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## Consumer Financial Services Arbitration: What Does the Future Hold After *Concepcion*?

### I. INTRODUCTION

THE FEDERAL ARBITRATION ACT (FAA) WAS ENACTED IN 1925 TO overcome a long-entrenched judicial hostility towards arbitration, and it established a liberal federal policy favoring arbitration that is applicable in both federal and state courts.<sup>1</sup> Arbitration has played a special role in resolving disputes between consumers and companies. As the United States Supreme Court itself emphasized, “Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind.”<sup>2</sup> The legislative history of the FAA reveals that its drafters believed that “the Act, by avoiding ‘the delay and expense of litigation,’ will appeal ‘to big business and little business alike, . . . corporate interests [and] individuals.’ Indeed, arbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.”<sup>3</sup>

The importance of arbitration as an alternative to court litigation for resolving disputes, including disputes between a consumer and a company, is reflected in hundreds of judicial opinions that define and refine the role played by arbitration in American society. The Supreme Court alone has issued more than thirty significant opinions dealing with arbitration.<sup>4</sup>

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1. Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–14 (2006)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

2. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citing S. REP. NO. 69-536, at 3 (1924)).

3. *Id.* (quoting S. REP. NO. 69-536, at 3 (1924) and citing H.R. REP. NO. 97-542, at 13 (1982)).

4. See, e.g., *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010);

## CONSUMER FINANCIAL SERVICES ARBITRATION

In addition, over the course of time, consumer arbitration agreements have evolved from short, one-paragraph general provisions to multi-page, detailed agreements filled with consumer-friendly features which make arbitration more beneficial to the consumer than court litigation.<sup>5</sup> Such features include: contractual fee-shifting to the company of attorney and expert fees, if the consumer prevails; company payment of arbitration fees, whether or not the consumer prevails; preservation of all substantive rights and remedies the consumer would have in litigation; an unfettered right of the consumer to opt-out of arbitration within some reasonable period of time after the arbitration provision becomes effective if he or she chooses; establishment of the venue of any arbitration hearing near the consumer's residence; and a provision requiring the company to pay a specific amount (typically \$7,500 or \$10,000) to the consumer (plus fees and costs otherwise payable) if the arbitrator finds it liable for the amount demanded by the consumer prior to the initiation of the arbitration.<sup>6</sup>

Nevertheless, many courts, plaintiffs' class action lawyers, and consumer advocacy groups vigorously resisted the enforcement of consumer arbitration agreements, particularly those containing class action waivers.<sup>7</sup> Recently, in the

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14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009); Vaden v. Discover Bank, 556 U.S. 49 (2009); Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008); Preston v. Ferrer, 552 U.S. 346 (2008); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003); PacifiCare Health Sys. v. Book, 538 U.S. 401 (2003); Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Circuit City Stores v. Adams, 532 U.S. 105 (2001); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000); Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996); First Options v. Kaplan, 514 U.S. 938 (1995); Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995); *Allied-Bruce*, 513 U.S. 265; *Gilmer*, 500 U.S. 20; Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468 (1989); Perry v. Thomas, 482 U.S. 483 (1987); Shearson/Am. Express v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); *Moses H. Cone Mem. Hosp.*, 460 U.S. 1; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957); Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

5. See, e.g., Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility vs. Concepcion*, 88 NOTRE DAME L. REV. 825, 853-57 (2012) (noting that arbitration clauses increasingly "promise to pick up the tab for all initiation fees, deposits, and costs of the arbitral proceeding"). Compare *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 4-5 (discussing a short "broad arbitration clause" that makes no mention of the party that drafted the clause paying for any arbitration costs), with Verizon Wireless Customer Agreement Arbitration Clause (Sept. 8, 2011), <http://www.proandcontracts.com/wp-content/uploads/2011/09/2011.09.08-Verizon-Wireless-Arbitration-Clause.pdf> (a more recent, two-page arbitration agreement that indicates Verizon will pay costs of arbitration).

6. See Gilles, *supra* note 5, at 853-57 (2012) (noting the increase of fee-shifting provisions); see also, e.g., *What if I Am not Satisfied with the Resolution AT&T Offers Me for a Problem I Am Experiencing?*, AT&T WIRELESS, [http://www.att.com/esupport/article.jsp?sid=47114&cv=820&requestid=1349995#fbid=if9D\\_7mjrR4](http://www.att.com/esupport/article.jsp?sid=47114&cv=820&requestid=1349995#fbid=if9D_7mjrR4) (last visited Mar. 16, 2013) (declaring, among other things, that AT&T will pay filing, administration and arbitrator fees for arbitration commenced by the consumer).

7. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 632-36 (2012) (noting two principal legal challenges to class action waivers: state law unconscionability and vindication of federal statutory rights). A class action waiver is an agreement that neither party will participate in a class action in court or in arbitration with respect to any claim that is

landmark case of *AT&T Mobility, LLC v. Concepcion*, the U.S. Supreme Court held that the FAA preempts state laws that refuse to enforce consumer arbitration agreements containing class action waivers on unconscionability or public policy grounds.<sup>8</sup> Shortly thereafter, in *Marmet Health Care Center, Inc. v. Brown*, the Court once again reinforced that “[s]tate and federal courts must enforce the Federal Arbitration Act . . . with respect to all arbitration agreements covered by that statute.”<sup>9</sup> Most recently, in *Nitro-Lift Technologies, LLC v. Howard*, the Court reinforced that the FAA is “the Supreme Law of the Land” and once the Court has interpreted the FAA, “it is the duty of other courts to respect that understanding of the governing rule of law.”<sup>10</sup>

While in theory *Concepcion*, *Marmet*, and *Nitro-Lift* should have been the last word on the subject, in reality, consumer arbitration is presently at a crossroads. Some courts, and many class action lawyers and consumer advocacy groups, have continued to try to devise ways to evade the Supreme Court’s edicts.<sup>11</sup> In particular, there has been an effort to create a significant exception to *Concepcion* that would refuse to enforce a consumer arbitration agreement that prevents consumers from vindicating their alleged statutory rights.<sup>12</sup> That issue has now reached the U.S. Supreme Court, which is poised to decide it in the spring of 2013.<sup>13</sup> Moreover, consumer arbitration is currently under the microscope of the federal Consumer Financial Protection Bureau (CFPB), which has the power under certain conditions proscribed in Section 1028 of the Dodd-Frank Wall Street Reform and Consumer

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subject to arbitration. See William M. Howard, Annotation, *Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R. 6th 145 (2006). For examples of class action waivers, see, e.g., *Lowry v. JP Morgan Chase Bank, N.A.*, No. 4:12CV00816, 2012 WL 3988997, at \*1 (N.D. Ohio Sept. 11, 2012); *Bradberry v. T-Mobile USA, Inc.*, No. C06-6567 CW, 2007 WL 1241936, at \*7 (N.D. Cal. Apr. 27, 2007).

8. *Concepcion*, 131 S. Ct. at 1753.

9. 132 S. Ct. at 1202.

10. *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (internal quotation omitted).

11. Shortly after *Concepcion* was decided, the consumer advocacy group Public Justice created a blueprint on how to attack consumer arbitration provisions in the aftermath of *Concepcion*. See Leslie Bailey & Paul Bland, *How Courts Can and Should Limit AT&T Mobility v. Concepcion*, PUBLIC JUSTICE, <http://publicjustice.net/ConcepcionMemo> (last visited Feb. 10, 2013). Also, an organization named Consumers Count, according to the press release announcing its formation, has the goal of eliminating the use of consumer arbitration. Press Release, Consumers Count, New Consumer Advocacy Group, Consumers Count, Formed to Restore Individuals’ Constitutional Right to Take Grievances Against Corporations to Court (Oct. 3, 2012), <http://www.marketwatch.com/story/new-consumer-advocacy-group-consumers-count-formed-to-restore-individuals-constitutional-right-to-take-grievances-against-corporations-to-court-2012-10-03>. Consumers Count’s co-founders say in the release that the organization “is designed to turn arbitration into an unexpected nightmare for corporations” by inundating companies with mass individual arbitrations that will be so burdensome that companies will “disavow arbitration.” *Id.* Some courts have also attempted to side-step *Concepcion* by purporting to find the arbitration provision unconscionable under state law for reasons other than the class action waiver itself. See, e.g., *Brewer v. Miss. Title Loans, Inc.*, 364 S.W.3d 486, 487 (Mo. 2012) (en banc), *cert. denied*, 133 S. Ct. 191 (2012).

12. See *Am. Express Co. v. Italian Colors Rest.*, 667 F.3d 204, 219 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012) (discussed *infra* Part III).

13. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012) (granting certiorari to *Am. Express Co.*, 667 F.3d 204).

## CONSUMER FINANCIAL SERVICES ARBITRATION

Protection Act to significantly curtail, if not totally eliminate, the use of arbitration provisions in consumer agreements.<sup>14</sup> After discussing *Concepcion*, this Article examines these post-*Concepcion* developments in more detail.

### II. THE ROAD TO *CONCEPCION*

Over the years, the Supreme Court, recognizing the many benefits that flow from the use of arbitration to resolve disputes, has taken special pains to protect the FAA from its detractors. In particular, the Court has held that: (a) the FAA applies in state as well as federal courts<sup>15</sup> and preempts inconsistent state laws;<sup>16</sup> (b) arbitration cannot be discriminated against or singled out for special treatment;<sup>17</sup> (c) an arbitration provision must be enforced as written,<sup>18</sup> even though arbitration is more informal than, and does not permit as much discovery as, court proceedings;<sup>19</sup> (d) an arbitration provision must be enforced even if piecemeal litigation is the result;<sup>20</sup> (e) enforcement of an arbitration provision cannot be denied based upon speculation;<sup>21</sup> (f) an arbitration provision must be enforced even if the contract in which it is contained is alleged to be unlawful or void *ab initio*;<sup>22</sup> and (g) an arbitration cannot proceed on a class basis unless there is affirmative evidence that both parties so intended.<sup>23</sup>

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14. Pub. L. No. 111–203, § 1028, 124 Stat. 1376, 2003–05 (2010) (codified at 12 U.S.C. § 5518 (2006 & Supp. V 2011)).

15. *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (“State and federal courts must enforce the Federal Arbitration Act . . .”) (per curiam).

16. *Southland Corp. v. Keating*, 465 U.S. 1, 3 (1984) (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).

17. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) (“Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as other contracts.’” (quoting *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974))).

18. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79 (1989).

19. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (“[B]y agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” (quoting *Mitsubishi Motors Corp. v. Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

20. *See Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 (1983) (“Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.”).

21. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) (“The ‘risk’ that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.”).

22. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006) (“[W]e conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract.”); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (“[T]he federal court is instructed to order arbitration to proceed once it is satisfied that the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue. . . . But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.” (internal quotations omitted)).

23. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

It was against this rich backdrop of arbitration decisions that the Supreme Court decided *Concepcion*. The case arose out of a dispute over \$30.22.<sup>24</sup> AT&T advertised that its phone was free, but it charged \$30.22 in sales tax based on the phone's full retail value.<sup>25</sup> It was promptly sued in a class action for false advertising and fraud.<sup>26</sup> There was an arbitration provision with a class action waiver in the wireless service agreement between AT&T and its customers, and AT&T moved to compel arbitration.<sup>27</sup> AT&T contended that any arbitration had to take place on an individual, not a classwide, basis because the arbitration provision stated that the arbitrator did not have authority to conduct class arbitration.<sup>28</sup>

AT&T's arbitration provision also had a number of consumer-friendly features. For example, the consumer paid no arbitration costs unless the claim was deemed frivolous by the arbitrator;<sup>29</sup> regardless of the amount of the consumer's claim, AT&T had to pay the consumer a minimum of \$7,500 (now, \$10,000), plus double attorneys' fees if the arbitrator awarded the consumer more than AT&T's final settlement offer before an arbitrator was appointed (known as a "bump-up" clause);<sup>30</sup> the arbitrator was authorized to award any form of individual relief (including punitive damages, attorneys' fees, and injunctive relief) that would be available to consumers in court;<sup>31</sup> AT&T waived any right to recover its own attorneys' fees from the consumer regardless of the outcome of the arbitration;<sup>32</sup> arbitration took place in the county where the consumer resided;<sup>33</sup> for claims under \$10,000, the consumer could choose whether arbitration will be in person, by telephone, or on written submission;<sup>34</sup> the American Arbitration Association (AAA), which for more than a decade has rigorously adhered to consumer due process protocols requiring fairness in arbitrations between consumers and companies, was named as the administrator;<sup>35</sup> and consumers and their attorneys were not required to keep arbitration results confidential, and could bring issues to the attention of government enforcement agencies.<sup>36</sup>

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24. AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

25. *Id.*

26. *Id.*

27. *Id.* at 1744–45.

28. *Id.* at 1744.

29. *Id.*

30. *Id.*; *What if I Am not Satisfied with the Resolution AT&T Offers Me for a Problem I Am Experiencing?*, *supra* note 6.

31. *Concepcion*, 131 S. Ct. at 1744 (2011).

32. *Id.*

33. *Id.*

34. *Id.*

35. See Petition for Writ of Certiorari at 59a, *Concepcion*, 131 S. Ct. 1740 (No. 09-893) (providing AT&T's original contract, which states arbitrations "will be administered by the AAA"); AM. ARBITRATION ASSOC., CONSUMER DUE PROCESS PROTOCOL 34 (2007), available at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_005014&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_005014&RevisionSelectionMethod=LatestReleased).

36. See Petition for Writ of Certiorari, *supra* note 35, at 6.

## CONSUMER FINANCIAL SERVICES ARBITRATION

The federal district court reluctantly denied AT&T's motion to compel arbitration based on the "Discover Bank Rule," so-called because it is derived from the California Supreme Court opinion in *Discover Bank v. Superior Court*.<sup>37</sup> Under the Discover Bank Rule, a class action waiver is unconscionable when it is: (1) "found in a consumer contract of adhesion" drafted by a party with superior bargaining power, (2) in a setting in which "disputes between the contracting parties predictably involve small amounts of damages," and (3) "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."<sup>38</sup>

The district court found that AT&T established that the Concepcions could vindicate their rights in an individual arbitration.<sup>39</sup> However, AT&T did not show that bilateral arbitration was an adequate substitute for the deterrent effects of a class action.<sup>40</sup> The court found that the Plaintiffs "were better off" individually pursuing their claims in arbitration because their net recovery would probably be larger and more quickly paid than in a class action.<sup>41</sup> But it concluded that it had to faithfully adhere to California's policy of favoring class litigation and class arbitration because only a class action would protect the thousands of putative class members who did not even know that their rights were violated.<sup>42</sup>

On appeal, the Ninth Circuit affirmed the district court after holding that there was no FAA preemption.<sup>43</sup> The Ninth Circuit found that the FAA did not expressly preempt the Discover Bank Rule because that Rule did not single out arbitration for special treatment.<sup>44</sup> The court observed that all class action waivers, whether within or outside an arbitration provision, are unconscionable under California law.<sup>45</sup> It further concluded that the FAA also did not implicitly preempt the Discover Bank Rule because the Rule did not stand as an obstacle to the accomplishment of Congress' two objectives in the FAA.<sup>46</sup> According to the Ninth Circuit, those two objectives were (1) placing arbitration agreements on the same footing as other contracts, and (2) promoting the efficient and expeditious resolution of claims.<sup>47</sup>

That set the stage for Supreme Court review. AT&T's certiorari petition raised the following question: "Whether the Federal Arbitration Act preempts states from

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37. *Concepcion*, 131 S. Ct. at 1745 (citing *Laster v. T-Mobile USA, Inc.* No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*12–13 (S.D. Cal. Aug. 11, 2008)); see also *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (2005) (establishing the "Discover Bank Rule").

38. *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011).

39. *Laster*, 2008 WL 5216255, at \*12.

40. *Concepcion*, 131 S. Ct. at 1745 (citing *Laster*, 2008 WL 5216255, at \*14).

41. *Id.* at 1753 (citing *Laster*, 2008 WL 5216255, at \*12).

42. See *Laster*, 2008 WL 5216255, at \*13–14.

43. *Laster v. AT&T Mobility*, 584 F.3d 849, 859 (2009).

44. *Id.* at 857 (citing *Shroyer v. New Cingular Wireless Serv. Inc.*, 498 F.3d 976, 987 (2007)).

45. *Id.* at 857–59 (citing *Shroyer*, 498 F.3d at 990).

46. *Id.* at 859.

47. *Id.* at 857.



conditioning the enforcement of an arbitration agreement on the availability of particular procedures — here, classwide arbitration — when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.<sup>48</sup>

The majority opinion, written by Justice Scalia, and joined in by Chief Justice Roberts and Justices Alito, Kennedy and Thomas (who also wrote a separate concurring opinion), emphasized that under Section 2 of the FAA, an agreement to arbitrate is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>49</sup> The Court held that Section 2 of the FAA preempts the *Discover Bank* Rule classifying most class action waivers as unconscionable.<sup>50</sup> According to the Court, Section 2’s savings clause does not preserve state law defenses that stand as an obstacle to the accomplishment of the FAA’s objectives.<sup>51</sup>

In contrast to the Ninth Circuit, Justice Scalia identified a third objective of the FAA, which he described as the “principal purpose” of the FAA: ensuring that arbitration agreements are enforced according to their terms.<sup>52</sup> The *Discover Bank* Rule required that class arbitration be made available as a condition of enforcing the arbitration agreement — i.e., either the parties agree to class arbitration or they get no arbitration at all.<sup>53</sup> But the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the parties’ contractual agreement and the FAA.

The Court reiterated a point previously made in *Stolt-Nielson v. AnimalFeeds Int’l Corp.* that class arbitration (unless affirmatively consented to by both parties) is patently inconsistent with the FAA.<sup>54</sup> In *Stolt-Nielson*, the Court held that ordering class arbitration when the arbitration provision is silent on the subject of class arbitration is inconsistent with and forbidden by the FAA:

*Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.*<sup>55</sup>

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48. Petition for Writ of Certiorari, *Concepcion*, 131 S. Ct. 1740 (No. 09-893).

49. *Concepcion*, 131 S. Ct. at 1744 (quoting 9 U.S.C. § 2 (2006)).

50. *Id.* at 1753.

51. *Id.* at 1748.

52. *Id.* (quoting *Volt Info. Sci. Inc.*, 489 U.S. 468, 478 (1988)).

53. *Id.* at 1750.

54. *Id.* at 1750–51; see also *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010).

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



## CONSUMER FINANCIAL SERVICES ARBITRATION

Justice Scalia confronted head-on the fact that “unconscionability” is a state law contract defense that typically applies to contracts generally and not just arbitration agreements:

*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. . . . But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In Perry v. Thomas, 482 U.S. 483 . . . (1987), . . . we noted that the FAA’s preemptive effect might extend even to grounds traditionally thought to exist ‘at law or in equity for the revocation of any contract.’<sup>56</sup>*

He concluded that: “Although § 2’s saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>57</sup>

The Court expressed concern about the slippery slope that an affirmance of the Ninth Circuit would have created.<sup>58</sup> For example, could a state say that the same discovery permitted by courts must also be permitted in arbitration?<sup>59</sup> Or that court rules such as the Federal Rules of Evidence must also be used in arbitration?<sup>60</sup> Or that juries must be permitted to resolve disputes whether in court or in arbitration?<sup>61</sup> If all it takes to be within the savings clause is for a state law rule to purport to apply to contracts generally, Justice Scalia reasoned, then the savings clause exception would swallow the FAA.<sup>62</sup> He recognized that some things that sound like they apply to both arbitration clauses and contracts generally actually have a disproportionate impact on arbitration and are an obstacle to the accomplishment of the FAA’s purposes.<sup>63</sup> Notably, the majority in *Concepcion* rejected the dissenters’ argument that enforcement of the class action waiver might cause some small-dollar consumer claims to escape judicial review:

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56. *Id.* at 1747.

57. *Id.* at 1743.

58. *Id.* at 1747.

59. *Id.* (questioning whether courts could find “unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery”).

60. *Id.*

61. *Id.* (“The same argument might apply to a rule classifying as unconscionable arbitration agreements . . . that disallow an ultimate disposition by a jury . . .”).

62. *Id.* at 1748 (“Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”).

63. *Id.*

*The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system . . . . But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of \$ 7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer.*<sup>64</sup>

### III. IS THERE A VINDICATION OF RIGHTS EXCEPTION TO *CONCEPCION*?

As discussed, *Concepcion* held that the FAA preempts “generally applicable contract defenses” if they “stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>65</sup> It then held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>66</sup> Nevertheless, plaintiffs sometimes argue that even after *Concepcion*, they should be allowed to attempt to prove, through discovery or the presentation of factual evidence, that they cannot vindicate their rights in an individual arbitration. Most (but not all) courts have seen this for what it is — an attempt to make an end-run around *Concepcion*.<sup>67</sup>

Thus, the Third, Ninth and Eleventh Circuits have all held that there is no “vindication of rights” exception to *Concepcion*. In *Litman v. Cellco Partnership*, the Third Circuit initially followed the New Jersey Supreme Court’s holding in *Muhammad v. County Bank of Rehoboth Beach* that class action arbitration waivers “functionally exculpate wrongful conduct,” and hence are unenforceable.<sup>68</sup> On remand after *Concepcion*, the Third Circuit did a complete turn-about and held that “the rule established by the New Jersey Supreme Court in *Muhammad* is preempted by the FAA.”<sup>69</sup>

Subsequently, in *Homa v. American Express*, the Third Circuit held that the district court properly enforced a class action waiver and compelled individual arbitration “notwithstanding the factual record in this case establishing that [Homa] could not effectively vindicate his substantive statutory rights under [American Express’s] arbitration agreement.”<sup>70</sup> Homa had compiled a substantial evidentiary record, including “Homa’s deposition, numerous attorneys’

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64. *Id.* at 1753.

65. *Id.* at 1748.

66. *Id.*

67. *See infra* Part III.

68. *Litman v. Cellco P’ship*, 655 F.3d 225, 228 n.2 (3d Cir. 2011) (quoting *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006)), *cert. denied*, 132 S. Ct. 1046 (2012).

69. *Id.* at 231.

70. No. 11-3600, 2012 U.S. App. LEXIS 17763, at \*9 (3d Cir. Aug. 22, 2012) (brackets in original).

certifications, exhibits, and a certification of a vice president of American Express.”<sup>71</sup> Homa contended that “the uncontradicted evidentiary record in this case establishes that enforcing [American Express’s] arbitration clause would make it impossible for any person . . . to effectively vindicate his substantive statutory rights.”<sup>72</sup> Nevertheless, the Third Circuit held that, even accepting Homa’s argument to be true, individual arbitration was required under the FAA and *Concepcion*: “Even if Homa cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not . . . . Though some persons might regard our result as unfair, 9 U.S.C. § 2 requires that we reach it.”<sup>73</sup>

In *Cruz v. Cingular Wireless, LLC*, Plaintiffs argued that the arbitration clause’s class action waiver was “unenforceable because it would exculpate ATTM from liability under state law . . . .”<sup>74</sup> Plaintiffs also argued that “attorneys will refuse to represent ATTM customers for these legally complex but small-value claims” absent a class.<sup>75</sup> Noting that *Concepcion* “specifically rejected this public policy argument,” the Eleventh Circuit held that the FAA preempted state law.<sup>76</sup> To the extent that Florida law:

*[W]ould invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many customers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA’s objective of enforcing arbitration agreements according to their terms, and is preempted.*<sup>77</sup>

*Cruz* also rejected the Plaintiffs’ attempt to circumvent *Concepcion* by proffering the affidavits of three Florida consumer law attorneys who attested that they would not represent consumers on an individual basis in claims like the Plaintiffs’ and statistics showing that only an “infinitesimal” number of customers had commenced arbitrations against Cingular.<sup>78</sup> The Eleventh Circuit held that “faithful adherence to *Concepcion*” required the rejection of such evidence because it “goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion* — namely, that the class action waiver will be

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71. *Id.* at \*4–5.

72. *Id.* at \*5 (brackets and ellipses in original).

73. *Id.* at \*13 (internal citation omitted).

74. 648 F.3d 1205, 1212 (11th Cir. 2011).

75. *Id.*

76. *Id.* at 1212–13.

77. *Id.* at 1213.

78. *Id.* at 1214.

exculpatory, because most of these small-value claims will go undetected and unprosecuted.”<sup>79</sup>

In *Coneff v. AT & T Corp.*, Plaintiffs argued that *Concepcion* did not apply to “a sufficiently narrow, fact-based state-law rule for voiding class-action waivers.”<sup>80</sup> The Ninth Circuit held that *Concepcion* “forecloses this argument,” because the majority opinion “expressly rejected” the argument that “the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted.”<sup>81</sup>

Splitting with these circuits, the Second Circuit, in *American Express Co. v. Italian Colors Restaurant*, ruled that an arbitration agreement is unenforceable when “plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.”<sup>82</sup> In *American Express*, the Plaintiffs argued that due to an anomaly in the federal antitrust laws, they would not be able to recover the hundreds of thousands or even millions of dollars in costs that would be required to present expert testimony, even if they prevailed on the merits of their claims.<sup>83</sup> The subsequent denial of American Express’ motion for *en banc* review spurred vigorous dissents by the Second Circuit’s Chief Judge and four other judges.<sup>84</sup>

The dissenters’ voices were heard by the Supreme Court, which on November 9, 2012, granted American Express’ petition for writ of certiorari.<sup>85</sup> The Court agreed to decide the question: “Whether the Federal Arbitration Act permits courts, invoking the ‘federal substantive law of arbitrability,’ to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.”<sup>86</sup> Justice Sonia Sotomayor took no part in the order granting certiorari,

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79. *Id.* at 1214. Even prior to *Concepcion*, numerous courts, pointing to the ability of a prevailing plaintiff to recover attorneys’ fees and costs under fee-shifting provisions that are contained in most consumer protection statutes, rejected such attorney certifications proffered by plaintiffs to try to establish that they cannot vindicate his or her rights in an individual arbitration. See, e.g., *Fay v. New Cingular Wireless, PCS, LLC*, No. 4:10CV883 HEA, 2010 WL 4905698, at \*3 (E.D. Mo. 2010) (enforcing arbitration clause despite affidavit from Plaintiff’s counsel that neither he nor any other attorney would take the individual case, because the theory “is clearly negated by the ability of the customer to receive attorneys’ fees”); *Strand v. U.S. Bank Nat’l Assoc.* ND, 693 N.W.2d 918, 926 (N.D. 2005) (rejecting affidavit of Plaintiff’s lawyer because it did not prove that “no attorney would be willing to accept such cases, particularly where attorney fees are available for prevailing plaintiffs”); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1274 (M.D. Ala. 2003) (rejecting affidavits of lawyers that class action was necessary to prosecute claim, because it was “based on the erroneous assumption that her costs and attorney’s fees will be paid from her damage award” instead of from statutory attorneys’ fees); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1342–43 (M.D. Ala. 2003) (same).

80. *Coneff v. AT & T Corp.*, 673 F.3d 1155, 1160 (9th Cir. 2012).

81. *Id.* (quoting *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011)).

82. 667 F.3d 204, 212 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012).

83. *Am. Express*, 667 F.3d at 212.

84. *In re Am. Express Merchants’ Litig.*, 681 F.3d 139 (2d Cir. 2012).

85. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

86. Petition for Writ of Certiorari at i, *Am. Express*, 667 F.3d 204 (No. 12-133).

probably because she was a member of the Second Circuit panel that heard the case in an earlier appeal.<sup>87</sup>

There is a very strong argument that *American Express* was wrongly decided. In *CompuCredit Corp. v. Greenwood*, the Supreme Court articulated a stringent test for determining whether Congress intended for federal statutory claims to be excepted from the FAA.<sup>88</sup> The Ninth Circuit had held that because the federal Credit Repair Organizations Act (CROA) has a “right to sue” clause, Congress must have intended to permit consumers to sue in court; therefore, CROA claims cannot be arbitrated.<sup>89</sup> The Supreme Court reversed, holding that if Congress had intended to prohibit the enforcement of arbitration agreements in CROA, it could have said so explicitly, as it has done in certain other statutes.<sup>90</sup> “Because CROA is silent on whether claims under the Act can proceed in an arbitrable forum,” the Court said, “the FAA requires the arbitration agreement to be enforced according to its terms.”<sup>91</sup> In *American Express*, the Second Circuit acknowledged that “the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court.”<sup>92</sup> Therefore, it does not pass the strict test laid down by the Supreme Court in *Greenwood* for interpreting congressional intent. Whether the Supreme Court follows such an argument in *Italian Colors*, or takes a different tack, should be known before the current term is over in the Spring of 2013. Oral argument was held on February 27, 2013.<sup>93</sup>

#### IV. WILL CONGRESS AND THE CFPB OVERRIDE *CONCEPCION*?

Regardless of the ultimate outcome of *Italian Colors*, a potential threat to the use of class action waivers in consumer arbitration agreements is action by the CFPB. Several parts of the Dodd-Frank Act affect consumer arbitration, among them Section 1028, which requires the CFPB to “conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.”<sup>94</sup> It further provides that the CFPB “by regulation, may prohibit or impose conditions or limitations on the use of [such] an agreement . . . if the Bureau finds that such a

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87. *Am. Express*, 133 S. Ct. at 594; *In re Am. Express Merchants’ Litig.*, 554 F.3d 300, 302 (2d Cir. 2009), *vacated*, *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

88. 132 S. Ct. 665 (2012); *id.* at 672–73.

89. *Id.* at 669.

90. *Id.* at 675.

91. *Id.*

92. *In re Am. Express Merchants’ Litig.*, 667 F.3d 204, 213 n.5 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012).

93. *Am. Express*, 133 S. Ct. at 594.

94. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, §1028, 124 Stat. 1376, 2003–05 (2010).

prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”<sup>95</sup>

On April 24, 2012, the CFPB announced that it had initiated its study of consumer arbitration.<sup>96</sup> It submitted to the Federal Register for publication a “Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements.”<sup>97</sup> The CFPB described the Request as “a preliminary step in undertaking the study.”<sup>98</sup>

The Request asked the public to submit comments on or before June 23, 2012, on four main topics dealing with the scope, methodology and data sources of the study: (1) the prevalence of pre-dispute arbitration agreements in consumer financial services products (other than credit card agreements, on which the CFPB already has data); (2) claims brought by consumers against financial services companies in arbitration; (3) claims brought by financial services companies against consumers in arbitration; and (4) the impact of pre-dispute arbitration agreements on consumers outside particular arbitral proceedings.<sup>99</sup>

The Request stated that comments were to be limited to the appropriate scope of the study, as well as appropriate methods and sources of data for conducting the study.<sup>100</sup> It further stated that the CFPB was not seeking comments at this time on whether it should exercise its rulemaking authority or whether any regulations would serve to protect consumers or be in the public interest.<sup>101</sup>

On June 22, 2012, your authors submitted extensive comments on behalf of the American Bankers Association, the Consumer Bankers Association and The Financial Roundtable.<sup>102</sup> Many of the companies that comprise those organizations have arbitration provisions in their consumer contracts and have found arbitration to be an efficient and cost-effective manner of resolving disputes and maintain customer goodwill.<sup>103</sup> They believe that arbitration offers consumers and companies greater benefits than either individual or class action litigation, and that those benefits — which include streamlined proceedings, informality, reduced cost and

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95. *Id.*

96. Press Release, Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Launches Inquiry into Arbitration Clauses (Apr. 24, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>.

97. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25,148, 25,149–50 (Apr. 27, 2012).

98. *Id.*

99. *Id.* at 25,149.

100. *Id.*

101. *Id.*

102. Nessa Feddis et al., *Comments on Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements* (June 22, 2012), available at <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0017-0030> (CFPB Comment Letter 62212, June 26, 2012) [hereinafter *Response*].

103. *Id.* at 2.

## CONSUMER FINANCIAL SERVICES ARBITRATION

speed and ease of access — have never been more important than they are in today's economy.<sup>104</sup>

Our comment letter urged the CFPB to study the benefits that consumers derive from individual arbitration and to compare that to the benefits they derive from *both* individual litigation and *class action* litigation.<sup>105</sup> Although the CFPB's Request did not specifically mention "class actions," they cannot be divorced from an examination of consumer arbitration.<sup>106</sup> In particular, we urged the CFPB to study:

(a) whether class actions provide meaningful benefits to the individual consumers as compared with individual arbitration in terms of outcomes, duration, costs, ease of access and consumer satisfaction;<sup>107</sup>

(b) the costs and impact of class action lawsuits, including frivolous or nuisance class action lawsuits, on consumers, businesses and the courts;<sup>108</sup>

(c) whether class actions are an efficient cost-effective mechanism to ensure compliance with the law given the range of enforcement powers afforded to the Bureau and other state and federal enforcement authorities;<sup>109</sup>

(d) the extent to which class members (as opposed to their lawyers) actually benefit from class actions, as well as the economic impact of class actions on businesses;<sup>110</sup>

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104. *Id.* at 3.

105. *Id.*

106. *Id.* at 4.

107. *Id.* at 8.

108. *Id.*

109. *Id.*

110. Many class action settlements occur not because the lawsuits have merit — indeed, many are nuisance suits — but because of the *in terrorem* threat of costly and drawn-out litigation that class actions pose. And while plaintiffs' lawyers often rake in substantial fees, the individual class member is frequently left with a coupon or a check for a few dollars. *Id.* at 9.



(e) the fact that there is empirical proof that class actions are not necessary for consumers to vindicate their statutory rights;<sup>111</sup>

Year	Truth in Lending Act (TILA) Individual Actions	TILA Class Actions
2002	539 (94% of total)	37 (6% of total)
2003	474 (93% of total)	39 (7% of total)
2004	554 (97% of total)	20 (3% of total)
2005	473 (97% of total)	19 (3% of total)
2006	671 (98% of total)	17 (2% of total)
2007	665 (95% of total)	40 (5% of total)
2008	733 (94% of total)	51 (6% of total)
2009	1,320 (97% of total)	40 (3% of total)
2010	928 (98% of total)	17 (2% of total)
2011	539 (98% of total)	15 (2% of total)

(f) whether the ability of the CFPB and other agencies to handle aggregated small dollar claims is more effective than class actions in deterring corporate misconduct;<sup>112</sup>

(g) whether class actions are not necessary to make consumers aware of the existence of a claim;<sup>113</sup>

(h) to take into account the many types of informal dispute resolution processes — including the error and dispute resolution procedures

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111. According to the LexisNexis CourtLink<sup>®</sup> database, over the past decade, 93% to 98% of all TILA claims brought in the federal courts were brought as individual actions, rather than class actions, even though TILA expressly permits class actions to be brought. *Id.* at 8. That is because TILA permits a successful plaintiff to recover his or her attorneys' fees and costs, and thereby provides an incentive for an attorney to represent the plaintiff in an individual action even in small dollar cases. Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (2006).

112. The CFPB should study the effect of actual and threatened governmental action by the CFPB, the FTC, the Department of Justice and state attorneys general and other enforcement agencies on corporate behavior and whether it reduces the alleged need for class actions to encourage compliance with the law. In addition, the CFPB should study whether the interests of consumers are better protected through actions brought by governmental agencies, as opposed to private class action lawyers, since the former act in the public interest while the latter have an economic stake in the case, and whether governmental agencies do a better job than the private bar at determining and prioritizing which actions should be pursued in order to further the "public interest." *Response, supra* note 102, at 11.

113. The CFPB should study the role played in modern society by the internet and social media in alerting consumers to alleged corporate misconduct. It should examine the impact of internet "gripe sites" frequented by consumers and the capacity of alleged corporate wrongdoing to go "viral" on the internet and become known immediately to consumers. It should also study the extent to which websites and databases maintained by government enforcement agencies (including the CFPB) that encourage consumers to "tell their story" and submit complaints help educate other consumers to particular issues and potential claims. *Id.*

## CONSUMER FINANCIAL SERVICES ARBITRATION

provided by federal and state law, those maintained internally by businesses and those offered by regulatory agencies (including the CFPB) and private organizations (such as the Better Business Bureau);<sup>114</sup>

(i) the extent to which consumers resolve their disputes with businesses through online dispute resolution, which uses technology to facilitate the resolution of disputes between parties;<sup>115</sup>

(j) to take account of the fact that most consumer arbitration agreements in use today contain numerous consumer-friendly features that make individual arbitration a more advantageous forum for resolving consumer disputes than the courts;<sup>116</sup> and

(k) whether consumers, businesses and the courts could benefit from having debt collection disputes resolved in arbitration instead of court.<sup>117</sup>

Our comment letter to the CFPB also emphasized the numerous empirical studies which have concluded that arbitration is more beneficial to consumers than litigation.<sup>118</sup>

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114. In the lives of consumers and in the marketplace, all of these alternative dispute resolution procedures are inextricably intertwined and provide a necessary context for the study of consumer arbitration. *Id.*

115. There are companies and organizations that provide online dispute resolution services both nationally and internationally. Understanding the extent to which consumers resolve disputes through online dispute resolution services will help to place more traditional consumer arbitration services and other alternative dispute resolution procedures in the proper context. Indeed, because online dispute resolution is the only practical way of resolving international consumer disputes, curtailment of consumer arbitration by the CFPB could throw a monkey wrench into the use of online dispute resolution and harm international transactions over the internet. *Id.* at 7.

116. *Id.* at 14.

117. *Id.* at 16.

118. See, e.g., ERNST & YOUNG, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES (2004), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf> (finding that: consumers prevailed more often than businesses in cases that went to an arbitration hearing; consumers obtained favorable results, including settlements, in 79% of reviewed cases; and consumers surveyed were largely satisfied with the arbitration process); HARRIS INTERACTIVE, ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION 5 (2005), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf> (reporting strong satisfaction with arbitration results and process, including speed and simplicity); ABA SECTION OF LITIGATION, TASK FORCE ON A.D.R. EFFECTIVENESS, SURVEY ON ARBITRATION (2003), available at <http://apps.americanbar.org/litigation/taskforces/adr/surveyreport.pdf> (indicating that 78% of trial attorneys find arbitration faster than lawsuits and 86% of trial attorneys find that arbitration costs are equal to or less than lawsuit costs); MICHAEL A. PERINO, REPORT TO THE SECURITIES AND EXCHANGE COMMISSION REGARDING ARBITRATOR CONFLICT DISCLOSURE REQUIREMENTS IN NASD AND NYSE SECURITIES ARBITRATIONS 35 (2002), available at <http://www.sec.gov/pdf/arbconflict.pdf> (finding that 93% of consumers using arbitration find it to be fair); Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, 14 METRO. CORP. COUNSEL 32 (2006) (comparing “win” rates and case durations from disclosed consumer arbitration awards in California with publicly available outcome information from the Bureau of Judicial Statistics on litigated contract cases involving individuals in the seventy-five largest counties in the United States and concluding that (a) consumers

In 2009, the Searle Civil Justice Institute of Northwestern University School of Law released the first in-depth study of consumer arbitrations administered by the AAA.<sup>119</sup> The study, which was based on a review of 301 consumer arbitrations that were closed by award between April and December 2007, reached the following conclusions: (1) The upfront cost of arbitration for consumer claimants is quite low (an average of \$96 for claims less than \$10,000 and \$219 for claims between \$10,000 and \$75,000);<sup>120</sup> (2) AAA consumer arbitration is an expeditious way to resolve disputes (an average of 6.9 months);<sup>121</sup> (3) Consumers won some relief in 53.3% of the cases filed and recovered an average of \$19,255 (52.1% of the amount claimed);<sup>122</sup> (4) No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business;<sup>123</sup> (5) Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was \$14,574;<sup>124</sup> (6) A substantial majority of consumer arbitration clauses (76.6%) fully complied with the AAA Due Process Protocol;<sup>125</sup> (7) AAA's review of arbitration clauses for Protocol compliance was effective (98.2% of the time) at identifying and responding to clauses with Protocol violations;<sup>126</sup> (8) AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses;<sup>127</sup> (9) As a result of AAA's Protocol compliance review, some businesses either waive problematic provisions or revise arbitration clauses to remove provisions that violate the Protocol.<sup>128</sup>

A second study by the same organization, this one involving debt collection, showed that: “[C]onsumers prevailed more often in arbitration than in court . . . .

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who brought arbitration claims against businesses prevailed in 65.5% of cases, while plaintiffs litigating contract claims in court prevailed 61.5% of the time overall, and (b) the median duration for arbitrations was 4.35 months, compared with 19.4 months for court lawsuits); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 48, 63 (1998) (concluding that employees collectively receive 10.4% of their demand in litigation, compared with 18% in arbitration, and that “arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history”).

119. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOLUTION 843, 843 (2010).

120. *Id.* at 845. These amounts are below the levels specified in the AAA fee schedule for low-cost arbitrations and are the result of arbitrators reallocating consumer costs to businesses. AM. ARBITRATION ASS'N, THE AMERICAN ARBITRATION ASSOCIATION (AAA) OFFERS TWO FEE SCHEDULES, available at [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_012009](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_012009) (last accessed Apr. 9, 2013).

121. Drahozal & Zyontz, *supra* note 119, at 845.

122. *Id.* at 845–46.

123. *Id.* at 846.

124. *Id.*

125. Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration 5* (University of Kansas School of Law, Working Paper No. 2011-4, 2011).

126. *Response*, *supra* note 102, at 5.

127. *Id.* In 2007, AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its case load) because the business failed to comply with the Protocol. *Id.*

128. *Id.*

## CONSUMER FINANCIAL SERVICES ARBITRATION

[T]he likelihood of creditors winning in arbitration is less than in court.”<sup>129</sup> The authors further concluded that “nothing in our study provides any evidence of biased outcomes in arbitration.”<sup>130</sup>

The CFPB has not announced whether it will permit further public input in its arbitration study or when the study will be completed.

### V. CONCLUSION

*Concepcion*'s validation of class action waivers in consumer arbitration agreements was a landmark ruling, but may not have been the last word on the subject. Observers on both sides of the class action waiver issue are eagerly awaiting the Supreme Court's forthcoming decision in *American Express Co. v. Italian Colors Restaurant* and the CFPB's release of its arbitration study.

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129. Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 80 (2011).

130. *Id.* at 83; see also Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051 (2009) (study based upon an analysis of data derived from debt collection arbitrations commenced by creditors concluded that “the consumer arbitration process provides a more pro-consumer environment for claims adjudication than does the traditional court system”).