Consumer Protection, Hijacking and The *Concepcion* Cases

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I. INTRODUCTION

In *AT&T Mobility LLC v. Concepcion*[1] ("*Concepcion*"), a 2011 decision that remains controversial to this day, the U.S. Supreme Court held that traditional state-level unconscionability defenses to class-arbitration waivers in consumer adhesion contracts were wholly preempted under the auspices of the Federal Arbitration Act ("FAA"). The decision leaves consumers with substantially less opportunity to have their legal complaints heard in a court of law.

Nevertheless, in *Concepcion's* wake, courts and agencies throughout the country have continued to devise numerous means of challenging the legality of arbitration clauses. This article looks at some of these post-*Concepcion* holdings and examines their viability in the mid- to long-term, in light of a United States Supreme Court that appears strongly inclined to bolster its support for the FAA—even in instances where doing so preempts other federal laws in the process.

II. *CONCEPCION* AND POST *CONCEPCION* CASES

The impetus that ultimately led to the *Concepcion* holding was *Discover Bank v. Superior Court*, a 2005 case before the Supreme Court of California.[2] In *Discover Bank*, the plaintiff, Christopher Boehr—a Discover credit card holder residing in California—challenged the legality of a clause in the bank's card-application paperwork forbidding customers from engaging in any form of class-wide arbitration against Discover.[3] Boehr filed a complaint in California court claiming that Discover had been engaging in deceptive trade practices by misrepresenting their payment deadlines to consumers.[4] Discover moved to compel arbitration, as stipulated in Boehr's original card agreement, and the trial court initially granted their motion. However, after the plaintiff's motion for reconsideration and a pro-plaintiff ruling in a largely identical case, *Szetela v. Discover Bank*, the court reversed itself and concluded that allowing such waivers would be unconscionable under California law.[5] Further, the court concluded that the FAA, which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," did not preempt either California law in this regard or the court's right to rule in Boehr's favor.[6] The state's Second Court of Appeal reversed the trial court's holding, but the California Supreme Court reversed and remanded the appellate decision, reinstating the trial court verdict.[7]

In its opinion, the supreme court established what subsequently became known as the "Discover Bank rule."[8] The "rule" invalidated class-action waivers on unconscionability grounds when the waiver existed in a "take it or leave it" consumer adhesion contract; the amount of money being disputed was inconsequential; and "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[9] While the rule was widely cited in hundreds of cases over the course of five years, the U.S. Supreme Court effectively reversed it in *Concepcion*.

The basic case circumstances in *Concepcion* were similar to those in *Discover Bank*: both involved challenges to class-arbitration prohibitions in consumer adhesion contracts. Unfortunately for the plaintiffs (the Concepcions), they elected to adjudicate their case in federal court instead of state court, despite the fact that they resided in California.[10] That decision may have been fatal to their case, thanks in large part to hostility among the U.S. Supreme Court's conservative bloc to state-level FAA challenges. Not only did the Court deny the Concepcions any relief, Justice Antonin Scalia—who authored the *Concepcion* opinion—seized the opportunity provided to entirely abrogate the California Supreme Court's *Discover Bank* holding. The holding stated that, absent any specific congressional mandate, general public policy reasons were insufficient grounds for superseding the FAA and its 90 years of historical precedent.

Justice Scalia's opinion took particular umbrage with state-level courts trying to wiggle around the mandates of federal law, providing their own interpretations of FAA clauses and manipulating the Act as they saw fit. The Court explicitly stated that "the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[11]

The *Concepcion* case clearly divided the court, given both the length of Justice Stephen Breyer's dissent, as well as Justice Scalia's apparent need to rebut Justice Breyer's rebuttal.[12] Despite the apparent incongruity with his argument, Justice Scalia found nothing in the FAA's legislative history suggesting an intention on Congress's part to include class arbitration under the Act's auspices.[13] Nonetheless, he concluded that the U.S. Supreme Court's own case history had firmly established a "national policy favoring arbitration," including class-wide arbitration.[14]

However, this contention presents some analytical holes in need of filling. For instance, Justice Scalia's analysis fails to account for the likelihood of bias in instances where a defendant is granted the exclusive right—per a contract's stipulated terms—to select an arbitrator. Justice Scalia also disregarded the reality that consumers rarely have any role in the drafting of such clauses.

Concepcion has created some confusion as to whether a plaintiff can invalidate an arbitration waiver clause, and if so, under what conditions. Because of this confusion, attorneys have tested *Concepcion*'s limits, questioning: (1) whether procedural and substantive unconscionability defenses are sufficient to overcome *Concepcion*; (2) whether class arbitration waiver clauses would be enforceable if the plaintiff would, as a practical matter, be prohibited from asserting his or her federal statutory rights; (3) whether *Concepcion* would apply where the parties would be required to participate in class arbitration under state law; or (4) whether *Concepcion* applies when actions lie in state court.

1. *Coneff v. AT&T Corporation*

In *Coneff v. AT&T Corp.*,[15] plaintiffs argued that *Concepcion* was distinguishable, but these arguments were not persuasive to overcome the *Concepcion* ruling and effect.[16] The Plaintiffs argued: (1) large arbitration costs associated with individual arbitration would prevent effective vindication of federal rights in the arbitral forum; (2) cases such as *Mitsubishi*[17] and *Green Tree*[18] are in conflict with the *Concepcion* ruling and implied exceptions should apply; and (3) Washington law[19] was different from the California law as addressed in the *Discover Bank* case, which *Concepcion* overruled and rejected.

In *Italian Colors Restaurant*, the Supreme Court rejected this cost argument and stated individual proceedings were adequate in vindicating federal statutory rights.

The Ninth Circuit, however, noted that *Concepcion* had rejected similar arguments. Specifically, the Supreme Court in *Concepcion* reasoned small amounts in controversy would not necessarily increase arbitration costs and interfere with the plaintiff's vindication of rights and that FAA favored a liberal policy in enforcing private arbitration agreements.[20] The court reversed the district court decision, ruling against the plaintiffs, to conform with and follow the decision in *Concepcion*. The court noted the U.S. Supreme Court was clear yet broad in stating that the FAA trumped state law and such private agreements are enforceable.[21]

Post-*Concepcion* cases have reinforced the decision in *Concepcion,* emphasizing that class arbitration is not favored. For example, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*[22], where an arbitrator exceeded his powers authorizing class arbitration contrary to the FAA or when not agreed by the parties. Further case law may provide hope for consumers and show what *Concepcion* has left open such as whether an agreement upon the parties to arbitrate via class arbitration.

2. *American Express, Co., et.al. v. Italian Colors Restaurant*

In *American Express, Co., et.al. v. Italian Colors Restaurant,*[23] the plaintiff argued its right of "effective vindication" would be precluded if *Concepcion*'s rule was applied. The plaintiff asserted that the high costs of an individual arbitration would, as a practical matter, preclude the plaintiff from enforcing its statutory

rights. This argument, however, did not get very far.

In *Italian Colors Restaurant*, the Supreme Court rejected this cost argument and stated individual proceedings were adequate in vindicating federal statutory rights, as class actions were not the only practical way for the plaintiffs to vindicate federal statutory rights.[24]

In support of this contention, Justice Scalia explained that there is no mention of class action under the Sherman and Clayton Acts. Moreover, he emphasized a class action was noteven contemplated at the time of the laws' enactment. Justice Scalia, however, seemingly overlooks that anti-trust allegations are serious in nature and afforded special attention under the law.

Fortunately, the dissenting opinion got it right. In essence, the dissenting opinion suggests the broad decisions in *Concepcion* and *American Express, Co., et.al. v. Italian Colors Restaurant* shield companies from illegal activity and behavior[25], which is contrary to the FAA's intent. Essentially, the dissenting opinion forecasted a major issue *Concepcion* would not fix.

Since *Concepcion*, courts have changed several rulings to accommodate the shift in policy and practice per *Concepcion*'s broad understanding. This means reversing original consumer protection rulings that found class waivers were unconscionable and unenforceable.[26]

3. California cases: *Samaniego v. Empire Today, LLC* and *Ajamian v. CantorCO2e, L.P.*

In 2012, two California courts refused to apply *Concepcion:*[27] *Samaniego v. Empire Today, LLC*[28] and *Ajamian v. CantorCO2e, L.P.*[29] These cases have not been overruled, and while called into question, remain good law on several points. The primary differences between these cases and *Concepcion* and *Italian Colors* are: (1) the cases involved employment contracts and (2) the arbitration clauses were both procedurally and substantively unconscionable under California law.

Samaniego v. Empire Today, LLC looked at the *Discover Bank* rule as a categorical rule overruled by *Concepcion,* but allowing for a narrow exception of contractual defenses such as procedural and substantive unconscionability issues. This meets the intent and spirit of the FAA and state law, disallowing contracts that are one-sided, unfair or fraudulent.[30] *Samaniego* looked at the theory the weaker party to an adhesion contract can avoid enforcement of a choice-of-law provision where enforcement of such would result in substantial injustices.

It is important to note that in *Ajamian*, the court, reasoned that both procedural and substantive unconscionability needed to be present.[31] The court used a sliding scale between excessive procedural and substantive unconscionability to compensate for weaker unconscionability in the two-part test. The court went back and forth on this issue but eventually found the agreement procedurally and substantively unconscionable, thus unenforceable. This is an indication procedural and substantive unconscionability defenses (at least under California law) could be viable options in overcoming *Concepcion*'s ruling upholding class arbitration waiver clauses.[32]

4. NLRB Case: *D.R. Horton, Inc. and Michael Cuda*

In a 2012 employment law case, *D.R. Horton, Inc. and Michael Cuda*,[33] the National Labor Relations Board (NLRB) narrowly held that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial."[34] The Board took care to note the *Horton* case differed from *Concepcion* for several reasons, and the *Concepcion* ruling did not apply. For example, the NLRB historically recognizes employees' ability to join to pursue workplace grievances via litigation and even arbitration. The board cited numerous case precedent and other federal statutes such as the Federal Arbitration Act and the Norris-LaGuardia Act.

In fact, the Board noted that not too long after the passage of the National Labor Relations Act (and even the Norris-LaGuardia Act), the board held "the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity, see *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942), as was an employee's circulation of a petition among coworkers, designating him as their agent to seek back wages under the FLSA, see *Salt River Valley Water Users Association*, 99 NLRB 849, 853–854 (1952), enforced. 206 F.2d 325 (9th Cir. 1953)."[35]

Second, the NLRB's decision further emphasized that the issue was one of conflict between two federal laws (or an individual's federal rights), whereas *Concepcion* involved state law preempted by federal law. [However, *American Express, Co., et.al. v. Italian Colors Restaurant* closes off this line of thinking; the court in *American Express, Co.* would not allow such a distinction between laws, as the court ruled the FAA controls unless there is a congressional mandate to suggest otherwise. This leaves procedural and contractual defenses as the only viable defenses available in overcoming class arbitration waiver clauses.]

Third, the NLRB's decision found a sharp contrast between the *Concepcion* ruling and the *Horton* case by highlighting that agreements between employees and employers were at stake, which is far limited and narrower than the *Concepcion* decision. In particular, *Concepcion*'s argument involved the claim that a class-action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable, potentially affecting tens of thousands of claimants. In *Horton*, this was not the case.

Finally, the Board recognized the parties agreed to arbitrate, but stated the case is not permitting Horton to authorize class arbitrations or class actions. Rather, the Board emphasized an employer could not prohibit such as a condition of employment, "so long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class wide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis."[36]

The Board's decision in *Horton,* however, was short lived. Just a year later, the Fifth Circuit reversed the decision, holding, "we disagree and conclude that the Board's decision did not give proper weight to the Federal Arbitration Act.[37]

5. *Recent case law*

Arguably, there may be room for interpretation as the *Concepcion* ruling may not apply to certain types of cases and the agreement of the parties may give significant weight to a non-*Concepcion* ruling and effect. In a recent wave of cases, state courts found ways around *Concepcion*.

a. *Cases where courts found arbitration clauses unconscionable*

In cases, such as *Flemma v. Halliburton Energy Services, Inc.*[38], and *Chavarria v. Ralph's Grocery Company*[39], the courts found the arbitration agreements unconscionable.

Flemma involved an employee action against the employer, Halliburton Energy Services, Inc., alleging wrongful termination. The court reasoned, "enforcing the Texas agreement would violate New Mexico public policy because, under New Mexico law, the agreement is unconscionable."[40] The court also found the agreement unfairly one-sided and the parties did not form a valid agreement under New Mexico law.

In *Chavarria*, another employee action against an employer (but a putative class action), alleging wage and hour violations

under California law, the court denied an employer's motion to compel arbitration of the plaintiff's individual claim. The court found the arbitration policy both procedurally and substantively unconscionable. The court explained, "where . . . the employee is facing an employer with 'overwhelming bargaining power' who 'drafted the contract and presented it to [the employer] on a take-it-or-leave-it basis,' the clause is procedurally unconscionable."[41] Further, the court stated several terms rendered the arbitration policy substantively unconscionable.[42]

b. *Cases where the FAA did not preempt state law*

In *Harris v. Bingham McCutchen, LLP*[43], an employee action against a law firm for housing and public policy violations, the state court further found the FAA does not preempt Massachusetts's law requiring "clear and specific reference" to statutory discrimination claims. Therefore, an arbitration clause that did not "clearly and specifically" refer to statutory discrimination claims as required by Massachusetts law cannot be enforced on those statutory discrimination claims. The court's reasoning was that a choice-of-law clause is interpreted to incorporate the chosen state's law governing the enforcement of arbitration agreements.[44] The court also recognized and distinguished that *Concepcion* determined the FAA preempted California law that class-action waivers in "commercial adhesion contracts were unconscionable as stated in *Discover Bank*."[45]

In *Mendez v. Mid-Wilshire Health Care Center*[46], another employee action, the court held that arbitration agreements in collective bargaining agreements (or CBAs) did not apply to an employee's FEHA claims. The court ruled on a similar basis in *Harris v. Bingham McCutchen, LLP*. The court reasoned a waiver of an employee's right to employment discrimination claims heard in a judicial forum must be "clear and unmistakable" and a court will not infer such an intent to waive unless "explicitly stated."[47]

c. *Cases where courts found several contractual provisions unconscionable and not severable*

There have been cases where courts held several provisions unconscionable and found severability impossible without destroying the nature of the intended agreement. For example, *Gandee v. LDL Freedom Enterprises, Inc.*[48] and *Brown v. MHN Government Services, Inc.*[49]

In *Gandee v. LDL Freedom Enterprises, Inc.*, a borrower, Gandee, brought a putative class action against a lender, LDL Freedom Enterprises, Inc., alleging violations of the state Debt Adjustment Act and the Consumer Protection Act. Gandee challenged several provisions in LDL Freedom Enterprises, Inc.'s agreement including the venue clause, fee-shifting provision, and statute of limitations provision on the grounds of unconscionability. The court found that Gandee was correct and met the burden in showing the arbitration would be prohibitive and the provisions unconscionable; the challenged provisions were substantively unconscionable under Washington law.

The court reasoned that *Concepcion*, as applied to the case, is consistent with Washington law and not in conflict. "In Washington, either substantive or procedural unconscionability is sufficient to void a contract."[50] The court's rationale was simple. LDL Freedom Enterprises, Inc. drafted the contract, so naturally the venue would be one advantageous to the drafter. Further, the only party to benefit from the fee-shifting provision (or loser pays provision) would be, again, LDL Freedom Enterprises, Inc., which is contrary to the law's intent and subsequently "chills Gandee's ability to bring suit under the CPA."[51] The statute of limitations provision was also unfair, as the provision shortened the state law 4-year period to 30 days.

Brown v. MHN Government Services, Inc.[52] was another Washington case that found a similar result. However, this was not a consumer protection case but an employment-related case. In *Brown v. MHN Government Services, Inc.*, employees, on behalf of themselves and a proposed class, brought an action alleging state law wage claims. Like in *Gandee v. LDL Freedom Enterprises, Inc.*, the court held several provisions, including the arbitration agreement, forum selection provision, statute of limitation provisions, and the fee-shifting provision, unconscionable.[53] The court, unlike in *Gandee v. LDL Freedom Enterprises, Inc.*, also held the arbitrator selection provision was substantively unconscionable.

The court in *Brown v. MHN Government Services, Inc.* saw several provisions as unfair, one-sided, and not severable. However, the court found the arbitration agreement procedurally unconscionable, even though the arbitration agreement lacked procedural oppression unlike in other cases where procedural oppression was present. The court reasoned the arbitration agreement still contained "procedural surprise due to its lack of clarity regarding which set of AAA rules would govern the arbitration."[54]

MHN changed its position several times on which set of AAA rules applied, creating ambiguity in the arbitration agreement.[55] This ruling suggests arbitration must be explicitly clear and that "procedural unconscionability can be present where rules are referenced in an arbitration agreement but not attached."[56]

III. AFTER *CONCEPCION*, WHAT'S LEFT TO ADMIRE?

Concepcion and *Italian Colors Restaurant* don't leave much for consumer attorneys attempting to overcoming a class arbitration waiver, whether the consumer's claims involved statutory of common law violations. But the opinions do leave a small door open, for some questions.

The first issue involves what kinds of cases qualify for class arbitration or class actions under the FAA, if at all. Second, whether an agreement can allow plaintiffs to waive certain issues for individual arbitration and allow plaintiffs to pursue other issues via class claims and class actions via a judicial forum. Finally, the procedural issues that arise from such matters would be another concern, as it is unclear whether a procedural attack would overrule a class arbitration waiver.

1. *Congressional Mandated Areas*[57]

Congressional mandated areas could offer limited exceptions in bypassing *Concepcion*'s applicability. For instance, arguably, *Concepcion* does not apply in employment related cases, as evidenced from the NLRB administrative agency ruling in *D.R. Horton* and in the series of California cases, *Samaniego v. Empire Today, LLC* and *Ajamian v. CantorCO2e, L.P.*

Concepcion and _Italian Colors Restaurant_ don't leave much for consumer attorneys attempting to overcome a class arbitration waiver.

In addition, the U.S. Supreme Court has been reluctant to apply *Concepcion* to general international cases. It is important to note there are limited exceptions or instances where the FAA binds international matters. By acknowledging Chapters 2 and 3 of the FAA apply to international arbitration, courts allow limited instances in forcing international parties to arbitrate; these instances include complex matters or where congress provides otherwise.

With the McCarran-Ferguson Act of 1945 enacted years after the FAA, arguably, the FAA neither indicates nor includes the insurance sector within its authority, thus having a 'reverse preemption' effect.[58] In essence, even though the FAA is liber-

ally constructed and construed, the FAA does not preempt state insurance laws.

Recently, in *Scott v. Louisville Bedding Co.*[59], a Kentucky court ruled in favor of a policyholder and held that the FAA did not preempt the state law limiting such arbitration clauses in insurance matters. Another recent case, *Washington Department of Transportation v. James River Insurance Company*[60], accentuated similar reasoning and ruled the FAA did not preempt the state insurance law. Still, this is not the consensus when a matter relates to an international party. Indeed, courts have held that state laws cannot trump treaties or conventions.

Cases such as *ESAB Group v. Zurich Insurance*[61] and *Safety National Casualty Corporation v. Certain Underwriters at Lloyd's, London*[62] emphasized once a foreign party is involved in a matter, then the New York Convention[63] applies. These arguments go to the heart of the Convention, which is to allow an objective means and device for resolution of international disputes or disputes involving international parties. As such, a state law superseding the Convention would cause doubt as to the state and nation as a genuine interest in upholding customary international law and relations. As for now, courts are in conflict as to where the Federal Arbitration Act of 1925, the McCarran-Ferguson Act of 1945 and the New York Convention stand.

2. *Negotiation*

The parties may agree to arbitrate and even allow for class arbitration or class litigation methods before or after agreeing to an arbitration agreement.[64] While not surprising, most companys probably would not agree to class arbitration or litigation methods; but it is not difficult to believe a company would agree if the costs would be too burdensome to bear and negative brand reputation would result. Clearly, such a decision or agreement to allow class arbitration would favor the company's financial interests if doing so would equate to lower costs and brand protection. As such, the plaintiffs may be able to use such situations as a bargaining tool.

Consider that *Concepcion*-like clauses have the potential to hide unethical or bad industry practices. Arguably, this would hinder public awareness and exposure of any wrongdoing of a company, as individual arbitration would not yield the same impact as class arbitration or class litigation. There is an increased likelihood of the depletion of the plaintiff's resources. Furthermore, the plaintiffs would not be properly spreading the costs among themselves, and plaintiffs may not receive the benefits of such.

Further, the *Concepcion* ruling has left open the possibility that parties can agree to either arbitrate or litigate on certain issues, while waiving the right to either arbitrate or litigate on other issues, not in violation under federal law (similarly stated under the *Horton* ruling). Essentially, could claimants agree to forego certain claims in arbitration and leave other claims open for litigation? The verdict is unknown.

3. *Procedural Attacks & Contractual Defenses*

Concepcion has also left open whether procedural defenses, such as substantive and procedural unconscionability, along with traditional contractual defenses, are able to overcome arbitration waiver provisions. *Concepcion* did not directly speak on this issue[65], yet, after *Concepcion*, many court rulings began reversing decisions on the sole fact the FAA preempted any court decision that ruled agreements prohibiting class arbitration or class actions unconscionable and unenforceable. However, very few court rulings or the parties involved focused on the procedural limitations of *Concepcion*.

As mentioned earlier, cases such as *Samaniego v. Empire Today, LLC* and *Ajamian v. CantorCO2e, L.P.* give consumers hope that not all agreements will be treated the same and that the weaker party can prevail in challenging the unfairness and unequal agreement. In those series of cases and thereafter, the weaker parties alleged procedural and substantive unconscionability defenses. Recent cases show that fee-shifting, choice-of-law, statute of limitations or arbitration selection clauses that are unfairly one-sided may be unconscionable. Consequently, if there are several unconscionable provisions, then these provisions may be impossible to sever without changing the entire intent and context of the whole agreement.

IV. POTENTIAL ABUSES OF POST-*CONCEPCION* RULINGS

1. *Companies 10, Consumers 0*

The *Concepcion* court assumed the consumer could find adequate representation and/or could advocate for one's self, especially on complex legal issues. This is not so. Essentially, *Concepcion*'s impact equates to leaving consumers out in the cold, leaving the possibility that consumers and others will not be able to get representation on legal issues. As the dissenting opinion stated in *Concepcion*, very few attorneys would take cases that do not involve a large dollar amount. Thus, this will create a definite and immediate imbalance.

Moreover, even if an attorney takes the plaintiff's case, there are few options in succeeding in bypassing *Concepcion*. This is because not every state's law will specifically allow for setting aside an agreement based on procedural and/or substantive unconscionability issues. Additionally, the same may be true for a state's law that does not provide for similar "clear and unmistakable" or "clear and specific reference" standards as in *Mendez v. Mid-Wilshire Health Care Center* and *Harris v. Bingham McCutchen, LLP*.

2. *Loss of Economy*

While not specifically declared, the national practice or view on litigation is that litigation is a minor yet significant part of the economy. With litigation consisting of 2% to 3% of the Gross Domestic Product[66], arguably, litigation will be slowing down soon. Where litigation is complex or specialized, the nation can see billions of dollars placed into this area of litigation. For example, healthcare and international issues often dominate litigation and arbitration practices.

Class actions or other similar actions also contribute to this GDP outlook. So, what does the elimination of the class action mean for the national economy? How would the *Concepcion* ruling affect the national economy disallowing class arbitration and related matters?

Despite *Concepcion*, public policy still supports early and non-court resolution of legal matters, because these methods take up less resources, time and energy. As such, putting aside the uninspiring ruling in *Concepcion*, lower courts and jurisdictions have been encouraged and even mandated in some jurisdictions via state law to resolve disputes early and through non-court resolution methods.

As discussed above, the U.S. Supreme court has not rationalized this issue in any way other than favoring the pro-defendant view disfavoring class arbitration. Unfortunately, courts continue to tussle over whether plaintiffs can pursue class actions or class arbitration. Yet, public opinion would support alternative dispute resolution (ADR) for class actions, because this would ease court congestion and resources. Additionally, any method of ADR helps in balancing the interests of pro-plaintiff and pro-defendant stance in such litigation matters.

3. *Bad Consumer Practices and Potential Abuses*

There is no concrete indication yet of the negative consequences of *Concepcion*. Nevertheless, one could foresee and even anticipate industry practices shifting in a company's favor that negatively affects the consumer base.

a. *Evading Detection & Liability*

One example would be class waivers in agreements. This has become commonplace and can be used as a method in evading detection of federal monitoring mechanisms in certain industries such as securities and consumer protection. This equals a lack of notice provided to the public of certain negative or unscrupulous business practices that the public and federal government need to know.

With class arbitration, there is a possibility of either flagging or correcting bad industry practices if the public or federal government is aware of such practices. Without the consumer's ability to join into class arbitrations, the industry, public and federal government cannot effectively ascertain, forecast or gauge whether certain trends or practices affect a particular industry or business. Arguably, class actions and related matters show patterns and practices that would trigger the right attention by the proper entities and public to correct and remedy those negative patterns and practices.

b. *Consumer Imbalance & Industry Influence*

If the class waiver is neither specific nor interpreted in a different manner, another issue may arise where plaintiff attorneys may not form class matters but combine a smaller number of plaintiffs together.[67] This would overwhelm courts. This also would affect defendants and industries alike, resulting in several large awards to plaintiffs versus one collective award to correct industry practice or business practice.

A *Concepcion* clause might yield favorable results for the defendant and very low or no results for the plaintiff, since the arbitrator would mostly be chosen by the defendant. This also would mean the majority of the arbitrator's business would be dependent upon the defendant and/or the defendant's industry.[68] There is a very unlikely arbitrators would find it favorable to rule in favor of the plaintiff with the possibility of losing business. The question of arbitrator fairness and neutrality would come into play.[69]

With one plaintiff involved in an arbitration process (and most likely without attorney guidance), a plaintiff may neither understand nor know the arbitrator's obligations and the plaintiff's rights; so, error is possible. While appealing an arbitrator's decision may be a likely result, the likelihood that a plaintiff will know and understand this option (even after being provided notice) is low. An appeal may mean wasted time and effort on the plaintiff's part or the arbitration as a whole, and the one-sided agreement may appear to be an extortionate tactic, since the plaintiff may feel either discouraged, overwhelmed or lacking in knowledge and not pursue the appeal. The plaintiff has no choice but to accept the arbitrator's decision.[70]

Moreover, the time between the arbitrator's decision and the appeal may create other issues, such as the defendant's act of evading responsibility and payment of additional damages. In sum, the defendant will get away with significant liability and other violations under the law.

c. *Bargaining Power Issues*

The bargaining power is obviously unequal. The plaintiff does not draft the agreement. This would also mean the plaintiff chooses neither the rules nor the arbitrator. This would also raise doubt as to the good faith of the defendant or arbitrator. Possible questionable interests might indicate the exploitation of the plaintiff's vulnerability and lack of resources, knowledge and attorney representation for the plaintiffs. This further displaces the plaintiff's interests and the arbitrator's questionable interests may derail an otherwise successful arbitration.

The drafting of such clauses may be so proliferating that the clauses become abusive. There has been no specific limitation to such waivers, other than the procedural challenges left open from the *Concepcion* ruling. Therefore, *Concepcion* makes such waivers standard and bargained for in certain industries.

Concepcion prevents the advocacy and litigation of legitimate consumer concerns plaguing an entire business or industry, which is one of the basic, underlined First Amendment principles, which would be class matters. Consequently, companies have the authority to waive an individual's right to assembly and pursue lawful remedy under the law.

d. *Heightened Consumer Scrutiny*

Cases such as *Concepcion* and *AmEx* deemphasize the importance of public policy and create a heightened scrutiny for plaintiffs to overcome the class waiver clause. Essentially, the burden has shifted from the defendant to the plaintiff. The presumption is that class waivers are valid and enforceable, if there is no evidence of procedural error or issue. In fact, most plaintiffs would not be able to prove this procedural error, if the plaintiff's right to assemble and corroborate on evidentiary issues is inhibited.

An unexpected benefit from *Concepcion* is the consumer industry's opportunity to influence the arbitration practice. *Concepcion* keeps the decision-making authority and interpretation of the contractual obligations in the hand of the arbitrator and parties in many ways. Consumer advocates and the consumer industry as a whole may see opportunities to negotiate for better and balanced terms, particularly in the post-agreement phase.

4. *Post-Concepcion: Reversals and Errors*

Since *Concepcion*, several courts have reversed lower court decisions to accommodate *Concepcion*. Often, there is little guidance as to what is acceptable under *Concepcion*. This leaves the consumer, legal and arbitral communities to guess whether certain class arbitration waivers are fully enforceable. Therefore, errors are possible in court rulings because of this lack of *Concepcion*'s understanding and its hold on the arbitral community. Notably, error in some court reversals may have occurred due to *Concepcion*'s lack of guidance.

For example, in, *Wolf v. Nissan Motor Acceptance Corporation*,[71] a service member, Mathew Wolf, brought a class action under federal law, Servicemembers Civil Relief Act (SCRA). Wolf, deployed overseas, used a federal law (SCRA) allowing him to return a leased vehicle. The service member asked for the advance payments made under the financing agreement but the company refused to do. Even though the law looked favorable upon Wolf's case and federal law, the court reversed, stating that it had to follow *Concepcion* as it is binding.

It is unclear whether the court in *Wolf* fully understood *Concepcion*'s ruling and reach. The problem in *Wolf* was the lack of clear congressional language within the SCRA allowing for class arbitration or class litigation, despite the law being one providing for special relief. Out of fairness, later cases helped in clarifying that cases involving federal laws and rights and procedural defenses might change a potential *Concepcion*-like result and impact.[72]

Wolf's reversal was, arguably, in error. In closer review, *Wolf* involved a federal law, a congressionally mandated law providing for special relief, arguably outside the FAA. This law came in effect decades after the FAA and specially for bypassing issues like *Concepcion*. The entire intent and spirit of the SCRA arguably sets aside an exception to the FAA, as Wolf's arguments go to the heart of the SCRA, a congressional mandated law.

Additionally, Wolf was pursuing his statutory remedies and rights, seeking to enjoin Nissan from unfair business practices and for the return of his advanced payments. Arbitration (individual

or class arbitration) forecloses the possibility of allowing Wolf to pursue those remedies in a traditional judicial route.

Finally, Wolf is not alone in his legal journey. T decision in *Wolf* also affects an entire class of people with similarly woes as Wolf. Ultimately, by disallowing a class action or class arbitration, *Wolf* prejudices a protected class of individuals under the SCRA. No service member would have the time, effort or ability to pursue an individual claim for relief. As such, class action or class arbitration would be the most effective and feasible method as envisioned under the SCRA.

Wolf is one case, arguably, in error. However, this case calls into question how many other cases have been reversed in error per *Concepcion*, based on the sole fact that the FAA preempted any court decision that ruled agreements prohibiting class arbitration or class actions unconscionable and unenforceable.

V. RECOMMENDATIONS: SOLUTIONS TO *CONCEPCION*

Trends suggest that business practices might change. A possible benefit of this change is that businesses and the consumer industry may see a balancing of the equities in consumer agreements. If this were to happen, it could help resolve the problem of class action waivers by providing consumers with sufficient bargaining power at the time of contracting. In reality, however, this is unlikely, and here are some additional possible solutions to the problems cretaed by *Concepcion.* These alternatives include: (1) renegotiation for class arbitration and/or allow arbitrator to interpret the contractual language on whether class arbitration is possible; (2) filing a motion to compel class arbitration and/or requesting injunctive relief and declaratory relief to determine the clause or agreement's applicability; (3) court-developed alternatives; and (4) congressional intervention in creating statutory law making situations like *Concepcion* unconscionable and not favored under current law.

1. *Renegotiation*

Renegotiation may be an option for some consumers. Although companies may not see any benefit in renegotiating, every situation is not be the same. As a result, a company may see some benefit in renegotiating and allowing class arbitration if the costs are reduced or lessened. Moreover, the company may avoid losing brand reputation and standing by agreeing to the renegotiation, which could prevent individual claims going before a court to determine the validity of an agreement (exposing certain practices to the world).

Where the opportunity for renegotiation arises, with the help of his or her attorney, the plaintiff's bargaining power could shift for the better. Renegotiation for the allowance of varied ADR methods for different matters and looking to state law and public policy are other approaches. This approach recognizes there are other methods in resolving conflicts that are invaluable to industries seeking to minimize the financial liability owed to the plaintiffs and others.

It is unreasonable to assume most companies will negotiate a new and fair agreement for many consumer and transactions. It is reasonable, however, for a consumer to try the renegotiating approach, as the consumer would lose nothing. This could help in equalizing bargaining power.

2. *Court Intervention Tools: Motions to Compel, Injunctive Relief and Declaratory Relief*

There may be reluctance in certain fields to allow class matter practice due to other mechanisms and tools that alert the public and government of these practices, such as whistleblower laws. However, courts and society cannot rely upon whistleblower actions as definitive methods in policing these areas and suspect practices for we have seen instances where business can silence the voice of the whistleblower. In some cases, class action lawsuits may be the only way in which to bring about change and attention to certain issues.

By tradition, defendants in *Concepcion*-like cases request the court to compel individual arbitration. However, nothing prohibits the plaintiff from requesting a similar action, i.e., compelling class arbitration.[73] Consumers diligent in getting the matter properly handled can institute actions such as motions to compel class arbitration and a demand for class arbitration and injunctive and declaratory relief via asserting contractual defenses and other applicable theories under the law. Bringing such an action based on contractual defenses like procedural and substantive unconscionability can get the court's attention in considering whether the court should review the issues and whether the arbitration provision is fair, equal and bargained for.

3. *Court-Developed Alternatives*

Courts can use a self-developed alternative to bypass the *Concepcion* ruling or theory altogether, which some courts have done in avoiding the unfair results from *Concepcion*. This essentially involves public policy considerations. When a plaintiff brings anti-class arbitration and litigation clauses to the court's attention and there is some reason to believe that the legal claims or practices are a part of an industry standard that is not acceptable or damaging, there must be a higher level of scrutiny placed on the drafter.

Questions in this court-developed alternative could touch upon: (1) foreseeability (2) incidence (3) intent (4) effects (5) commonality (6) finality (7) conflicts and (8) public policy.[74] These factors are consistent regardless if the court's decision will approve or deny the class arbitration. Economy and public policy are the primary concerns for any alternative.

Congressional intervention is a final alternative and may offer the best solution for consumers.

4. *Congressional Intervention*

Congressional intervention is a final alternative and may offer the best solution for consumers. Legislatively, there have been congressional responses to address inequities and imbalances created by certain laws or court rulings. Examples would include the congressional response to *Banco Nacional De Cuba v. Sabbatino*[75] and a line of expropriation cases at that time. In *Banco Nacional De Cuba v. Sabbatino*, the U.S. Supreme Court held that the expropriation did not violate international law, as there was a presumption of the validity under the Act of State Doctrine. Congress, however, responded enacting laws removing this presumption via the Second Hickenlooper Amendment[76] (or known as the Sabbatino Amendment).

It seems unlikely, however, that Congress will enact a general prohibition on consumer arbitration. This is not to say it has not had numerous opportunities. As in years past, the Arbitration Fairness Act, prohibiting forced arbitration in consumer contracts, has been introduced in both the House[77] and the Senate.[78] And, just as in years past, there is little likelihood of passage.

At the federal level, the most likely source of reform from oppressive forced arbitration clauses is action by the newly created Consumer Financial Protection Bureau [CFPB]. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, enacted in response to the financial crisis of 2007-10, created the CFPB.[79] Section 1028(a) of the Act instructs the CFPB to study "the use of agreements providing for arbitration of any future dis-

pute . . . in connection with the offering or providing of consumer financial products or services," and to provide a report to Congress on the same topic. Congress has given the CFPB the authority to limit or prohibit the use of forced arbitration in consumer financial contracts, based on the results of its study.

The CFPB issued its report in March of 2015.[80] To the surprise of few consumer advocates, the Report indicated that arbitration agreements restrict consumers' relief for disputes with financial service providers by precluding lawsuits and limiting class actions. The report found that, in the consumer finance markets studied, very few consumers individually seek relief through arbitration and the courts, while millions of consumers obtain relief each year through class action settlements.[81] It is hoped that in light of the findings of the Report, the CFPB will take steps to eliminate forced arbitration in consumer financial transactions.[82] Of course, any action taken by the CFPB is limited to consumer financial transactions.

VI. CONCLUSION

Concepcion and its progeny create a chilling effect on attorneys representing individuals injured from certain suspect business practices, because adequate attention and relief through a class is nearly impossible. In many instances, the only way these practices are economically and efficiently redressed is through the class action route.

Consumers play a valuable role in policing the fairness and ethics of certain business practices and laws. *Concepcion* essentially allows businesses to avoid liability and (even if unintentional and not foreseeable) hide questionable business practices, which could be detrimental and devastating to individual consumers as well as our economy.

Time will tell if *Concepcion* has an impact in one industry or another. Until then, the consumer population must use the tools available to them, which generally will not include judicial class actions or class arbitration. What *Concepcion* offers is an unexpected opportunity for consumers and the arbitration industry to reevaluate the various relationships with businesses.

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1 AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 31 S.Ct. 1740 (2011).

2 Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

3 *Id*. at 1103.

4 *Id*.

5 Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862 (2002).

6 *Id*.; *see also* 9 U.S.C. § 2.

7 *Discover Bank*, 113 P.3d at 1100.

8 *Id.* at 1109-1111.

9 *Id*.

10 *Concepcion*, 131 S. Ct. at 1742.

11 *Id*. at 1749.

12 *See Id*. at 1762, n. 5.

13 *Id*.

14 *Id.* at 1749.

15 Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012). *See also* Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741 (Cal. 2015).

16 *Id.*

17 Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc 473 U.S. 614 (1985).

18 Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2001).

19 *Id.* Plaintiffs argued Washington law would rule such waivers unconscionable and unenforceable.

20 It is interesting to note plaintiffs also raised procedural unconscionability arguments, which is a valid defense to contract formation. The issue was there were questions as to what law control (Missouri or Washington). The court also noted that some states required both procedural and substantive unconscionability issues to be present in order to effective object and make one's burden in the invalidity of such agreements. Here, Washington's law was unsettled as to whether both procedural and substantive unconscionability issues must be present in a contract dispute. *Concepcion* also leaves open this question, thus never thoroughly addressing and examining this area.

21 *See also,* American Express Co., et. al. v. Italian Colors Restaurant, 133 S.Ct. 2304. The court closes off the possibility that asserting federal law rights, post-*Concepcion*, would protect consumers facing a *Concepcion*-like clause. This was not the case in *American Express* as federal law violations were alleged and the court still held *Concepcion* applied.

22 Stolt-Nielsen v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

23 *American Express, Co*. 133 S.Ct. 2304.

24 It is interesting to note that in the *American Express* line of cases, the Second Circuit consistently held its ground in stating that the *Concepcion* ruling did not apply in the *American Express Merchants' Litigation*. Its sole reasoning rested upon Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), where the U.S. Supreme Court held that parties may agree to arbitrate on certain issues rather than litigate those issues "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."

25 Before American Express, Co., et.al. v. Italian Colors Restaurant, the legal community believed federal violations and laws such as anti-trust implications would fall outside *Concepcion*'s reach. However, it did not. In fact, *Concepcion*'s ruling had the opposite effect. The dissenting opinion in American Express Co., et.al. v. Italian Colors Restaurant, No. 12-133, Slip Op. at 15, highlights: "As a result, Amex's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires; the FAA was never meant to produce this outcome. The FAA conceived of arbitration as a "method of resolving disputes"—a way of using tailored and streamlined procedures to facilitate redress of injuries. *Rodriguez de Quijas*, 490 U. S., at 481 (emphasis added). In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action. I respectfully dissent."

26 *See, e.g.,* Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012)

27 While these two cases are not the only cases rejecting *Concepcion*'s broad ruling, these are significant as it yields from the same state interpreting similar contractual issues. In fact, *Figueroa v. THI of New Mexico at Casa Arena Blanca LLC*, 306 P.3d 480 (N.M. App. 2012), the New Mexico Court of Appeals found the unconscionability analysis of an arbitration agreement was not preempted by the FAA and the arbitration agreement at hand was unreasonably and unfairly one-sided, therefore, making it unenforceable. Figueroa reasoned, "if state law governs issues concerning the validity, revocability, and enforceability of contracts generally, that law's application to arbitration agreements is not preempted by the FAA." *Id*. at 484. The court also recognized

the New Mexico Supreme Court invalidated arbitration agreements that were unfairly and unreasonably one-sided in favor of the drafter in *Cordova*, 2009-NMSC-021, ¶ 4, 146 N.M. 256, 208 P.3d 901.

[28] Samaniego v. Empire Today LLC, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 1st Dist. 2012), review denied (July 11, 2012).

[29] Ajamian v. CantorCO2E, L.*P.,* 137 Cal. Rptr. 3d 773 (Cal. Ct. App. 1st Dist. 2012).

[30] *Samaniego*, 140 Cal. Rptr. 3d at 502. "Concepcion addresses whether the FAA preempts the Discover Bank rule. (131 S.Ct. at p. 1746.) The United States Supreme Court held that it does, because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (Id. at p. 1748.) But at the same time as the Court repudiated the categorical rule in Discover Bank, it explicitly reaffirmed that the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' [although] not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Id*. at p. 1746, 30 Cal.Rptr.3d 76, 113 P.3d 1100; 9 U.S.C. § 2; see Mission Viejo Emergency Medical Associates v. Beta Healthcare Group (2011) 197 Cal.App.4th 1146, 1158, fn. 4, 128 Cal. Rptr.3d 330.) In short, arbitration agreements remain subject, post- Concepcion, to the unconscionability analysis employed by the trial court in this case."

[31] *Ajamian*, 137 Cal. Rptr. 3d at 796. "Where there is no other indication of oppression or surprise, the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high. …" In *Figueroa*, the court highlighted "if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement under New Mexico law that both must be present to the same degree or that they both be present at all. See *Figueroa*, 306 P.3d 480 at 489. This signifies that state law may control and will definitely vary in unconscionability defenses.

[32] Other distinctions are clear and may help to shed light on additional issues. In both cases, the courts found California law was applicable and a lack of "clear and unmistakable evidence" the parties intended to delegate authority to the arbitrator rather than the court in deciding issues such as unconscionability. See *Ajamian*, 137 Cal. Rptr. 3d 773 (Cal. Ct. App. 1st Dist. 2012).

[33] D. R. Horton, Inc. and Michael Cuda. Case 12–CA–25764 (January 3, 2012, Decision and Order); note that D.R. Horton, Inc. has appealed this decision to the Fifth Circuit. *See note 37* infra.

[34] *Id.* at 12.

[35] *Id.* at 2.

[36] *Id.* at 12.

[37] D.R. Horton, Inc. v. National Labor Relations Board, 737 F3d 344 (5th Cir. 2013).

[38] Flemma v. Halliburton Energy Services, Inc., 303 P.3d 814 (N.M. 2013).

[39] Chavarria v. Ralphs Grocery Company, 2013 WL 5779332 (C.A.9 (Cal.))

[40] *Flemma*, 303 P.3d at 820.

[41] *Chavarria*, 2013 WL 5779332 at 4.

[42] *Id.* at 5.

[43] Harris v. Bingham McCutchen LLP., 214 Cal. App. 4th 1399 (2013).

[44] *Id.* at 1407.

[45] *Id.*

[46] Mendez v. Mid-Wilshire Health Care Center, 163 Cal. Rptr. 3d 80 (2013).

[47] *Id.* at 86.

[48] Gandee v. LDL Freedom Enterprises, 176 Wash. 2d 598 (2013).

[49] Brown v. MHN Government Services, Inc., 178 Wash. 2d 258 (2013).

[50] *Gandee* , 176 Wash. 2d at 603.

[51] *Gandee*, 176 Wash. 2d at 606.

[52] *Brown*, 178 Wash. 2d 258 (2013).

[53] It is important to distinguish this case from *Gandee*, as the court in *Brown.* held that the arbitration agreement was procedurally unconscionable under California law.

[54] *Brown*, 178 Wash. 2d at 267.

[55] *Id.* at 268.

[56] *Id.* at 268.

[57] It is important to note that *Concepcion* does not affect public enforcement litigation. Such parties may bing claims on behalf of a large group of people. History, tradition and legislation recognize this in areas of employment litigation and consumer protection.

[58] *See* Mutual Reinsurance Bureau v. Great Plains Mutual Reinsurance Company, 969 F. 2d 931 (10th Cir. 1992)

[59] Scott v. Louisville Bedding Co., 404 S.W.3d 870 (Ky. App. 2013).

[60] State of Wash. Dep't. of Transp. V. James River Ins. Co., 292 P.3d 118 (Wash. 2013).

[61] ESAB Grp., Inc. v. Zurich Ins., 685 F.3d 376 (4th Cir. 2012).

[62] Safety Nat'l. Cas. Corp. v. Certain Underwriters at Lloyds, London, 587 F.3d 714, 720 (5th Cir. 2009) (*en banc*).

[63] Formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See 9 U.S.C. §§ 201-208. In 1990, this Convention saw an addition of a third chapter: the Inter-American Convention on International Commercial Arbitration of 1975 (or the Panama Convention). See also 9 U.S.C. §§ 301-307.

[64] Section 2 of the FAA provides that both pre-dispute agreements and post-dispute agreements fall within its scope. Therefore, such agreements are "valid, irrevocable and enforceable" subject to a defense under contract law or in equity. 9 U.S.C. §2 (2000).

[65] The *Concepcion* ruling hinted to this and the plaintiffs in *Coneff* and other cases even made intelligent arguments there were procedural unconscionability issues presented. Clearly, this possibly may create a state law issue of sorts. However, few courts have been effectively able to articulate this issue opposite the *Concepcion* ruling.

[66] Tillinghast-Towers Perrin, Tort Cost Trends: An International Perspective (1995).

[67] This is the case with a recent 2011 class action certification ruling in Walmart v. Dukes, 131 S.Ct. 2541 (2011), an employment discrimination suit. The court disallowed the class certification in its current form, as the class was too broad. Attorneys for the consumers could not pursue a class action in any form, forcing the attorneys to pursue smaller numbers of consumer claims at a time.

[68] Symeon Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey,* The American Journal of Comparative Law, Volume LX, Number 2 (2012)

[69] *Id*. Symeonides provides two excellent examples on this issue. (1) "an arbitrator with an arbitral organization decided nineteen cases in favor of a particular credit card business and then one in favor of the consumer; this was the last referral that the organization made to the arbitrator" (2) "In 2009, the National Arbitration Forum (NAF), a private arbitration provider focusing on consumer debt cases, withdrew from that market after being used in two lawsuits: (a) one by San Francisco's city attorney, charging

that NAF was running an 'arbitration mill' favoring credit card companies and that "of 18,075 credit card cases heard over several years, consumers won thirty times" and (b) another suit by Minnesota's attorney general, charging that NAF shared a common owner with one of the country's largest debt collection agencies."

[70] *Id.*

[71] Wolf v. Nissan Motor Acceptance Corp., 2011 WL 2490939 (D.N.J. June 22, 2011).

[72] This case denotes that denying service members under federal law asserting their federal right to proper relief and remedy would equate to consumers having a similar fate. What this means for creditor rights is that creditors can legally discriminate and create policies, practices and agreements that contradict public policy.

[73] For consumers who ban together and the attorneys that represent them, motion practice would be an interesting solution to *Concepcion*, as companies may be faced with additional liability, expenses and exposure of certain practices some companies may not want visible or on record. This is especially interesting if the plaintiffs win on their motions. Attorney fees, damages, injunctive and/or declaratory relief, and/or eventual class arbitration could be the reality the defendant faces.

[74] *Foreseeability*: Whether certain legal claims or practices complained of were foreseeable?
Incidence: Whether or not certain practices incidental and limited in scope as to not frequently occur?
Intent: Whether or not the practices are intentional or unintentional?
Effects: Whether or not the practice substantially impacts an entire industry, commerce or consumer confidence?
Commonality: Whether or not there is commonality among other claimants?
Finality: Whether or not there is finality via individual resolution or class resolution methods?
Conflicts: Whether or not there are any conflicts that could impede upon the parties' interests or destroy the harmony in a potential class matter?
Public Policy: Whether or not there are clear and acceptable public policy considerations that supersede the clause?

[75] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In the series of these expropriation cases, Cuba nationalized its sugar industry and seized all the assets of U.S.-owned sugar products. It is important to note, during that time, there was major political and international conflict involving Cuba's actions.

[76] 22 U.S.C. § 2370

[77] Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015).

[78] Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015).

[79] *See* 12 U.S.C. § 5511 (Dodd-Frank Act § 1021) ("The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.").

[80] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[81] A summary of the Report may be found at, http://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf.

[82] Those opposed to consumer arbitration have already taken steps to prevent the CFPB from prohibiting forced arbitration in consumer arbitration. Congressmen Steve Womack (AR-3) and Tom Graves (GA-14) have written an amendment to an appropriations bill that would require the CFPB begin all over again with its studies before taking any action, http://op.bna.com/bar.nsf/id/jbar-9xlp9s/$File/amend.pdf