

Tsunami: *AT&T Mobility LLC v. Concepcion* Impedes Access to Justice

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AUTHOR’S NOTE: As this Article was in production, two important decisions were issued that may lessen the impact of *Concepcion*, at least temporarily. First, the National Labor Relations Board issued *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012). This decision held that an employer, whether unionized or not, violates employees’ right to engage in collective action, protected under § 8(a)(1) of the National Labor Relations Act, when it requires employees covered by the Act to sign an agreement that precludes them from bringing class actions or collective claims. To the extent this decision stands and is not reversed on appeal, it will protect most employees against the *Concepcion* tsunami. However, the *D.R. Horton* decision will have no impact on consumers and may well be reversed on appeal. Second, the U.S. Court of Appeals for the Second Circuit, in *In re American Express Merchants’ Litigation*, No. 06-1871-cv, 2012 WL 284518 (2d Cir. Feb. 1, 2012), recognized an exception to *Concepcion* when companies’ use of arbitral class action waivers would prevent persons from vindicating their rights under federal law. Specifically, the Second Circuit held unenforceable an arbitral class action waiver that it found would effectively prevent plaintiffs from bringing a federal antitrust claim. While this decision will have an important impact in the Second Circuit, at least unless it is reversed, it is not clear how many other courts will recognize this exception to the scope of *Concepcion*.

## INTRODUCTION

It is highly ironic but no less distressing that a case with a name meaning “conception” should come to signify death for the legal claims of many potential plaintiffs. The U.S. Supreme Court’s five-to-four decision in *AT&T Mobility LLC v. Concepcion*<sup>1</sup> is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions.<sup>2</sup> This Article will explore the decision; how the decision is being interpreted by lower courts; the decision’s impact on parties to such litigation; and how, if not legislatively limited, this case will substantially harm consumers, employees, and perhaps others. By permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued.<sup>3</sup> In many contexts, if

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<sup>1</sup> 131 S. Ct. 1740 (2011). Justice Scalia’s opinion was joined by the Chief Justice and Justices Alito, Kennedy, and Thomas, though Justice Thomas also filed a separate concurrence.

<sup>2</sup> *Concepcion* may also have an even broader impact. For example, it may ultimately be used to prevent franchisees from bringing class actions against franchisors. Cf. Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 275, 277 (2009) (asserting, in the pre-*Concepcion* world, that “we do not see the class action as likely to become extinct, or even to appear on the endangered species list”). *Concepcion* will likely also have a detrimental impact on group litigation that is not brought as a class or representative action. Some companies’ arbitration clauses not only preclude plaintiffs from bringing class or representative actions but also proscribe plaintiffs from joining their claims together in a single lawsuit as is often permitted by Fed. R. Civ. P. 20 and comparable state rules of civil procedure. E.g., *Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766, 768 (8th Cir. 2011) (discussing a clause mandating that “[a]ny arbitration . . . shall be conducted and resolved on an individual basis only and not on a class-wide, multiple plaintiff, consolidated, or similar basis”); *Swift v. Zynga Game Network, Inc.*, No. C-09-5443 EDL, 2011 WL 3419499, \*3 (N.D. Cal. Aug. 4, 2011) (discussing an arbitration clause providing, *inter alia*, that “no arbitration may be joined with any other”). *Concepcion* will no doubt be used to attempt to block plaintiffs’ unconscionability attacks on such provisions when contained in arbitration clauses. However, this Article will focus specifically on class actions rather than these other types of joint claims.

<sup>3</sup> Professor Myriam Gilles has expressed a similar view as to the likely impact of *Concepcion*. See Myriam Gilles, *AT&T Mobility vs. Concepcion: From Unconscionability to Vindication of Rights*, SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), <https://www.scotusblog.com/author/myriam-gilles> (“While more attention was paid to *Wal-Mart v. Dukes*, [131 S. Ct. 2541 (2011),] the *AT&T* ruling is the real game-changer for class action litigation, as it permits most of the companies that touch consumers’ day-to-day lives to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts.”). For pre-*Concepcion* scholarship discussing the use of arbitration as a class action shield, see Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Jean R. Sternlight, *As Mandatory*

plaintiffs cannot join together in a class action, lack of knowledge, lack of resources, or fear of retaliation will prevent them from bringing any claims at all. As one plaintiffs' lawyer specializing in consumer claims stated, "The ruling opens the door for companies to pickpocket \$10 at a time from millions of consumers."<sup>4</sup>

## I

### THE *CONCEPCION* DECISION

In *Concepcion* the Court held that the Federal Arbitration Act (FAA) preempted lower courts' use of California's *Discover Bank*<sup>5</sup> rule to hold arbitral class action waivers unconscionable.<sup>6</sup> The *Discover Bank* rule classifies as unconscionable class action waivers contained in consumer contracts of adhesion that would insulate companies from claims that they cheated large numbers of consumers out of individually small sums of money.<sup>7</sup> The Court found that the rule effectively requires "the availability of classwide arbitration."<sup>8</sup> Therefore, stated the Court, the *Discover Bank* rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."<sup>9</sup> The Court asserted that by effectively allowing any party to a consumer arbitration to demand class-wide

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*Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

<sup>4</sup> Bob Sullivan, *After High Court Ruling, Firms Divide and Conquer in Consumer Cases*, THE REDTAPE CHRONICLES (Sept. 21, 2011, 7:12 AM), [http://redtape.msnbc.msn.com/\\_news/2011/09/21/7863184-after-high-court-ruling-firms-divide-and-conquer-in-consumer-cases](http://redtape.msnbc.msn.com/_news/2011/09/21/7863184-after-high-court-ruling-firms-divide-and-conquer-in-consumer-cases) (quoting David DiSabato, a New Jersey attorney); see also Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL'Y 73 (2011).

<sup>5</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

<sup>6</sup> *Concepcion*, 131 S. Ct. at 1753.

<sup>7</sup> As quoted by the Supreme Court, the *Discover Bank* rule provided:

"[W]hen the 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 individually small sums of money, then . . . 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."

*Id.* at 1746 (quoting *Discover Bank*, 113 P.3d at 1110) (alteration in original).

<sup>8</sup> *Id.* at 1748.

<sup>9</sup> *Id.*

arbitration,<sup>10</sup> the *Discover Bank* rule undermines the FAA's supposed purpose of supporting efficient and informal individualized arbitration.<sup>11</sup>

The *Concepcion* decision arose from a confused sea of lower court decisions regarding the permissibility of using arbitration clauses to prevent plaintiffs from bringing consumer and other class actions.<sup>12</sup> The facts of *Concepcion* were fairly typical of these cases, in that plaintiffs' individual damages were quite small. Vincent and Liza Concepcion argued that AT&T Mobility (AT&TM) defrauded them by charging \$30.22 for a phone that was advertised to be free.<sup>13</sup> When the Concepcions sought to litigate, AT&TM filed a motion to compel arbitration and further argued that the Concepcions could arbitrate only individually rather than in a class action. In California and in a number of other jurisdictions, the use of arbitration to preclude class actions was often found unconscionable.<sup>14</sup> On the other hand, numerous other jurisdictions had held that including class action waivers in arbitration clauses was not unconscionable.<sup>15</sup>

The defendant in *Concepcion*, AT&TM, successfully argued that federal law, specifically the FAA, trumped lower court decisions that

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<sup>10</sup> *Id.* at 1750.

<sup>11</sup> The Court asserts that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." *Id.* at 1751. The Court contends that the switch from individual to class arbitration sacrifices the informality, speed, and low cost of arbitration and also greatly increases risks to defendants, forcing them to settle questionable claims. *Id.* at 1751–52.

<sup>12</sup> For discussions of the mixed case law on whether, pre-*Concepcion*, arbitral class action waivers could be unconscionable, see J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006). See also Bryon Allyn Rice, Comment, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215 (2008).

<sup>13</sup> *Concepcion*, 131 S. Ct. at 1744.

<sup>14</sup> See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (applying California law to hold an arbitral class action waiver unconscionable); see also *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59 (1st Cir. 2007) (applying Massachusetts law to find a class action waiver unconscionable as applied to a Fair Labor Standards Act claim); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir. 2003) (applying California law to hold a class action waiver unconscionable); *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1260 (W.D. Wash. 2009) (applying Washington law to hold an arbitral class action waiver unconscionable); *Muhammad v. Cnty. Bank of Rehoboth Beach*, 912 A.2d 88, 91 (N.J. 2006) (holding an arbitral class action waiver unconscionable under New Jersey law).

<sup>15</sup> E.g., *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Lloyd v. MBNA Am. Bank, N.A.*, 27 F. App'x 82, 84 (3d Cir. 2002); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001).

had held that arbitral class action waivers could be unconscionable. While *Concepcion* will have less impact in those jurisdictions that had already permitted companies to use arbitration to insulate themselves against class actions,<sup>16</sup> the analysis that follows shows that *Concepcion* is having a significant impact in those jurisdictions that previously allowed unconscionability attacks against arbitral class action waivers.

The reasoning of the majority's opinion in *Concepcion* is vulnerable to attack on various grounds.<sup>17</sup> Critics will likely point out, *inter alia*, that voiding class action waivers in situations in which requiring individualized arbitration would be unconscionable is not the same as mandating class-wide arbitration, that the Court's decision tramples states' traditional abilities to establish their own rules on unconscionability, that class-wide arbitrations are indeed feasible, and that no legislative history or policy argument supports the idea that the FAA was passed to protect companies against the supposed unfairness of class actions. While it would in some ways be fun to join the attacks on the majority's analysis, this Article will instead focus on the policy impact of the decision, particularly in light of how *Concepcion* is being interpreted by lower courts.

## II

### LOWER COURTS' INTERPRETATIONS OF *CONCEPCION*

When *Concepcion* was handed down, it was not entirely clear how broad its impact might be. While many thought the decision would doom employment and consumer class actions,<sup>18</sup> some lawyers and commentators suggested ways lower courts might distinguish *Concepcion* and thereby continue to void at least some arbitral class

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<sup>16</sup> See sources cited *supra* note 15.

<sup>17</sup> For several such attacks, see Fisk & Chemerinsky, *supra* note 4; David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. COLLOQUY 13 (2011), <http://colloquy.law.northwestern.edu/main/2011/08/unconscionability-wars.html>; Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, AM. REV. INT'L ARB. (forthcoming 2012), available at <http://ssrn.com/abstract=1919936>.

<sup>18</sup> See Marcia Coyle, *Divided Justices Back Mandatory Arbitration for Consumer Complaints*, N.Y. L.J., Apr. 28, 2011, at 2 (quoting the lawyer for the *Concepcions* as stating, "The decision will make it harder for people with civil rights, labor, consumer and other kinds of claims that stem from corporate wrongdoing to join together to obtain their rightful compensation.").

action waivers.<sup>19</sup> Courts might, for example, find that *Concepcion* preempted only the essentially *per se* rule in *Discover Bank* and allow consumers or employees to challenge arbitral class action prohibitions using evidence and a more traditional unconscionability analysis.<sup>20</sup> Courts could also find that *Concepcion* did not apply when companies would not be forced by state law to participate in class-wide arbitration, but rather only to abandon individualized arbitration in certain cases. Courts could limit *Concepcion* to its unusual facts—emphasizing that the arbitration clause used by AT&TM was extremely pro-consumer. Courts might limit *Concepcion* to the preemption of the particular unconscionability attack and allow other attacks on class action waivers based on public policy or an inability to enforce the relevant federal or state statutes. Or, courts might even find that *Concepcion* does not apply to claims originating in state rather than federal court.

However, while it has been less than a year since the Court issued *Concepcion*, the results in its wake already look grim for the future of consumer and employment class actions. Most courts are rejecting all potential distinctions and are instead applying *Concepcion* broadly as a “get out of class actions free” card.<sup>21</sup> In case after case, courts are

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<sup>19</sup> For an example of an excellent brief asking that a court void a class action waiver as unconscionable, notwithstanding *Concepcion*, see Respondents’ Answer Brief on the Merits, *McKenzie Check Advance of Fla., LLC v. Betts*, 60 So. 3d 1055 (Fla. 2011) (No. SC11-514), 2011 WL 4442949. See also Arthur H. Bryant, *Class Actions Are Not Dead Yet*, NAT’L L.J., June 20, 2011, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202497707930> (presenting various arguments for how *Concepcion* might be distinguished by lower courts); Fisk & Chemerinsky, *supra* note 4 (asserting that courts may limit the scope of *Concepcion* to the terms of its highly unusual arbitration provision); Jill I. Gross & Christopher Bloch, *Arbitration Case Law Update 2011*, in *ARBITRATION CASE LAW UPDATE 2011*, at 205, 212 (PLI Corp. Law & Practice, Course Handbook Series No. B-1899, 2011), WL 1899 PLI/Corp 205 (stating that while there is little doubt *Concepcion* will have a serious adverse impact on consumer class actions, perhaps courts will construe *Concepcion*’s preemptive scope narrowly); S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT’L L. & COM. REG. (forthcoming 2012), available at <http://ssrn.com/abstract=1967101> (urging that *Concepcion* will not lead to the demise of arbitral class actions).

<sup>20</sup> I argued for a narrow interpretation shortly after the issuance of *Concepcion*. See Jessie Kokrda Kamens, *Will Class Actions Survive Ruling by Supreme Court in Concepcion?*, 12 Class Action Litig. Rep. 1 (BNA) (May 13, 2011) (quoting Sternlight).

<sup>21</sup> Some may note that the cases discussed in this Article come from a limited range of jurisdictions and seem to be drawn inordinately from California. This apparent jurisdictional bias reflects the fact that *Concepcion* raises issues primarily in those jurisdictions, particularly California, that formerly voided arbitral class action waivers as unconscionable. In jurisdictions that already precluded unconscionability attacks on arbitral class action waivers, *Concepcion* will have an impact only to the extent that courts rely on the decision to foreclose additional attacks on arbitration clauses.

now refusing to void arbitral class action waivers in consumer and employment cases.<sup>22</sup> Specifically, they have found that suits must proceed in individualized arbitration rather than class actions in cases brought regarding consumer fraud,<sup>23</sup> consumer debt,<sup>24</sup> violations of federal and state wage and hour legislation,<sup>25</sup> and unpaid wages.<sup>26</sup> As interpreted by most courts, *Concepcion* is destroying virtually all possible attacks on arbitral class action waivers.<sup>27</sup>

Indeed, rather than finding ways to distinguish *Concepcion*, a number of judges are extending *Concepcion*'s reasoning to contexts not directly discussed by the Court. For example, in *D'Antuono v.*

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<sup>22</sup> Indeed, some courts are rejecting challengers' unconscionability claims without even giving them a chance to conduct discovery on the issue. *E.g.*, *Khan v. Orkin Exterminating Co.*, No. C 10-02156 SBA, 2011 WL 4853365 (N.D. Cal. Oct. 13, 2011). *But see Alvarez v. T-Mobile USA, Inc.*, No. CIV S-10-2373 WBS GGH, 2011 WL 4566440 (E.D. Cal. Sept. 29, 2011) (granting the petitioner's motion to compel discovery).

<sup>23</sup> *See, e.g.*, *Swift v. Zynga Game Network, Inc.*, No. C-09-5443 EDL, 2011 WL 3419499 (N.D. Cal. Aug. 4, 2011); *Murphy v. DIRECTV, Inc.*, No. 2:07-cv-06465-JHN-VBKx, 2011 WL 3319574 (C.D. Cal. Aug. 2, 2011); *In re Gateway LX6810 Computer Prods. Litig.*, No. SACV 10-1563-JST (JEMx), 2011 WL 3099862 (C.D. Cal. July 21, 2011); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, No. C-10-02553 RMW, 2011 WL 2886407 (N.D. Cal. July 19, 2011); *Bernal v. Burnett*, No. 10-cv-10917-WJM-KMT, 2011 WL 2182903 (D. Colo. June 6, 2011); *Wallace v. Ganley Auto Grp.*, No. 95081, 2011 WL 2434093 (Ohio Ct. App. June 16, 2011).

<sup>24</sup> *Estrella v. Freedom Fin.*, No. C 09-03156 SI, 2011 WL 2633643 (N.D. Cal. July 5, 2011); *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-cv-3338 (NLH)(KMW), 2011 WL 2490939, at \*7 (D.N.J. June 22, 2011) (finding that the claim under the Servicemembers Civil Relief Act seeking a prorated refund of advance car lease payments must be arbitrated individually); *Day v. Persels & Assocs.*, No. 8:10-CV-2463-T-33TGW, 2011 WL 1770300, at \*5 (M.D. Fla. May 9, 2011) (stating plaintiffs conceded that unconscionability argument fails in light of *Concepcion*); *Bellows v. Midland Credit Mgmt., Inc.*, No. 09CV1951-LAB (WMC), 2011 WL 1691323 (S.D. Cal. May 4, 2011).

<sup>25</sup> *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011); *Grabowski v. Robinson*, No. 10cv1658-WQH-MDD, 2011 WL 4353998 (S.D. Cal. Sept. 19, 2011); *Daugherty v. Encana Oil & Gas (USA), Inc.*, No. 10-cv-02272-WJM-KLM, 2011 WL 2791338 (D. Colo. July 15, 2011).

<sup>26</sup> *Lewis v. UBS Fin. Servs. Inc.*, No. C 10-04867 SBA, 2011 WL 4727795 (N.D. Cal. Sept. 30, 2011) (refusing to distinguish unconscionability challenges brought in the employment context from those brought in the consumer context); *Quevedo v. Macy's Inc.*, No. CV 09-1522 GAF MANX, 2011 WL 3135052 (C.D. Cal. June 16, 2011).

<sup>27</sup> Of course, even *Concepcion* has not eliminated all attacks that might be made against arbitration clauses on other grounds. *E.g.*, *Chavarria v. Ralphs Grocer Co.*, No. CV 11-02109 DDP (VBKx), 2011 WL 4104856 (C.D. Cal. Sept. 15, 2011) (holding an arbitration clause unconscionable on various grounds). The *Chavarria* court stated, "Ralphs' arbitration policy lacks any semblance of fairness and eviscerates the right to seek civil redress, rendering it a right that exists in name only. To condone such a policy would be a disservice to the legitimate practice of arbitration and a stain on the credibility of our system of justice." *Id.* at \*8.

*Service Road Corp.*,<sup>28</sup> a case not involving a class action waiver, the district court stated, “While this case does not ultimately turn on *AT&T Mobility’s* holding, this Court cannot overlook that decision entirely because its reasoning may be at odds with reasoning in the Second Circuit’s recent cases . . . .”<sup>29</sup> The court went on to hold that an arbitration agreement imposed on exotic dancers was neither procedurally nor substantively unconscionable.<sup>30</sup> Several other courts have applied *Concepcion* to reject not only unconscionability attacks on class action waivers but also arguments that denying plaintiffs their class actions would violate state law or public policy,<sup>31</sup> that arbitral class action waivers prevent plaintiffs from vindicating their rights under state law,<sup>32</sup> or that class action waivers are not applicable as to claims for public injunctive relief brought under California law.<sup>33</sup>

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<sup>28</sup> 789 F. Supp. 2d 308 (D. Conn. 2011).

<sup>29</sup> *Id.* at 322 (citation omitted).

<sup>30</sup> *Id.* at 327–29. The arbitration clause did not include a class action prohibition.

<sup>31</sup> *E.g.*, *Kaltwasser v. AT&T Mobility LLC*, No. C 07-00411, 2011 WL 4381748, at \*7 (N.D. Cal. Sept. 20, 2011) (rejecting the argument that arbitral class action waiver might be void under “public policy principles of contract law”); *In re Gateway LX6810 Computer Prods. Litig.*, No. SACV 10-1563-JST (JEMx), 2011 WL 3099862 (C.D. Cal. July 21, 2011) (rejecting the argument that a class action waiver might be void under various California statutes); *Wallace v. Ganley Auto Grp.*, No. 95081, 2011 WL 2434093 (Ohio Ct. App. June 16, 2011) (rejecting the argument that policy underlying a Ohio consumer protection act might entitle plaintiffs to a class action). *But see* *Minute Order, Anderson v. Apple Am. Grp. LLC*, No. 34-2010-00093705-CU-OE-GDS (Cal. Super. Ct. Aug. 16, 2011) (holding that *Concepcion* did not preclude plaintiffs in an employment case from arguing that arbitral class action waiver prevented them from effectively vindicating their statutory rights under California labor law).

<sup>32</sup> *E.g.*, *Kaltwasser*, 2011 WL 4381748, at \*4–7 (rejecting the plaintiffs’ argument that the arbitral class action waiver should be voided with respect to their consumer fraud claims under state law because whereas the plaintiffs had already spent \$65,000 on expert fees and estimated substantial additional expenditures, the plaintiffs’ individual actual damages did not exceed \$2000).

<sup>33</sup> *E.g.*, *Meyer v. T-Mobile USA, Inc.*, No. C 10-05858 CRB, 2011 WL 4434810 (N.D. Cal. Sept. 23, 2011) (finding that *Concepcion* means that prior California law precluding arbitration of public injunctive relief claims is preempted by the FAA); *Arellano v. T-Mobile USA, Inc.*, No. C 1-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011) (finding that *Concepcion* broadly trumps public policy arguments, such as that claims for public injunctive relief cannot be arbitrated). *But see* *Ferguson v. Corinthian Colls.*, Nos. SACV 11-0127 DOC (AJWx), SACV 11-0259 DOC (AJWx), 2011 WL 4852339 (C.D. Cal. Oct. 6, 2011) (refusing to apply *Concepcion* to overturn a California law permitting plaintiffs to litigate rather than arbitrate certain statutory claims for injunctive relief); *In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, No. ML 09-2093 AG (ANx), 2011 WL 4090774, at \*9–10 (C.D. Cal. Sept. 6, 2011) (finding that *Concepcion* did not overrule California case law precluding arbitration of public claims for injunctive relief); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Ct. App. 2011) (holding



*Concepcion* is also having a significant retroactive impact. Specifically, a number of courts have permitted defendants to raise an arbitration defense even in cases that have been pending in litigation for as long as several years. These courts, often California courts (since California is where attacks on arbitral class action waivers had previously been most successful), reason that *Concepcion*'s dramatic change in the law voids plaintiffs' claims that defendants waived the arbitral defense.<sup>34</sup> For example, *Kaltwasser v. AT&T Mobility LLC*<sup>35</sup> involved a putative class action, filed in January 2007, in which the district court had previously found the contractual arbitration agreement unenforceable.<sup>36</sup> Nonetheless, while the plaintiff's motion for class certification was still pending, the district court effectively reversed its own prior decision and sent the plaintiff back to individualized arbitration on his claim that AT&TM falsely advertised it was the cellular service provider with "the fewest dropped calls."<sup>37</sup>

*Concepcion* is also undoubtedly causing many plaintiffs in class actions or putative class actions to abandon their claims by entering into settlements. The incentive to settle a claim increases as plaintiffs and their attorneys realize that they may or will be forced out of class action litigation into individualized arbitration. While not all settlement agreements lead to published decisions, some do.<sup>38</sup> Although it is not possible to examine the extent to which these settlements are beneficial to plaintiffs, it reasonably can be inferred that many plaintiffs and their attorneys are cutting their losses in light of the damage *Concepcion* wrought to their arguments.

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unenforceable a contractual waiver of the right to pursue representative action under California's Private Attorney General Act, notwithstanding *Concepcion*).

<sup>34</sup> See, e.g., *Swift v. Zynga Game Network, Inc.*, No. C-09-5443 EDL, 2011 WL 3419499 (N.D. Cal. Aug. 4, 2011); *Morse v. ServiceMaster Global Holdings, Inc.*, No. C 10-00628 SI, 2011 WL 3203919 (N.D. Cal. July 27, 2011) (multiple individual wage and hour claims); *Nakano v. ServiceMaster Global Holding Inc.*, No. C 09-05152 SI, 2011 WL 3206592 (N.D. Cal. July 27, 2011) (same); *Bryant v. Serv. Corp. Int'l*, No. C 08-01190 SI, 2011 WL 2709643 (N.D. Cal. July 12, 2011); *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341 JSW, 2011 WL 2566449 (N.D. Cal. June 27, 2011); *Villegas v. U.S. Bancorp*, No. C 10-1762 RS, 2011 WL 2679610 (N.D. Cal. June 20, 2011).

<sup>35</sup> No. C 07-00411, 2011 WL 4381748 (N.D. Cal. Sept. 20, 2011).

<sup>36</sup> *Id.* at \*1. The prior unconscionability determination had been affirmed by the court of appeals. *Kaltwasser v. Cingular Wireless LLC*, 350 F. App'x 108, 109 (9th Cir. 2008).

<sup>37</sup> *Kaltwasser v. AT&T Mobility LLC*, 2011 WL 4381748, at \*1, \*2.

<sup>38</sup> E.g., *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, Nos. MDL 2147, 10 C 2278, 2011 WL 2204584 (N.D. Ill. June 2, 2011); *Del Rio v. CreditAnswers, LLC*, No. 10cv346-WQH-BLM, 2011 WL 1869881 (S.D. Cal. May 16, 2011).

Judges are not necessarily interpreting *Concepcion* broadly because they agree with its analysis. Rather, readers can almost feel the anguish of certain judges who state in their opinions that they would have liked to void the class action waiver but felt their hands were tied by *Concepcion*. For example, one judge stated, while refusing to void a class action waiver in a consumer fraud case, “There is no doubt that *Concepcion* was a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals.”<sup>39</sup> Another judge, refusing to strike down the class action waiver that required members of the armed services to bring individual arbitration claims to enforce their rights under the Servicemembers Civil Relief Act, stated,

Though [the plaintiff’s] argument and authority [as to unconscionability of the class action waiver] are persuasive, the Court must take note of the recent decision issued by the Supreme Court of the United States in *AT&T Mobility L.L.C. v. Concepcion*.

...

Based on the United States Supreme Court’s holding and reasoning in [*Concepcion*], the Court cannot find that any public interest articulated in this case, either in connection with the SCRA or New Jersey law, overrides the clear, unambiguous, and binding class action waiver included in the parties’ arbitration agreement.<sup>40</sup>

The Eleventh Circuit’s decision in *Cruz v. Cingular Wireless, LLC*<sup>41</sup> exemplifies many courts’ broad interpretation of *Concepcion*. In *Cruz*, plaintiffs—customers of AT&TM and covered by the same arbitration clause discussed in *Concepcion*<sup>42</sup>—brought a class action

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<sup>39</sup> Bernal v. Burnett, No. 10-cv-01917-WJM-KMT, 2011 WL 2182903, at \*7 (D. Colo. June 6, 2011). Judge William Martínez rejected the plaintiffs’ argument that the adhesive nature of the arbitration contracts imposed rendered them unconscionable when he stated,

Plaintiffs’ argument has considerable validity and the Court would likely have found that the Arbitration Agreements at issue here [were] unconscionable . . . if it were issuing this decision pre-*Concepcion*. But the Court has to take the legal landscape as it lies and cannot ignore the Supreme Court’s clear message. . . . In *Concepcion*, the Supreme Court rejected the idea that arbitration agreements are *per se* unconscionable when found in adhesion contracts. . . . As a result, this Court has no alternative but to discount the weight to be attributed to the adhesive nature of the Arbitration Agreements at issue here.

*Id.* at \*6. And the same judge, in a wage and hour case, expressed similar sentiments. Daugherty v. Encana Oil & Gas (USA), Inc., No. 10-CV-02272-WJM-KLM, 2011 WL 2791338, at \*6 (D. Colo. July 15, 2011).

<sup>40</sup> Wolf v. Nissan Motor Acceptance Corp., No. 10-cv-3338 (NHL)(KMW), 2011 WL 2490939, at \*6–7 (D.N.J. June 22, 2011).

<sup>41</sup> 648 F.3d 1205 (11th Cir. 2011).

<sup>42</sup> *Id.* at 1210–11.

consumer fraud claim regarding small hidden charges.<sup>43</sup> The plaintiffs sought to distinguish *Concepcion* in several ways. First, they argued that unlike the *Concepcion* plaintiffs, they had specific evidence showing they would be unable to vindicate their rights absent a class action.<sup>44</sup> Second, rather than arguing that the class action waiver was unconscionable, the plaintiffs asserted that the waiver violated public policy because it would defeat the remedial purpose of the Florida Deceptive and Unfair Trade Practices Act.<sup>45</sup> Third, the plaintiffs pointed out that because of the “blow up” clause<sup>46</sup> contained in the arbitration provision, there was no risk that the defendant would be forced into the class-wide arbitration that the Supreme Court in *Concepcion* found so objectionable.<sup>47</sup> The Eleventh Circuit rejected all of these arguments, finding that the arguments had already been considered and rejected by the U.S. Supreme Court. “The Plaintiffs’ evidence goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*—namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted.”<sup>48</sup>

*Cruz* did identify one small window through which future claimants might try to crawl. Perhaps, it recognized, future claimants might try to invalidate an arbitral class action waiver “on public policy grounds where it effectively prevents the claimant from vindicating her statutory cause of action.”<sup>49</sup> Here *Cruz* cited a line of Supreme Court cases that endorse the idea that arbitration agreements may not be enforceable when they prevent claimants from vindicating their rights. Specifically, *Mitsubishi Motors Corp. v. Soler Chrysler-*

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<sup>43</sup> *Id.* at 1208.

<sup>44</sup> *Id.* at 1213–15. Specifically, plaintiffs made a factual record including “affidavits of three Florida consumer law attorneys who attested that they would not represent consumers on an individual basis in pursuing their . . . claims against AT[&]TM.” *Id.* at 1214. Plaintiffs also presented statistical evidence that they said showed the “infinitesimal” percentage of AT&TM subscribers who had ever arbitrated a dispute with AT&TM, which evidence the Eleventh Circuit said had also been presented in *Concepcion*. *Id.* (asserting that “only 0.000007% of AT[&]TM customers filed a notice of dispute against AT[&]TM”).

<sup>45</sup> *Id.* at 1207.

<sup>46</sup> This clause provided that if the class action waiver “is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.” *Id.*

<sup>47</sup> *Id.* at 1213.

<sup>48</sup> *Id.* at 1214.

<sup>49</sup> *Id.* at 1215. Professor Myriam Gilles also discussed this possible line of attack in a recent blog. Gilles, *supra* note 3.

*Plymouth, Inc.*<sup>50</sup> required an automobile franchisee to arbitrate a claim under the Sherman Antitrust Act stating, “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>51</sup> A later case, *Green Tree Financial Corp. v. Randolph*,<sup>52</sup> enforced the challenged arbitration clause but recognized that when a claimant could establish that “large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,”<sup>53</sup> the results would be different.<sup>54</sup> However, the Eleventh Circuit found in *Cruz* that the plaintiffs could not establish that their rights could not be vindicated because the Supreme Court in *Concepcion* had already “examined *this very arbitration agreement* and concluded that it did not produce such a result.”<sup>55</sup> The Eleventh Circuit also noted that this “vindication of rights” argument might not necessarily apply to state as opposed to federal statutory causes of action.<sup>56</sup>

While *Cruz* at least took some pains to limit the scope of its ruling, a few recent rulings have interpreted *Concepcion* even more broadly also to block the “vindication of rights” argument. In *Kaltwasser v. AT&T Mobility LLC*<sup>57</sup> the plaintiff argued that the arbitral class action waiver was void because he could not realistically pursue his consumer fraud claim individually in that his expert fees would exceed \$165,000 and his maximum recovery would be only \$2000.<sup>58</sup> The district court rejected the argument, however, on three grounds. First, the court found that the *Green Tree Financial Corp. v.*

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<sup>50</sup> 473 U.S. 614 (1985).

<sup>51</sup> *Id.* at 637.

<sup>52</sup> 531 U.S. 79 (2000).

<sup>53</sup> *Id.* at 90.

<sup>54</sup> *Id.*

<sup>55</sup> *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011)). In future cases, courts, including perhaps the Supreme Court, will need to decide whether the “effectively vindicates” language protects the rights of absent class members as well as named plaintiffs.

<sup>56</sup> *Id.* (citing *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 79, 81–83 (D.C. Cir. 2005)) (severing a portion of an arbitration clause that was inconsistent with state law); cf. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 270–72 (2006) (asserting that the “effectively vindicate” argument ought to apply only to federal and not to state-law claims, given the preemptive scope of the FAA).

<sup>57</sup> No. C 07-00411, 2011 WL 4381748 (N.D. Cal. Sept. 20, 2011).

<sup>58</sup> *Id.* at \*4.

*Randolph*<sup>59</sup> “vindication of rights” argument may not apply to claims, such as *Kaltwasser*’s, brought under state rather than federal law.<sup>60</sup> Second, the court concluded that even if *Green Tree* applies to state claims, “the notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with *Concepcion*,” and that had the majority intended to allow such an argument it would have so stated.<sup>61</sup> Third, the court also expressed its view that the “vindication of rights” argument would be unworkable as an administrative matter because the argument would require courts to consider the viability of individuals’ claims on a case-by-case basis.<sup>62</sup>

A very few decisions have bucked lower courts’ general trend of interpreting *Concepcion* broadly to prevent plaintiffs from voiding arbitral class action waivers. For example, one federal district court refused to apply *Concepcion* to prevent plaintiffs from bringing a Title VII pattern and practice claim collectively, notwithstanding *Concepcion*.<sup>63</sup> Specifically, the court confirmed its earlier pre-*Concepcion* ruling that because denying the plaintiffs a class action would prevent the plaintiffs from enforcing their right to be free of pattern and practice discrimination in violation of Title VII,<sup>64</sup> the arbitral class action prohibition could not be enforced.<sup>65</sup> The court reasoned that in the Second Circuit, at least, a plaintiff cannot pursue a pattern and practice Title VII discrimination claim individually but

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<sup>59</sup> 531 U.S. 79 (2000) (rejecting the plaintiff’s claim that an arbitral fee precluded her from vindicating her rights under federal law but suggesting that an arbitration clause might be voided on that ground if the plaintiff were able to make a stronger factual showing).

<sup>60</sup> *Kaltwasser*, 2011 WL 4381748, at \*5 (noting a circuit split on the issue). Compare *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006) (stating that the *Green Tree* “vindication of rights” principle applies to claims brought only under federal statutes), with *Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (finding that arbitration clauses can be invalid when they prevent vindication of rights under state and federal law).

<sup>61</sup> *Kaltwasser*, 2011 WL 4381748, at \*5.

<sup>62</sup> *Id.* at \*6. The district court did not explain why such fact-specific findings are more unworkable than inquiries regularly performed by courts in other contexts. See also *Meyer v. T-Mobile USA, Inc.*, No. C 10-05858 CRB, 2011 WL 4434810 (N.D. Cal. Sept. 23, 2011) (rejecting, without discussion, the plaintiffs’ argument that the arbitral class action waiver would prevent them from vindicating their statutory rights).

<sup>63</sup> *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813 (S.D.N.Y. July 7, 2011).

<sup>64</sup> The arbitration clause did not explicitly preclude the plaintiffs from bringing a class action. However, the court interpreted *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), to prevent the plaintiffs from bringing a class action. *Chen-Oster*, 2011 WL 2671813, at \*1.

<sup>65</sup> *Id.* at \*4–5.

rather must do so in a class action.<sup>66</sup> Therefore, explained the court, forcing plaintiffs to proceed individually in arbitration would deprive them of their rights under federal law, which distinguished the case from *Concepcion*.<sup>67</sup>

Similarly, a California appellate court found that arbitral class action waivers could not be applied to representative claims brought under California's Private Attorney General Act (PAGA).<sup>68</sup> The court explained that whereas class actions allow individuals to vindicate their private rights, the PAGA representative action instead protects public rights in that "the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies."<sup>69</sup> Thus, reasoned the court, *Concepcion* does not apply to such actions. The California court further observed that PAGA claims do not require some of the class action features (e.g., notice or opt out) that the Supreme Court found troubling to apply in arbitration in *Concepcion*.<sup>70</sup> In short, stated the California court, "Until the United States Supreme Court rules otherwise, we continue to follow what we believe to be California law."<sup>71</sup> However, note that even these cases, which have refused to extend *Concepcion* to certain contexts, have not permitted unconscionability attacks on class action waivers in the employment or consumer context.<sup>72</sup> Thus, *Concepcion* is giving

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<sup>66</sup> *Id.* at \*3.

<sup>67</sup> While recognizing that the Second Circuit or Supreme Court might ultimately apply *Concepcion* broadly to deny the *Cruz* plaintiffs their class action and force them into arbitration, the court found that for now, at least, the district court should apply the law as it is and not as it might become. *Id.* at \*5.

<sup>68</sup> CAL. LAB. CODE §§ 2698–2699.5 (West 2011). The PAGA allows claimants to bring actions seeking civil penalties on their own behalf, or on behalf of current or former employees, where employers have violated the *California Labor Code*.

<sup>69</sup> *Brown v. Ralph's Grocery Co.*, 128 Cal. Rptr. 3d 854, 861 (Ct. App. 2011) (quoting *Amalgamated Transit Union, Local 1756 v. Superior Court*, 209 P.3d 937, 943 (Cal. 2009)).

<sup>70</sup> *Id.* at 863.

<sup>71</sup> *Id.* Not all courts have agreed. *See, e.g.*, *Meyer v. T-Mobile USA, Inc.*, No. C 10-05858 CRB, 2011 WL 4434810 (N.D. Cal. Sept. 23, 2011); *Arellano v. T-Mobile USA, Inc.*, No. C 1-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011).

<sup>72</sup> In *Brown*, an employment case, the plaintiffs had argued that the arbitral class action waiver was unconscionable, and the lower court so found. 128 Cal. Rptr. 3d at 857. On appeal, however, the court reversed on the ground that plaintiffs had failed to make the specific factual showing of unconscionability required in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007). *Brown*, 128 Cal. Rptr. 3d at 859. Thus, stated the court, "we do not have to determine whether, under [*Concepcion*], the rule in *Gentry* concerning the invalidity of class action waivers in employee-employer contract arbitration clauses is preempted by the FAA." *Id.* (citations omitted). One unpublished decision, *Teimouri v. Macys Inc.* (Cal. Super. Aug. 18, 2011) (decision on file with author), has gone on to hold

companies far greater power than they previously had to use arbitral class action waivers to protect themselves from class actions.

### III

#### THE IMPACT OF *CONCEPCION* AND ITS PROGENY

To date *Concepcion* is having a huge impact only on those companies that had the foresight to impose arbitral class action waivers on their consumers, employees, or others. Such companies, as we have seen, are using their waivers to block ongoing as well as proposed class actions.<sup>73</sup> However, prior to *Concepcion*, not all companies had used arbitration clauses to impose class action waivers. The use of such clauses varied by industry, by jurisdiction, and by time period. A 2001 study showed that thirty-five percent of the consumer contracts in an average California consumer's life required arbitration,<sup>74</sup> and thirty-one percent of those excluded class actions.<sup>75</sup> On the other hand, a more recent study showed that seventy-five percent of studied consumer contracts contained arbitration clauses, all of which contained class action waivers.<sup>76</sup>

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that *Concepcion* does not preempt a fact-specific claim that a class action waiver is unconscionable in the labor context.

<sup>73</sup> See *supra* notes 34–37 and accompanying text (discussing retroactive uses of *Concepcion*).

<sup>74</sup> Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004). Another more recent study of twenty-one companies with substantial name recognition or market share in the areas of telecommunications, credit, or financial services found that over seventy-five percent of the companies imposed mandatory arbitration on their consumers, and that every consumer arbitration contract included a waiver of class actions. Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880–83 (2008); cf. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 468–69 (2010) (asserting that the particular industries studied by Eisenberg et al. are particularly likely to impose mandatory arbitration and limit consumers’ access to class actions, and suggesting that a broader look at consumer contracts would yield a very different picture).

<sup>75</sup> Demaine & Hensler, *supra* note 74; see also Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 275, 288 (2009) (reporting that less than half of franchise agreements studied in 1999 and 2007 contained arbitration clauses, and that 53.6% of those in 1999 and 78.6% of those in 2007 contained class action waivers).

<sup>76</sup> Eisenberg et al., *supra* note 74, at 882–84; see also Drahozal & Wittrock, *supra* note 75 (finding wide variation in the uses of arbitration and class action waivers across various types of business).

In the near future, we can expect that even more companies will impose arbitral class action waivers as a means to insulate themselves from class actions because *Concepcion* has changed the calculus. Prior to *Concepcion*, some companies may have feared that inserting an arbitral class action waiver would backfire—leading them into lots of costly litigation over the viability of the clause and perhaps ultimately being held invalid by the courts.<sup>77</sup> Now, however, *Concepcion* and its progeny are giving companies reason to believe that an arbitral class action waiver would be upheld, so it is likely that many more companies will choose to impose such waivers.

For those companies that fear being sued in class actions it will be quite easy to insert class action waivers into small-print documents or online provisions that they send or make available to their customers or employees. Under the FAA, an arbitration clause need not even be signed to be valid, so long as it is written.<sup>78</sup> For example, Starbucks recently updated the online terms and conditions associated with its gift cards to require that any consumers resolve disputes pertaining to the cards using individual arbitration in Seattle, rather than litigation.<sup>79</sup> Companies will also have no problem amending relationships with existing customers or employees, as most courts that have considered the question have allowed such changes to ongoing relationships.<sup>80</sup> Thus, given that most companies would prefer not to be sued in class actions, we may soon see the possibility of class actions only in rare contexts in which the company and potential plaintiffs do not have a prior relationship. For example, it might not be possible for a trucking company to avoid a class action that arises out of an accidental spill of toxic chemicals on the highway, in that the company has no way of predicting who might be a potential plaintiff. However, you can be sure that creative attorneys are working already to think about how to impose arbitration and thus class action waivers on pharmaceutical customers, recipients of

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<sup>77</sup> See Drahozal & Wittrock, *supra* note 75, at 290–93 (outlining the diverse approaches courts took to arbitral class action waivers prior to *Concepcion*).

<sup>78</sup> 9 U.S.C. § 2 (2006).

<sup>79</sup> STARBUCKS CARD TERMS AND CONDITIONS, STARBUCKS, <http://www.starbucks.com/card/card-terms-and-conditions> (last visited Jan. 1, 2012).

<sup>80</sup> Occasionally consumers or employees have tried to argue that revising an ongoing relationship to require arbitration does not result in an enforceable agreement, but courts often find that consumers consented to arbitration by continuing to use a product or service, and that employees consented to the revised clause by continuing to work at the job. See, e.g., F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS § 5.2.3.3 (5th ed. 2007).



medical devices, and perhaps even concertgoers. For example, even prior to *Concepcion* a Whataburger franchisee in East Texas had sought to bind its customers to arbitration by posting a sign on the door stating:

Arbitration Notice

By entering these premises, you hereby agree to resolve any and all disputes or claims of any kind whatsoever, which arise from the products, services or premises, by way of binding arbitration, not litigation. No suit or action may be filed in any state or federal court. Any arbitration shall be governed by the FEDERAL ARBITRATION ACT,<sup>81</sup> and administered by the American Mediation Association.

Perhaps pill bottles, concert tickets, and implant inserts will soon all contain similar statements?

Assuming that arbitral class action waivers become more widespread, what impact will this have? We can expect to see an impact on prospective defendants, representative plaintiffs, absent class members, and society at large. Each of these impacts will be briefly discussed below.

*A. Impact of Concepcion on Defendants*

Many prospective defendants will be thrilled rather than troubled by the prospect of a new virtually class-action-free world.<sup>82</sup> Such companies often argue, as they did in amicus briefs in *Concepcion*, that class actions are extremely expensive and burdensome for companies,<sup>83</sup> and that they allow plaintiffs and their attorneys to use

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<sup>81</sup> Stephanie Mencimer, *Eat Burger, Waive Right to Sue*, MOTHERJONES (Jan. 31, 2008, 9:07 AM), <http://motherjones.com/mojo/2008/01/eat-burger-waive-right-sue>.

<sup>82</sup> In a fascinating blog, Charles Silver and Maria Glover have noted that upon occasion companies may actually prefer to be sued in class actions rather than individually. Maria Glover & Charles Silver, *Zombie Class Actions*, SCOTUSBLOG (Sept. 8, 2011, 10:16 AM), <http://www.scotusblog.com/2011/09/zombie-class-actions>. These commentators have recognized that at times a company is better off settling claims with a class (on the cheap of course) than litigating many individual claims. Yet *Concepcion* may serve the interests of these defendants as well because even having forced plaintiffs to waive their class claims the company can reverse course, waive its own objection to class claims brought by friendly class counsel, and thereby enter into a cozy settlement that eradicates the potential claims of individual claimants. Silver and Glover call this the creation of “zombie” classes “whose mission will be to feed on and suck the life from live claims.” *Id.*

<sup>83</sup> Brief of the Center for Class Action Fairness as Amicus Curiae in Support of Petitioner, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3167314; Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct.

the cost of class actions to extort settlements from companies with little or no liability.<sup>84</sup> Such companies have, with some success, been seeking to use legislation and rule changes to rein in class actions for many years.<sup>85</sup> However, by using the private tool of arbitration, corporate defenders will be able to achieve far more than they have been able to achieve through Congress or the federal and state rules committees: the total elimination of class actions in many contexts. These defendants will largely say “good riddance” to class actions.<sup>86</sup>

### B. *Impact of Concepcion on Named Plaintiffs*

*Concepcion* and its progeny will affect putative named plaintiffs by requiring them to pursue their claims individually in arbitration rather than as part of a class in either litigation or arbitration. There may be some debate as to whether or not this change will harm the named plaintiffs. Some claim that arbitration will afford greater access to justice than litigation, perhaps even including class actions.<sup>87</sup> Asserting that arbitration is quicker and cheaper than litigation, some say that victims of discrimination or consumer fraud will be able to present their claims more effectively in arbitration than they would in

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1740 (2011) (No. 09-893), 2010 WL 673841; Brief of Amici Curiae DIRECTV, Inc., Comcast Corp., and Dell Inc. in Support of Petitioner, AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3183855; Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3183854.

<sup>84</sup> Justice Scalia’s majority opinion in *Concepcion* accepted this argument. 131 S. Ct. at 1751 (noting that in class actions “defendants will be pressured into settling questionable claims,” and referring to “in terrorem” settlements).

<sup>85</sup> For example, the Class Action Fairness Act, 28 USC §§ 1711–1715 (2006), allowed the transfer of many class actions from state to federal court in the hope that federal courts would be less generous in certifying class actions. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008); Edward F. Sherman, *Decline & Fall*, 93 A.B.A. J. 51 (2007). Rule 23 of the Federal Rules of Civil Procedure was also amended during this same time period. See generally Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475 (2005); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1791897](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791897); Francis E. McGovern, *Common Themes and Unintended Consequences in Class Action Reform*, 83 WASH. U. L.Q. 1107 (2005).

<sup>86</sup> As noted *supra* note 82, to the extent that defendants prefer to allow class action settlements, they can waive their opposition to the arbitral or litigated class action.

<sup>87</sup> See, e.g., Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen’s Jeremiaid on the “Costs of Arbitration,”* DISP. RESOL. J., Nov. 2002/Jan. 2003, at 8, 14 (asserting that arbitration offers the average citizen a more realistic remedy than does the public court system).

litigation.<sup>88</sup> They urge that litigation may be beneficial for attorneys but not for claimants.<sup>89</sup> In *Concepcion* itself the Supreme Court examined an ingenious arbitration clause that was created to provide the impression that consumers who sought to bring claims against AT&TM would be assured access to justice. The clause states that AT&TM must pay all costs for nonfrivolous claims and pay a minimum of \$7500 plus double attorneys' fees to any claimant who received an arbitration award greater than AT&TM's last written settlement offer.<sup>90</sup> Yet, even as to the named plaintiffs (and certainly as to absent class members, as will be discussed), the clause sounds better than it is. What lawyer can afford to take a \$30 or other small claim on the gamble that the defendant would be stupid enough not to settle a winning claim and therefore risk having to pay \$7500 and double attorneys' fees? And can individual claimants really do well in arbitrating a consumer fraud claim if they have to represent themselves?<sup>91</sup> Also, with respect to many kinds of claims, it may not be practical for plaintiffs to proceed individually, rather than collectively.

Plaintiffs also argue that if they are not allowed to proceed as a class—either in arbitration or through this lawsuit—they will not be able to pursue their claims. They assert that the nature of the claims (e.g., fraud) takes time and upfront work to develop, and that no attorney will be willing or able to do that on an individualized basis. They also contend that the confidential, non-precedential nature of

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<sup>88</sup> *Id.*; see also Amy Schmitz, *Arbitration Ambush in a Policy Polemic*, 3 PENN ST. Y.B. ON ARB. & MED. 52, 86, 91–92 (2011) (stating that “evidence suggests that consumers may fare better in arbitration than in litigation,” but also noting that abolition of class actions can be problematic for consumers).

<sup>89</sup> *Id.* Some also argue that even assuming class actions would be more beneficial for named plaintiffs than would individualized arbitration, once an injury has occurred, in contrast, on an *ex ante* basis all consumers and plaintiffs would be better off accepting arbitration. The argument is that by accepting arbitration sans class actions, consumers and employees would receive all or part of the cost savings and wage increases that companies realize by eliminating class actions, and that these benefits exceed the expected benefit of bringing a class action rather than bringing an individual claim in arbitration. Ware, *supra* note 56, at 276–77. However, we do not know how these costs and benefits compare, we do not give consumers and employees this choice, and we have no reason to believe that consumers and employees could knowingly choose between these options. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (discussing psychological biases that prevent people from making rational choices as to contract terms).

<sup>90</sup> AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

<sup>91</sup> See Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 418 (2010) (suggesting that claimants may often need representation in mediation and arbitration).

arbitration will make it impossible to pursue these claims on an individualized basis, as their strongest witnesses—former employees of defendants—would be forced to testify over 800 times.<sup>92</sup>

In short, the proposition that arbitration is quicker and cheaper than litigation neglects to consider the fact that you get what you pay for. Litigation is often time consuming and expensive because claimants need representation by attorneys and discovery to prevail on their claims of discrimination or consumer fraud.<sup>93</sup>

### C. *Impact of Concepcion on Absent Class Members*

The impact of *Concepcion* on prospective absent class members will be even more significant than its impact on prospective named plaintiffs. In particular, we can expect that *Concepcion* will altogether eliminate the claims of most absent class members unless they can somehow suddenly and timely bring their own individual claims. But no one can seriously suggest that absent class members will bring individual actions that will replace class actions.

The idea that individual arbitration might adequately replace class actions neglects to consider one of the major but too-little-discussed virtues of class actions—they allow people to be represented as to claims they may not have known they had.<sup>94</sup> Even the fairest of individual arbitration clauses cannot help consumers or employees who do not know they have been wronged. Class actions, in contrast, allow a single knowledgeable victim to bring a lawsuit on behalf of all those similarly situated.<sup>95</sup> In this busy, complex world most of us lack the time or ability to figure out that we are being victimized by fraud, discrimination, negligence, or other misdeeds. The harm may be real and may violate the law; but especially when victims are harmed only in small or imperceptible ways—for example, by inappropriate fees, defective computer software, exposure to toxic substances, or denial of overtime pay—many victims will simply not

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<sup>92</sup> *Bernal v. Burnett*, No. 10-cv-01917-WJM-KMT, 2011 WL 2182903, at \*7 (D. Colo. June 6, 2011). The *Bernal* court stated that it was “sympathetic” to this argument but nonetheless bound by *Concepcion* not to void the arbitral class action waiver.

<sup>93</sup> See generally Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401 (2004) (finding that formal, complex, expensive dispute resolution processes are best for resolving some kinds of disputes, whereas informal processes best serve other interests).

<sup>94</sup> Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 88–90 (2004).

<sup>95</sup> *Id.*

realize that they have been harmed, much less harmed in violation of a law.<sup>96</sup> Indeed, even victims of larger or clearer wrongs may lack the knowledge that they have been harmed in an unlawful way, at least unless they can afford to see an attorney who might so inform them.

The high cost of legal services is a second reason why eliminating class actions will, in reality, eliminate the possibility that most absent class members would bring claims. Even a consumer who, perhaps through a revelation, came to realize she had been harmed in an unlawful fashion, might well not be able to afford to bring an individual claim. As noted above, many individual claims cannot realistically be brought without the assistance of an attorney. Moreover, there are many costs to bringing individual claims besides the cost of hiring an attorney. The individual who chooses to bring a case, even in arbitration, must give up a substantial amount of time and peace of mind. In employment cases, individuals who choose to bring lawsuits against their employer may face retaliation.<sup>97</sup> By contrast, absent class members need not pay for representation or endure many emotional or other costs of bringing a claim. As one defender of class action waivers has recognized, employing such waivers may reduce the value of aggregatable claims to zero, as many claims are not worth pursuing except as part of a class action.<sup>98</sup>

Available evidence suggests that very few consumers will choose to bring individual arbitration claims against a company. Affidavits submitted in *Concepcion* stated that “[f]ewer than 200 of AT&T’s millions of customers brought claims in individual arbitration against the company for any reason, compared to thousands who sought help from a consumer group for the specific claims alleged in *Coneff*.”<sup>99</sup> Similarly, one credit card company, First USA, revealed that in the two years after it implemented its mandatory arbitration clause in early 1998, only four consumers had filed arbitration claims against

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<sup>96</sup> See Glover, *supra* note 85 (manuscript at 28–29) (observing that particular kinds of claims, such as those relating to consumer finance, are particularly difficult for wronged individuals to recognize because identification of the wrong may require analysis of large sets of data, comparative analysis, or technical expertise).

<sup>97</sup> Fisk & Chemerinsky, *supra* note 4, at 76 (noting the importance of class actions as a means to elude fears of retaliation).

<sup>98</sup> Ware, *supra* note 56, at 276–77.

<sup>99</sup> Brief of Amici Curiae Marygrace Coneff, et al. in Support of Petitioner at 9, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3973886, at \*9.

the company.<sup>100</sup> If a single class action had been brought against First USA the action would potentially have aided many class members. Thus, it is clear that absent class members will lose their claims if companies are allowed to evade class action suits.

#### *D. Impact of Concepcion on the Public*

How will the public be impacted if prospective defendants are able to use arbitral class action waivers without fearing unconscionability attacks?<sup>101</sup> For starters, we are likely to see a substantial reduction in the number of class actions brought in federal and state court. While good empirical data on numbers of class actions are notoriously scarce,<sup>102</sup> a report by the Federal Judicial Center showed that in 2007 more than 1500 labor class actions (mostly FLSA) and consumer fraud class actions were filed in or removed to federal court, making up 67.7% of the federal class action docket.<sup>103</sup> In the future, as more companies realize that they can use arbitral class action waivers to protect themselves from class actions, we can expect fewer and fewer claims. This reduction in the number of class actions will certainly decrease the extent to which companies are deterred from engaging in illegal conduct.

Proponents will defend this elimination of class actions, perhaps arguing that most class actions present weak legal claims, that class actions are not beneficial for class members, that arbitration can be structured to ensure greater access to justice than is provided by class actions, that government enforcement actions can take the place of any worthy class actions, or that any benefits of class actions are outweighed by their detriments. Yet, these arguments all fail.

It is no doubt true that some class actions present weak substantive claims, and that some class actions serve the interests of plaintiffs' counsel or defendants more than the actions serve the interests of plaintiffs. On the other hand it is also true that many class actions

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<sup>100</sup> In contrast, First USA itself filed 51,622 arbitration claims against consumers in the same period. See Caroline E. Mayer, *Win Some, Lose Rarely?: Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1.

<sup>101</sup> For a fascinating discussion of broad public policy concerns impacted by the substantial elimination of class actions, see Resnik, *supra* note 17 (discussing concerns of fairness, access to justice, and the role of courts in a democratic order).

<sup>102</sup> Gail E. Lees et al., *2009: First-Quarter Update on Class Action Trends*, 10 Class Action Litig. Rep. (BNA) (Apr. 24, 2009).

<sup>103</sup> See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS (2008), available at <http://ftp.resource.org/courts.gov/fjc/cafa1108.pdf>.

serve the interests of both plaintiffs and members of the public, protecting them against illegal and unfair business practices. Congress, as well as federal and state rules committees, have been working hard to revise class action procedures to ensure that class actions function as fairly and effectively as possible. These groups, rather than companies themselves, are best positioned to weigh the benefits and drawbacks of class actions and refine the rules as needed. We should not allow companies to shortcut the legislative process by using arbitration to abolish class actions.<sup>104</sup>

If we allow companies to insulate themselves from class actions, we are effectively allowing companies to escape many legal regulations and thereby eliminating a great deterrent to company misconduct. As we have seen above, it is unrealistic to expect absent class members to bring individual claims.<sup>105</sup> Nor is it realistic to assume that federal or state enforcement agencies can pick up the slack and bring all necessary actions to enforce federal and state consumer and employment laws. Those agencies have never been particularly well funded,<sup>106</sup> and now in these times of economic hardship are even less able to bring many enforcement actions.<sup>107</sup> Unlike many European countries, we have chosen to use private lawsuits to enforce many of our laws.<sup>108</sup> Unless we substantially strengthen government enforcement efforts, which seems presently unlikely, eliminating class actions will simply take the teeth out of many of our substantive laws. As one author notes, “[P]rivate parties, at least as a functional matter, are often necessary for meaningful enforcement of regulatory directives to occur.”<sup>109</sup> For those who believe that our existing substantive laws do serve the public interest, eliminating enforcement of those laws will not benefit society.

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<sup>104</sup> Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005) (arguing that it is unjust to allow companies to deregulate themselves).

<sup>105</sup> See *supra* Part III.C.

<sup>106</sup> See Glover, *supra* note 85 (manuscript at 11) (stating that “for most public regulatory bodies, scarce resources are the rule, not the exception”).

<sup>107</sup> See generally Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008) (discussing the relationship between class actions and the regulatory state).

<sup>108</sup> See Glover, *supra* note 85.

<sup>109</sup> *Id.* (manuscript at 15).

## CONCLUSION

In short, if we allow lower courts' interpretations of *Concepcion* to effectively eliminate most consumer and employment class actions, we are providing companies with licenses to cheat and harm almost at will. If courts do not change their approach and begin to construe *Concepcion* more narrowly, we will need to look to Congress and perhaps the executive branch for alternative solutions to this problem.<sup>110</sup>

Congress could step in to counter *Concepcion* in several ways. For example, Congress could pass the proposed Arbitration Fairness Act,<sup>111</sup> which would prevent companies from imposing mandatory arbitration on consumers and employees.<sup>112</sup> If companies cannot impose mandatory arbitration they also cannot use mandatory arbitration to abolish class actions. Alternatively, Congress might devise a more limited "fix" to *Concepcion* itself, amending the FAA to clarify that arbitration clauses cannot be used to eliminate class actions.<sup>113</sup>

Federal executive agencies can also take some steps to protect individuals and the public at large from the excesses of *Concepcion*. Several agencies, including the Federal Trade Commission,<sup>114</sup> the Securities and Exchange Commission,<sup>115</sup> and the new Bureau of Consumer Financial Protection<sup>116</sup> are already considering regulating

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<sup>110</sup> Of course, even if courts were to construe *Concepcion* as narrowly as possible, the decision itself would remain a major impediment to consumer and perhaps also employment class actions. For additional ideas on how to potentially improve consumers' access to justice, see Stipanowich, *supra* note 17.

<sup>111</sup> Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (2011).

<sup>112</sup> *Id.*

<sup>113</sup> Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 498–99 (2011) (advocating for the passage of the Consumer Class Action and Class Arbitration Waiver Reform Act in lieu of the Arbitration Fairness Act).

<sup>114</sup> See FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

<sup>115</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act granted authority to the SEC to restrict mandatory pre-dispute arbitration agreements between customers and securities brokers-dealers. 15 U.S.C.A. § 80b-5(f) (West Supp. 2010) (Authority to Restrict Mandatory Pre-Dispute Arbitration).

<sup>116</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act directs the Consumer Financial Protection Bureau to report on "the use of agreements providing for arbitration of any future dispute between covered persons and consumers" and also grants authority to restrict such agreements. 12 U.S.C.A. § 5518 (West 2010) (Authority to Restrict Mandatory Pre-Dispute Arbitration).



mandatory arbitration. Perhaps concerns about the abolition of class actions will further fuel their efforts. Each of these agencies, however, has a limited mandate and will not be able to address all of the concerns raised by *Concepcion*.

State legislatures have quite limited power to combat the effects of *Concepcion* given prior Supreme Court decisions. In particular, state legislatures can neither prohibit mandatory arbitration nor prohibit use of arbitral class action waivers. Such actions would be held preempted by the FAA, just as the Court in *Concepcion* preempted state courts' finding that arbitral class action waivers are unconscionable.<sup>117</sup> States might instead fight *Concepcion* indirectly, by providing more funding to state agencies that enforce laws protecting consumers and employees. However, in these days of budget deficit it is not likely that many, if any, states will take such action.

Thus, *Concepcion* has caused a tsunami wave that is threatening to eliminate many consumers' and employees' abilities to enforce their substantive rights by participating in class actions. We must look primarily to Congress to take corrective action and to ensure that all persons continue to have access to justice.

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<sup>117</sup> See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (preempting a state law that prohibited arbitration of certain claims); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that the FAA preempted a state's statute governing how arbitration clauses must be displayed in contracts).

