CALIFORNIA CONSUMER CONTRACTS AFTER *AT&T MOBILITY V. CONCEPCION*

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ABSTRACT

California has traditionally been protective of consumers with regard to class action waivers and class arbitration. However, since *AT&T Mobility LLC v. Concepcion* came out in 2011, state courts have been compelled to enforce arbitration provisions in private agreements. Two years later, *American Express Co. v. Italian Colors Restaurant* ("*Amex*") solidified the power of the *Concepcion* opinion by eliminating the second of two main arguments courts had been using to render class action waivers and arbitration agreements invalid.

This Article examines the extent to which *Concepcion* and *Amex* affected California's lower courts, consumers, and businesses. By preempting longstanding state policy, the Federal Arbitration Act has infused substantial power in contract arbitration and class action provisions and rendered consumer arguments relying on state law ineffective. A closer look at consumer versus non-consumer contracts and a comparison of contracts across different industries over the next several years will provide a more accurate picture of the changes effected by these decisions.

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I. INTRODUCTION

Ever since Congress passed the Federal Arbitration Act (FAA) in 1925, arbitration clauses have been a staple of consumer contracts.[1] Although the FAA stipulates the enforcement of contracted arbitration agreements, it does not

[1] *See* Theodore Eisenberg et. al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (describing results of a study which found that over three-quarters of consumer agreements from 164 large public corporations contained mandatory arbitration of dispute clauses); *see generally* Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 667 (2013) (stating that the commercial arbitration community initially approved of the U.S. Supreme Court's expansion of the FAA's powers).

provide direction on class arbitration actions.[2] In *Discover Bank v. Superior Court*, the California Supreme Court ruled that class arbitration and class action waivers might be void under the doctrine of unconscionability.[3] The Court noted that if the waiver is part of a consumer contract of adhesion, the setting predictably involves small amounts of damages.[4] In this context "when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," the Court held that a waiver is unconscionable and will be set aside.[5]

After the *Discover Bank* decision, lower courts began applying the *Discover Bank* test for unconscionability in earnest and finding class arbitration and class action waivers to be invalid.[6] It appeared that consumer plaintiffs' use of the unconscionability argument was gaining traction.[7] However, this was relatively short-lived. Six years later, the United States Supreme Court held in *AT&T Mobility LLC v. Concepcion* ("*Concepcion*") that the FAA preempts California's *Discover Bank* test for unconscionability.[8] The Court determined that the *Discover Bank* test was applied in a way that disfavored arbitration and hindered the enforcement of private arbitration agreements.[9] Consequently, the Supreme Court held that the *Discover Bank* test, by mandating the availability of class arbitration in some instances, "[interfered] with fundamental attributes of arbitration."[10] This landmark case has created a ripple effect, affecting subsequent lower court cases, corporations, and consumers.

The release of the *Concepcion* decision caused a general furor amongst the arbitration community. This paper focuses on consumer contracts and examines *Concepcion*'s effect on lower courts, consumers, and businesses. Part II briefly provides a background of the infamous *Concepcion* case. Part III discusses the case's subsequent impact on lower courts in California, before and after the United States Supreme Court released the *American Express Co. v.*

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[2] *See* Robert Ward, *Divide & Conquer: How the Supreme Court Used the Federal Arbitration Act to Threaten Statutory Rights and the Need to Codify the Effective Vindication Rule*, 39 SETON HALL LEGIS. J. 149, 150 (2015) (citing Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 774 (2012)).

[3] Discover Bank v. Superior Court, 36 Cal. 4th 148, 162 (2005).

[4] *Id*. at 163.

[5] *Id*.

[6] Cohen v. DirecTV, Inc., 142 Cal. App. 4th 1442, 1453 (2006); *see also* Klussman v. Cross Country Bank, 134 Cal. App. 4th 1283, 1287 (2005); Aral v. EarthLink, Inc., 134 Cal. App. 4th 544 (2005); Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court, 133 Cal. App. 4th 396 (2005).

[7] *See* Ann Marie Tracey & Shelley McGill, *Seeking A Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, 45 LOY. L.A. L. REV. 435, 442 (2012).

[8] AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011).

[9] *Id*.; Gutierrez v. Wells Fargo Bank, NA, 704 F.3d 712, 719 (9th Cir. 2012).

[10] *Concepcion*, 131 S. Ct. at 1748; *see Discover Bank*, 36 Cal. 4th at 153.

Italian Colors Restaurant ("*Amex*") decision. Part IV examines *Concepcion*'s impact outside of the court system by looking at how the case has impacted consumers and businesses. Part V concludes by suggesting other areas worthy of exploration as the decision continues to wield substantial influence.

II. WHAT HAPPENED IN *CONCEPCION*?

In *Concepcion*, Vincent and Liza *Concepcion* signed an agreement with AT&T in order to obtain a cellular phone.[11] The agreement included an arbitration clause with atypically "pro-consumer" features.[12] Although the agreement took away the option to arbitrate as a class,[13] other parts of the relevant clause seem to be helpful to AT&T customers with potential claims. First, the agreement directs customers to initiate dispute proceedings by filling out a page-long Notice of Dispute form that could be downloaded from AT&T's website.[14] AT&T ensures that if the company does not offer to settle the claim or if the dispute has not been resolved within thirty days, the customer may file a Demand for Arbitration (also on the company website).[15] During arbitration, AT&T assumes all costs if the claim is nonfrivolous.[16] The agreement eliminates potential travel issues for the customer by requiring that any arbitration be held in the county where the customer is billed.[17] The customer also has the choice of manner of arbitration if the claim is $10,000 or under; if he or she does not want to travel, the arbitration can take place by phone or be based solely on submissions.[18] The company makes the assurance that it will not try to claim attorney's fees.[19] To put the icing on the cake, the agreement states that if the customer ultimately receives an arbitration award greater than the company's last settlement offer, AT&T will pay at least $7,500 in recovery and twofold of the customer's attorney's fees.[20]

In 2006, the *Concepcion*s filed a complaint against AT&T.[21] The complaint later joined a putative class action alleging that AT&T had engaged in false advertising and fraud by advertising free cellular phones but charging consumers for the sales tax based on the retail value of the phones.[22] The District

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[11] *Concepcion*, 131 S. Ct. at 1744.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

Court denied AT&T's motion to compel arbitration based on California's *Discover Bank* test for unconscionability.[23]

The Ninth Circuit likewise found the arbitration clause unconscionable and affirmed the District Court's decision.[24] However, the United States Supreme Court reversed the Ninth Circuit decision and abrogated the *Discover Bank* test, reasoning that it conflicted with the "full purposes and objectives of [the FAA]."[25] The majority stated that California's *Discover Bank* rule had the effect of rendering most class arbitration waivers in consumer contracts unenforceable based on the unconscionability doctrine.[26] The Court further stated that when class arbitration is not consensual in the manner of *Discover Bank*, it is inconsistent with the FAA.[27] The Court noted that even if the class waiver rule applied to both litigation and arbitration, it should be preempted because it would otherwise result in a "disproportionate impact on arbitration agreements."[28] Despite this ruling, confusion ensued after the Supreme Court released its decision.[29]

III. AFTER *CONCEPCION*, IT WAS UNCLEAR HOW MUCH THE DECISION WOULD IMPACT LOWER COURTS AND LITIGANTS.

Lower courts could either interpret *Concepcion* broadly to find that states could no longer find arbitration agreements unenforceable based on public policy[30] or read the opinion narrowly by limiting its holding to consumer contracts only.[31] Some remained hopeful that *Concepcion* would be read narrowly, speculating that *Concepcion* came out the way it did because of AT&T's uniquely consumer-friendly arbitration agreement.[32] The people in this

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[23] *Id.* at 1745.
[24] *Id.*
[25] *Id.* at 1753.
[26] *Id.* at 1746.
[27] *Id.* at 1751.
[28] *Id.* at 1747.
[29] *See* Charles H. Samel, Amanda J. Beane, *Closing the Courthouse Doors to Consumer Class Actions? What Recent Case Law Reveals About Successful Enforcement of Arbitration Agreements and Class Action Waivers*, 21 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 15, 16 (2012) (stating that the precise scope of *Concepcion* remained uncertain in the wake of the decision).
[30] "*Concepcion* . . . decided that states cannot refuse to enforce arbitration agreements based on public policy." James Schurz, *The Future of Consumer Class Actions: Understanding the New Legal Landscape After AT&T v. Concepcion*, 18 WESTLAW JOURNAL CLASS ACTION 1 (2011) citing Arellano v. T-Mobile USA, Inc., No. C 10-05663 WHA, 2011 WL 1842712, at *1 (N.D. Cal. May 16, 2011).
[31] Schurz, *supra* note 30.
[32] *See* Philip J. Loree Jr., *More FAA: Why AT&T Mobility Makes Sense-and Why It Likely Isn't the End of Class Arbitration*, 29 ALTERNATIVES TO HIGH COST LITIG. 145, 155 (2011). *See, e.g.*, Jacob Johnson, *Barras v. BB&T: Charting a Clear Path to Apply Concepcion Through a Quagmire of*

camp maintained that *Concepcion*'s holding would not apply to other contracts containing arbitration agreements.[33]

In *Concepcion's* majority opinion, Justice Scalia seems to conclusively declare that "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[34] However, he then considers the AT&T arbitration clause's particularly consumer-friendly features. Courts could read *Concepcion* narrowly within consumer contracts by citing Scalia's discussion of the specific facts of *Concepcion*, finding that in the *Concepcion*s' case, individual arbitration would put them in a better position under their arbitration agreement with AT&T than class arbitration would.[35] Some people used this language and suggested that the facts in *Concepcion* were unique, that the opinion would be read narrowly, and that subsequent decisions would be distinguished.[36] With all of its bells and whistles, AT&T's arbitration clause seems to favor the consumer and provide adequate redress for any valid claims. One could reasonably read the Supreme Court's decision as limiting its scope to the *Concepcion*s' contract arbitration clause. Commentators speculated that because of *Concepcion*'s distinctive contract that seemed to favor the consumer, lower courts would distinguish future cases from *Concepcion*'s facts.

A. In California, it is arguable that Concepcion *initially resulted in a smaller impact than expected.*

The question of whether lower courts would read *Concepcion* narrowly or whether courts would broadly apply it to future class action and arbitration enforceability cases was heavily debated in California. Whether courts agreed with the decision or not, federal preemption required them to follow the holding which meant they no longer had the option of conditioning the enforceability of arbitration agreements on the availability of class arbitration procedures.[37] While some jurisdictions had already allowed companies to use class arbitration

Divergent Approaches, 64 MERCER L. REV. 591, 598 (2013) (noting that because *Concepcion* distinctly stated that federal policy favoring arbitration would necessarily preempt any state policy argument that would limit bilateral arbitration, some thought that the result might differ if the limiting policy stemmed from federal).

[33] Loree, *supra* note 32, at 155.

[34] *Concepcion*, 131 S. Ct. at 1743.

[35] *Id.* at 1753.

[36] *See* Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 707-08 (2012).

[37] *See* U.S. Const. art. VI, cl. 2; *Concepcion*, 131 S. Ct. at 1744.

waivers,[38] California courts had been one of the leading proponents of invalidating waivers using the unconscionability doctrine.[39]

Some commentators argue that compared to other states, California courts are hostile to arbitration.[40] It is thus less surprising to find that lower courts in California did not immediately begin to invariably apply *Concepcion* to all subsequent cases once it was decided in April 2011.[41] However, the cases where courts struck down contracts with arbitration agreements have mainly been in the employment rather than commercial context.[42] Nevertheless, this paper focuses on consumer cases.

In *Trompeter v. Ally Fin., Inc.*, the Northern District Court of California reviewed the arbitration agreement at hand and applied the unconscionability doctrine as a generally applicable contract principle.[43] *Concepcion* suggested that the unconscionability doctrine could not be applied to all aspects of arbitration. Indeed, the creditor in *Trompeter* argued that *Concepcion* should be applied to find that voiding the agreement conflicted with the FAA's intent to favor arbitration.[44] The court was unconvinced by this reasoning and opined that *Concepcion* should not be read so broadly.[45]

In *Trompeter*, plaintiffs challenged the validity of a retail installment sales contract that included an arbitration agreement with a class action waiver.[46] The court looked at multiple factors and concluded that there was sufficient evidence to support a finding of both procedural and substantive unconscionability under California law.[47] The court found the agreement between

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[38] Sternlight, *supra* note 36, at 707; *see e.g.*, Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002); Lloyd v. MBNA Am. Bank, N.A., 27 F. App'x 82, 84 (3d Cir. 2002); Edelist v. MBNA Am. Bank, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001).

[39] *See* sources cited *supra* note 6; Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. REV. 1419, 1420-21 (2014) (stating that California courts resisted the United States Supreme Court's steady progress towards expanding the reach and scope of the statute); Weston, *supra* note 2, at 776.

[40] Haas, *supra* note 39, at 1456; *see* Michael A. Helfand, *Purpose, Precedent, and Politics: Why Concepcion Covers Less Than You Think*, 4 Y.B. ON ARB. & MEDIATION 126, 127 (2012) (predicting that *Concepcion*'s impact will not be quite as far reaching as some have presumed).

[41] *Concepcion*, 131 S. Ct. at 1753.

[42] *See, e.g.*, Truly Nolen of Am. v. Superior Court, 208 Cal. App. 4th 487, 506 (2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1132 (2012) (declining to decide whether *Concepcion* abrogates the rule in prior California Supreme Court case); *see also* Minute Order, Anderson v. Apple Am. Grp. LLC, No. 34-2010-00093705-CU-OE-GDS (Cal. Super. Ct. Aug. 16, 2011) (holding that *Concepcion* was not a bar to employee plaintiffs arguing that a class arbitration waiver did not permit them to vindicate their statutory rights).

[43] *See* Trompeter v. Ally Fin., Inc., 914 F. Supp. 2d 1067, 1077 (N.D. Cal. 2012).

[44] *Id.* at 1076.

[45] *Id.*

[46] *Id.* at 1073.

[47] *Id.* at 1076.

creditor and consumer procedurally unconscionable because of its adhesive nature.[48] The consumer plaintiff did not have the ability to negotiate terms of the standardized contract; the fact that the arbitration clause was inconspicuously located at the bottom of the back page of the contract's signature page and the creditor failed to provide a copy of the applicable arbitration rules, all supported a finding of procedural unconscionability.[49] Next, the court found that the agreement was substantively unconscionable based on multiple contract provisions that favored the creditor over consumers.[50] For example, the court found that a provision (stating a party does not waive the right to arbitrate by using self-help remedies or filing suit) favored the company at the expense of the consumer contributed to a finding of substantive unconscionability.[51] Another provision supporting the court's finding of substantive unconscionability was the provision for an appeal when injunctive relief is awarded, because it permits the creditor to further delay to the detriment of consumers.[52] The court's finding of procedural and substantive unconscionability rendered the arbitration clause invalid under California law.[53]

The court further deemed the unconscionable provisions in the contract unseverable from the whole and concluded that the agreement was "tainted with illegality," so the entire agreement was unenforceable.[54] In this case, the court addressed *Concepcion* but decided that the generally applicable contract principle of unconscionability could still be applied because *Concepcion* acknowledged, "§ 2 [of the FAA] preserves generally applicable contract defenses."[55] The court further asserted that its review of the *Trompeter* agreement was not contrary to the FAA's policy goal of favoring arbitration.[56]

The plaintiff in *Lau v. Mercedes-Benz USA, LLC* also attempted to make an argument grounded in the unconscionability doctrine.[57] The consumer plaintiff had signed a purchase contract that included an arbitration agreement.[58] The plaintiff acknowledged *Concepcion*, but argued that the decision had not rendered the unconscionability argument moot against all arbitration clauses.[59] The court agreed with the plaintiff's argument that generally applicable contract defenses,

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[48] *Id.* at 1073.
[49] *Id.* at 1072-73.
[50] *See id.* at 1076.
[51] *Id.* at 1073-74.
[52] *Id.* at 1075.
[53] *Id.* at 1076.
[54] *Id.*
[55] *Id.* at 1077 (citing *Concepcion*, 131 S.Ct. at 1748).
[56] *Trompeter*, 914 F. Supp. 2d at 1077.
[57] Lau v. Mercedes-Benz USA, LLC, No. CV 11-1940 MEJ, 2012 WL 370557, at *6 (N.D. Cal. Jan. 31, 2012).
[58] *Id.* at *1.
[59] *Id.*

including unconscionability, could still be used against the enforcement of an arbitration clause.[60] The court reasoned that since the unconscionability doctrine did not unfailingly invalidate arbitration clauses, it did not conflict with the FAA's purpose by creating a scheme inconsistent with the Act.[61] While demonstrative of the fact that California courts did not mechanically apply a broad reading of *Concepcion* to all subsequent cases, the case is unreported.[62]

In *Truly Nolen of America v. Superior Court*, another post-*Concepcion* case, the court reasoned that since the United States Supreme Court did not specifically rule on the class arbitration issue in the context of unwaivable statutory rights, the court remained bound by an earlier California Supreme Court case, *Gentry v. Superior Court*.[63] In *Truly Nolen*, the defendants argued that *Gentry*'s holding was no longer valid after *Concepcion*.[64] Although the court agreed that *Concepcion* implicitly disapproved the reasoning of the *Gentry* court, the court nevertheless decided to distinguish *Concepcion*, reasoning that the United States Supreme Court did not directly address the precise issue presented in *Gentry*.[65] The court accordingly proceeded to find *Gentry*'s holding viable in the *Truly Nolen* case.[66]

That same year, the Ninth Circuit did not automatically apply *Concepcion* in *Gutierrez v. Wells Fargo, NA*. In *Gutierrez*, the case had been ongoing when *Concepcion* was decided.[67] Wells Fargo then made a motion to compel arbitration based on their arbitration agreement with Gutierrez.[68] The court reasoned that compelling arbitration at the post-appeal juncture would severely prejudice Gutierrez.[69] Furthermore, Wells Fargo did not raise the issue of arbitration until after a "series of dispositive motions, voluminous discovery, preparation for trial, two-week bench trial, post-trial briefing, and appellate proceedings."[70] In its analysis, the court additionally noted that allowing arbitration at that point would deter the purposes of the FAA because it would be duplicative and prolong dispute resolution, ultimately resulting in a process "far from [facilitated] streamlined proceedings."[71] Although the court refused to order the parties to

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60 *Id.*
61 *Id.*
62 *Id.*
63 *Truly Nolen*, 208 Cal. App. 4th at 493; *see* Gentry v. Superior Court, 42 Cal. 4th 443 (2007).
64 *Truly Nolen*, 208 Cal. App. 4th at 496.
65 *Id.* at 507.
66 *Id.*
67 *Gutierrez*, 704 F.3d at 720.
68 *Id.*
69 *Id.* at 721.
70 *Id.*
71 *Id.*

arbitrate here, the court acknowledged *Concepcion* when it proclaimed that ordering arbitration would undercut Gutierrez's expectations under the contract.[72]

B. Although some courts struggled to read Concepcion *narrowly, Amex quashed the feasibility of these attempts.*

At first, it seemed that some lower courts did in fact read *Concepcion* narrowly. However, *Amex* came along in early 2013 and seemed to render any debate on the scope of *Concepcion* moot. *Concepcion* could no longer be limited to its unusual facts.[73] Together, *Concepcion* and *Amex* have wreaked havoc on the former state of law regarding consumer class arbitrations.[74]

1. The *Amex* decision was a second major blow to consumer plaintiffs in the short span of two years.

Before *Concepcion* and *Amex*, there were two main ways to invalidate an arbitration provision: the plaintiff could either apply a state law such as unconscionability or argue using the federal vindication of rights doctrine (when the plaintiff had a federal statutory claim).[75] The Supreme Court's holdings in *Concepcion* and *Amex* overturned long-standing precedent concerning the preemptive effect of the FAA. While *Concepcion* effectively eliminated the first option by holding that the court cannot find a contract unconscionable on the grounds that it contains a class arbitration waiver,[76] the second option was still available. But then in the summer of 2013, the *Amex* decision came out.[77]

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[72] *Id.* at 722 (quoting *Concepcion*: "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.").

[73] *See* Feeney v. Dell Inc., 466 Mass. 1001, 1002 (2013) (quoting *Amex*: "the FAA's command to enforce arbitration agreements trumps any interest . . . .").

[74] *See* Steve Baicker-Mckee & David Herr, *Class Action Arbitration Waivers and the Federal Arbitration Act*, 28 No. 9 FED. LITIG. 13 (2013)*;* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 823 (2013) (asserting that the combined effect of *Concepcion* and *American Express* is to deal a crippling blow to the adjudication of many kinds of small-claims cases).

[75] The vindication of rights doctrine is concerned with whether the cost of litigating a small-value claim would be prohibitively expensive, thus barring potential plaintiffs from vindicating their statutory rights. The viability of an argument using this doctrine is also uncertain now but will not be discussed in this paper. See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2318 (2013) (Kagan, J., dissenting) ("Our decision [in Green Tree] made clear that a provision raising a plaintiff's costs could foreclose consideration of federal claims, and so run afoul of the effective-vindication rule."); Ward, *supra* note 2, at 153.

[76] *Concepcion*, 131 S. Ct. at 1753.

[77] Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

In *Amex*, the plaintiffs were merchants who accepted American Express cards.[78] Their contract with American Express included a class arbitration waiver.[79] However, plaintiffs argued that if they resolved the antitrust claim with individual arbitration, the expert they would need to hire to prove their claim might well exceed $1 million, whereas potential recovery for any individual plaintiff ran between $12,850 or, at most, $38,549 if damages were trebled.[80] They relied on a judicial exception[81] to the FAA which allegedly "harmonized competing federal policies by allowing courts to invalidate agreements that prevent the 'effective vindication of a federal statutory right.'"[82] The Supreme Court rejected the argument, concluding that the FAA "does not sanction such a judicially created superstructure."[83]

Amex held that under the FAA, courts cannot invalidate a class arbitration waiver based on plaintiffs' assertion that the cost of participating in an individual arbitration concerning a federal statutory claim exceeded any amount they could possibly recover.[84] This holding will likely result in the elimination of the use of the vindication of rights doctrine for consumer plaintiffs with low value claims.[85] In Justice Kagan's dissent (joined by Justices Ginsburg and Breyer), she states that "[the vindication of rights] doctrine bars applying [arbitration clauses] when (but only when) it operates to confer immunity from potentially meritorious federal claims)."[86] After concluding that the Court's decision would prevent the effective vindication of federal statutory rights, she dissents.[87] And with that, the second feasible way consumers had been bringing claims to invalidate arbitration agreements was essentially gone.[88]

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[78] *Id.* at 2308.

[79] *Id.*

[80] *Id.*

[81] The "vindication of rights" exception was first articulated as dicta in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). The *Mitsubishi* court expressed a willingness to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's rights to pursue statutory remedies. *Id.* at 666 n.20.

[82] *Italian Colors*, 133 S. Ct. at 2310.

[83] *Id.* at 2312.

[84] *See* Herr & Baicker-McKee, *supra* note 74.

[85] *See* Brian J. Murray, *I Can't Get No Arbitration: The Death of Class Actions That Isn't, at Least So Far*, FED. LAW., September 2013, at 62, 63.

[86] *Italian Colors*, 133 S. Ct. at 2313.

[87] *Id.*

[88] *See* Tina Wolfson & Bradley King, *Even After Concepcion and Italian Colors, Some Arbitration Agreements Are Not Enforceable*, FED. LAW., January/February 2015, at 19 (stating that the FAA's preemptive power expanded to trump even rights created by other federal laws); Klonoff, *supra* note 74, at 823 (arguing that *American Express* removed one of the few viable ways in which lower courts could have limited or distinguished *Concepcion*).

C. The Mighty Concepcion

More convincing, especially after *Amex*, is the side of the debate conceding that *Concepcion* has had a sweeping effect on the enforcement of consumer contract arbitration agreements, including the validity of class arbitration waivers.[89] The majority of courts were compelled to follow *Concepcion*, even in cases where the application of existing state law would have invalidated the agreement.[90] These cases certainly did not limit the *Concepcion* decision to its facts.[91]

1. After *Concepcion*, lower courts found that the FAA preempted long-standing state rulings.

Some courts in California applied *Concepcion*'s reasoning even before *Amex* came down. For example, in *Kilgore v. KeyBank, National Association*, the Ninth Circuit held that based on the preemptive analysis in *Concepcion*, a previous state rule banning the arbitration of claims for public injunctive relief was no longer good law.[92] Although *Kilgore* was subsequently abandoned when the Ninth Circuit reconsidered the case en banc,[93] a later Ninth Circuit case reached the same holding as *Kilgore* prior to the decision's reversal.[94]

In the later case, *Ferguson v. Corinthian Colleges, Inc.*, the plaintiff students of Corinthian Colleges signed enrollment agreements that contained arbitration clauses.[95] The students brought a putative class action against the college and tried to argue relying on California law.[96] The students claimed that

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[89] *See* 2 E-Commerce & Internet Law 22.05[2][M][iii] (2013-2014 update) (noting that *Concepcion* "clearly and unambiguously prevents courts in California or elsewhere from declining to enforce arbitration provisions in consumer contracts merely because arbitration would displace class remedies").

[90] *See* Weston, *supra* note 2, at 782.

[91] *See* Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After Concepcion and* Amex, 67 VAND. L. REV. 955, 1013 (2014); *see, e.g.,* Bellows v. Midland Credit Mgmt., Inc., No. 09CV1951, 2011 U.S. Dist. LEXIS 48237, at *11 (S.D. Cal. May 4, 2011) (applying *Concepcion* even when arbitration clause did not contain any "bonus provision"); Day v. Persels & Assocs., LLC, No. 8:10-CV-2463-T-33TGW, 2011 U.S. Dist. LEXIS 49231, at *15-16 (M.D. Fla. May 9, 2011) (same); Zarandi v. Alliance Data Sys. Corp., No. CV10-8309 DSF, 2011 U.S. Dist. LEXIS 54602, at *4-5 (C.D. Cal. May 9, 2011) (same).

[92] Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947, 960-61 (9th Cir. 2012).

[93] Kilgore v. KeyBank, Nat. Ass'n, 718 F.3d 1052, 1061 (9th Cir. 2013); Kilgore v. KeyBank Nat. Ass'n, 697 F.3d 1191, 1192 (9th Cir. 2012).

[94] *See* Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928, 938 (9th Cir. 2013).

[95] *Id.* at 930.

[96] *Id.*

Corinthian Colleges operated a scheme that misled prospective students in order to entice them to enroll in their program.[97]

Previously, California's Supreme Court insinuated that arbitrators are not as trustworthy as judges and accordingly do not deserve the dignity of being entrusted with public injunction claims.[98] The *Broughton-Cruz* rule established that claims for public injunctive relief were exempt from arbitration.[99] The Ninth Circuit examined the *Broughton-Cruz* rule and concluded that it prohibits outright arbitration of certain types of claims.[100] The *Ferguson* court held that after *Concepcion*, the court must find that the FAA definitively preempts California's *Broughton-Cruz* rule.[101] Furthermore, the Ninth Circuit had established a rule earlier that year governing the scope of the FAA.[102] The court noted that if a state law is applied in a way that disfavors or disproportionately impacts arbitration, it is preempted.[103] Even if California had previously sought to protect potential consumer plaintiffs, these decisions significantly impaired the courts' power to do so.[104] The Ninth Circuit noted that *Concepcion* interpreted the FAA as "giv[ing] preference (instead of mere equality) to arbitration provisions."[105]

2. Plaintiffs have failed to distinguish between their case and *Concepcion*, and arbitration agreements are consequently enforced.

Although courts applied *Concepcion* to new cases arguing contract unconscionability, judges did not always do so without lamenting the blow to consumer rights.[106] Post-*Concepcion* plaintiffs have tried to invalidate arbitration

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[97] *Id.* at 931.

[98] *See* Cruz v. PacifiCare Health Sys., Inc., 30 Cal. 4th 303, 312 (2003) (citing Broughton v. Cigna Healthplans of California, 21 Cal. 4th 1066, 1082 (1999)) (stating that because the judicial forum has significant institutional advantages over arbitration in administered a public injunctive remedy, if the remedy is entrusted to arbitrators it will lead to the likely consequence of the diminution or frustration of the public benefit).

[99] *Ferguson*, 733 F.3d at 930.

[100] *Id.* at 934.

[101] *Id.* at 938.

[102] *See* Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151 (9th Cir. 2013).

[103] *Id.* at 1159.

[104] *See* Matthew Maggiacomo, *The Savior of Aggregate Litigation: The Giving Green Tree*, 14 CARDOZO J. CONFLICT RESOL. 939, 953 (2013) (declaring that *Concepcion* renders states practically powerless in stopping the use of class action waivers and mandatory arbitration clauses to protect potential claimants).

[105] Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 238 (2014).

[106] *See, e.g.*, Bernal v. Burnett, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011) (opining that *Concepcion* was undoubtedly "a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals").

agreements by distinguishing their case from *Concepcion*. However, these attempts have not met widespread success.

For example, in *Murphy v. DirecTV, Inc.*, the Ninth Circuit found an arbitration agreement enforceable under *Concepcion* despite the plaintiffs' attempt to argue that their arbitration agreement had been created prior to *Discover Bank* being overruled by *Concepcion*.[107] Although the plaintiffs contended that *Concepcion* should not be applied retroactively, and, as such, that *Discover Bank* should still govern the interpretation of their contract, the court disagreed and upheld the agreement.[108]

In *Cayanan v. Citi Holdings*, plaintiffs attempted to distinguish their case from *Concepcion*.[109] Plaintiffs attempted to bring a class action against Citi Holdings regarding their consumer credit accounts.[110] Citi Holdings made a motion to compel individual arbitration.[111] Plaintiffs argued that their arbitration agreements rendered them unable to vindicate their statutory rights as a factual matter.[112] They sought to differentiate the facts of their case from *Concepcion*.[113] Plaintiffs argued that while AT&T Mobility had to pay at least $7,500 in addition to twice the claimant's attorney's fees if the arbitration award exceeded the last written settlement offer, the defendants in their case did not have a similar monetary incentive to resolve the dispute.[114] Further, plaintiffs argued that in contrast with *Concepcion*, Citi Holdings was not prohibited from seeking to recover attorneys' fees.[115] However, California's Southern District Court ultimately granted Citi Holdings' motion to compel arbitration of the plaintiffs' claims.[116]

3. Courts are not only using *Concepcion*'s reasoning to reject unconscionability arguments but also to reject violation of state law and public policy arguments.

Within a year of the *Concepcion* decision, some lower courts were not stopping at applying its holdings broadly.[117] Some judges noted the reasoning applied in *Concepcion* and extended it to repudiate arguments relying on state

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[107] Murphy v. DirecTV, Inc., 724 F.3d 1218, 1225 (9th Cir. 2013).
[108] *Id.*
[109] Cayanan v. Citi Holdings, Inc., 928 F. Supp. 2d 1182 (S.D. Cal. 2013).
[110] *Id.* at 1186.
[111] *Id.*
[112] *Id.* at 1206.
[113] *See id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1208.
[117] Sternlight, *supra* note 36, at 709.

law, as previously addressed, and also to dismiss rationale put forward that cite public policy.[118]

In a Northern District Court of California case later that year, the court rejected the plaintiff's unconscionability argument.[119] While this could have been predicted after the result in *Concepcion*, the court did not stop there. The court also rejected the argument that class arbitration waivers prevented the plaintiffs from vindicating their rights under state law.[120] Outside the context of class arbitration errors, the court also rejected a public policy argument that denying plaintiffs their class actions would violate state law or principles as well as the argument that class action waivers are not applicable to claims for public injunctive relief brought under state law.[121]

Although not reported, *In re Gateway LX6810 Computer Products Litigation* also illustrates a district court rejecting an argument of procedural and substantive unconscionability.[122] The plaintiffs had purchased defective Gateway computers accompanied by a limited warranty.[123] Of course, the warranty included an arbitration clause. The last sentence of the clause stipulated, "The arbitration, or any portion of it, will not be consolidated with any other arbitration and will not be conducted on a class-wide or class action basis."[124] Other than the failed argument proclaiming unconscionability, plaintiffs also attempted to argue that their claims for injunctive relief could not be arbitrated under multiple California statutes.[125] Their efforts were fruitless; the court echoed Justice Scalia's majority opinion in *Concepcion*, responding that "when state law prohibits outright the arbitration of a. . .claim. . .the conflicting rule is displaced by the FAA."[126] *In re Gateway* demonstrates that courts are rejecting not only unconscionability arguments with regard to class action waivers but also unconscionability arguments made in conjunction with claims of state law violation.

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[118] *See* Alan S. Kaplinsky, Mark J. Levin, & Martin C. Bryce, Jr., *Arbitration Developments: Post-Concepcion – The Supreme Court Expands Upon Its Landmark Decision*, 69 BUS. LAW. 647, 648 (2014) (noting that the Supreme Court vacated an Oklahoma Supreme Court decision that improperly relied on state public policy law); *Id.*

[119] Kaltwasser v. AT&T Mobility LLC, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011).

[120] *Id.* at 1047-50.

[121] *Id.* at 1050.

[122] *In re* Gateway LX6810 Computer Products. Litig., No. SACV 10-1563-JST, 2011 WL 3099862 (C.D. Cal. July 21, 2011).

[123] *Id.* at *1.

[124] *Id.*

[125] *Id.* at *3.

[126] *Concepcion*, 131 S. Ct. at 1743.

4. Courts are not only applying *Concepcion* but are also extending its reasoning and even applying it retroactively.

Court holdings normally apply to the litigants in the instant case and in subsequent cases.[127] Courts do not generally apply holdings retroactively.[128] A United States Supreme Court case has even held that a decision announcing a new standard is "almost automatically nonretroactive" when the decision clearly overrides past precedent.[129] Hence, the fact that some courts have authorized retroactive application after *Concepcion* evidences its massive influence. The Ninth Circuit specifically held that arbitration agreements in consumer contracts applied retroactively to pre-*Concepcion* contracts, reaching even further back than when California courts had been following the *Discover Bank* unconscionability test.[130] Companies that had been using class arbitration waivers in their consumer agreements essentially got a lucky break when *Concepcion* was decided because they turned around and began using it to block attempts at forming class actions as well as dispel pending class actions.[131]

A California appellate court case applied *Concepcion*'s reasoning retroactively in 2012.[132] In *Phillips v. Spring PCS*, a California trial court denied a cellular phone company motion to compel arbitration in 2006.[133] At the time, the trial court based its decision on the unconscionability of a class action waiver.[134] However, in 2012, after *Concepcion*, the defendants renewed their motion to compel arbitration based on the United States Supreme Court decision. Although plaintiffs argued that the previous denial of the trial court should hold based on res judicata, the trial court and the appellate court agreed that the motion should be granted and ordered the parties to proceed with arbitration.[135]

Courts are reversing their own decisions even in cases initiated several years prior to *Concepcion*.[136] Cases such as *Kaltwasser v. AT&T Mobility* demonstrate how courts are even willing to apply *Concepcion* to cases that have long been pending.[137] *Kaltwasser* was filed in 2007, over four years prior to the

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[127] See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 816 (2003).
[128] *See* Allen v. Hardy, 478 U.S. 255, 258 (1986).
[129] *Id.*
[130] *Murphy*, 724 F.3d at 1225; 2 DOMKE ON COM. ARB. § 32:30.60.
[131] Sternlight, *supra* note 36, at 717. Note, however, that companies which continue to litigate while simultaneously attempting to preserve the right to compel arbitration as an affirmative defense may be found to have waived that right. *See* Wolfson & King, *supra* note 88, at 19, 21.
[132] *See* Phillips v. Sprint PCS, 209 Cal. App. 4th 758 (2012).
[133] *Id.* at 763.
[134] *Id.*
[135] *See id.*
[136] *See* Sternlight, *supra* note 115, at 711.
[137] *See Kaltwasser*, 812 F. Supp. 2d at 1044.

Concepcion decision.[138] The Northern District Court of California initially found the contract's arbitration clause unenforceable, and the Court of Appeal affirmed the district court's decision.[139] However, after AT&T Mobility triumphed in *Concepcion*, the company resubmitted a motion to compel arbitration in its pending putative class action with Kaltwasser.[140] This time, the district court granted the motion to compel despite the fact that plaintiff had first filed his claim several years ago, discovery had begun, and plaintiff had retained an expert to investigate AT&T Mobility's data.[141] The district court reasoned that AT&T Mobility had not relinquished its right to arbitration because that right did not exist prior to *Concepcion*, and the company promptly made a motion to compel once *Concepcion* was decided.[142] Decisions in cases such as *Kaltwasser* are essentially forcing plaintiffs in class actions and putative class actions to strongly consider settlements, even if they would not have done so before, out of fear that the court will apply *Concepcion* and order them to individual arbitration.[143]

D. Can parties to a contract opt out of the FAA and into state law if they mutually consent in a choice of law clause?

Some attorneys have made a last ditch effort to argue for state law over FAA by pointing to choice of law clauses within the agreement in dispute. Prior to *Concepcion* and *Amex*, California courts would sometimes find the argument persuasive and find that a selection of state law could be indicative of the parties' opting out of the FAA even if, in the absence of a choice of law clause, the FAA would preempt state law.[144] Courts read FAA's edict to ensure "that private agreements to arbitrate are enforced according to their terms" as meaning that although the FAA governed arbitration agreements involving interstate commerce, if parties to the contract had agreed to be bound by state law, the FAA would not preclude California law.[145] If the choice of law was agreed upon bilaterally, honoring the agreement gives credence to the freedom to contract.[146]

In *Imburgia v. DIRECTV, Inc.*, the Ninth Circuit found that the arbitration agreement waived federal preemption of state law and because California law

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138 *Id.*
139 *Id.*
140 *Id.*
141 *See id.* at 1045.
142 *Id.* at 1051.
143 Sternlight, *supra* note 36, at 711.
144 *See* Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989).
145 *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 52 (1995); *See also* Preston v. Ferrer, 552 U.S. 346 (2008); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 688 (1996).
146 *See* Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1089 (2014) (opining that bilateral choices made by both parties deserve to be given full deference).

would find the class action waiver unenforceable, the entire arbitration agreement was invalid.[147] In *Imburgia*, plaintiffs were DIRECTV customers alleging that the company improperly charged early termination fees.[148] *Concepcion* was decided while the case was pending, and once the Supreme Court issued the decision, DIRECTV made a motion to compel arbitration.[149] In plaintiffs' 2007 contract with DIRECTV, the arbitration provision contained language stating, "If. . .the law of [the consumer's] state would find this agreement to dispense with class arbitration procedures, unenforceable, then this entire Section 9 is unenforceable."[150]

California's Consumer Legal Remedies Act (CLRA) precludes class action waivers.[151] The court reasoned that because plaintiffs are California residents, and California law would find a class action waiver unenforceable; according to the contract terms, the arbitration agreement is invalid.[152] The *Imburgia* court notes that an arbitration agreement's choice of law provision is as valid as a choice of law provision in any other contract.[153] It interpreted the language in the arbitration provision as denoting that if the contract's class arbitration procedures would be unenforceable under the law of the consumer's state without considering the preemptive effect the FAA, then the agreement would be unenforceable.[154] Although the contract language was arguably ambiguous, the court pointed to contract case law holding that ambiguous contract language should be construed against the drafting party.[155] The Ninth Circuit consequently held that under the terms of the customer agreement, because the class action waiver would be unenforceable under California law, the entire arbitration agreement was unenforceable.[156] The court affirmed the lower courts denial of DIRECTV's motion to compel arbitration.[157]

In contrast, a California Practice Guide postulates that "the right to agree contractually to [opt out of the FAA] itself derives from the FAA; so it is not possible to opt out entirely from the FAA."[158] Federal and state courts are split

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147 *See* Imburgia v. DirecTV, Inc., 225 Cal. App. 4th 338, 347 (2014).
148 *Id.* at 340.
149 *Id.* at 341.
150 *Id.*
151 *See* CAL. CIV. CODE § 1751, 1781, subd.(a).
152 *See Imburgia*, 225 Cal. App. 4th at 342.
153 *Id.* at 343.
154 *See Id.* at 344.
155 *Id.* at 345; 6 CAL. JUR., 3d Arbitration and Award, § 13.
156 *Imburgia*, 225 Cal. App. 4th at 347.
157 *Id.*
158 Cal. Prac. Guide Alt. Disp. Res. Ch. 5-B (citing Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F.3d 277, 288-89 (3rd Cir. 2010)).

regarding the effect of an FAA opt-out clause in a generic choice of law provision.[159]

IV. LOOKING BEYOND THE COURT SYSTEM, *CONCEPCION* HAS AFFECTED CONSUMERS AS WELL AS BUSINESSES.

Consumers are inundated with contracts.[160] In order to apply for a credit card, a consumer must enter into a contract with the banks or other vendors. In order to obtain cellular service, a consumer has to sign an agreement with the service provider. Arbitration clauses are found in consumer agreements with credit card providers, mortgage lenders, retail and investment banks, discount lenders, cellular phone companies, and many other types of companies that provide goods and services.[161]

These businesses affect consumers' lives daily. Commentators, Myriam Gilles and Gary Friedman, echo this sentiment:

> As we presaged in a 2005 article, the Supreme Court's ruling suggests that many—indeed, most—of the companies that touch consumers' day-to-day lives can and will now place themselves beyond the reach of aggregate litigation.[162]

Consumers rarely read through lengthy contracts and do not realize that they often include arbitration clauses. Accordingly, few claims are actually filed. For example, a credit card company, First USA, admitted that in the two years after it added a mandatory arbitration clause into its contracts, a mere four consumers initiated claims against the company.[163]

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[159] Cal. Prac. Guide Alt. Disp. Res. Ch. 5-B; *see* Kristina A. Del Vecchio, *Consumer Class Claims and Arbitration: Between A Rock and A Hard Place*, BANKING & FIN. SERVICES POL'Y REP., October 2014, at 1, 4 (noting that at least one other court had already disapproved of *Imburgia*'s holding and that prior to *Imburgia*, the Ninth Circuit had already spoken as to the same clause in Murphy v. DirecTV, Inc., 724 F.3d 1218 (9th Cir. 2013) (finding that pursuant to *Concepcion*, the class action waiver was not unenforceable as unconscionable).

[160] *See* Maggiacomo, *supra* note 104, at 943-44 (noting that in the United States, it is almost impossible to purchase any good or service without running into an arbitration agreement).

[161] Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012); *see* Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 94 (2012).

[162] Gilles & Friedman, *supra* note 161, at 627.

[163] *See* Sternlight, *supra* note 36, at 723-24.

A. Are arbitration clauses actually found at a higher rate in consumer versus non-consumer contracts?

In 2008, Theodore Eisenberg and two other law professors conducted an empirical study examining the use of arbitration clauses in large corporations.[164] The data presented showed that mandatory arbitration clauses appeared at a far higher rate in consumer versus non-consumer agreements.[165] A whopping 75% of consumer contracts compared to 6% of non-consumer contracts contained an arbitration clause.[166] Furthermore, the data showed that every consumer contract containing an arbitration clause also had a class arbitration waiver.[167]

In 2010, Christopher R. Drahozal and Stephen J. Ware summarized empirical studies examining the use of arbitration clauses.[168] They were critical of the earlier Eisenberg study and detail how the contracts were not representative of the entirety of business or consumer contracts.[169] Drahozal and Ware concluded that the Eisenberg findings should be construed narrowly because the consumer contracts studied were predominantly ones that were particularly likely to include arbitration clauses, while the business contracts were mainly the type that were unlikely to contain arbitration clauses.[170]

Drahozal and Ware cited a report issued by the Consumer Arbitration Task Force of the Searle Civil Justice Institute in 2009.[171] Contractual class arbitration waivers were not found in all consumer arbitrations administered by the American Arbitration Association.[172] Cell phone companies and credit card issuers were the two businesses with the highest amount of class arbitration waivers.[173] One hundred percent of contracts with class arbitration waivers were found in cell phone (5 out of 5 cases) and credit card contracts (26 out of 26 cases).[174]

Prior to *Concepcion*, even with arbitration clauses with allegedly "pro-consumer features," a district court found that less than 1% of AT&T Mobility's customers attempted to make a claim.[175] It is logical to conjecture that if

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[164] Eisenberg, *supra* note 1.
[165] *See id.* at 882-83.
[166] *Id.* at 883.
[167] *Id.* at 884.
[168] Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 434 (2010).
[169] *Id.* at 435.
[170] *Id.*
[171] *Id.* at 472.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *See* Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (noting that after 2003, less than 200 consumer arbitrations involving AT&T Mobility had been filed against the company nationwide).

consumers did not take advantage of arbitration clauses that supposedly favored them, even fewer consumers made claims against other companies with which they had less favorable arbitration clauses.

Although most consumers will never find themselves embroiled in litigation, *Concepcion* has had an effect on consumers in everyday society whether they know it or not. One pessimistic commentator bleakly remarked, "Finally, the Court appears to have placed the nail in the coffin on consumers' ability to pursue class processes when bound by an arbitration agreement."[176]

B. Even if consumers are not presently affected by changes precipitated by Concepcion*, the changes may have inadvertently limited their future interests.*

Consumers are frequently unaware of contractual arbitration clauses until a problem surfaces.[177] Post-*Concepcion*, if a consumer does eventually want to assert a claim against a corporation they have contracted with, he or she may only have an option to individually arbitrate. At this time, unless they decide to represent themselves, it will be difficult to find a lawyer to represent them.[178]

Logically, *Concepcion* has a greater impact on consumers with claims that would yield small amounts of money even if successful (versus consumers who could potentially reap a large settlement).[179] These consumers will not be able to consolidate their claims and find their way into court.[180] Even if the arbitration clause in question provides that plaintiff will be given attorney's fees, if the claim is worth under a hundred dollars, it is unlikely that plaintiff would be offered thousands of dollars in attorney's fees.[181]

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[176] Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 463 (2011).

[177] *See* Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 2,3 (Law and Economics Research Paper Series, Working Paper No. 09-40, 2009), *available at* http://perma.cc/N34E-DE3Z (examining the extent to which buyers read standard form contracts and suggesting that consumers often do not read them).

[178] *See* Gilles & Friedman, *supra* note 161, at 646 (noting that rational lawyers would be deterred by prohibitive disincentives).

[179] *See* Cole, *supra* note 176, at 470 (opining that an arbitration provision tends to be the end of the road for a consumer with a low value dispute).

[180] *Id.* at 491.

[181] *See* Gilles & Friedman, *supra* note 161, at 646-47 (arguing that it is almost impossible to imagine a court awarding $25,000 . . . as a "reasonable fee" for obtaining a settlement of $30.22).

C. Have large corporations really moved to amend their consumer contract arbitration clauses as a result of Concepcion*?*

When the *Concepcion* opinion was released, some commentators postulated that companies would react by amending existing arbitration clauses in their contracts with consumers (and employees).[182] Cynical commentators referred to *Concepcion* as a "game-changing edict" that would result in companies seeking to avoid potential liability to proactively incorporate class action waivers into their consumer agreements.[183] This could even potentially be accomplished without consumers realizing a change has occurred given that the FAA allows a written arbitration clause to stand even if it is not signed.[184] Companies can easily accomplish this, especially with existing contracts with consumers with whom they already have a relationship.[185]

This dour prediction of *Concepcion*'s aftermath is not completely baseless.[186] A recent empirical study by Professor Myriam Gilles looked at consumer contracts of large corporations (including credit card and telecommunications companies) after *Concepcion*.[187] The data showed that of thirty-seven contracts with arbitration clauses, all of them contained class action waivers, and the majority of the arbitration clauses with class action waivers had been revised since *Concepcion*.[188]

Other scholars have also found documentation supporting the prediction that corporations would integrate and amend consumer contracts to include class arbitration waivers following the *Concepcion* and *Amex* decisions.[189] Some businesses such as banks and wireless phone companies have regularly began integrating class arbitration waivers in consumer contracts.[190] Businesses with

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[182] *See* Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 846-47 (2012) (assuming that because a significant number of companies have added arbitration clauses into their contracts since 2000, adaptive corporations will continue to amend their clauses in response to litigation outcomes).

[183] *See* Gilles & Friedman, *supra* note 161, at 627.

[184] 9 U.S.C. § 2 (2006); Sternlight, *supra* note 161, at 718.

[185] *See* Sternlight, *supra* note 161, at 718 (declaring that courts have considered the question and found that a revision in an ongoing relationship is acceptable because courts find that consumers consented to the amendment by continuing to use the company's product or service).

[186] *See* Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in A Post-Class Action Era*, 63 DEPAUL L. REV. 447, 459 (2014) (stating that many corporations have incorporated class action waiver in their consumer contracts in response to judicial decisions such as *Concepcion*).

[187] Sternlight, *supra* note 161, at 89.

[188] *Id.*

[189] *See* Symeonides, *supra* note 105, at 228-230.

[190] *See Id.* (noting also that computer sellers and cable companies are routinely integrating arbitration agreements with class arbitration waivers in their boilerplate language in contracts with

existing contractual arbitration clauses have since opted to add class waivers to consumer contacts.[191] The businesses adding class waivers to consumer agreements include prominent corporations such as Netflix, eBay, Paypal, and PlayStation.[192] The two authoritative Supreme Court cases preclude states like California from attempting to rule for consumers who have entered into agreements with class arbitration waivers.

1. Contrary to expectations that most if not all big businesses would amend consumer agreements to add arbitration and class arbitration waivers, not all businesses have done so.

The data on post-*Concepcion* consumer contracts is not completely uniform. Some research does not square with Gilles' study. Peter Rutledge and Christopher Drahozal argue that large businesses in fact have not been overwhelmingly modifying their consumer agreement arbitration clauses.[193] Their empirical study specifically focused on the extent to which big businesses have switched to arbitration after the *Concepcion* decision.[194]

In the study, Rutledge and Drahozal looked at two samples of franchise agreements.[195] The first sample studied arbitration clauses from 1999 until the present day.[196] In contrast, the second sample examined arbitration agreements immediately prior to the *Concepcion* decision in 2011, as well as agreements after *Concepcion*.[197] The results indicated that the number of agreements with arbitration clauses did not drastically increase after 2011.[198] The first sample yielded results showing that usage of class arbitration waivers has increased considerably since 1999.[199] However, a larger jump in usage occurred prior to 2011.[200] Results from the second sample likewise showed an increase in arbitration clauses, albeit an increase of merely 1%.[201] The paucity of empirical

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consumers); Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 273 n.10 (2013).

191 *See* Symeonides, *supra* note 105, at 230.

192 *See Id.*

193 *See* Rutledge & Drahozal, *supra* note 91 at 956.

194 *Id.*

195 *Id.*

196 *Id.* at 988.

197 *Id.* at 989.

198 *Id.* at 990.

199 *Id.* at 990-91.

200 *See id.* ("In 1999, 51.6% of franchisors with arbitration clauses also used class arbitration waivers. By 2011, immediately before *Concepcion*, that percentage had increased to 77.8%, with an additional increase to 86.7% by 2013.").

201 *Id.* at 990 ("[The] net use of arbitration clauses increased only slightly after *Concepcion*, with 62.6% of franchisors using arbitration clauses before *Concepcion* and 63.6% after the decision.").

studies on this subject renders it difficult to determine how much businesses have actually modified standard consumer agreements as a result of *Concepcion*.

V. CONCLUSION

Concepcion has instigated a deluge of cases and law review articles. This paper concludes that even California courts that initially tried to resist broadly applying *Concepcion*'s holding could no longer do so after the *Amex* decision. Courts have ruled against consumer plaintiffs attempting to distinguish their cases from *Concepcion* with arguments based on well-established state law and have applied *Concepcion* retroactively in some cases. After reviewing some conflicting studies on consumer contracts in the aftermath of *Concepcion*, it is unclear whether big businesses have actually made a uniform move to amend arbitration clauses in existing contracts. More expansive studies on post-*Concepcion* and *Amex* consumer contracts would help clarify this issue. Additionally, it would be useful to potential consumer plaintiffs to explore how lower courts have been responding to vindication of rights arguments after the *Amex* decision.