Overview & History: The Alternate Universe of Forced Arbitration

Is Judicial Acceptance Of Arbitration A Return To "Liberty Of Contract?"

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Forced Arbitration In The Workplace: A Symposium
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Lochner v. New York, 198 U.S. 45 (1905), elevating the "right and liberty of the individual to contract" over regulations limiting working hours, introduced what is often known as the Lochner era. Interference with the "right to contract," often was invalidated by courts that were willing to find regulatory efforts "unreasonable, unnecessary and arbitrary." The Lochner era continued through the middle of the Roosevelt New Deal, and finally disappeared in 1937 when the Court reversed its previous thinking and allowed regulation in many areas of health and safety.

Today, judicial regulation of mandatory arbitration is rare in most jurisdictions. Arbitration seems to be founded on the same fictitious "right and liberty of the individual to contract." The means of entry into the contract seem to make no difference. The one-sided terms of the contract are routinely upheld unless they can be successfully challenged against a high "unconscionability" burden of proof. There is no effective appeal of arbitral decisions, in the very large majority of cases.

Arbitration really is a parallel universe of justice, that many call "justice lite." For a number of years, because of the strange things I perceived to be happening in the system of arbitration, I wrote columns providing examples of the parallel universe. Some of the columns follow, and I hope they give real life examples of how this relatively unfettered "liberty of contract" really does work. The articles begin with what little it takes to enter into an arbitration contract, continue with the reality of terms and conditions in the contracts, then explore whether you can get out of the contracts, and finally (for a little balance) tell a consumer-friendly arbitration story.

WHAT ARBITRATION CLAUSE?
ILLITERACY AS A DEFENSE TO ARBITRATION

I admit I was surprised to find that a person can agree to a written arbitration clause, even though he or she is illiterate. I was even more surprised to find that illiteracy is no defense to enforcement of an arbitration clause under Mississippi law, but it is under Texas law. (Like you, I'm already thinking of the elitist Northeast jokes, but I'm not going there.)

WARNING: THOSE OF YOU WHO CAN'T READ, STOP NOW! Why it helps to put something in capital letters, if a person can't read it anyway, is a bit mystifying, but it does help save a contract from unconscionability, in Mississippi. Last summer, I spent some time in Hungary. I can promise you that it made no difference whether the Hungarian language was capitalized - I had no idea what it was conveying.

So, the 5th Circuit would respond, get someone to read the contract in Hungarian to you, and translate it to English, before you sign it. It's true, that would work fine as long as the translator was honest. It really wouldn't be much help if the translator were looking to deceive me, or help sell me something I didn't want. If I believed the translator was honest, and only found out later that he wasn't, I would be in trouble if my Hungarian contract was somehow subject to Mississippi law.

The 5th Circuit case, decided in March and construing Mississippi law, involved Washington Mutual Finance Group, as plaintiff, seeking to compel arbitration against a group of people collectively lumped as "the Illiterate Appellees." The District Court, after hearing the evidence, held that illiteracy coupled with a lack of oral disclosure, made the arbitration agreement procedurally unconscionable. The case involved the Illiterate Appellees obtaining loans from the finance company, and also purchasing credit, life, disability and property insurance. Presumably, when they started to receive bills, they found out they were paying for insurance they did not need or want. They had never been informed that they were signing arbitration agreements. To the contrary, when they did ask about the nature of the documents they were signing and said they could not read them, the salesperson told them they were signing insurance and finance papers.

Who becomes accountable: the salesperson who stood to earn commissions on these insurance contracts by giving a vague answer, or the people who said they couldn't read and needed help? You already know. The Illiterate Appellees are accountable because they never directly asked about the arbitration agreement itself. You see, "any inaccurate impressions WM Finance's statements may have created would indisputably have been cleared up had the Illiterate Appellees simply complied with their legal obligation to read the contract or have it read to them."

In Texas, to the contrary, two different cases determined that the plaintiff who could not read an arbitration agreement because (1) he was functionally illiterate or (2) he could not read English, did not have to arbitrate their personal injury cases. The Hispanic plaintiffs, alleging that the documents were not translated nor did they know what they were signing when their boss told them not to worry about it and sign quickly so they could get back to work, were injured in an explosion. The functional illiterate was seriously injured when a 65-ton hydraulic crane which he was operating toppled. His evidence also proved that the employees who presented him with the arbitration document did not themselves understand it and therefore no one could explain it. Besides, throughout the opinion, the judge called him Tommy.

There may be some result orientation in these cases. State courts have a great deal of expertise in adjudicating personal injury cases, and do not believe that these cases should be disappearing from their dockets. Although it was not argued in the Texas cases, there is a Seventh Amendment Constitutional right to a jury trial in personal injury cases, and the waiver of that right must be knowing, voluntary and intelligent. On the other hand, there is no jury trial right under most consumer protection statutes, and the federal courts seem happy to have these cases diverted to a different forum.

Finally, the 5th Circuit may have sensed that there is a slippery slope if John Q. Public can argue that he cannot be forced into arbitration unless he can understand the contract language. Even literate people cannot understand standard boilerplate language in many contract clauses. If these clauses were held unenforceable, lawyers might have to rewrite them in plain English.

I LOST MY RIGHT TO A JURY TRIAL?

The notice it takes to evaporate a jury trial right is minimal. Blind people, by not asking the right questions of an unscrupulous lender, "consented" to arbitration. Envelope stuffers announce that by continuing to use credit cards or other services, you "consent" to arbitration. Generally, you are on notice of an arbitration plan if you sign papers (whether you can read them or not) or if you get your mail (whether you open it or not).

You can have notice of arbitration and "consent" even when you don't have notice but you naughty boys or girls haven't gone to some length to get the notice that a company neglected to provide. A case illustrating how it is *your* fault, even though Big Company has failed to send the document containing your "consent," is Schafer v. AT&T Wireless Services from the Southern District of Illinois. Ms. Schafer ordered a cell phone. It came in a box, which was supposed to include the AT&T Wireless Welcome Guide. All the terms and conditions of her cell phone usage were in the Welcome Guide. The problem was, she alleged, her box didn't have a Welcome Guide. The lack of instructions didn't matter to Ms. Schafer, who knew how to activate her phone. But it was a careless, naughty thing to do, activating a cell phone without reading all the terms and conditions. I certainly can't imagine any faithful Law Tribune reader who would use a cell phone without thoroughly reading the Welcome Guide, and neither could Judge Foreman in Illinois.

Judge Foreman, probably a person who never could figure out how to use his VCR, made it apparent he couldn't credit Ms. Schafer's claim that *she* could activate *her* phone without the Guide. Besides, Ms. Schafer conceded that she received the box. The box said the terms and conditions were in the Guide, so if AT&T neglected to enclose them, well - she should go get them. She just had to find an AT&T salesperson, or maybe, if she called AT&T and the menu let her talk to a real person, that person could send a Welcome Guide. When she didn't do these tasks, she "assumed the risk" of accepting whatever terms were in the document. "Assuming the risk" is an interesting way to put it. She was lucky she only consented to arbitration, and wasn't required to give up her firstborn, to use her cell phone.

So, since you needn't read a contract to assume the risk of its contents, clever companies could include, with their consumer products, instructions on activation by notice that to receive *additional* important terms and conditions, you could take more steps. Then, they could really make it like a scavenger hunt, the last step staying on hold for an hour hearing why this process improves service to you, their valued customer.

There is one recent surprise in the march toward arbitration without notice. The 1st Circuit, in Campbell v. General Dynamics, decided an e-mail announcement to an entire workforce implementing a new ADR policy was inadequate. Unlike what Ms. Schafer was supposed to do, a General Dynamics employee who received the e-mail only had to click on two links to learn: first click - the new policy; second click - the complete

program. No one had to signify receipt. Mr. Campbell alleged in an average day he was "inundated with between 10 and 100 e-mails," and no one told him that he should read them to continue to understand changes in his employment terms. He alleged he did not click the links, and had no clue about required arbitration. The 1st Circuit held that a mass e-mail can be adequate communication. But this Court placed responsibility on the employer to be sure that an e-mail changing employment terms would actually be read. Not surprisingly, it found there were easy ways to ensure such reading: (1) require the employee to check a box confirming receipt and/or reading, or (2) put language in the original e-mail that the links contain an arbitration agreement waiving the employee's jury trial right.

Placing responsibility for adequate notice on the party desiring to alter the relationship seems right. If the company doesn't give fair notice, it is the one which should "assume the risk" of the alteration having no effect.

IT'S MY GAME, BUT I'M NOT PLAYING

I love the names companies use to label the mandatory arbitration programs they impose on their employees. Today, we can enjoy the workings of the "Fairness in Action Program" used by the Dillard's Department Store chain.

In July, 2001, Stephanie Brown was one of a number of workers who were summoned to a supervisor's office. They were told that Dillard's was starting the "Dillard's Fairness in Action Program" which they were accepting by continuing to work. As the brochure describing the program said:" ...the Fairness in Action Program assures that each party gets a fair deal - that's what justice is about, after all." Each worker, however, had to sign the "agreement."

So then, one of Stephanie's co-workers asked to take the "agreement" home with her to discuss it with her parents. The supervisor, exemplifying "fairness in action" from the get-go, told her she might be fired if she did not sign the form immediately. Naturally, they all signed up.

The Dillard's concept of "fairness" reared its head in a number of places in this store. For example, employees were required to clock in and out, but when the computer was (often) down paper time sheets were used. Evening shift employees like Stephanie, who were scheduled to leave at 9:15 p.m., were required to stay until the store was fully cleaned. If cleaning took until, say, 9:45, they were required to falsify their time sheets showing they left on schedule - so Dillard's could avoid overtime pay.

In May, 2002, on a day she was not scheduled, she was requested to work for another employee who was sick. She was told not to report before 6 p.m., because otherwise she qualified for overtime, which Dillard's did not want to pay. She said, and produced corroborating evidence, that she had clocked in at 5:58. Store officials, alleging that the computer had not worked properly, called her in the next day to fill out a paper time sheet. When she did, the store manager told her she was being immediately terminated for falsifying her time, alleging that she had actually arrived at 6:10. She was sympathetically advised "people like you cost the company money." When she began to cry, the store manager reminded her "you already got another job, right?" (Which was true - she was saving money to attend air traffic control school.)

Feeling she was wrongfully terminated, Stephanie filed her arbitration claim. Dillard's, evidencing its superior knowledge of "what justice is about, after all," decided that her claim "had no merit" and refused to participate in its own arbitration program. Her repeated attempts to contact Dillard's were useless. After almost one year of no progress, she filed her lawsuit in state court. Incredibly, Dillard's removed to federal court and moved to compel arbitration.

Shortly before Christmas, 2005, after Dillard's had lost in District Court, Ms. Brown received, at least, a modicum of procedural justice in action. The 9th Circuit, correctly analyzing Dillard's tactics, noted that if Dillard's succeeded it would "set up a

perverse incentive scheme." Employers would have an "incentive" to refuse to participate hoping the employee would get frustrated and drop the effort. And, refusal would carry no cost because if the employee filed a lawsuit, then the employer could appear and move to compel arbitration.

Three and one-half years later Stephanie Brown can pursue her state court lawsuit. As the 9th Circuit aptly found: "Many people in Brown's position would simply have given up." I would hope that other courts, if confronted in the future with this tactic, more severely punish such a hypocritical company. At the minimum, the CEO should have to write, 1000 times on the blackboard, what the "Fairness in Action Program" assures. That would provide a bit of justice.

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THE TROUBLE WITH ARBITRATION

Some recent developments are making me wonder whether arbitration is just an alternative forum to resolve disputes, as the courts are so fond of saying. Or, on the other hand, is arbitration really a get out of jail free card which allows a wrongdoer to write rules which will virtually exempt it from liability for those wrongs, as critics are fond of saying?

One cardinal, unwritten black-letter rule of law seems to be re-emerging in some of the court decisions trumpeting the "public policy favoring arbitration." That rule is: "Rich is better than poor; money talks." The re-emerging trend is most apparent in the cases where poor people "agree" to illegal, usurious interest rates, combined with arbitration clauses providing the forum for eventual collection, in exchange for "payday loans," that is, advances against paychecks. When the advances plus interest are not paid in full, compounded interest rates and other fees begin to mount up in a way similar to the way plantation workers could not get out from under the company store.

The scheme becomes "legalized" by the use of arbitration clauses. A couple of plaintiffs, however, went after one such check-cashing outfit, and persuaded the Florida Supreme Court to hold that an arbitration clause in an illegal contract could not survive any more than the contract itself could survive. As that court saw it, enforcing the arbitration clause "could breathe life into a contract that not only violates state law, but is also criminal in nature." Sounds pretty elementary, doesn't it?

Not when the Federal Arbitration Act is subject to interpretation. The Supreme Court of the United States, in Buckeye Check Cashing, Inc. v. Cardegna, recently decided in this term, made the case into a "who decides" issue, and held that a challenge to the validity of the contract must be resolved by an arbitrator. Indeed, how could anyone have thought that a state Supreme Court should be able to interpret its own statutes and public policy, when the illegal contract, despite its illegality, provides for arbitration?

It is not much of a step for the illegal business to decide that, since the "agreement of the parties" under the contract will govern the arbitrator's jurisdiction and powers, it might as well include a ban on class actions. That way, even if an arbitrator found that an individual contract was void as against public policy, and therefore the debt in the individual case was unenforceable, it could continue going on its merry way collecting all the other illegal debts as long as those debtors did not find lawyers to challenge them. This tactic is starting to work. One of the New York state Appellate Division courts recently affirmed a class action waiver for New York borrowers by the County Bank of Rehoboth, Delaware, an out-of-state bank to which these payday loans

are immediately assigned.

Is it just me who naïvely believes that this kind of unconscionable tactic could not possibly work in our court system? Is there any judge in our District Court, or on the state Appellate or Supreme Court, who would not allow class actions to invalidate usurious loans to working people who don't make enough to get out of poverty? And if I am right about that, what is it about the existence of an arbitration clause that allow these illegal businesses to indirectly accomplish what they could not accomplish directly?

Unfortunately, because the agencies administering arbitration don't have the stomach to refuse to enforce class action waivers, and because states are preempted from doing so because of the conflict with the Federal Arbitration Act - which has turned into the King Kong of statutes -the only hope for relief is the United States Congress.

Don't hold your breath.

CAN COMPANIES GRANT THEMSELVES "GET OUT OF JAIL FREE" CARDS BY USING MANDATORY ARBITRATION?

John Szetela got a credit card from Discover Bank in 1993. In 1999, the Bank amended his earlier Cardholder Agreement by adding a mandatory arbitration section, inserted into an envelope stuffer, which among other things prohibited class actions. If Mr. Szetela did not want to accept these terms, his only choice was to close his account. In 2000, Mr. Szetela filed a class action alleging that Discover improperly charged overlimit fees of $29. Discover's motion to compel individual arbitration was granted; Szetela arbitrated and recovered $29. Then, he appealed and alleged that his class action should be allowed. Essentially, he argued that the no class action provision was unconscionable.

Procedurally, the California Appellate Court held that Szetela was required to "take it or leave it" with no opportunity for meaningful negotiation, establishing procedural unconscionability. He proved substantive unconscionability as well. Although the no class action prohibition was purportedly mutual, the court could not imagine any circumstances in which Discover Bank would sue its own customers in a class action lawsuit. Instead, "Discover has create[d] for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.... Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect.... it violates public policy by granting Discover a "get out of jail free" card."

This line of authority, i.e., that public policy favoring arbitration is outweighed by public policy favoring the class action device to allow an effective redress of grievances, has been echoed in other state court jurisdictions.

On the other hand, the federal courts to date (with the exception of the Western District of Washington in Luna v. Household Finance in 2002) have held that arbitration clauses are not unconscionable when they exclude class actions. For example, Patricia Snowden and six other plaintiffs claimed that Checkpoint Check Cashing charged them usurious interest rates, in part violating the Truth in Lending Act. Checkpoint, in its contract, barred class actions. The 4th Circuit, in a 2002 holding, compelled individual arbitration. It dispensed with her argument that the small damages available to her would preclude legal representation, by noting that if she prevailed in a TILA case, she was entitled to attorney's fees. It summarily dismissed the argument that a no class action clause is inconsistent with public policies protecting consumers, stating that the AAA is a reputable organization and places no limits on remedies available. I assume that means that in the 4th Circuit arbitrators have the power to issue broad injunctive relief consistent with consumer protection. See also, Johnson v. West Suburban Bank (3d Cir. 2000) (no class action arbitration does not suffer "inherent conflict" with TILA, as individual rights may be fully protected).

Finally, Larketta Randolph, who purchased her mobile home through Green Tree Financial Corporation, a transaction which landed her in the United States Supreme Court, returned to the 11th Circuit after remand. She argued that the prohibition of classwide arbitration was unenforceable, but her case was also a Truth in Lending claim. The TILA specifically contemplates class actions, because it caps statutory damages available to a class. Nevertheless, apparently the statute was not "intended to create a non-waivable right to bring TILA claims in the form of a class action," presumably because Congress did not explicitly say so when it passed the TILA well before mandatory arbitration began to catch on. After her years of struggle, I hope her individual case was a winner.

Now that the administering agencies, such as AAA, have promulgated class action procedures, I think these cases can often be reconciled by severing the no class action clauses from the arbitration agreement (as long as the agreement is not otherwise unconscionable). Then all the policies, those protecting consumer rights and those protecting arbitration, would be enforced. Whether arbitrators will adequately deal with class actions is another question altogether, but requiring severance would, at least, present these issues to the arbitrators for resolution.

MAFIA SHOULD HAVE USED BINDING CLASS ACTION WAIVERS

"Payday loans" are a modern device intended to avoid interest rate regulations and financial disclosure laws. So-called "salary lenders" who engage in these predatory loan arrangements concentrate on low income families who live paycheck-to-paycheck. To circumvent state consumer protection legislation, they partner with obscure national banks which are not subject to state law. People who receive the "payday loans" are usually both desperate and unsophisticated. Charlene Jenkins was a good example. Between June 7, 2002 and September 6, 2002, she received eight loans, each for under $500, from First American Cash Advance of Georgia. If a dispute arose, she agreed to arbitrate, and of course she "agreed" not to "serve as a representative, as a private attorney general, or in any other representative capacity... or... participate as a member of a class." To nail it down completely she "agreed" that "the arbitrator shall not conduct class arbitration." First American included in these "agreements," as a co-participant, the First National Bank in Brookings. Brookings, Georgia? No way. Brookings is not in Georgia, not even near Georgia, but in South Dakota. Naturally, Ms. Jenkins' eight separate promissory notes were all governed by South Dakota law.

By teaming up with this genuinely obscure national bank, First American charged annual percentage rates between 438% to 939%. By teaming up with an arbitration agency, First American figured it would avoid class actions. In fact, without class relief First American might be lucky enough to avoid litigation altogether, because of the difficulty that a poor person like Ms. Jenkins would have finding an attorney to represent her in an individual capacity only.

The Chief Judge of the Southern District of Georgia, however, concluded that "enforcing the arbitration clause... against the payday consumers would lead to an unjust result." When First American moved for reconsideration, Judge Bowen highlighted the invaluable assistance that "unconscionable mandatory arbitration agreements" offered "to circumvent state laws [and] enable stronger parties to force weaker parties into binding arbitration."

Judge Bowen probably believed his decision would be affirmed in a heartbeat. Maybe, like me, he thought it was only the Mafia who charged interest rates of 900% or so. The Mafia's big mistake was to threaten physical violence if the borrower didn't pay on time. All they really needed was a bit of interstate commerce to get federal jurisdiction, and a mandatory arbitration clause waiving class actions. In the 11th Circuit, Mafia Cash Advance Services would be well protected.

Judge Bowen's decision was, disgustingly, reversed. The 11th Circuit panel held that class actions can be precluded, because under the Georgia RICO statute attorney's fees are recoverable. Supposedly, that would make Ms. Jenkins' individual case an attractive proposition. Just think, for example, of all the civil RICO cases that have been brought in Connecticut! Why, with only a couple of years of discovery, Ms. Jenkins' $1000 usurious interest recovery could be proved to be a product of racketeering, and therefore Ms. Jenkins can vindicate all her individual substantive rights. That is, if the arbitrator in his or her discretion will award the hugely disproportionate attorney's fees required to obtain the evidence to prove a RICO violation. At any rate, since arbitration is generally confidential, we will probably never know.

If the Mafia is not smart enough to get the case into federal court, however, there is hope. Florida's Supreme Court, in January, held that Mr. John Cardegna could bring a class action against Buckeye Check Cashing, Inc. because the contract containing the mandatory arbitration clause was illegal and therefore void from the beginning. The same kind of financial scheme was at issue. Florida's Supreme Court correctly put the horse before the cart in deciding that a court first had to determine whether the usury laws were violated, because otherwise it would "breathe life into a contract that not only violates state law, but is also criminal in nature, by use of an arbitration provision. This would lead to an absurd result. Legal authorities from the earliest time had unanimously held that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. Illegal promises will not be enforced in cases controlled by federal law." No contract, no arbitration clause. No public policy exists, in Florida anyway, to let an arbitration clause subvert the usury laws.

The Mafia will be closely watching continued developments.

THEY JUST CAN'T HELP IT

A highly regarded California arbitrator, who also designs mandatory arbitration plans for employers, has stated: "A desire to gain the advantage may be irresistible. Employers just can't help it."

Mandatory arbitration, as a condition of employment or a condition of doing or continuing to do business with a company, presents an extraordinary opportunity to the company to design a system which is a binding alternative to court. When the two major arbitration organizations (AAA and JAMS) are chosen to administer company plans, both publicly announce that, for them to agree to administer a proposed plan, it must comply with due process provisions which will assure fairness to all parties. AAA's basic proposal, known as the Due Process Protocol, may be found on its web site at www.adr.org. The Due Process Protocol has been favorably cited by many courts as, in fact, providing protections which allow the speed and efficiency of arbitration to continue in effect without depriving parties of their rights.

Some companies, however, look for the edge. They write plans which are calculated either to bar access to the arbitration form altogether, or else to tilt the scales to their advantage. What follows are three current examples:

1. Fleet Bank maintains a Conflict Resolution Policy, which includes mandatory arbitration. Fleet Bank continues to preserve its own right to use the courts for provisional remedies or interim relief, but for its employees arbitration is the exclusive remedy for all claims. Although Fleet purports to govern its process by the employment dispute rules and procedures of the AAA (which would include the Due Process Protocol), it requires the loser to pay the attorney's fees of the prevailing party: "the prevailing party shall be entitled to payment from the non-prevailing party of the costs and expenses incurred by the prevailing party... including without limitation the prevailing party's reasonable attorney's fees."

This provision would likely act as a bar to any prospective claimant against Fleet. Trial lawyers know that even the most favorable case, if liability is in dispute, might have a 70% to 30% chance of success, which means that even this best case will still lose three times out of ten. Approximately one year ago, our office completed a five-day arbitration, during which time we kept track of our fees, which by completion amounted to slightly over $100,000. Defense fees would have been as high, or higher. We would, of course, be compelled (had the case been against Fleet) to advise any client that if he or she lost the arbitration, it could also include losing his or her house. Only the very richest clients, or conversely those who are judgment-proof, could afford to enter an arbitration with Fleet.

2. SFX Broadcasting, owned by Clear Channel Communications (a huge broadcaster owning many radio and television stations across the country), mandates

arbitration which must be initiated "within one year of the conduct giving rise to the claim." Thus, in Connecticut, where under a written contract a claimant would have six years to sue, the same claimant must arbitrate with a written demand filed within one year. If it is not, "the claimant waives any entitlement to arbitration and to any other legal or equitable remedy." This shortened statute of limitations applies to future claims. Incredibly, however, an already-employed employee who must, as a condition of continued employment, sign this agreement, waives all pending claims unless he or she acts within 3 days: "I acknowledge and confirm that I have no claims against the company... unless I deliver written notice of any such claims... to the President of the company, within three (3) business days of executing this agreement." This wholly unconscionable waiver is administered by JAMS.

3. Finally, another media group, Sinclair Media, mandated arbitration with the following provisions: (1) the loser pays all costs of the arbitration; (2) Sinclair exempts itself from the arbitration requirement if it seeks a remedy, and includes a loser-pays provision for any such court proceeding; (3) a statute of limitations shortened to three months from the event or occurrence giving rise to the dispute and, most incredibly, (4) a provision that if the employee did not "respond within fourteen (14) calendar days to each communication regarding the selection of an arbitrator and the scheduling of a hearing and other matters relating to arbitration proceedings... Employee agrees Employee will have waived any right to raise any claims arising out of any dispute or controversy... in arbitration or in any court or other forum." No continuances, no equitable tolling, and no application mutually to the company, Sinclair.

These mandated programs are unconscionable. If they survive court scrutiny, employees and others will lose countless basic rights. It is up to the courts to strike these systems down, and ensure basic due process when arbitration is mandated.

ENFORCEMENT OF "CUSTOMIZED" ARBITRATION AGREEMENTS

One benefit of arbitration is that parties of equal bargaining power can provide for a method of settling disputes which is alternative to the court system. A negotiated arbitration agreement, which allows parties to resolve disputes quickly and at reduced cost, can dispense with many procedures which apply in court. An expedited, more informal process can allow businesses who have commercial disputes to continue doing business together, or can allow construction projects to proceed while specific questions are being resolved. In general, the theory is that a relationship can be preserved if the dispute resolution process is sensible for both parties. Equal negotiating power, in general, insures an outcome which is sensible, as neither party can impose unreasonable terms or conditions on the other.

Arbitration in the employment and consumer sectors of our economy, however, is different. Most employees (with the exception of highly-compensated executives) do not have much power to negotiate the terms and conditions of employment. Consumers buying products have no negotiating power. The theory in these areas is that employees and consumers can "vote with their feet" by refusing to accept the job or refusing to buy the product.

In the real world, however, consumers won't find out about an "arbitration agreement" until they have opened the box and (perhaps) read the manual enclosed in it. Since most consumers believe that the product is going to work, it is the rare one indeed that will return it just to protest an arbitration provision.

In the real world, however, the employee who has successfully interviewed for an interesting job may have been the one who was selected over 100 other applicants, in a tough job market. That employee also believes that the future will be fine at the workplace. Almost no one would quit a job, before it even starts, in protest that arbitration is the method the new employer has chosen to resolve disputes, which may never arise.

Because the "vote with your feet" concept is unrealistic in these venues, manufacturers and employers have, in some instances, tried to "customize" the arbitration process to their benefit only. One method which has had mixed results is to shorten the statute of limitations.

Ten or fifteen years ago, a few employers successfully inserted six-month limitations periods in arbitration agreements. In a race discrimination case brought in 1992 under Section 1981 in the 7th Circuit, for example, the court upheld a six-month statute of limitations. At that time, however, it was not settled that the section 1981 statute of limitations was four years, so there was a reasonable argument that six months approximated the most analogous state limitations period. In general, many courts in those years saw the issue as whether the shorter statute of limitations was unreasonable or oppressive, giving undue advantage to one party.

Not content with shortening a limitations period to six months, more recently some companies have provided that all claims must be made within as short a time period as 30 days. These attempts have not succeeded. In particular, courts have been offended that a private employer has sought to modify statutory limitations periods which are part and parcel of public policies against discrimination or other employee-protective statutes. Since 2000, various attempts to shorten the statute of limitations have failed, whether the shortened period was 30 days, 90 days, six months or even one year.

Of course, one can search forever for the case in which a company has allowed a longer statute of limitations for claims. To my knowledge, no such case exists. Fooling with the statute of limitations is always one-sided, and is always meant to benefit the drafter. A statute of limitations is part and parcel of a right itself. "Customizing" it should always be unconscionable, and never enforceable, when the contract is of the "take it or leave it" variety.

OPTING OUT OF ARBITRATION - LIKE REBATES, ONLY WORSE?

All by itself, Circuit City Stores is responsible for more mandatory arbitration rulings than probably the next ten companies put together. More allegations of unconscionability have engaged appellate courts in Circuit City cases than with any other employer. How bad can it be working at Circuit City? Does every discharged employee threaten to sue?

Perhaps so. And, as a result, faced with the deluge of disgruntled dischargees, Circuit City has tried almost everything to insure that it will have the edge in the arbitrations it mandates. One of the more interesting things they have done, in the true retailing philosophy, is to give their new employees thirty days to decide if they want to opt out of the mandatory arbitration program. The opt out option has been intended to avoid findings of procedural unconscionability. This little trick has, in fact, thus far beguiled the judges who have reviewed it.

Circuit City Stores, Inc. v. Ahmed, which the 9th Circuit decided in 2002, describes how it works. Think of yourself as a new Circuit City employee. You are welcomed with the usual battery of forms to sign, which include the terms of an "arbitration agreement." The arbitration program is introduced in a videotape presentation. Maybe the videotape is like the most recent Phillip Morris ad which informs you that you can visit their web site to learn how using their product will kill you. I imagine, however, that it probably tells new employees that arbitration is good for them: cheaper, faster, easier to use in the unlikely event that a dispute would ever arise. But, included with the papers and the videotape is "a simple one-page form" which allows these new employees "a meaningful opportunity to opt out of the arbitration program." Not only that, the new Circuit City employee is encouraged to contact Circuit City representatives before deciding whether to participate in the program. If the new employee desires to show how much he or she wants to be part of the Circuit City team, he or she can even consult an attorney to help with the decision. Consider the benefit that an attorney's letter to Human Resources would have for the new employee trying to decide the opt out issue.

Mr. Ahmed, who for some reason did want to sue Circuit City two years into his employment, did not contact representatives, nor consult an attorney, nor mail in the opt out form within 30 days. He argued he was not sophisticated enough to recognize the meaning of the provision, and claimed the 30-day period was too short, because according to him "an employee is thinking positively about the employment relationship in the first 30 days." This argument does sound sort of reasonable.

The 9th Circuit, though, struck it down. Mr. Ahmed cited no cases in support of these arguments.

These days, there may be no cases in support of a proposition that an employee joins a new company thinking positively about the future. But it certainly has some common sense behind it. And, in real life, no one who wants to succeed with a new company starts the relationship by letting the company know that he or she has a lawyer monitoring the situation.

To me, this "option to opt out" is like a rebate. When people buy products and get their

rebate coupons, apparently only 10% to 15% actually return the coupons and receive the rebate. People act this way even though the rebate may have been a factor in buying the product, and they will get money back. They still don't send in the forms.

When people don't return forms that will result in an actual return of money, why should they be expected to return a form for which the result is purely abstract? The answer is, there is no such expectation. And, since unconscionability requires both proof of procedural and substantive unfairness, courts don't reach the question of substantive unfairness if the procedures are okay.

We don't yet know if other companies will be as clever as Circuit City, nor can we predict if the judiciary will continue its benign treatment of this manipulative device.

WHAT'S SAUCE FOR THE GOOSE...

Consumers and employees often believe that mandatory arbitration clauses drag them into a forum they didn't choose, to be heard before an arbitrator whose powers are virtually unreviewable, who will award them a minimum of nothing and a maximum of less than they wanted. Once in a while, however, a "runaway arbitrator" appears, to let us all know that the arbitration system also can produce capricious, functionally unreviewable, results which favor down-and-out individuals. The $6 million punitive damages award in Stark v. Sandberg, Phoenix & Von Gontard and EMC Mortgage Corporation is a great example.

The Starks ran a business which was failing. To rescue it, they borrowed $56,900 and secured the loan with a mortgage on their house. Not too much later, the business failed anyway. They filed for bankruptcy. The original lender sold the note to the defendant EMC Mortgage Corporation. The couple moved out of their house into an apartment, anticipating the foreclosure which EMC commenced.

Maybe foreseeing publication of their case as a hypothetical question for law school examinations in the future with their lawyer named prominently in it, the Starks hired attorney Roy B. True (six degrees of separation, perhaps, from the former basketball player World B. Free). He notified EMC's counsel, Scott Greenberg of the Sanders firm, that he represented the Starks and that EMC should not contact them directly. Nevertheless, while the arbitration was pending, EMC contacted Mrs. Stark at her apartment, contacted Mr. Stark at work, and wrote to them directly about keeping their insurance coverage. There were at least ten such contacts. In addition, EMC hired someone to forcibly enter the Starks' home and put a sign in the front window, stating: "Property has been secured and winterized. Not for sale or rent. In case of emergency call 1st American (732)-363-3626."

Those actions, and only these, cost the defendants $6 million. The arbitrator, justifying the award which amounted to one-tenth of one percent of EMC's shareholder equity, wrote that it was "not great punishment but it should act as a deterence [sic]." The arbitrator was particularly emphatic about the forcible entry, which he found "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights." (The 8th Circuit added both the [sics].)

Can anyone imagine that this punitive damages award, if given by a jury in a federal district court, would have remained intact through an appeal to the 8th Circuit? The award of statutory damages for EMC's violation of the Fair Debt Collection Practices Act was $1000 to each plaintiff, along with $1000 to each for actual damages. Costs and attorneys fees were assessed against the defendants, as well. Under the circumstances, defendants argued that the punitive award evidenced a manifest disregard for the law, because it conflicted with recent Supreme Court case law invalidating high ratios of punitive to compensatory damages, such as BMW v. Gore where a 500:1 ratio was

vacated. A showing of manifest disregard, however, requires that a party had to make the controlling case known to the arbitrator during the arbitration, thus giving him a chance to disregard it. Here, probably relying on a clause in the arbitration agreement which precluded an award of punitive damages (the arbitrator correctly found that such a restriction was unconscionable), the law firm never argued how a proper punitive damages award should be measured.

The 8th Circuit panel concluded that EMC had mandated this form of dispute resolution for itself and its customers. It should have realized that "although this result may seem draconian... arbitration is not a perfect system of justice, nor is it designed to be." Indeed, EMC itself had compelled the case (originally filed in court) into arbitration. So, it "got exactly what it bargained for."

One rationale for imposing mandatory arbitration is that it avoids the "runaway jury." Time will tell whether this rationale will hold up. If a jury in the 8th Circuit had awarded $6 million on these facts, it is more probable than not that the Starks would have been fortunate to retain $60,000. That is because the "runaway jury's" award is subject to full appellate review. The "runaway arbitrator's" award is not.

MORE THAN CLASS ACTION KILLERS: THE IMPACT OF *CONCEPCION* AND *AMERICAN EXPRESS* ON EMPLOYMENT ARBITRATION

IMRE STEPHEN SZALAI

Introduction

The Supreme Court recently issued two important decisions involving the enforceability of class waivers in arbitration agreements, *AT&T Mobility LLC v. Concepcion* ("*Concepcion*")[1] and *American Express Co. v. Italian Colors Restaurant* ("*Amex*").[2] Observers can easily contextualize these decisions as part of a broader trend of Supreme Court cases limiting the availability of class actions.[3] Indeed, Justice Kagan wrote a spirited dissent in *Amex* criticizing the majority as being obsessed with eliminating class actions: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled."[4] In the wake of these Supreme Court decisions, several courts have in effect ended class or collective actions by compelling the named plaintiff to submit his or her claim to individual arbitration.[5] Armed with these decisions, companies can use arbitration agreements to immunize themselves from class action liability.

Concepcion and *Amex* can significantly impact the availability of class actions, and the decreasing availability of class actions is problematic. However, the reach of

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[1] 131 S.Ct. 1740 (2011).

[2] 133 S.Ct. 2304 (2013).

[3] *See, e.g.*, Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013) (rigorously enforcing Rule 23(b)(3)'s predominance requirement); Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011) (rigorously enforcing Rule 23(a)(2)'s commonality requirement).

[4] *Amex*, 133 S.Ct. at 2320.

[5] *See, e.g.*, Arroyo v. Riverside Auto Holdings, Inc., No. E056256, 2013 WL 4997488 (Cal. Ct. App. Sept. 13, 2013) (plaintiff who filed a class action regarding wage and hour claims must submit his individual claim to arbitration); Ryan v. JPMorgan Chase & Co., 924 F.Supp.2d 559 (S.D.N.Y. 2013) (relying on *Concepcion* and *Amex* to enforce class waiver and compel employee to submit her individual claim to arbitration); Jasso v. Money Mart Express, Inc., 879 F.Supp.2d 1038 (N.D. Cal. 2012) (enforcing class waiver and compelling employee to submit her individual claim to arbitration); Torres v. United Healthcare Services, Inc., 920 F.Supp.2d 368 (E.D.N.Y. 2013) (compelling employees to arbitrate on an individual basis); Rivera v. Hilton Worldwide, Inc., No. G047644, 2013 WL 6230604 (Cal. Ct. App. Nov. 26, 2013) (ordering employee to arbitrate his individual claim); Fimby-Christensen v. 24 Hour Fitness USA, Inc., No. 5:13–cv–01007–EJD, 2013 WL 6158040 (N.D. Cal. Nov. 22, 2013); Smith v. BT Conferencing, Inc., No. 3:13–cv–160, 2013 WL 5937313 (S.D. Ohio Nov. 5, 2013).

these decisions goes far beyond the class action context. These Supreme Court rulings can also undermine the fairness of *individual* arbitration proceedings. As explained in this Article, *Concepcion* and *Amex* threaten to have a destabilizing effect on the legal framework supporting individual arbitration proceedings in the United States, an impact observable in the context of employment disputes.

Through judicial review of arbitration agreements, courts in the past could generally invalidate skewed, one-sided, unfair arbitration clauses drafted by employers and imposed on employees, but some courts have begun to construe *Concepcion* and *Amex* as narrowing the scope of judicial review of arbitration agreements.[6] If the judiciary is giving less scrutiny to arbitration agreements because of *Concepcion* and *Amex*, such limited judicial review can open the door for employers to tilt the scales more in their favor by drafting arbitration clauses with questionable procedures. One-sided arbitration clauses with burdensome procedures or a lack of procedural protections can in turn undermine the enforcement of critical legislation protecting employees, such as wage and hour and civil rights statutes.

The judicial review of employment arbitration agreements for fairness is particularly important because of grievous errors made by the Supreme Court. The Supreme Court, completely ignoring the rich history behind the Federal Arbitration Act ("FAA"), has held that the FAA covers employment disputes.[7] However, the history of the FAA's enactment establishes that the FAA was never intended to force employees into arbitration.[8] The judicial fairness review of employment arbitration agreements helps counterbalance some of the unjustness of the Supreme Court's flawed decision to apply the FAA in the employment context, but judicial review is shrinking because of *Concepcion* and *Amex*.

Moreover, the Supreme Court has made other fundamental errors when interpreting the FAA over the years. For example, through flawed Supreme Court interpretations, the FAA now binds state courts and broadly preempts many state laws.[9] However, the FAA was never intended to apply in state court.[10] Additionally, the Court pushed the boundaries of the FAA in a way that makes it more challenging for parties to invalidate arbitration agreements in court. For example, in *Rent-A-Center, West, Inc. v. Jackson*, which involved an employment dispute, the Supreme Court found that an arbitration agreement can delegate a dispute about the enforceability of the arbitration agreement to an arbitrator, and such delegation clauses are generally enforceable unless a party specifically challenges the delegation clause.[11] In effect, because of the delegation clause, a court can be easily stripped of the ability to review an arbitration agreement for fairness. Grouped together, *Rent-A-Center*, , *Concepcion*, and *Amex* arguably narrowed

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[6] *See infra* notes 110-139 and accompanying text.
[7] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[8] *See infra* notes 178-79 and accompanying text.
[9] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).
[10] *See generally* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992).
[11] 130 S.Ct. 2772 (2010); *see also In re* Checking Account Overdraft Litigation, No. 09-MD-02036-JLK (S.D. Fla. Aug. 27, 2013) (order enforcing delegation clause and sending to arbitration all arguments regarding arbitration clause's enforceability).

the scope of judicial review of individual arbitration agreements, and now courts can enforce arbitration agreements in an increasingly rubberstamp-like manner. Through the Supreme Court's expansion of the FAA, the FAA is becoming a virtually all-powerful, docket-clearing tool for the judiciary.[12]

This Article highlights how the Supreme Court's *Concepcion* and *Amex* decisions, can impact individual employment arbitration proceedings and destabilize the broader legal framework supporting arbitration in the United States. The shrinking scope of judicial review of arbitration agreements should prompt a broader debate about the relationship between the courts and a system of arbitration. If employment arbitration is to have any legitimacy, judicial review of arbitration agreements should be increasing in scope rather than decreasing, to ensure that employees knowingly and voluntarily entered into arbitration agreements.

Part I of this Article provides an overview of the Supreme Court's *Concepcion* and *Amex* decisions. Part II of this Article explores how courts construe these decisions as changing the scope of judicial review of individual arbitration agreements, with a particular emphasis on cases involving employment disputes. Part III then discusses the implications of this changing nature of judicial review, how parties and courts can address these implications, and how the legislature can alleviate some of the problems arising from *Concepcion* and *Amex* by adding a definition of arbitration to the FAA.

I. The Supreme Court's *Concepcion* and *Amex* Decisions

In both *Concepcion* and *Amex*, the arbitration agreements at issue contained class waivers requiring claims to be brought in an individual capacity and not as part of a class or representative proceeding.[13] The plaintiffs in *Concepcion* were consumers who had entered into cell phone agreements with AT&T,[14] and the plaintiffs in *Amex* were merchants who had entered into agreements with American Express.[15] In both cases, the plaintiffs filed class actions in court against the companies, AT&T and American Express respectively. The underlying claims of the consumers in *Concepcion* involved allegations that AT&T engaged in fraud and unfair business practices by charging sales taxes on

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[12] The Supreme Court's arbitration cases are also part of a larger trend of Supreme Court cases limiting the availability of litigation. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (the Rehnquist Court "acted aggressively and explicitly to limit the scope or availability of litigation [in the areas of] remedies and rights of action, qualified immunity and attorney's fees, the enforceability of mandatory arbitration agreements, and limitations on the permissible scope of punitive damage awards"). The Roberts Court has continued this trend of limiting the availability or scope of litigation, especially through the Court's controversial heightening of pleading standards. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[13] AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1744 (2011); American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2308 (2013).

[14] *Concepcion*, 131 S.Ct. at 1744.

[15] *Amex*, 133 S.Ct. at 2308.

phones that were advertised as free.[16] In *Amex*, the merchants alleged that American Express violated antitrust laws by using its monopoly power to force merchants to accept credit cards subject to significantly higher fees than the fees associated with competing credit cards.[17] In both of these class action lawsuits, the corporate defendants moved to compel individual arbitration pursuant to the FAA.[18]

A. ***Concepcion***

The district court in *Concepcion* denied AT&T's motion to compel arbitration because the court found the class waiver to be unconscionable under California law.[19] The California Supreme Court had previously articulated an unconscionability test which classified most class waivers as unconscionable.[20] Under this test, referred to as the "*Discover Bank* rule," class waivers are unlawfully exculpatory and unconscionable if they are found in a consumer adhesion contract and the party with the superior bargaining power allegedly engaged in a scheme to defraud large numbers of consumers out of small sums of money.[21] The district court found that under California's *Discover Bank* rule, the class waiver at issue was not enforceable, and the Ninth Circuit affirmed.[22]

The Supreme Court framed the issue in *Concepcion* as "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."[23] Justice Scalia, joined by Justices Kennedy, Thomas,[24] Alito and Chief Justice Roberts, explained that under section 2 of the FAA, courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[25] Thus, while generally applicable contract defenses, such as unconscionability, could invalidate an arbitration agreement, according to the Court the FAA does not permit "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[26]

The *Concepcion* Court next determined whether California's *Discover Bank* rule was a generally-applicable contract defense, which would be a valid defense under the FAA, or a defense targeting arbitration, which the FAA would preempt.[27] Justice Scalia, writing for the majority, explained that the FAA preempts state laws that expressly

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[16] *Concepcion*, 131 S.Ct. at 1744.
[17] *Amex*, 133 S.Ct. at 2308.
[18] *Concepcion*, 131 S.Ct. at 1744-45; *Amex*, 133 S.Ct. at 2308.
[19] *Concepcion*, 131 S.Ct. at 1745.
[20] *Id.* at 1746 (citing Discover Bank v. Superior Court, 113 P.3d 1100 (2005)).
[21] *Id.*
[22] *Id.* at 1745.
[23] *Id.* at 1744.
[24] Justice Thomas joined the majority's opinion in *Concepcion*, and he also wrote a separate concurring opinion setting forth a textual argument why the FAA's savings clause should not permit courts to consider the *Discover Bank* rule. *Id.* at 1753-56.
[25] *Id.* at 1746.
[26] *Id.*
[27] *Id.*

prohibit the arbitration of a claim.[28] However, the FAA can also preempt other laws or court rulings that, although appearing to be generally-applicable on their face, "have been applied in a fashion that disfavors arbitration."[29] Additionally, the majority determined that the FAA can preempt rules having a "disproportionate impact on arbitration," and that a court could not "rely on the uniqueness of an agreement to arbitrate" as a ground for refusing to compel arbitration.[30] For example, the FAA would preempt a court's finding of unconscionability if the court based its decision on the agreement's failure to allow full discovery, failure to incorporate the Federal Rules of Evidence, or failure to provide for a jury of "twelve lay arbitrators."[31] Such findings of unconscionability by a court would rely on the uniqueness of arbitration and improperly attack arbitration for not conforming to litigation procedures.

The majority in *Concepcion* explained that the FAA does not permit "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[32] The majority found that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[33] The majority pointed out that the differences between class and bilateral arbitration are "fundamental," and it is unlikely that Congress intended an arbitrator to apply class procedures protective of class members.[34] Under this reasoning, the majority held that the FAA preempted California's *Discover Bank* rule.[35] Therefore, the class waiver in *Concepcion* was enforceable, and the parties had to submit their disputes to individual, not class, arbitration.

Justice Breyer wrote a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.[36] Justice Breyer found that because California's *Discover Bank* rule applied equally to class waivers in "*any* contract," the savings clause in section 2 of the FAA permitted application of the rule.[37] Breyer also emphasized the *Discover Bank* rule did not establish a "blanket policy" against class waivers, noting that some California courts had enforced class waivers when such agreements satisfied the unconscionability doctrine.[38]

Breyer's opinion also criticized the majority for characterizing individual arbitration, as opposed to class arbitration, as a "fundamental attribute" of arbitration under the FAA.[39] Breyer explained that the majority focused too much on the potential disadvantages of class arbitration while ignoring countervailing advantages. Instead, Breyer believed that California should be entitled to make its own decision in weighing

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[28] *Id.* at 1747.
[29] *Id.*
[30] *Id.* (citation omitted).
[31] *Id.*
[32] *Id.* at 1748.
[33] *Id.*
[34] *Id.* at 1750-51.
[35] *Id.* at 1753.
[36] *Id.* at 1756-62.
[37] *Id.* at 1757 (emphasis in original).
[38] *Id.*
[39] *Id.* at 1759.

the pros and cons of class proceedings.[40] Breyer stressed that under the FAA, courts must treat arbitration agreements on the same footing as other agreements, and the *Discover Bank* rule did not offend this principle since it applied equally to class waivers in any contract.[41] Under the dissent's reasoning, the savings clause of section 2 of the FAA would permit courts to apply the *Discover Bank* rule and invalidate class waivers.

B. ***Amex***

The plaintiff merchants in *Amex* resisted the motion to compel arbitration by asserting that individual claims would be prohibitively costly.[42] Relying on an economist's declaration, the plaintiffs reported that the cost of obtaining an expert analysis to prove the antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," but that each merchant would only recover between about $12,000 and $38,000.[43] Therefore, it was impractical for each merchant to bring individual proceedings. Despite this declaration, the district court granted the motion to compel arbitration and dismissed the lawsuit.[44] However, the Second Circuit reversed, finding that the class waiver was not enforceable because the merchants had demonstrated they would "incur prohibitive costs" if forced into individual arbitration.[45]

The Supreme Court framed the issue in *Amex* as "whether a contractual waiver of class arbitration is enforceable under the [FAA] when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[46] Justice Scalia, again writing for the majority, which again consisted of Justices Kennedy, Thomas,[47] Alito, and Chief Justice Roberts, explained that under the FAA, courts must rigorously enforce the terms of an arbitration agreement, even with respect to statutory claims unless a "contrary congressional command" overrides the FAA.[48] Turning to the antitrust laws, the majority found that nothing in these laws required the Court to override the FAA and reject the waiver of class proceedings.[49] The majority also reasoned that the antitrust laws cannot preclude class waivers because they were enacted before the advent of modern class actions, and thus individual proceedings should be considered acceptable for resolving antitrust claims.[50]

The merchants argued that an arbitration agreement cannot be enforced if the agreement prevents the "effective vindication" of a federal statutory right.[51] The

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[40] *Id.* at 1759-61.
[41] *Id.* at 1761-62.
[42] *Amex*, 133 S.Ct. at 2308.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 2307.
[47] Justice Thomas also wrote a concurring opinion relying on a textual analysis of the FAA to show why the merchants' arguments should be rejected. *Id.* at 2312.
[48] *Id.* at 2309 (citations omitted).
[49] *Id.*
[50] *Id.*
[51] *Id.* at 2310.

merchants contended that enforcing the class waivers in this case would prevent the effective vindication of their rights since they would have no economic incentive to pursue their antitrust claims in individual arbitration.[52] However, the majority rejected these arguments and dismissed the "effective vindication" doctrine as mere dictum from prior Supreme Court cases.[53] The Court explained that this doctrine was intended "to prevent prospective waiver of a party's right to pursue statutory remedies."[54] Properly understood, the effective vindication doctrine would thus apply if arbitration agreements expressly forbid the assertion of certain statutory rights. The majority opined that the doctrine "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[55] However, the majority reasoned that the high cost in proving a statutory claim is distinct from the "elimination of the right to pursue that remedy."[56] The majority reasoned that under *Concepcion*, the "FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of law-value claims."[57]

Justice Kagan wrote a dissenting opinion in *Amex*, joined by Justices Ginsburg and Breyer.[58] The dissenters explained that the majority gave an overly-cramped, narrow reading to the effective vindication doctrine, which, according to the majority, applied only in a few, discrete situations.[59] The dissenters, however, argued that the effective vindication doctrine was much broader.[60] According to the dissenting Justices, the doctrine barred the enforcement of an arbitration clause whenever the clause would operate to confer immunity from federal claims, regardless of the procedural devices used to confer that immunity.[61] The dissent reasoned that an exculpatory clause explicitly insulating a company from antitrust liability would not be enforceable.[62] Similarly, an arbitration clause could have the same unlawful effect pursuant to a wide variety of procedural devices. For example, a clause could be exculpatory if it established excessive filing or administrative fees, removed the arbitrator's authority to grant relief, or prohibited certain testimony.[63] Under the arbitration clause at issue, which prohibited class proceedings and imposed confidentiality provisions preventing the merchants from sharing information or producing a common expert report, the merchants would have to spend ten times more in proving their claims than the claims were worth.[64] The

[52] *Id.*
[53] *Id.* at 2310.
[54] *Id.* (citation omitted).
[55] *Id.* at 2310-11 (citation omitted).
[56] *Id.* at 2311.
[57] *Id.* at 2312 n.5.
[58] *Id.* at 2313-20. Justice Sotomayor did not participate in the decision.
[59] *Id.* at 2317.
[60] *Id.* at 2317-18.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 2316.

dissenters reasoned that because such costs are prohibitive and trigger the effective vindication doctrine, the arbitration agreement should not be enforced.[65]

II. *Concepcion* and *Amex* Are Changing Judicial Review of Individual Arbitration Agreements

After *Concepcion* and *Amex*, a party subject to an arbitration clause with a class waiver may have to pursue claims in individual arbitration, or otherwise forego them. It will become more difficult to pursue class proceedings because these cases make it more challenging for parties to invalidate class waivers in arbitration agreements.[66] Lower courts can no longer refuse to enforce class waivers as a matter of public policy.

Because class actions have played a major role in American society,[67] and because they can be controversial,[68] it is easy to focus on how *Concepcion* and *Amex* can in effect limit the availability of class proceedings. However, the doctrines and analyses set forth in these decisions may potentially reach far beyond the class action context. As demonstrated below, these decisions impact the judicial review and enforceability of individual arbitration agreements. The next two Parts provide an overview of how some courts, particularly in the employment context, have engaged in a fairness review of individual arbitration agreements both before and after the Supreme Court's decisions in *Concepcion* and *Amex*.

A. Judicial Review of Employment Arbitration Agreements Before *Concepcion* and *Amex*

Prior to *Concepcion* and *Amex*, a line of authority in the employment context permitted courts to engage in a fairness review of the arbitral procedures set forth in an arbitration agreement before compelling an employee to submit his or her dispute with an employer to arbitration. This line of authority, which ultimately derived from the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[69] primarily took root in California, though courts in other jurisdictions also engaged in this type of review.

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[65] *Id.* at 2316-17.

[66] *See supra* note 5.

[67] *See, e.g.*, Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-Mart v. Dukes*, 62 DEPAUL L. REV. 659, 660 (2013) (explaining that class actions "have been the basis for the most important civil rights cases [in American history], addressing school desegregation, prisoners' rights, and employment discrimination, among other issues," and the Supreme Court's landmark *Brown v. Board of Education* case involved a class action).

[68] *See, e.g.*, Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against Class Defendants*, 66 SMU L. REV. 1 (2013) ("Class actions are a politically charged and controversial topic because their judgments dispose of the rights of a large number of people who are not present in the litigation.").

[69] 500 U.S. 20 (1991).

Under this review, courts would sometimes strike down and carve out unfair, one-sided arbitration procedures before compelling arbitration of employee's disputes.[70] In some situations, courts would invalidate the entire arbitration agreement.[71] This judicial fairness review of bilateral arbitration agreements helped ensure a fair arbitration proceeding, and through this review, courts played an important role in helping to police arbitration procedures in the employment context. This Part provides an overview of the judicial fairness review that occured before *Concepcion* and *Amex*, illuminating the important ways in which *Concepcion* and *Amex* altered the playing field.

In *Gilmer*, the Supreme Court addressed whether an employee's statutory claims under the Age Discrimination in Employment Act ("ADEA") could be subject to compulsory arbitration under the FAA.[72] The Supreme Court ultimately found that such claims are subject to arbitration because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[73] The Supreme Court found that Congress did not intend to preclude arbitration of ADEA claims.[74] The Court reasoned that as long as "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," arbitration is appropriate, and arbitration would not undermine a statute's remedial and deterrent functions.[75]

The plaintiff employee in *Gilmer* raised several challenges to the adequacy of the arbitration procedures at issue.[76] The employee argued that arbitration would be deficient because of the potential bias of the arbitrators, limited discovery, the lack of written opinions, and limited relief.[77] However, the Court rejected all of these challenges.[78] It found that both the applicable arbitration rules and the FAA provided protection against biased decision-makers.[79] According to the Court, the plaintiff failed to show how the limited discovery allowed by the arbitration rules would undermine a fair opportunity to present a claim.[80] Furthermore, the arbitration rules at issue required written awards, and the arbitrators could award equitable relief.[81]

In the employment arbitration case *Cole v. Burns International Security Services*, the United States Court of Appeals for the District of Columbia Circuit used four of the employee's challenges in *Gilmer* and developed a list of fairness factors to help courts

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[70] *See, e.g.*, Abrahim v. ESIS, Inc., No. C-07-04014-JCS, 2008 WL 220104 (N.D. Cal. Jan. 25, 2008).
[71] *See, e.g.,* Lelouis v. Western Directory Co., 230 F. Supp. 2d 1214 (D. Ore. 2001).
[72] *Id.* at 23.
[73] *Id.* at 26 (citing Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
[74] *Id.* at 26-29.
[75] *Id.* at 28 (citation omitted).
[76] *Id.* at 30-32.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 30-31.
[80] *Id.* at 31.
[81] *Id.* at 31-32.

analyze the enforceability of an employment arbitration agreement under the FAA.[82] In finding that the arbitration agreement at issue satisfied "minimal standards of procedural fairness" and allowed employees to effectively vindicate statutory rights, the Court of Appeals observed that the arbitration agreement at issue satisfied the following factors: (1) it provided for neutral arbitrators, (2) it provided for more than minimal discovery, (3) it required a written award, (4) it provided for all relief that would otherwise be available in court, and (5) it did not require employees to pay unreasonable costs, fees, or expenses as a condition of accessing the arbitration forum.[83] The *Cole* court noted in connection with this last factor that an employee could not be forced to arbitrate "public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses."[84]

Other courts have adopted these *Cole* factors to assess the fairness of an employment arbitration agreement. For example, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court applied the *Cole* factors when it addressed the arbitrability of antidiscrimination claims under the California Fair Employment and Housing Act.[85] The California Supreme Court held that such claims are arbitrable provided that the arbitration agreement permits the employee to vindicate his or her rights.[86] In order to help police the fairness of an employment arbitration agreement, the California Supreme Court in *Armendariz* borrowed the five fairness factors from the *Cole* decision and explained that an employee could vindicate his or her statutory rights only if the arbitration agreement satisfied these minimum fairness factors.[87]

Many lower courts, particularly those in California, have applied these *Armendariz* fairness factors when reviewing the enforceability of an arbitration agreement in the employment context. The *Armendariz* court did not discuss these fairness factors as linked to the FAA's savings clause; instead, the *Armendariz* court viewed these factors as arising from the effective vindication doctrine.[88] However, some lower courts have treated these fairness factors as part of general contract law or have applied an unconscionability analysis, as permitted by the savings clause of the FAA.[89]

Several pre-*Concepcion* court decisions invalidated employment arbitration agreements with one-sided or unfair arbitration procedures because the agreements failed to satisfy the *Armendariz* fairness factor analysis and/or a general unconscionability

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[82] *Id.* at 1481-83. In developing these fairness factors, the court also relied in part on due process protocols drafted by a task force representing arbitration service providers, employees, and employers. *See generally* Richard A. Bales, *The Employment Due Process Protocols at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. DISP. RESOL. 165 (2005).

[83] *Cole*, 105 F.3d at 1482-83.

[84] *Id.* at 1485.

[85] 6 P.3d 669 (Cal. 2000).

[86] *Id.* at 674, 680-82.

[87] *Id.* at 682 n.8.

[88] See *infra* notes 115-16 and accompanying text.

[89] *See, e.g.*, Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 94 (Cal. Ct. App. 2004) ("The *Armendariz* requirements are an application of general state law contract principles regarding the unwaivability of public rights in the arbitration context.").

analysis. For example, in *Fitz v. NCR Corp.*, an employee filed a wrongful termination lawsuit in court against her employer, and the employer responded by asking the court to enforce an arbitration agreement in the employer's dispute resolution policy.[90] The arbitration agreement limited discovery "to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing."[91] Additionally, the agreement required the parties to exchange exhibits and a list of witnesses to be used during arbitration at least two weeks prior to the hearing, while no other discovery was permissible unless the arbitrator determined there was a compelling need for additional discovery.[92]

The *Fitz* court, recognizing that "arbitration agreements must ensure minimum standards of fairness,"[93] engaged in a fairness review of the procedures set forth in the arbitration agreement. As a result of this review the court ultimately found that the agreement was void in its entirety on the grounds of unconscionability.[94] During the course of its fairness review, the *Fitz* court observed that the discovery limits were not mutual because the employer was likely to be in possession of the vast majority of the evidence, and that allowing only two depositions would not be fair to the employee.[95] According to the court, the discovery limits were also overly harsh considering the "complexity of employment disputes, the outcomes of which are often determined by the testimony of percipient witnesses, as well as written information about the disputed employment practice."[96] The court also found that the arbitrator's discretion to allow for additional discovery was an insufficient safeguard against unfairness because the party seeking additional discovery would have to satisfy a high burden and demonstrate a compelling need to justify additional discovery.[97] As a result of these findings, the *Fitz* court held that the arbitration agreement was not enforceable because the discovery procedures failed to satisfy "minimum standards of fairness."[98]

In *Ontiveros v. DHL Express, Inc.*, an employment case similar to *Fitz*, a California appellate court refused to enforce an arbitration clause after engaging in a fairness review of the arbitration agreement.[99] The agreement permitted a party to make a request for production of documents and to depose one individual and any expert witnesses.[100] The agreement also provided that an arbitrator could permit additional discovery "upon a showing of substantial need."[101] The court found that the one deposition limit was inadequate to allow the plaintiff to prove her claims, given that the alleged misconduct involved two different worksites and numerous employees over the

[90] *Id.* at 90.
[91] *Id.* at 97.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 96-100, 107.
[95] *Id.* at 96-100.
[96] *Id.* at 98.
[97] *Id.*
[98] *Id.* at 99-100.
[99] 79 Cal. Rptr. 3d 471 (Cal. Ct. App. 2008).
[100] *Id.* at 486.
[101] *Id.*

course of four years.[102] The *Ontiveros* court reasoned that the discovery limits made the arbitration agreement substantively unconscionable.[103]

In its review of the arbitration agreement, the *Ontiveros* court also found that the arbitration agreement's cost-sharing provisions—which required the employee to pay for half of the costs of the arbitrator—made the arbitration agreement unconscionable.[104] The court reasoned that the payment of such expenses, which were unique to arbitration and imposed by the employer, would deter employees from pursuing important statutory claims.[105] As a result of the problematic discovery and cost provisions, the *Ontiveros* court refused to enforce the arbitration agreement.[106]

Like the *Fitz* and *Ontiveros* courts, several other courts have found particular arbitration procedures to be inappropriate or insufficient, and such courts either refused to compel arbitration or invalidated the problematic procedures on the grounds of the *Armendariz* fairness factors and/or a general unconscionability analysis.[107]

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[102] *Id.* at 487.
[103] *Id.* at 487-88.
[104] *Id.* at 484-86.
[105] *Id.* at 485.
[106] *Id.* at 489.
[107] *See, e.g.*, Abrahim v. ESIS, Inc., No. C-07-04014-JCS, 2008 WL 220104, *5-6 (N.D. Cal. Jan. 25, 2008) (relying on *Armendariz* to invalidate an arbitration agreement's requirement that the employee pay a fee to an employer in order to initiate arbitration); McManigal v. Medicis Pharmaceutical Corp., No. C07–4874-TEH, 2008 WL 618909 (N.D. Cal. Mar. 3, 2008) (fee provisions violated *Armendariz*); Lelouis v. Western Directory Co., 230 F. Supp. 2d 1214 (D. Ore. 2001) (citing *Armendariz* with approval and invalidating arbitration agreement because the arbitration agreement, inter alia, made the employee bear half the costs of arbitration); Jackson v. S.A.W. Entertainment Ltd., 629 F. Supp. 2d 1018 (N.D. Cal. 2009) (finding arbitration agreement problematic under *Armendariz* because the agreement did not provide for employer to pay the costs associated with arbitration); Hulett v. Capitol Auto Group, Inc., No. 07-6151-AA, 2007 WL 3232283 (D. Ore. Oct. 29, 2007) (citing *Cole* and finding discovery limits to be substantively unconscionable); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538 (E.D. Pa. 2006) (citing *Gilmer* and finding that provision limiting depositions solely to expert witnesses was substantively unconscionable); Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998) (severe discovery limits, *inter alia*, made the arbitration agreement unconscionable); Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005) (refusing to enforce arbitration agreement because of, *inter alia*, limited discovery provisions which would "significantly prejudice employees"); Doubt v. NCR Corp., No. C-09-05917-SBA, 2010 WL 3619854 (N.D. Cal. Sept. 13, 2010) (discovery limitations in arbitration agreement made agreement unconscionable); Hamrick v. Aqua Glass, Inc., No. 07-3089-CL, 2008 WL 2853992 (D. Ore. Feb. 20, 2008) (citing *Gilmer* and finding discovery limits to be unconscionable); Miller v. Aqua Glass, Inc., No. 07-3088-CL, 2008 WL 2854126 (D. Ore. Feb. 20, 2008) (citing *Gilmer* and finding discovery limits to be unconscionable); Hoffman v. Cargill, Inc., 968 F. Supp. 465, 475 (N.D. Iowa 1997) (citing *Gilmer* and finding discovery limits raise "grave concern about the fundamental fairness of the arbitration proceeding").

B. Judicial Review of Employment Arbitration Agreements After *Concepcion* and *Amex*

As discussed above, many court opinions pre-*Concepcion* and pre-*Amex* reviewed the fairness of arbitration procedures in the employment context and invalidated procedures or the entire arbitration agreement on the basis of the *Armendariz* factors, a general unconscionability analysis, or both.[108] Courts are still navigating how *Concepcion* and *Amex* are changing the landscape of arbitration law. However, some courts construe *Concepcion* and *Amex* as undermining earlier authority and requiring a more circumscribed scope of judicial review of arbitration agreements.

Although *Concepcion* involved the validity of a class waiver, the Supreme Court interpreted the FAA as embodying a very broad, and arguably vague, preemptive power. According to the Court, the FAA would preempt "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" or that "interfere[] with fundamental attributes of arbitration."[109] After the Court's ruling, courts are not permitted to "rely on the uniqueness of an agreement to arbitrate" when invalidating an arbitration agreement on the grounds of unconscionability,[110] and the FAA can preempt a state rule of general applicability that has a "disproportionate impact" on arbitration or "disfavors" arbitration.[111]

Some courts construe *Concepcion*'s broad preemption analysis to undermine the *Armendariz* fairness factors and even to invalidate a more general unconscionability analysis used before *Concepcion*. For example, in *James v. Conceptus, Inc.*, a whistleblower-retaliation lawsuit against a former employer, a federal district court in Texas found that the *Armendariz* fairness factor analysis was "in serious doubt following *Concepcion*."[112] To help understand the district court's reasoning, it is helpful to recall that the *Armendariz* fairness factors arose from the effective vindication doctrine and the non-waivable nature of important statutory claims that further fundamental public interests; they did not arise from the FAA or general contract law.[113] The California Supreme Court in *Armendariz* distinguished between the fairness factor analysis and the separate doctrine of unconscionability:

> In the previous section of this opinion [discussing the fairness factors], we focused on the minimum requirements for the arbitration of unwaivable statutory claims. In this section, we will consider objections to arbitration that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the

[108] *See supra* notes 69-109 and accompanying text.
[109] *Concepcion*, 131 S.Ct. 1740, 1748.
[110] *Id.* at 1747 (citation omitted).
[111] *Id.*
[112] 851 F. Supp. 2d 1020, 1033 (S.D. Tex. 2012).
[113] *Armendariz*, 6 P.3d at 682.

> type of claim being arbitrated. These objections fall under the rubric of "unconscionability."[114]

Thus, based on the *Armendariz* court's introduction to the unconscionability analysis, it seems that the California Supreme Court viewed the five fairness factors from *Cole* as a distinct public policy requirement, separate from the general unconscionability analysis applicable to any contract. As the *Conceptus* court explained, these *Armendariz* fairness factors therefore cannot be considered grounds that "exist at law or in equity for the revocation of any contract, 9 U.S.C. § 2, because they 'apply only to arbitration [and] derive their meaning from the fact that an agreement to arbitrate is at issue.'"[115] The *Conceptus* court reasoned that the *Armendariz* fairness factors are "categorical, *per se* requirements specific to arbitration clauses," not generally applicable contract law.[116] Consequently, the *Conceptus* court ruled that under *Concepcion*, the FAA would preempt the *Armendariz* fairness factor analysis, and these fairness factors can no longer automatically invalidate an otherwise valid agreement to arbitrate.[117]

The *Conceptus* court then analyzed the arbitration agreement at issue, particularly its cost-splitting provisions. The court found that under the old, and now preempted, *Armendariz* fairness factor analysis, the agreement's cost-splitting provisions would have been automatically "unconscionable on a per se basis . . . without further inquiry."[118] As noted above, pre-*Concepcion* court decisions relied on the *Armendariz* fairness factors to strike down arbitration provisions requiring employees to bear the costs of arbitration.[119] However, the *Conceptus* court recognized that post-*Concepcion*, it could not apply *Armendariz* to strike down fee provisions as a categorical rule.[120]

In *Mercado v. Doctors Medical Center of Modesto, Inc.*, a California appellate court also recognized that *Concepcion* and *Amex* "cast doubt on the continued validity of *Armendariz*."[121] The *Mercado* court explained that under *Concepcion*, a court cannot "rely on the uniqueness of an agreement to arbitrate" to invalidate an agreement as unconscionable.[122] The *Mercado* court, which described *Armendariz* as setting forth special minimum requirements for an arbitration agreement, concluded that such special requirements "appear to be the type of state rule *Concepcion* condemned."[123] Moreover,

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[114] *Id.* at 689.
[115] *Conceptus*, 851 F. Supp. 2d at 1033 (citing *Concepcion*, 131 S.Ct. at 1746).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *See supra* notes 105-09 and accompanying text.
[120] *Conceptus*, 851 F. Supp. 2d at 1034 ("To the extent *Armendariz* invalidates all cost-splitting provisions in arbitration agreements as a categorical rule, it likely is abrogated by *Concepcion*.").
[121] No. F064478, 2013 WL 3892990, *7 (Cal. Ct. App. July 26, 2013).
[122] *Id.* at *6.
[123] *Id. See also* Ruhe v. Masimo Corp., No. SACV-11-00734-CJC(JCGx), 2011 WL 4442790, *2 (C.D. Cal. Sept. 16, 2011) (*Armendariz* fairness factors "appear to be preempted by the FAA under the Supreme Court's reasoning in *Concepcion*"); Baeza v.

as recognized by the *Mercado* court, the Supreme Court's *Amex* decision also casts serious doubt on the continued validity of *Armendariz*.[124] In *Amex*, the Supreme Court explained that the effective vindication doctrine was mere dictum, and the *Armendariz* fairness factors arose out of this effective vindication doctrine.[125] Thus, *Amex* undermines the foundation of *Armendariz*.[126]

Previously, under *Armendariz*, a court could invalidate an arbitration provision requiring an employee to pay any part of an arbitrator's fees.[127] However, courts are construing *Amex* as "mak[ing] it more difficult for Plaintiffs to show that [an arbitration agreement] is unenforceable due to high fees associated with arbitration."[128] As explained by one court:

> After [*Amex*], if there is any situation in which provisions in an arbitration agreement increasing the cost of arbitration are unenforceable, it appears that the increased costs must do more than merely create a situation in which "it is not worth the expense involved in proving a statutory remedy," because "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." Rather, it appears that the increased costs must be "so high as to make access to the forum impracticable," such that the costs effectively "constitute the elimination of the right to pursue that remedy."[129]

Thus, *Amex*'s limiting of the effective vindication doctrine and *Concepcion*'s broad preemption doctrine seriously undermine *Armendariz*.

While some courts have focused on *Concepcion*'s preemption of the *Armendariz* fairness factors, the impact of *Concepcion* goes beyond these *Armendariz* factors. Some courts are treating *Concepcion* as changing and limiting the scope of a general unconscionability analysis. For example, in *Lucas v. Hertz Corp.*, a federal district court in California addressed an unconscionability challenge to an arbitration agreement that did not permit discovery.[130] The court described how pre-*Concepcion* courts used to invalidate limited discovery provisions in arbitration agreements:

> Prior to the Supreme Court's ruling in *Concepcion*, numerous courts, at both the state and federal level, found arbitration agreements substantively unconscionable where the rules of the arbitral forum allowed for only

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Superior Court, 135 Cal.Rptr.3d 557, 568 (Cal. Ct. App. Dec. 14, 2011) (describing *Armendariz* as "abrogated in part" by *Concepcion*).

[124] *Mercado*, 2013 WL 3892990, *6.

[125] *Id.*

[126] *Mercado*, 2013 WL 3892990, *7.

[127] *See supra* notes 105-09 and accompanying text.

[128] Byrd v. SunTrust Bank, No. 2:12-cv-02314-JPM-cgc, 2013 WL 3816714, *18 (W.D. Tenn. July 22, 2013).

[129] *Id.* (quoting *Amex*, 133 S.Ct. at 2307, 2310-11, 2307).

[130] 875 F. Supp. 2d. 991 (N.D. Cal. 2012).

> minimal discovery or where the affect [sic] of the discovery rules operated solely to one side's benefit.[131]

The *Lucas* court then stated that under *Concepcion*'s broad preemption analysis, "limitations on arbitral discovery no longer support a finding of substantive unconscionability."[132] Under this court's application of *Concepcion*, an unconscionability analysis that relies on the "uniqueness of an arbitration agreement" is inappropriate and preempted.[133] A pre-*Concepcion* court may have found the discovery limits at issue in the *Lucas* case to be unconscionable.[134] However, the *Lucas* court found that *Concepcion* foreclosed such a conclusion.[135] The *Lucas* court held that "in this post-*Concepcion* landscape, the arbitration agreement [at issue with its limited discovery provisions] is not substantively unconscionable."[136]

State-specific standards developed specifically for arbitration agreements—like the *Discover Bank* rule in *Concepcion* and the *Armendariz* fairness factors for employment arbitration—seem doomed under *Concepcion*'s broad preemption analysis. Furthermore, cases like *Lucas* show that in addition to preempting arbitration-specific rules, *Concepcion* can even threaten generally applicable state law defenses such as unconscionability if applied in a way that results in a "disproportionate impact" on arbitration or that "interfere[s] with fundamental attributes of arbitration. . ."[137] Additionally, the *Amex* case, by limiting the effective vindication doctrine, threatens to undermine the foundation supporting the *Armendariz* factors. In sum, many courts are construing *Amex* and *Concepcion* as circumscribing the prior, more expansive scope of judicial review of arbitration agreements.

III. Looking Forward: The Potential Consequences of the Changing Nature of Judicial Review of Arbitration Agreements and How to Respond to These Changes

The changing scope of judicial review of arbitration agreements in the wake of *Concepcion* and *Amex* can have significant consequences for employment arbitration.

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[131] *Id.* at 1007.
[132] *Id.*
[133] *Id.*
[134] *See supra* notes 69-109 and accompanying text.
[135] 875 F. Supp. 2d at 1007.
[136] *Id.* at 1009.
[137] Mortensen v. Bresnan Communications, LLC, 722 F.3d 1151, 1159 (9th Cir. 2013) ("We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA."); *see also* Dean v. Draughons Jr. College, Inc., 917 F. Supp. 2d 751, 762 (M.D. Tenn. 2013) (*Concepcion* preempts a Kentucky cost-prohibitiveness defense, even if the defense were based on general unconscionability principles, because such a defense is arbitration-specific and would frustrate the FAA's objectives).

The next two Parts of this Article discuss these consequences and suggest some ways to respond to the changing nature of judicial review.

A. The Potential Consequences of the Changing Nature of Judicial Review of Arbitration Agreements

The potential implications of this changing nature of judicial review of arbitration agreements are far-reaching. An employee may now lose the benefit of the *Armendariz* fairness factors, which provided at least a minimum guarantee of procedural protections for employment arbitration. Additionally, employees may have difficulty relying on unconscionability defenses if such arguments have a "disproportionate impact" on arbitration.[138] Furthermore, a more circumscribed scope of judicial review opens the door for unscrupulous employers to engage in greater overreaching when drafting arbitration agreements. For example, if an employer adds language to an arbitration agreement severely limiting or banning discovery, employees may have a harder time challenging such limits, previously challengeable under *Armendariz*. Even under a general unconscionability analysis, the discovery limits may be unassailable because some courts construe *Concepcion* as preempting an unconscionability analysis that disfavors arbitration.[139] Moreover, if an employer adds a broad delegation clause, which was endorsed by the Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*,[140] judicial review of an arbitration agreement would be closer to an almost automatic rubberstamping of orders compelling arbitration.[141] The more limited nature of judicial review of arbitration agreements endorsed by these cases may lead to employer overreaching and more one-sided arbitration agreements.

Without the procedural protections of *Armendariz*, with a more circumscribed unconscionability analysis, and with a weakened effective vindication doctrine, employees can be forced to arbitrate in a proceeding with very limited procedural rights. This in turn may undermine the enforcement of critical statutory rights embodied in civil rights and wage and hour legislation. The rights and obligations created by such legislation are meaningless if employees can no longer access the judicial system and are relegated to a private system of arbitration governed by increasingly one-sided arbitration provisions.

Cases like *Concepcion*, *Amex*, and *Rent-A-Center* are destabilizing the relationship between courts and the system of arbitration supported by the FAA. The FAA is not solely about resolving disputes between two parties. Rather, it was enacted, at least in part, to assist the judiciary by alleviating overcrowded dockets.[142] At the time

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[138] *Concepcion*, 131 S.Ct. 1740, 1747 (2011).

[139] *See, e.g.*, Lucas v. Hertz Corp., 875 F. Supp. 2d. 991 (N.D. Cal. 2012).

[140] 130 S.Ct. 2772 (2010).

[141] *See, e.g.*, *In re* Checking Account Overdraft Litigation, No. 09-MD-02036-JLK (S.D. Fla. Aug. 27, 2013) (order enforcing delegation clause and sending to arbitration all arguments regarding arbitration clause's enforceability).

[142] IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 16, 24-25, 27, 34-36, 44, 45, 47, 52, 58, 62, 63, 68, 79, 138, 166-73, 188-89 (2013).

of the FAA's enactment, the judicial system was overwhelmed with congested dockets and overly technical, confusing procedural court rules slowing down the resolution of cases.[143] The FAA provided a safety valve to alleviate the burdens of the judiciary, but the FAA simultaneously provided a special, continuing role for the judiciary in connection with the enforcement of arbitration agreements and review of arbitration awards.[144] Thus, the FAA sets forth and defines a relationship between the government and its people. Changing the scope of judicial review therefore not only impacts the two parties to a dispute; it also changes the relationship between the judiciary and the privately-run system of dispute resolution. By shrinking the scope of judicial review of arbitration agreements, the Supreme Court is further closing the courthouse door and providing for less oversight regarding arbitration.[145] Moreover, if courts are moving closer to rubberstamping one-sided arbitration agreements, such minimized judicial review threatens to undermine the public's confidence in the judicial system. And in the employment setting, where there is typically a large disparity in bargaining power between employers and employees, a decreasing level of judicial review can undermine the legitimacy of arbitration proceedings involving key public laws like civil rights and wage legislation.

B. How to Respond to the Changing Nature of Judicial Review of Arbitration Agreements

The next two sub-Parts discuss possible responses to the changing scope of judicial review. Employees who are currently litigating and challenging the enforceability of an arbitration agreement can seek to limit a court's application of *Concepcion* and *Amex* through various arguments described below, and in the longer run, there are some possible legislative solutions.

1. Limiting the Reach of *Concepcion* and *Amex* in Litigation

The changing nature of judicial review of arbitration agreements should prompt a broader debate about the proper role of the judiciary, the level of judicial review that should occur in connection with arbitration, and the types of claims that should be subject to arbitration. These are fundamental questions related to accessing justice through the court system. Ideally, such fundamental choices should be debated and made through Congress or through the rulemaking process of an administrative agency, but not through a unilateral decision by five Justices of the Supreme Court. However until legislative action or rulemaking takes place, how should an employee who files a lawsuit respond when an employer seeks to compel arbitration and rely on *Concepcion* and *Amex* to reject an employee's challenges to an individual arbitration agreement? One possibility is for employees in litigation to distinguish *Concepcion* and *Amex* and to argue for a limited application of these two cases.

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[143] *Id.*

[144] *See generally* 9 U.S.C. §§ 1- 16 (2012).

[145] The Supreme Court's recent arbitration cases are part of a larger trend of Supreme Court decisions limiting the scope and availability of litigation. *See supra* note 12.

An employee can distinguish *Concepcion* as not applicable to employment arbitration agreements in several ways. First, *Concepcion* focused on the enforceability of a class waiver in a consumer setting,[146] not an employment setting. Additionally, the plaintiff consumers in *Concepcion* knew the core, relatively simple facts of their case: they were charged $30 for a phone that was advertised as free.[147] Employees, on the other hand, may often lack key evidence which is in the hands of an employer, and broad discovery rights can help employees uncover such evidence.[148] Furthermore, there is arguably more at stake in the employment setting when compared to a consumer setting. In the employment setting, an arbitration agreement can affect one's entire livelihood and almost every conceivable dispute that could arise at the workplace over a long time span with a particular employer. A significant part of one's daily affairs can be beyond the reach of the judiciary as a result of employment arbitration agreements, and low-wage earners may have little choice but to accept an arbitration agreement in order to remain employed. However, in the consumer setting, an arbitration agreement may have a small scope or reach and may only cover the purchase of a non-essential item. The *Concepcion* decision did not address the employment setting, where greater supervision of arbitration is arguably more justified. Similarly, the arbitration agreement at issue in *Amex* involved relatively sophisticated parties, merchants and the American Express Company.[149] *Amex* did not consider the employment context.

Moreover, an employee trying to distinguish *Concepcion* and *Amex* can seek to limit application of these two cases by arguing that they involve the enforceability of class waivers, not other provisions, such as discovery, in arbitration.[150] Although *Concepcion* discussed special provisions in arbitration, such as judicially-monitored discovery or the required use of the Federal Rules of Evidence,[151] such statements in the opinion are mere dicta because these arbitration provisions were not before the Supreme Court in *Concepcion*. Moreover, the dicta involved extreme fact patterns, such as an arbitration clause requiring full discovery permitted in courts or application of the Federal Rules of Evidence.[152] For these extreme fact patterns where an arbitration clause required court-like proceedings, the Court opined in dicta that the FAA would preempt such rules.[153] However, clauses involving the opposite of these extremes, such as those providing for little to no discovery, are more likely to appear in arbitration agreements. Similarly, many statements in *Amex* about the effective vindication doctrine are mere

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[146] *Concepcion*, 131 S.Ct. 1740 (2011).
[147] *Id.* at 1744.
[148] *See, e.g.*, Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 98 (Cal. Ct. App. 2004) (relying on *Armendariz* and finding that discovery limitations in an arbitration agreement were inappropriate in light of the "complexity of employment disputes, the outcomes of which are often determined by the testimony of percipient witnesses, as well as written information about the disputed employment practice").
[149] 133 S.Ct. 2304 (2013).
[150] Hill v. Garda CL Northwest, Inc., 308 P.3d 635, 639 (Wash. 2013) (en banc) (limiting *Concepcion* to class waivers, not other types of arbitration provisions).
[151] *Concepcion*, 131 S.Ct. at 1747.
[152] *Id.*
[153] *Id.* at 1747-48.

dicta. For example, the Court briefly noted that "perhaps" the effective vindication doctrine would cover high administrative or filing fees.[154] However, the Court in *Amex* did not explore the detailed contours of the effective vindication doctrine because it was not necessary to do so. *Amex*, like *Concepcion*, involved the enforceability of class waivers. Neither *Amex* nor *Concepcion* involved other severe procedural restrictions.

Furthermore, the dispute resolution agreement at issue in *Concepcion* was unusual because its provisions were consumer friendly. For example, the Court found that under the agreement, any "aggrieved customers who filed claims would be essentially guaranteed to be made whole."[155] Also, consumers would be guaranteed at least $7,500 and twice their attorney's fees if they obtained an arbitration award greater than AT&T's last settlement offer.[156] Thus, *Concepcion* did not involve a heavily one-sided arbitration agreement with harmful procedures.

Employees can also argue that a general unconscionability defense can still invalidate an arbitration agreement pursuant to the savings clause of section 2 of the FAA. Although some courts, such as the *Lucas* court,[157] use *Concepcion* to limit the scope of an unconscionability defense, other courts reject such a broad interpretation of *Concepcion*. For example, in *Brown v. MHN Government Services, Inc.*, the Washington Supreme Court found that *Concepcion* should be interpreted narrowly.[158] Under this narrow reading, *Concepcion* would only preempt arbitration-specific state rules, like the *Discover Bank* rule at issue in *Concepcion*, but not general unconscionability arguments. The employer in *Brown* argued that under *Concepcion*, an unconscionability defense cannot interfere with fundamental attributes of arbitration.[159] However, the Washington Supreme Court rejected the employer's broad interpretation of *Concepcion* and found that courts could still apply a general unconscionability analysis to examine whether a particular arbitration provision is "overly harsh or one-sided."[160] Thus, while the *Lucas* court believed it could not find a discovery limit unconscionable under its broad reading of *Concepcion*, a court following the Washington Supreme Court's narrower reading of *Concepcion* could consider the discovery limit at issue in the *Lucas* case under a general unconscionability analysis and potentially find the provision "overly harsh."

Similarly, in *Chavarria v. Ralphs Grocery Co.*, the Ninth Circuit limited the broad scope of FAA preemption under *Concepcion*.[161] The *Concepcion* decision contains broad language regarding the FAA's preemptive powers; it suggested that the FAA can preempt state laws having a "disproportionate impact" on arbitration.[162] The agreement in *Chavarria* contained a problematic cost provision, where the arbitrator would apportion significant fees to both the employer and employee at the beginning of the

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[154] *Amex*, 133 S.Ct. at 2310-11.
[155] *Concepcion*, 131 S.Ct. at 1753.
[156] *Id.*
[157] *See supra* notes 130-36.
[158] 306 P.3d 948 (Wash. 2013).
[159] *Id.* at 953.
[160] *Id.* at 953-54.
[161] No. 11-56673, 2013 WL 5779332 (9th Cir. Oct. 28, 2013).
[162] *Concepcion*, 131 S.Ct. at 1747.

arbitration, regardless of the merits of the underlying dispute.[163] The Ninth Circuit explained that any state law invalidating this provision would clearly have a "disproportionate impact" on arbitration because this provision is arbitration specific.[164] However, the Ninth Circuit reasoned that invalidating this term would not disfavor arbitration; invalidating this term would simply help make arbitration fair.[165] The Ninth Circuit suggested that the broad preemptive language from *Concepcion* cannot be read to invalidate state rules requiring some level of fairness in arbitration.[166] In other words, the FAA cannot preempt a state law that merely has a "disproportionate impact" on arbitration; in order to be preempted, the law must also disfavor arbitration and not seek to make arbitration fairer. In sum, not all courts are construing *Concepcion* as narrowing the scope of unconscionability review, and parties can still rely on unconscionability arguments to invalidate an arbitration agreement.

2. Legislative Solutions

Trying to argue in litigation that *Concepcion* and *Amex* should not be applied in the employment setting is likely an uphill battle, and even if this strategy may be successful in a few cases, there are likely to be conflicting court decisions on this issue. To offer better and consistent protection for employees, legislation solutions are a better option. As explained below, the current state of arbitration doctrine can undermine the enforcement for several critical laws, and the legislative branch should respond.

When arbitration agreements are voluntarily entered into, arbitration can be fair and mutually beneficial to both parties. However, in the employment context, employees with little bargaining power may have no real choice and may be forced to submit to arbitration. Courts have enforced arbitration agreements even where it appears employees did not knowingly agree to arbitration. In one case, two employees were required to attend a two-hour orientation session where "they were told to sign their names approximately seventy-five times on a variety of documents without anyone explaining the contents of said documents and without an adequate opportunity to read most of them." One of these documents contained an arbitration clause.[167] This mandatory orientation meeting was described as "intimidating, hurried and tense," and the court found that the employees were completely unaware one of the documents contained an arbitration clause.[168] However, the court, relying on a strong federal policy favoring arbitration, enforced the arbitration clause and compelled the employees to submit civil rights claims to arbitration.[169]

Employees are generally subject to the dynamics of employment relationships involving employers with stronger bargaining power, and in such relationships, arbitration can be forced onto the weaker party and used to the disadvantage of

[163] *Chavarria*, 2013 WL 5779332, at *5.
[164] *Id.* at *8.
[165] *Id.* at *8-*9.
[166] *Id.*
[167] *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 106 (S.D.N.Y. 1995).
[168] *Id.* at 107.
[169] *Id.* at 108, 110.

employees. For example, employers can draft arbitration clauses that shorten statutes of limitations, limit discovery, or include other provisions making it more challenging for an employee to bring a claim.[170] Such overreaching in the drafting of arbitration clauses can undermine the enforcement of critical laws for which there is a strong public interest, such as wage and hour laws and civil rights laws.

Moreover, *Concepcion* and *Amex* have the potential to exacerbate the above-described problems. They make it more challenging for employees to proceed collectively if an arbitration agreement contains a class waiver. Also, as discussed in prior sections of this Article, some courts are beginning to construe *Concepcion* and *Amex* as limiting the scope of judicial review of arbitration agreements,[171] and a more circumscribed judicial review carries several negative implications for employees.[172] For example, if judicial review of arbitration agreements is becoming more limited, employers can engage in greater overreaching when drafting arbitration agreements with very limited procedural rights.

To provide the greatest protections for employees, Congress should enact the proposed Arbitration Fairness Act of 2013, which, among other things, would ban pre-dispute arbitration agreements in the employment context.[173] All of the policies underlying wage and hour and civil rights legislation, which protect vulnerable workers, also justify the adoption of the Arbitration Fairness Act, which would help employees access a public court with broad procedural opportunities, including class procedures, to enforce these critical rights. If Congress passes the Arbitration Fairness Act, an employee with a dispute would still have the option to submit disputes to arbitration, and under such circumstances, there would be less concern about one-sided arbitration provisions. A post-dispute submission by an employee would arguably be fairer because the submission would be voluntary and knowing.

The history of the FAA's enactment supports the Arbitration Fairness Act of 2013. The FAA was *never* intended to apply in the employment context; the FAA was designed for routine contract disputes between two merchants, not complex, public statutory claims between parties of unequal bargaining power.[174] Moreover, reformers who pushed for the FAA generally had a sincere belief in the use of arbitration to resolve disputes; they did not express a desire to use arbitration as a means of hindering the resolution of a dispute or making it more challenging to resolve a dispute.[175] The FAA

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[170] *See, e.g.*, Affholter v. Franklin County Water Dist., No. 1:07-CV-0388, 2008 WL 5385810 (E.D. Cal. Dec. 23, 2008) (enforcing arbitration agreement which provided for only one deposition as a matter of right); Damato v. Time Warner Cable, Inc., No. 13-CV-994, 2013 WL 3968765 (E.D.N.Y. July 31, 2013) (enforcing arbitration agreement where agreement shrinks the statute of limitations, limits damages, and limits appeals).

[171] *See supra* notes 110-39 and accompanying text.

[172] *See supra* notes 140-47 and accompanying text.

[173] H.R. 1844, 113th Cong. (2013); S. 878, 113th Cong. (2013).

[174] SZALAI, *supra* note 144, at 131-33, 134-35, 136, 142-43, 144-45, 147, 148, 149, 150, 151, 152-54, 159, 191-92, 192-98.

[175] *Id.* at 91-95; 199-200.

was never designed for the employment setting or for statutory claims.[176] To provide the greatest procedural protections for employees, Congress should pass the Arbitration Fairness Act of 2013 and restore the FAA to its original meaning.

Unfortunately, several bills that would establish broad bans on pre-dispute employment arbitration agreements have been introduced in Congress over the last few years, and none have been successful.[177] If a complete ban on pre-dispute employment arbitration agreements is not politically possible, legislative solutions should try to preserve a stronger role for the judiciary in policing arbitration agreements for fundamental fairness. A wider adoption of the *Armendariz* fairness factors would be preferable to the circumscribed judicial review of arbitration agreements occurring as a result of *Amex* and *Concepcion*. If the Arbitration Fairness Act is not politically feasible,

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[176] Understanding the historical background of the FAA's enactment also helps one understand the rise and development of the effective vindication doctrine and the *Armendariz* fairness factors discussed above. When the Supreme Court expanded the scope of the FAA beyond its original meaning by holding that statutory antitrust claims are arbitrable in *Mitsubishi*, the Court relied on the effective vindication doctrine as a way to counterbalance or justify the expansion of the FAA to cover statutory claims. Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The effective vindication doctrine would help ensure that arbitration is used as a sincere, effective method of dispute resolution, and not as a way to thwart or hinder the resolution of statutory disputes. Similarly, when the Supreme Court expanded the FAA to cover statutory claims under the Age Discrimination in Employment Act in *Gilmer*, it was also important for the Court to address the effective vindication doctrine and various factors relevant to the fairness of arbitrating employment disputes. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The Supreme Court's analysis in *Gilmer* provided the foundation for the *Armendariz* fairness factors. *See supra* notes 72-88 and accompanying text. One can understand the development of the effective vindication doctrine and the *Armendariz* fairness factors as a judicial attempt to counterbalance or alleviate concerns with the flawed judicial expansion of the FAA to cover statutory claims and employment disputes, which was never the original intent behind the FAA. If Congress is not politically able to ban pre-dispute arbitration agreements in the employment context, to provide some legitimacy, courts should be increasing, not decreasing, judicial review of employment arbitration agreements for fundamental fairness. In light of the history of the FAA and the Supreme Court's transformative expansion of the statute, it is highly inappropriate for courts to cut back on the scope of the effective vindication doctrine, the *Armendariz* fairness factors, or a more general review of arbitration agreements.

[177] *See, e.g.*, H.R. 815, 107th Cong. (2001) (banning pre-dispute arbitration agreements in the employment context); S. 2435, 107th Cong. (2002) (same); H.R. 3809, 108th Cong. (2004) (same); H.R. 2969, 109th Cong. (2005) (same); H.R. 3010, 110th Cong. (2007) (banning pre-dispute arbitration agreements in the consumer, franchise, and employment contexts); H.R. 991, 111th Cong. (2009) (banning pre-dispute arbitration agreements in consumer contracts); H.R. 1020, 111th Cong. (2009) (banning pre-dispute arbitration agreements in the consumer, franchise, and employment contexts); H.R. 1873, 112th Cong. (2011) (banning pre-dispute arbitration agreements in consumer and employment contracts); S. 987, 112th Cong. (2011) (same).

another possible legislative solution to deal with this more circumscribed judicial review would be to regulate the arbitration process in more detail by codifying the *Armendariz* fairness factors for the employment setting, perhaps by including a definition of employment arbitration under the FAA.

Strikingly, the FAA focuses on arbitration, and yet the statute never defines this key term.[178] This lack of a definition has given rise to problems. *Concepcion*, for example, strikes at the heart of the FAA by raising the fundamental issue of the meaning of arbitration covered by the statute. A majority of Justices in *Concepcion* found that bilateral arbitration, and not classwide arbitration, was a "fundamental attribute" of arbitration under the FAA.[179] However, as pointed out by the dissenting Justices in *Concepcion*, "[w]here does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribute' of arbitration? The majority does not explain."[180] The FAA is simply silent as to the meaning of arbitration. Thus, one can view *Concepcion* as a case struggling with the definition of arbitration, and the case invites lower courts to speculate as to the "fundamental attributes" of arbitration when considering preemption arguments.[181]

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[178] The history behind the FAA's enactment helps explain why the statute never provides a definition of arbitration. The FAA arose in part as a response to a highly technical and broken court system with confusing procedural rules from the early 1900s, and the reformers who wanted a modern arbitration law desired to break free from this extremely complex system. *See supra* note 144-45 and accompanying text. Understanding that the arbitration reform movement grew out of a procedural nightmare in the court system is a key to understanding why the reformers did not want to get bogged down with a technical, detailed, highly-regulated definition of arbitration. The reformers did not want to create another system that reminded them of the highly technical judicial procedure of the courts of that time. In the process of drafting the FAA, one of the main proponents of the FAA desired a more detailed description of arbitration in the statute, but the main drafter of the FAA rejected this request to get more detailed. SZALAI, *supra* note 144, at 123. Also, progressive values influenced the arbitration reformers, and progressives generally preferred indeterminate, flexible processes to deal with changes in an indeterminate society. *Id.* at 98-99, 173-79, 188, 199-200. Under progressive beliefs, it was important to have an expert decision-maker, freed from any restrictions, to cope with a fluid society instead of trying to define the decision-making process or provide detailed standards for a decision-maker. *Id.* The lack of a clear definition of arbitration in the FAA can be understood as reflecting this progressive belief in the power of an expert-decisionmaker operating with flexibility and unhindered by detailed procedural rules. Furthermore, the FAA was designed for simple contract disputes between merchants, not complex statutory claims of a public nature between parties of unequal bargaining power. *Id.* at 192-98. For such simple contract disputes between co-equals, it was probably not necessary for the statute to contain detailed regulations about the arbitration process.

[179] *Concepcion*, 131 S.Ct. at 1748-53.

[180] *Id.* at 1759.

[181] The FAA's lack of a definition of arbitration causes other problems as well. There are conflicting court decisions concerning whether the FAA covers hybrid mediation-arbitration agreements. *Compare* Advanced Bodycare Solutions, Inc. v. Thione Int'l, 524

If enactment of the Arbitration Fairness Act is not possible, another possible legislative solution to help alleviate concerns regarding the fairness of employment arbitration would be to adopt a statutory definition of arbitration for employment disputes. A definition of employment arbitration could codify, for example, the *Armendariz* fairness factors or some version thereof,[182] and a court could not enforce an employment arbitration agreement under the FAA unless the agreement satisfied this definition. Arbitration could be defined as a bundle of certain core procedures that must exist in the employment context in order for an employment arbitration agreement to be covered by the FAA. A legislative codification of the *Armendariz* fairness factors would provide at least some procedural protections for employees. Also, an amendment to the FAA could require courts to engage in an *Armendariz* fairness factor analysis before compelling arbitration or confirming an arbitration award. In other words, the amendment could prohibit delegating this analysis to arbitrators. Requiring judicial decisions would help foster the development of case law on the subject, which could help ensure uniform application of these fairness factors and provide guidance for future parties in drafting agreements and for courts in analyzing agreements.

Conclusion

The original drafters of the FAA would not recognize the statute as it is construed today. Flawed Supreme Court decisions changed the meaning of the statute, and the FAA appears to be in a continuing state of flux following the Supreme Court's *Concepcion* and *Amex* decisions. These decisions appear to be swinging the pendulum closer towards a judicial rubberstamping of arbitration agreements. These decisions could lead to overreaching by employers and threaten to undermine the enforcement of important statutory rights of employees. Stronger judicial review of employment arbitration agreements should resume, either by judicial limitation of *Concepcion* and *Amex*, or through legislative action.

F.3d 1235 (11th Cir. 2008) (FAA does not cover mediation clauses), *with* Fisher v. GE Medical Systems, 276 F.Supp.2d 891 (M.D. Tenn. 2003) (FAA covers mediation clauses).

[182] In 2007, and again in 2011, Senator Jefferson Sessions of Alabama introduced bills called the Fair Arbitration Act. These bills guaranteed certain procedural rights in arbitration, and these rights generally tracked the *Armendariz* fairness factors. *See* S. 1135, 110th Cong. (2007); S. 1186, 112th Cong. (2011). These bills died in committee. If a complete ban on forced employment arbitration is not politically feasible, new bills similar to the Fair Arbitration Act could alleviate some concerns arising from the more circumscribed judicial review resulting from *Concepcion* and *Amex*.