agreement, the context of the agreement would have to justify inferring such an agreement.[65] But the Court held that, given the nature of arbitration, the panel could not infer an agreement to allow class actions to proceed.[66] As the Court noted:

> This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.[67]

Given the fundamental differences between bilateral and class arbitration, the Court reasoned that silence on the issue could not be interpreted to presume consent to class-action arbitrations.[68] Thus, though the decision did not impact unconscionability as it relates to class-action waivers, the decision set the table for the policy concerns that would play out again in *Concepcion*.

III. *AT&T V. CONCEPCION*

The facts of *AT&T Mobility LLC v. Concepcion* involve the purchase of a cell phone and a service agreement, under which the Concepcions were promised a "free" phone.[69] Unfortunately for the Concepcions, the phones were not truly free, as they were still required to pay the taxes on the phone based on the retail value—a sum of $30.22.[70] The Concepcions filed suit against AT&T, and their case was consolidated into a class action alleging that AT&T had committed fraud and had engaged in false advertising in connection with the sale of the phones and service plans.[71] The agreement that the Concepcions had entered into contained an arbitration clause that not only compelled the Concepcions to bring their claim in an arbitration proceeding, but also required that they do so only in their individual capacity and not as a member of a class.[72]

In accordance with the provisions of the agreement, AT&T moved to compel arbitration.[73] The district court denied the motion, finding that the class-action waiver was unconscionable in accordance with the California Supreme Court's

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64. *Id.* at 1773.
65. *See id.* at 1775.
66. *See id.*
67. *Id.*
68. *Id.* at 1776.
69. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

Discover Bank opinion.[74] In doing so, the district court noted that in many other respects, the arbitration clause was fair to individual consumers like the Concepcions; nonetheless, the court was compelled to find the clause unconscionable under California precedent.[75] On appeal, the Ninth Circuit affirmed, finding that *Discover Bank* was not preempted by the FAA because it was a rule of general applicability to all contracts and not just those with arbitration clauses.[76] AT&T thus appealed to the Supreme Court of the United States.

Writing for the five-member majority,[77] Justice Scalia first acknowledged that defenses such as fraud, duress, and unconscionability survived preemption under § 2 of the FAA.[78] He then reiterated the *Discover Bank* rule and framed the issue before the Court as "whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."[79] In answering this question, the Court first noted that unlike a straightforward state rule that prohibits arbitration of a type of claim, the question before it was more complex in that the *Discover Bank* rule purported to be generally applicable, but in effect disfavors arbitration.[80] To illustrate the ruling, the Court hypothesized that an arbitration provision could be struck by a state court as unconscionable because it does not allow judicially monitored discovery, does not abide by the Federal Rules of Evidence, or disallows a panel consisting of anything other than twelve lay arbitrators.[81] Though such rules could appear facially neutral, their effects would clearly discriminate against arbitration, as requirements such as a twelve lay arbitrator panel would be counter to the essential nature of arbitration. Thus, despite the facially neutral appearance of such rules, the Court held that § 2 does not suggest "an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[82] Building upon this line of reasoning,

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74. *Id.* at 1745; *see also* Laster v. T-Mobile USA, Inc., No. 05CV1167, 2008 WL 5216255, at *7–8 (S.D. Cal. Aug. 11, 2008), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

75. *Concepcion*, 131 S. Ct. at 1745; *see also Laster*, 2008 WL 5216255, at *11–12.

76. *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 857 (9th Cir. 2010).

77. *See Concepcion*, 131 S. Ct. at 1740. Though Justice Thomas signed on with the majority, he wrote a separate concurrence in which he articulated his view that the FAA savings clause only applies to defenses regarding the formation of the arbitration agreement and not the substance of the agreement. *Id.* at 1754–55 (Thomas, J., concurring). Justice Thomas thus felt that though claims of fraud and duress were covered by the savings clause, public policy based defenses that went to the substance of the agreement were not. *Id.* at 1755. Justice Thomas, therefore, would have found for AT&T simply on the ground that the *Discover Bank* rule is not a defense that is available under the FAA. *Id.* Justice Thomas's focus, though couched in terms of public policy, could be read as a broad-based attack on unconscionability claims in general. Conspicuously absent from his list of defenses available under the savings clause was unconscionability. *See id.* (listing fraud, duress, and mutual mistake, but not unconscionability). However, if this is true, it appears to be based on substantive unconscionability claims, though he makes no reference to the classic conception of unconscionability, which includes the dual prongs of substantive *and* procedural unconscionability.

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

79. *Id.*

80. *See id.* at 1747.

81. *Id.*

82. *Id.* at 1748.

Justice Scalia then explored the "principal purpose" of the FAA, which is to "'ensur[e] that arbitration agreements are enforced according to their terms.'"[83] As a corollary to this purpose, the Court also noted that, to the extent the two purposes were not in conflict, the FAA is also meant to encourage the efficient resolution of disputes.[84]

Turning to the *Discover Bank* rule, the Court first indicated that, in effect, the rule would apply to all consumer contracts (given that consumer contracts are, in modern times, adhesive) and, it found that the other elements of the rule were so easily met as to be "toothless" with no "limiting effect."[85] Given that the *Discover Bank* rule allowed plaintiffs to choose class-wide arbitration ex post, despite the terms of the agreement, the Court held that it was counter to the purposes of the FAA.[86] Three justifications for this ruling were then offered, the first two of which are just flip sides of the same concept. First, the Court noted that to require class-action arbitration would be to sacrifice the informality that is a principal advantage inherent in arbitration, as class-action arbitration would "make[] the process slower, more costly, and more likely to generate procedural morass than final judgment."[87] This means that preliminary issues such as class certification, among other things, would have to be ruled upon before the merits of the case could be heard.[88] Indeed, the Court noted that by its very nature, class-action arbitration requires procedural formality (this was the Court's second justification which, again, is just the flip side of the first). Looking back to the drafters' intent when the FAA was passed in 1925, the Court held that such procedural requirements were not contemplated because class-action arbitrations are a recent development.[89] It therefore follows from this conclusion that the Court views arbitration under the FAA as only encouraging bilateral arbitration.[90] Finally, the Court noted that to permit class-action arbitrations despite the clear wording of the agreement would place defendants at a large disadvantage because the risk of damages without a meaningful review process would force settlements of even questionable claims.[91] On this point, the Court concluded, "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."[92]

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83. *Id.* (alteration in original) (quoting Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

84. *Id.* at 1749.

85. *Id.* at 1750.

86. *Id.* at 1750–51.

87. *Id.* at 1751.

88. *Id.* at 1751.

89. *Id.*

90. *Id.* Indeed, the Court later noted that if the parties had agreed to class-action arbitration, such a procedure would not be arbitration as envisioned under the FAA. *Id.* at 1752–53. This is in accord with the Court's previous decision of *Stolt-Nielsen*. *See supra* text accompanying note 64.

91. *Concepcion*, 131 S. Ct. at 1752.

92. *Id.*

IV. TWO POSSIBLE INTERPRETATIONS OF *CONCEPCION*

While the ultimate conclusion of the majority of the Court in this case is clear, the reasoning is still subject to some debate. At least two major interpretations seem possible—an "as applied" interpretation, or a "fundamental attributes of arbitration" approach. The first interpretation plays upon the framing of the question by the Court as "whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."[93] This view is that the Court's opinion is nothing more than an extension of the rule that arbitration agreements cannot be struck down simply by virtue of involving arbitration. The broader view, and perhaps the more likely intended interpretation, is that *Concepcion* stands for the proposition that any state-created rule that compels an arbitration procedure not in-line with the vision the drafters had of arbitration in 1925, is counter to the goals of the FAA and thus preempted. This is true both as to rules created by the legislature and the courts, and regardless of whether the rules are facially neutral.

A. The "As Applied" Application of Concepcion

One possible interpretation of the *Concepcion* opinion is that it is nothing more than an extension of the principle put forward in *Doctor's Associates v. Casarotto*, and that was further elaborated in later opinions. This principle holds that state laws and court-created doctrines may not single out arbitration provisions for different treatment. The Court's opinion at first seemed poised to go down this traditional route, framing the question as one of § 2 preemption when a state rule classified "most" class-action waivers as unconscionable.[94] Under this interpretation, the Court merely looked beyond the wording of the *Discover Bank* rule, which was couched in arbitration neutral terms, to its effect on arbitration, drawing comparisons to other hypothetical rulings that clearly could only affect arbitration agreements.[95] The Court also strongly indicated that the *Discover Bank* rule itself was, in effect, going to be heavily utilized in the context of arbitrations, given that consumer contracts tend to be contracts of adhesion.[96] Under this interpretation, the opinion would do nothing more than signal a further willingness by the Court to look at how state-created rules will affect arbitration agreements, regardless of their wording.

However, if this were the case, further discussion of the purposes of the FAA would seem unnecessary. Instead of stating that the *Discover Bank* rule was impermissibly singling out arbitration clauses, the Court instead extended its analysis to contemplate the effect class-action arbitrations would have on the arbitration process. Furthermore, if the Court's decision were nothing more than an extension of the *Doctor's Associates* principle, it would follow that an unconscionability ruling forbidding class-action waivers on an ad hoc basis could

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93. *Id.* at 1746.

94. *Id.*

95. *See* Cruz v. Cingular Wireless, LLC, No. 08-16080, 2011 WL 3505016, at *4–5 (11th Cir. Aug. 11, 2011).

96. *Concepcion*, 131 S. Ct. at 1750.

survive *Concepcion.* Perhaps a more neutrally worded approach, such as one that made no distinction between consumer and nonconsumer cases, could still survive scrutiny. But the Court, in at least two instances, seemingly negated this possibility, stating that "the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA,"[97] and later noting that the Court found it hard to believe Congress intended to allow states to force defendants into class arbitrations under the FAA.[98]

B. The "Fundamental Attributes of Arbitration" Approach

This leads to what is the more likely intended view of *Concepcion*, the "fundamental attributes of arbitration" approach (or perhaps more accurately the violates "fundamental attributes of arbitration" approach). Under this approach, the focus is not on whether, on its face, the state is impermissibly treating arbitration differently from other procedures. Instead, what is important is the purpose of the FAA when it was enacted in 1925 and what characteristics Congress envisioned an "arbitration" to have at that time. In *Concepcion* the Court repeatedly made reference to Congress's intent to promote arbitration agreements,[99] promote arbitration itself,[100] and to promote efficiency (though this last aim was secondary to the goal of promoting arbitration).[101] According to the Court, Congress envisioned bilateral, rather than class action, arbitrations when it passed the FAA (as class-action arbitrations were not even in existence at the time). This position is consistent with the purpose of efficiency, as class actions would add an additional layer of complexity, thus dragging out the litigation process, which ultimately would be inconsistent with the goals of the FAA. Under this interpretation, if a state law, or court-made rule, would force parties into a form of arbitration not envisioned by Congress when it drafted the FAA, the state law would be preempted.[102] With regard to class-action waivers, this appears to be true regardless

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97. *Id.* at 1748.

98. *Id.* (pointing out that it is unlikely that Congress intended to allow state law to "stand as an obstacle to the accomplishment of the FAA's objectives.").

99. *See id.* at 1745 (referring to Congress's focus on encouraging parties to contract for arbitration).

100. *Id.* (stating that Congress favored a "liberal federal policy" encouraging arbitration); *id.* at 1749.

101. *Id.* at 1758.

102. Professor Richard Bales has posited that the ruling goes even further, speculating that the holding is "boundaryless." He states:

> The majority, however, found that the *Discover Bank* rule has the effect of discouraging arbitration by increasing the complexity of the dispute-resolution process and thereby making arbitration less attractive to the AT&Ts of the world. The problem with this argument, as the dissent points out, is that it is inconsistent with the text of the statute. It is also boundaryless. What happens when AT&T puts a provision in its arbitration agreement forbidding arbitral discovery? A provision limiting remedies in employment cases to the lesser of actual damages or $500? Striking these clauses would "discourage" arbitration by increasing the complexity of arbitration and making arbitration less attractive to BigBusiness. Are we on the road to laissez-faire arbitration?

of collateral concerns such as attorney's fees. While the *Discover Bank* rule at issue in *Concepcion* did not consider the likelihood of attorney's fees being awarded, other courts have considered this as part of their unconscionability analysis. But the Supreme Court's articulated holding does not appear to consider whether attorney's fees are likely to be awarded or not to be relevant. Thus a number of unconscionability cases that have relied on such concerns are now called into question under *Concepcion*.[103]

Beyond the far-reaching impact on class-action waiver clauses, this interpretation also leaves some unanswered questions with regard to what Congress envisioned as "arbitration" under the FAA. First, it is unclear whether the principle put forth by the Court is primarily one of efficiency or one involving the definition of arbitration. The examples given by the Court, such as a rule compelling judicially monitored discovery, a rule compelling use of the Federal Rules of Evidence, and a rule compelling a panel of twelve arbitrators, do not illuminate this issue. The first two could be viewed as hindering the efficient resolution of a dispute, but it is difficult to tell from the opinion why the third one would violate this principle. While the extreme examples offered by the Court involve clear violations of what a normal arbitration calls for, considering that there is a mechanism for class-action arbitrations in place under the AAA,[104] the class-action waiver issue seems to involve a closer case. The Court resolves this by referring to the lack of class-action arbitration in 1925, but as the dissent points out, many arbitration procedures were not fully developed at that time.[105]

Thus, while the holding may well hinge upon a state rule that violates the "fundamental attributes of arbitration," the Court has left open the question of what these fundamental attributes are. The rule appears to be that any state rule that hinders the efficient resolution of disputes could be subject to preemption, but this raises the question of in relation to what? The answer appears to be in relation to arbitration as envisioned by Congress in 1925, but other than a statement that Congress did not envision class-action arbitration, we are left to wonder what the metes and bounds of this holding are.

The case of *Dale v. Comcast*[106] provides a good example of how *Concepcion* might affect existing rulings in the class-action arena. *Dale* involved a class action brought by subscribers of Comcast, a cable television provider, who sought to recover for unjust enrichment based on alleged violations of the Cable Communications Policy Act of 1984 ("Cable Act").[107] The subscribers were bound by arbitration agreements that waived the right to bring class-action claims and Comcast successfully argued to the district court that the claim should be arbitrated

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Richard Bales, *Supremes Uphold Arbitral Class-Action Waivers*, WORKPLACE PROF BLOG (Apr. 27, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/04/supreme-uphold-arbitral-class-action-waivers.html (emphasis omitted).

103. *See supra* note 39 and accompanying text.

104. The AAA is the American Arbitration Association. The AAA has its own rules regarding class arbitration, and these rules are very similar to the class-action rules found in the Federal Rules of Civil Procedure. *Concepcion*, 131 S. Ct. at 1751.

105. *Id.* ("Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925.").

106. 498 F.3d 1216 (11th Cir. 2007).

107. *Id.* at 1217–18.

and that the waiver clause was not unconscionable.[108] On appeal, the Eleventh Circuit reversed and remanded.[109]

In its analysis, the circuit court began by noting that an unconscionability claim is appropriately governed by state law and that Georgia law recognized both procedural and substantive unconscionability.[110] Focusing on the substantive unconscionability claim only, the court noted that it had previously upheld class-action waivers in other contexts, but held that it had not created a per se rule that every class-action waiver was enforceable under Georgia law.[111] The court then distinguished its previous decisions, in which it had upheld the waivers, on the grounds that the previous decisions involved claims "for which attorneys' fees and other costs were recoverable."[112] Unlike those decisions, the case before the court did not provide statutorily for attorney's fees. Turning its eye toward public policy, the court held that, without the benefit of bringing a class action, the subscribers would effectively be precluded from suing Comcast for a violation of the Cable Act provision at issue, noting that "[t]he cost of vindicating an individual subscriber's claim, when compared to his or her potential recovery, is too great."[113] Though the subscribers' cause of action could have potentially resulted in an award of attorney's fees under state law, the court found that the requisite "bad faith" needed to recover such an award made it too difficult for the subscribers to obtain representation.[114] The court thus held that the determination of whether a class-action waiver in an arbitration clause is unconscionable should be conducted on a case-by-case basis considering the following circumstances:

> the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.[115]

Under a narrow reading of *Concepcion*, the *Dale* decision could perhaps survive. Though a relevant concern of the *Dale* court was the ability to obtain representation in an arbitration context, the ruling did not create a broad ruling forbidding class-action waivers in arbitration. However, it is possible that even under a narrow reading of *Concepcion*, the decision could come under scrutiny as the issue is most likely only going to arise in contract of adhesion contexts, but the ruling seems open-ended enough to distinguish it from the *Discover Bank* rule.

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108. *Id.* at 1218

109. *Id.* at 1224.

110. *Id.* at 1219. Though the subscribers brought claims of both procedural and substantive unconscionability, the court focused only on the substantive claim and found no need to address the procedural claim as it found the clause substantively unconscionable. *Id.* at 1220 n.5.

111. *Id.* at 1221.

112. *Id.* at 1221–22.

113. *Id.* at 1224.

114. *Id.*

115. *Id.*

But under a broader reading of *Concepcion*, the *Dale* decision is under more scrutiny. Though the arbitration provision at issue in *Concepcion* did provide for attorney's fees,[116] the Court did not rely on the availability of attorney's fees in striking down the *Discover Bank* rule. Instead, the Court focused on what Congress envisioned as arbitration in 1925—this meant bilateral arbitration. Applying this focus on congressional intent to the *Dale* case, one would have to ask whether Congress envisioned parties bearing their own costs as well as accepting the risk that the cause of action at issue would not provide for the provision for attorney's fees. Given that focus, it seems unlikely that the Supreme Court would hold class-action waivers are only enforceable when attorney's fees are available either statutorily or via the arbitration agreement itself.

However, there may be a two-pronged method under which decisions such as Dale could survive even this broad ruling. First, if the Court's focus on efficiency is the linchpin of the broad interpretation of the decision, then an unconscionability ruling regarding the availability of attorney's fees may survive as it does not affect the efficient resolution of a dispute. But for this to work, it must rely on the second prong—the focus must be not on whether the class-action waiver is unconscionable, but rather on whether the lack of a method to realistically recover attorney's fees is available. If not, then perhaps a court could rule that this failure makes the arbitration clause unconscionable given that the claimant is forced into bilateral arbitration. The Supreme Court did not develop its discussion of the relevancy of the provision for attorney's fees, and so this appears to remain an open question. Nonetheless, decisions such as *Dale* appear to be susceptible to attack in light of *Concepcion*.[117]

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116. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011). The *Concepcion* arbitration clause provided that

> AT & T must pay all costs for nonfrivolous claims; . . . ; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages . . . . The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

Id. Though generous at first blush, the agreement really does nothing to encourage representation as explained below. *See infra* note 117 and accompanying text.

117. Indeed, in *Cruz*, the Eleventh Circuit struck down an argument similar to that made in *Concepcion* despite stronger evidence of the effect on the ability of claimants to obtain representation, a factor that was relevant in the *Dale* decision. Cruz v. Cingular Wireless, LLC, No. 08–16080, 2011 WL 3505016, at *6 (11th Cir. Aug. 11, 2011) ("Therefore, to the extent that Florida law would be sympathetic to the Plaintiffs' arguments [regarding, in part, the ability to retain counsel], and would invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted.").

C. The Impact of Concepcion

Regardless of the approach, a narrow or broad interpretation, one concept seems clear after *Concepcion*: class-action waivers in arbitration agreements cannot themselves be struck down as unconscionable (at least not without additional unconscionable facts). Under the "as applied" interpretation, while it is possible that a state court or legislature could try to broaden the scope of a rule to make its impact more akin to a rule of general applicability, it seems unlikely, given the Court's comments, that such a rule would survive, especially given that such waivers are almost always going to come hand-in-hand with arbitration provisions. Under the violates "fundamental attributes of arbitration" approach, the prospects of striking down class-action waivers is even more bleak as the Court has stated that class actions, by their very nature, violate the purpose of the FAA.

In the short term, under either interpretation, it is likely that companies will begin to make class-action waivers a part of every arbitration agreement they enter into with consumers, if they do not do so already.[118] This will, in turn, result in consumers being forced to make a choice between disputing perceived breaches involving small amounts in an arbitration forum without legal assistance (as the financial incentive to represent such a client will be small) or simply to accept the loss. Of course, it is predictable that a few individual consumers will pursue the arbitration route (certainly fewer than would be represented in a class action). Thus, in light of the Court's repeated references to the FAA's purpose of promoting arbitration, this result is ironic as the effect will be quite the opposite—fewer overall disputes will be settled via arbitration. Considering the disputes would have been class-action arbitrations, which Justice Scalia's opinion does not recognize as "arbitration" under the FAA, the irony of this situation would likely be lost on the Court.

There is still the option for the consumer to resolve issues by dealing with the customer service departments of the individual companies, but without the threat of a possible class-action lawsuit, the incentive for companies to resolve issues will be diminished. Furthermore, the availability of attorney's fees may not create an adequate incentive for attorneys to represent consumers should they choose to pursue their claims in arbitration. For instance, the arbitration provision at issue in *Concepcion* provided that, should the ultimate award be greater than the last offered settlement, then the consumer was entitled to an additional $7500 award and double its attorney's fees,[119] but realistically, this was no incentive at all with such a small dollar claim. Once the Concepcions hired an attorney to represent them, AT&T could likely avoid this provision by simply offering the $30.22 at issue. The Concepcions would then be faced with the choice to accept the amount and pay their own attorney's fees, or roll the dice in the hopes that relief in an

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118. Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. BLOGS, LAW BLOGS (Apr. 27, 2011, 12:36 PM), http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/ (quoting Vanderbilt Law Professor Brian Fitzpatrick as stating that it is hard to imagine a company not wanting to bind shareholders, consumers, and employees to such arbitration provisions).

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

amount greater than $30.22 is awarded. Understandably, this may have a chilling effect on the individual consumer as well as on the consumer's ability to obtain representation in the first place. The impact of prohibiting class-action arbitrations may very well, in effect, deny the realistic ability of consumers to obtain relief, and this is where the decision may have its greatest impact on consumers.[120]

Assuming companies operate under a theory of efficient breach, it will make sense for them to commit breaches that result in small dollar amounts. To illustrate, assume ABC, Inc. sells laptop computers with an express warranty. It comes to ABC's attention that a small number of the laptops have a minor defect that affects their volume control when certain applications are downloaded. ABC knows that fixing the problem will be expensive, and likely will require replacing the laptops. The company knows that consumers will think that ABC is required to repair or replace the laptops under the terms of the warranty, but knows there is a weak argument it can make that the defect is not covered. Instead of attempting to fix all of the defective laptops, the company chooses to let consumers try to resolve the claim via the customer service department, knowing that many will be discouraged by the process. Only if a customer actually files an arbitration claim will ABC finally negotiate a settlement in the form of a voucher worth less than the fix itself.[121] Prior to *Concepcion*, the threat of a class-action suit might have encouraged ABC to be more responsive to complaints in order to head off a costly lawsuit, perhaps offering a recall of the faulty laptops. After *Concepcion*, companies such as ABC are incentivized, under the right circumstances, to drag out a resolution in the hopes of discouraging consumers from pursuing their claims. Of course there will always be individuals who are persistent enough to reach a resolution, and some breaches may be large enough to warrant wide-scale remedial action for fear of the bad publicity. However, relying upon market forces alone to encourage resolution invests a lot of faith in the market's power.

Beyond the short-term effect on class actions, *Concepcion* potentially raises larger questions about arbitration clauses in general, including how it will affect resolution of future unconscionability claims. For instance, a number of courts have held that arbitration clauses that impose arbitration fees upon the plaintiff—fees that might otherwise discourage the claimant from pursuing a remedy—are

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120. This line of reasoning has been at the heart of a number of decisions striking down class-action waivers in arbitration agreements as unconscionable. For instance, in *McKenzie v. Betts*, 55 So. 3d 615 (Fla. Dist. Ct. App. 2011), consumer borrowers brought a class-action against a lender based upon violations of various Florida statutes for charging usurious rates. *Id.* at 617–18. At issue on appeal was the unconscionability of a class-action waiver. In holding the clause unconscionable, the court concluded that, "[b]ecause payday loan cases are complex, time-consuming, involve small amounts, and do not guarantee adequate awards of attorney's fees, individual plaintiffs cannot obtain competent counsel without the procedural vehicle of a class action. The class-action waiver prevents consumers from vindicating their statutory rights, and thus violates public policy." *Id.* at 629; *see also supra* note 39 (summarizing similar cases).

121. Obviously there will be cases where company ABC will fix the problem regardless of warranty obligations, such as when the problem is widespread enough, or harmful enough, to cause harm to the company image and possibly hurt sales. This example is intended to fall short of such a threshold.

unconscionable.[122] Some courts have found confidentiality agreements unconscionable.[123] If the Court's focus on arbitration as it existed in 1925 is the hallmark of the "fundamental attributes of arbitration" approach, then we must engage in a historical guessing game as to what Congress envisioned with regard to these issues. With regard to the arbitration fee issue, given the *Concepcion* Court's concern with expediency, an unconscionability ruling may not be an issue as cost shifting would not prolong arbitration (and may encourage it).[124] But the confidentiality issue may be subject to scrutiny as the reference to what Congress envisioned as "arbitration" leaves such questions unanswered.

CONCLUSION

No reasonable person would hire a lawyer to sue for the sums at issue in *Concepcion* ($30.22), nor would any attorney take the case other than at an hourly rate far in excess of the underlying claim. Rather than bring the claims as a class in arbitration and have the dispute resolved, individuals will be left unable to bring their claims at all. While some may choose to arbitrate the claims themselves without the assistance of an attorney, they will face the daunting task of navigating the arbitration system on their own. Understandably, many will not find this to be a realistic alternative.

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122. *See* Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003); Dobbins v. Hawk's Enters., 198 F.3d 715 (8th Cir. 1999) (holding that arbitration fees can make a contract unconscionable, but unconscionability will be determined on a case-by-case basis); State *ex rel*. Vincent v. Schneider, 194 S.W.3d 853, 860 (Mo. 2006) (en banc) ("It is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer."); Sosa v. Paulos, 924 P.2d 357 (Utah 1996) (concluding that, in a medical malpractice case, the requirement for the patient to pay the arbitration fees was unconscionable and contrary to public policy).

123. *See* Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007) (holding that a confidentiality clause that precluded mentioning even people not directly involved in arbitration proceeding was unconscionable); Sprague v. Household Int'l, 473 F. Supp. 2d 966 (W.D. Mo. 2005).

124. The Court has, in previous opinions, left the door open for the argument that an arbitration clause could be invalidated on public policy grounds if it effectively prevents a claimant from vindicating a statutory cause of action. *See* Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 636–37 (1985) ("Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim . . . . And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (rejecting generalized attacks on arbitration based upon suspicion that it would affect a claimant's rights but noting that such claims "may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions." (internal quotations and citations omitted)). These cases dealt with federal rather than state statutory rights however, and it is an open question whether this argument stands post-*Concepcion* scrutiny. Cruz v. Cingular Wireless, LLC, No. 08–16080, 2011 WL 3505016, at *8 (11th Cir. Aug. 11, 2011).

While the majority would find nothing ironic in its decision,[125] the irony was not lost on the entire Court. As the dissent, authored by Justice Breyer, correctly points out, the effect of the decision is not to encourage multiple individual suits for small sums, but rather it discourages these suits from ever being brought in the first place. Some might argue that with fewer lawsuits being brought, consumers will be helped as the cost of doing business for companies goes down and savings will be passed onto the consumer public. This assumption ignores the very real possibility that the savings will instead be translated into higher compensation packages for management or passed along to the shareholders.[126]

Putting aside the speculative aspect of this argument, it still does not pass muster when viewed from the perspective of those that have been wronged. The Concepcions were allegedly deceived and suffered damages of $30.22. While the sum is small, it is still a very real amount. Unfortunately, the real-life effect of the majority's opinion is to leave the Concepcions, and the greater American public, at the whim of a company's customer services department. It seems unlikely that the deterrent effect of such calls will be as great as the threat of a class action or that relief will be as easily obtained. In short, though the purpose of the FAA may be to promote arbitration and the efficient resolution of disputes, the effect of *AT&T v. Concepcion* is to achieve quite the opposite.

125. The Court will find no irony, as it defines arbitration rather narrowly under the FAA as envisioning bilateral (i.e., non-class-action) arbitrations.

126. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 93–94 (2004), *available at* http://scholars.law.unlv.edu/facpub/277/.