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MAKING THE WITHDRAWAL: THE EFFECT *AT&T MOBILITY V. CONCEPCION* WILL HAVE ON STATE LAWS SIMILAR TO CALIFORNIA'S *DISCOVER BANK* RULE

Zachary R. Brecheisen*

I. INTRODUCTION

The Supreme Court's holding in *AT&T Mobility v. Concepcion* has had a profound effect on the law of arbitration in the United States. Before *AT&T Mobility*, many state and federal courts had routinely held as unenforceable adhesive arbitration agreements containing class action waivers. In one fell swoop, the Supreme Court has upended the conventional thinking on contract unconscionability rules and placed a target over a multitude of state laws that resemble California's Discover Bank rule challenging the Federal Arbitration Act's (FAA) jurisdiction over class-wide arbitration waivers.

State and federal courts are still sorting out *AT&T Mobility*'s preemptive effect on state laws governing the unconscionability of class-wide waivers in arbitration clauses. Since many states have adopted different degrees and adaptations of the *Discover Bank* rule at issue in *AT&T Mobility*, the holding will likely force courts to address each state's rule on an individual state-by-state basis. Several federal courts have already applied *AT&T Mobility*, holding that the FAA preempts all state laws similar to *Discover Bank*. These cases have shown federal courts' willingness to broadly construe *AT&T Mobility* to preempt state laws which rely primarily on public policy rationale to find class arbitration waivers unconscionable.

This Comment will survey state unconscionability laws barring class-wide arbitration waivers and analyze (A) which laws the FAA has already preempted, (B) which laws are likely to be preempted upon challenge, and (C) the possibility that some state laws may remain outside the scope of the FAA.

II. BACKGROUND

In 2005, the California Supreme Court in *Discover Bank* addressed the unconscionability of class-wide arbitration waivers in contracts of adhesion.¹ The case involved a consumer who challenged the validity of the arbitration clause in his standard credit card agreement.² Specifically, plaintiff argued that the class action waiver rendered the arbitral clause unconscionable and thus unenforceable under California law.³

The California Supreme Court agreed with plaintiff, articulating the three-part "*Discover Bank* rule." Accordingly, class action waivers are unconscionable when: (1) the waiver is found in a consumer contract of adhesion drafted by a party with superior bargaining power; (2) the

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¹ *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005).

² *Id.*

³ *Id.* at 1104.

disputes between the parties predictably involve small amounts of damages; and (3) the party with superior bargaining power is alleged to have carried out a scheme to deliberately cheat large numbers of consumers out of individually small claims of money.⁴ The court found that the class-action waiver at issue satisfied all three elements and thus held the contract was unenforceable. In its holding, the court emphasized the crucial importance of having class procedures available to consumer to effectively prosecute small-dollar claims.⁵ The court reasoned that to hold otherwise would allow Discover Bank to escape “responsibility for [its] own fraud, or willful injury to the person or property of another.”⁶

Last year, in *AT&T Mobility*, the U.S. Supreme Court addressed whether California’s *Discover Bank* rule directly conflicted with the FAA or whether it was permissible under the “savings provision” of FAA § 2.⁷ Specifically, FAA § 2 allows states to invalidate arbitration agreements on “grounds as exist at law or in equity for the revocation of any contract.”⁸ The savings provision therefore allows a court to strike down arbitration agreements under “generally applicable contract defenses, such as fraud, duress, or unconscionability.”⁹ In the context of class-wide arbitration provisions, however, the Supreme Court noted that the savings provision cannot be so broadly applied such that the exception would eventually overwhelm the FAA’s general rule favoring enforceable arbitration.¹⁰

The Court viewed the *Discover Bank* rule as essentially a general requirement that class-wide arbitration always be available to consumers bound by arbitration contracts.¹¹ The majority was particularly concerned with how the three prongs of the *Discover Bank* rule were almost universally applicable to all consumer contracts, effectively rendering its applicability almost limitless.¹² Justice Scalia’s majority opinion dismissed the so-called “limits” of the *Discover Bank* rule and implied the rule was not actually an “application of [the] unconscionability doctrine ... [but instead a] state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases, upon the mere *ex post* demand by any consumer.”¹³

After a lengthy critique of class-wide arbitration, the Court held that California’s broad *Discover Bank* rule was outside the scope of the savings provision in FAA § 2 and the rule was therefore preempted by the FAA.¹⁴ The Court emphasized that the savings provision does not “preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives” in enforcing agreements to arbitrate as written.¹⁵ Although the *Discover Bank* unconscionability rule applied to all contract terms, its application had a disproportionate impact

⁴ *Id.* at 1110.

⁵ *Id.* at 1108–09 (quoting *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 38 (Cal. 2000)).

⁶ *Id.* (quoting CAL. CIV. CODE § 1668 (2011)).

⁷ *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); Federal Arbitration Act, 9 U.S.C. § 2 (2006).

⁸ 9 U.S.C. § 2.

⁹ *AT&T Mobility*, 131 S. Ct. at 1746.

¹⁰ *Id.* at 1748 (“In other words, the act cannot be held to destroy itself.”).

¹¹ *Id.* at 1750 (“Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.”).

¹² *Id.* (“The rule is limited to adhesion contracts ... but the times in which consumer contracts were anything other than adhesive are long past The [requirement of predictably small damages], however, is toothless and malleable ... and the [requirement of an alleged scheme to cheat consumers] has no limiting effect, as all that is required is an allegation.”).

¹³ *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011) (citing *AT&T Mobility*, 131 S. Ct. at 1750).

¹⁴ *AT&T Mobility*, 131 S. Ct. at 1753.

¹⁵ *Id.* at 1748.

on arbitration provisions.¹⁶ The *Discover Bank* rule, therefore, “[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” under the FAA.¹⁷ Stated more broadly, the Supreme Court envisioned the FAA preempting state laws that rely on public policy grounds to allow a consumer to demand class-wide arbitration *ex post*, despite contractually agreeing to submit all disputes to bilateral arbitration.¹⁸

In its holding, the Court roundly rejected the dissent’s argument that class-wide arbitration was “necessary to prosecute small-dollar claims that might otherwise slip through the legal system.”¹⁹ Instead, the Court saw that the FAA’s overriding purpose was to protect bilateral arbitration agreements, prioritizing freedom of contract over any “unrelated” public policy interests inherent to small-dollar claims.²⁰ This language struck directly at the heart of the consumer protection rationale behind *Discover Bank*.²¹

III. DISCUSSION

Despite the Supreme Court’s scathing critique of class-wide arbitration in *AT&T Mobility v. Concepcion*, the concept of class-wide arbitration and its availability remains alive and well. However, state laws requiring the availability of class-wide arbitration—despite consumers having already waived the procedure pursuant to contract—would almost certainly be preempted by the FAA. The status of state laws resembling *Discover Bank* is presently in flux. Some courts have held that the FAA preempts such state laws, while other state laws remain undecided.

A. States Where Courts Have Already Applied *AT&T Mobility v. Concepcion*

Several federal courts have addressed the holding in *AT&T Mobility* when applying the law of states in which class-wide arbitration waivers have been held as unenforceable. The U.S. Courts of Appeals for the Third, Eighth, and Eleventh Circuits have reviewed the state unconscionability rules of New Jersey, Minnesota, and Florida in light of the Court’s decision in *AT&T Mobility*.²² Additionally, federal district courts have reviewed the unconscionability rules

¹⁶ *Id.* at 1747.

¹⁷ *Id.* at 1753.

¹⁸ *Cruz*, 648 F.3d at 1212.

¹⁹ *AT&T Mobility*, 131 S. Ct. at 1753 (citing 131 S. Ct. at 1761 (Breyer, J., dissenting)).

²⁰ *Id.* at 1753; *see also Cruz*, 648 F.3d at 1212.

²¹ The California Court of Appeals has recently sought to circumvent the *AT&T Mobility* holding by using the same public policy rationale of protecting consumers with small-dollar claims to find arbitration clauses containing class waivers, but relying on other pro-defendant provisions. *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19 (Cal. Ct. App. 2011), *review granted and opinion superseded by* 272 P.3d 976 (Cal. 2012).

²² *Litman v. Cellco P’ship*, 655 F.3d 225, 232 (3d Cir. 2011) (rejecting New Jersey’s law that held waiver of class arbitrations are unconscionable); *Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (holding *AT&T Mobility* would bar plaintiffs from bringing an unconscionability argument under Minnesota common law to challenge a class waiver); *Cruz*, 648 F.3d at 1208 (discussing *AT&T Mobility* and its effect on Florida’s unconscionability doctrine).

of Pennsylvania, Washington, and Oregon.²³ As these are some of the first cases to review class-wide arbitration waivers in the wake of *AT&T Mobility*, they are useful to predict how courts may interpret the Supreme Court’s holding when analyzing similar rules in other states. Taken together, these initial cases demonstrate a tendency by federal courts to broadly apply *AT&T Mobility*’s holding to preempt state laws that ban class-action waivers on public policy grounds.

1. *New Jersey*

In *Muhammed v. County Bank of Rehoboth Beach, Del.*, the New Jersey Supreme Court articulated its unconscionability rule when faced with a class-wide arbitration waiver in a consumer contract.²⁴ *Muhammed* involved a payday loan agreement that specifically prohibited class arbitration and class litigation in the event of a dispute.²⁵ The court held that adhesive contracts are unconscionable where (1) they waive a party’s right to a class action in both the arbitration and litigation forums and (2) the “disputes between the contracting parties predictably involve small amounts of damages.”²⁶ The court was particularly sympathetic to the argument that absent class-wide proceedings, “rational consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel was willing to take the case.”²⁷ Echoing the rationale behind *Discover Bank*, the New Jersey Supreme Court found ruling otherwise would serve as a functional exculpation of the drafting party’s wrongful conduct.²⁸

In *Litman v. Cellco Partnership*, the U.S. Court of Appeal for the Third Circuit reviewed New Jersey’s *Muhammed* rule for the first time in light of *AT&T Mobility*.²⁹ Prior to *AT&T Mobility*, the Third Circuit upheld the *Muhammed* rule in *Homa v. American Express Co.* by stressing that *Muhammed* applied to class-action waivers that prevent a party from seeking class proceedings in both arbitration *and* litigation.³⁰ The court originally found that this distinction triggered the savings provision of FAA § 2 because the rule did not expressly target arbitration agreements, but was instead a “generally applicable contract defense.”³¹ The *Homa* distinction was no longer applicable given that the class waiver upheld in *AT&T Mobility* applied to both class arbitration and litigation.³² The Third Circuit abrogated its prior decisions, construing

²³ King v. Advance Am., Nos. 07-237, 07-3142, 2011 WL 3861898, at *6 (E.D. Pa. Aug. 31, 2011) (finding Pennsylvania unconscionability rule banning class waivers preempted by the FAA); Adams v. AT&T Mobility, LLC, 816 F. Supp. 2d 1077, 1088 (W.D. Wash. 2011) (discussing *AT&T Mobility*’s effect on Washington’s *Scott* rule); Willis v. Debt Care, USA, Inc., No. 3:11-cv-430-ST, 2011 WL 7121456, at *6–8 (D. Or. Oct. 24, 2011) (analogizing Oregon’s unconscionability rule banning class waivers to *Discover Bank* rule).

²⁴ Muhammed v. Cty Bank of Rehoboth Beach, Del., 912 A.2d 88, 99 (N.J. 2006).

²⁵ *Id.* at 91–93.

²⁶ *Id.* at 99.

²⁷ *Id.*

²⁸ *Id.* at 100.

²⁹ Litman v. Cellco P’ship, 655 F.3d 225, 232 (3d Cir. 2011).

³⁰ Homa v. Am. Express Co., 558 F.3d 225, 230 (3d Cir. 2009).

³¹ *Id.*

³² AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

AT&T Mobility broadly and holding, in *Litman*, that the FAA preempts the *Muhammed* rule, despite the distinction previously relied upon in *Homa*.³³

2. Florida

Unlike New Jersey, Florida courts did not create a succinct state-wide doctrine on the unconscionability of class-action waivers in arbitration agreements.³⁴ In *McKenzie v. Betts*—Florida’s most recent pre-*AT&T Mobility* case—the plaintiff attacked the validity of a class-action waiver found within a cash advance agreement.³⁵ The *McKenzie* court struck down the class-action waiver on public policy grounds because it precluded consumers from effectively pursuing a civil action against another party to an adhesive contract.³⁶ Specifically, the plaintiff provided sufficient expert testimony to persuade the court that competent attorneys would not represent plaintiffs in individual arbitration proceedings for small-dollar disputes, thus denying consumers a viable option to exercise their protected consumer rights.³⁷

The Eleventh Circuit examined Florida’s unconscionability law post-*AT&T Mobility* in *Cruz v. Cingular Wireless*, which involved a class waiver agreement almost identical to the contract at issue in *AT&T Mobility*.³⁸

The court read *AT&T Mobility* broadly to mean the FAA would preempt any “state rules mandating the availability of class arbitration based on generalizable characteristics of consumer protection claims.”³⁹

Though the court believed *AT&T Mobility* had broad applicability, the court concluded that the holding would require a case-by-case analysis under the particular circumstances of the class-wide arbitration waiver.⁴⁰ The court did not target any specific Florida law on class-wide waivers, but stated in dicta that the FAA would preempt any Florida law that invalidates class waiver provisions “simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue the potential claims absent class

³³ *Litman*, 655 F.3d at 231 (“We understand the holding of *Concepcion* to be **both broad and clear**”). (emphasis added); see also *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-cv-3338 (NLH)(KMW), 2011 U.S. Dist. LEXIS 66649, at *19-20 (D.N.J. June 22, 2011) (finding *AT&T Mobility* invalidates New Jersey’s *Muhammad* rule).

³⁴ *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1213 n.12 (11th Cir. 2011); *Compare* *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025 (Fla. Dist. Ct. App. 2005) (upholding class waiver because the consumer had all the same substantive rights against AT&T despite the waiver, including attorney’s fees, injunctive relief and damages), *with* *McKenzie v. Betts*, 55 So. 3d 615, 623 (Fla. Dist. Ct. App. 2011) (striking down class waiver provision based on credible evidence that competent counsel would not represent individual plaintiffs in small claims), *and* *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (striking down class waiver provision because it precluded availability of punitive damages, injunctive relief and the ability to pursue class action on claims that are “too small to litigate individually”).

³⁵ *McKenzie*, 55 So. 3d at 618–19.

³⁶ *Id.* at 624.

³⁷ *Id.* at 623.

³⁸ *Cruz*, 648 F.3d at 1210–11.

³⁹ *Id.* at 1212.

⁴⁰ *Id.* at 1205, 1214–15; see *AT&T Mobility LLC v. Fisher*, No. DKC 11-2245, 2011 U.S. Dist. LEXIS 124839, at *20 (D. Md. Oct. 28, 2011).

procedures.”⁴¹ The court’s language strongly echoes Justice Scalia’s *AT&T Mobility* attack on the “unrelated” public policy rationale behind protecting consumers with small-dollar claims.⁴²

3. *Minnesota*

Minnesota did not have a specific rule addressing the unconscionability of class waivers in contracts of adhesion. The Eighth Circuit, however, still applied *AT&T Mobility* to reject the plaintiff’s attempt to apply the unconscionability analysis to a class-wide arbitration waiver.⁴³ In *Green v. SuperShuttle International, Inc.*, the Eighth Circuit upheld the trial court’s decision to compel individual arbitration, despite the plaintiff’s argument that the class-wide waiver provision was an “unfair and inequitable practice” in violation of Minnesota consumer protection laws.⁴⁴ Although Minnesota courts had not articulated an unconscionability rule specifically on class waivers, the court determined that *AT&T Mobility*’s holding would bar any attempts to use Minnesota public policy grounds to strike down class-wide arbitration waivers.⁴⁵

4. *Pennsylvania*

Pennsylvania laid out its rule on the unconscionability of class arbitration waivers in *Thibodeau v. Comcast Corp.*⁴⁶ In *Thibodeau*, the Pennsylvania Superior Court articulated a rule striking down class-wide litigation and arbitration waivers in contracts of adhesion as expressly unconscionable and unenforceable.⁴⁷ To support its broad holding, the court stressed the public policy behind granting consumers the right to proceed as a class on small-dollar claims.⁴⁸ Like the *McKenzie* court in Florida, the Pennsylvania Superior Court was particularly concerned about the lack of qualified representation available to consumers seeking small-dollar recoveries.⁴⁹ The court reasoned that adhesive contracts forcing consumers to litigate or arbitrate individually would effectively immunize defendant corporations from most consumer grievances.⁵⁰

After *AT&T Mobility*, the U.S. District Court for the Eastern District of Pennsylvania looked to *AT&T Mobility*, along with the Third Circuit’s discussion in *Litman*, to hold that the FAA preempted *Thibodeau*.⁵¹ In *King v. Advance America*, the court declined to apply *Thibodeau* and granted defendant’s motion to compel individual arbitration.⁵² The court discerned no significant difference between Pennsylvania’s *Thibodeau* rule, California’s *Discover*

⁴¹ *Cruz*, 648 F.3d at 1213.

⁴² *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

⁴³ *Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

⁴⁴ *Id.*; *see Minnesota Fair Labor Standards Act*, MINN. STAT. §§ 177.21–.35 (2011).

⁴⁵ *Green*, 653 F.3d at 769.

⁴⁶ *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 885 (Pa. Super. Ct. 2006); *see generally Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 864–67 (Pa. Super. Ct. 1991) (endorsing class arbitration as a “fair an efficient method of adjudicating” small-dollar consumer claims).

⁴⁷ *Thibodeau*, 912 A.2d at 886.

⁴⁸ *Id.* at 884 (“Class action lawsuits are and remain the essential vehicle by which consumers may vindicate their lawful rights.”).

⁴⁹ *Id.* at 885.

⁵⁰ *Id.*

⁵¹ *King v. Advance Am.*, Nos. 07-237, 07-3142, 2011 WL 3861898, at *6 (E.D. Pa. Aug. 31, 2011).

⁵² *Id.*

Bank rule, or New Jersey’s *Muhammed* rule.⁵³ The court also noted that the Third Circuit, in *Litman*, suggested Pennsylvania’s *Thibodeau* rule was even more likely to contravene the FAA than the preempted *Muhammed* rule.⁵⁴ Relying heavily on *Litman*, the court broadly construed *AT&T Mobility* to find the FAA preempted state unconscionability laws that relied on general concepts of public policy.⁵⁵

5. Washington

Washington originally announced its rule on the unconscionability of class waivers in 2007 when the Washington Supreme Court refused to enforce such a waiver in a cellular service provider agreement.⁵⁶ In *Scott v. Cingular Wireless*, the court found that class-wide arbitration waivers effectively deny customers a forum in which to vindicate their protected consumer rights.⁵⁷ The court articulated a rule that declared class-wide waivers as unconscionable where: (1) many customers of the same company have the same or similar complaint; and (2) each consumer is damaged a small amount.⁵⁸ In articulating the rationale for the rule, the Court relied heavily upon the reasons used by the California Supreme Court in crafting the *Discover Bank* rule.⁵⁹

Due to the close relationship between the *Scott* and *Discover Bank* rules, U.S. district courts that have evaluated Washington’s unconscionability rule, post-*AT&T Mobility*, have found little distinction between the two.⁶⁰ The U.S. District Court for the Northern District of California, in *In re Apple*, found that the FAA preempted the *Scott* rule particularly because that rule was “based on *Discover Bank*.”⁶¹ The U.S. District Court for the Western District of Washington similarly agreed that *AT&T Mobility* dismissed the public policy concerns over small-dollar legal proceedings that motivated both the *Discover Bank* and *Scott* decisions.⁶²

6. Oregon

The Oregon Court of Appeals briefly articulated the unconscionability of class waivers in arbitration clauses in *Vasquez-Lopez v. Beneficial Oregon Inc.*, where an arbitration rider on a home loan agreement waived the borrower’s right to proceed as a class in any disputes against the creditors.⁶³ In finding the waiver unconscionable and unenforceable, the court discussed the waiver’s impact on consumers bringing small-dollar claims.⁶⁴ The court stated that “the class

⁵³ *Id.*

⁵⁴ *Id.* (citing *Litman v. Cellco P’ship*, 655 F.3d 225, 229 n.5 (3d Cir. 2011)).

⁵⁵ *Id.*

⁵⁶ *Scott v. Cingular Wireless*, 161 P.3d 1000, 1009 (Wash. 2007) (en banc).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1006–07 (noting class arbitration is “often the only meaningful type of redress available for small but widespread injuries” and denying that procedure exculpates defendant’s fraudulent conduct).

⁶⁰ *Adams v. AT&T Mobility, LLC*, 816 F. Supp. 2d 1077, 1088 (W.D. Wash. 2011); *In re Apple*, No. C-10-02553 RMW, 2011 U.S. Dist. LEXIS 78276, at *13 (N.D. Cal. Jul. 19, 2011).

⁶¹ *In re Apple*, 2011 U.S. Dist. LEXIS 78276, at *13 (applying Washington law).

⁶² *Adams*, 816 F. Supp. 2d at 1088.

⁶³ *Vasquez-Lopez v. Beneficial Or. Inc.*, 152 P.3d 940, 949–51 (Or. Ct. App. 2007).

⁶⁴ *Id.* at 951.

action ban is unilateral in effect and, more significantly, it gives the defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud."⁶⁵ While not wholly adopting the *Discover Bank* rule, the Court noted that it agreed with the California Supreme Court in *Discover Bank* that "class-wide arbitrations are workable and appropriate in some cases."⁶⁶

The U.S. District Court for the District of Oregon reviewed the *Vasquez-Lopez* holding in light of *AT&T Mobility* to find that the FAA preempted the decision in *Willis v. Debt Care, USA, Inc.*⁶⁷ In *Willis*, the court stated that *Vasquez-Lopez* rule was the "functional equivalent of the *Discover Card* [sic] rule by mandating the availability of class arbitration for consumer protection claims."⁶⁸ This close relation meant that, despite the class action procedure being the only way the *Willis*'s could effectively recover damages in the case, the FAA preempted the *Vasquez-Lopez* rule.⁶⁹

B. States That Rule Class-wide Arbitration Waivers Unconscionable But Have Yet to Consider *AT&T Mobility*.

The majority of states that declare class-wide arbitration waivers unconscionable have yet to address the issue through case law. To a large extent, the rules articulated by these states rely on some modicum of public policy rationale to justify striking down class-wide arbitration waivers. Common elements include the lack of competent representation for individuals attempting to dispute small-dollar claims, the adhesive nature of the contract, and the desire to hold corporations accountable for potentially fraudulent action. If *AT&T Mobility* is read and applied broadly, as it has been thus far by federal courts, state laws relying on these elements would receive the same harsh scrutiny as the *Discover Bank* rule and would likely not be spared by the FAA § 2 savings provision. Further, the FAA would likely also preempt rules in states such as New Jersey that attempted to walk the fine line by applying unconscionability rules equally to both arbitration and litigation class waivers.

1. States in the First Circuit

In Massachusetts, the U.S. Court of Appeals for the First Circuit, in *Kristian v. Comcast Corp.*, applied Massachusetts state unconscionability principles to a class waiver.⁷⁰ The plaintiffs in *Kristian* sued Comcast under state and federal antitrust laws. The plaintiffs attacked the validity of the class action waiver when their suit was moved to mandatory arbitration as required under the cable television service agreement.⁷¹

The court's discussion focused primarily on the unconscionability of the class action waiver as it related to the rights granted by federal antitrust statutes. The court, however, noted an unconscionability analysis under Massachusetts state law would be analogous to its application of

⁶⁵ *Id.*

⁶⁶ *Id.* at 950 (quoting *Discover Bank*, 113 P.3d at 1116.).

⁶⁷ *Willis v. Debt Care, USA, Inc.*, No. 3:11-cv-430-ST, 2011 WL 7121456, at *6-8 (D. Or. Oct. 24, 2011).

⁶⁸ *Id.* at *6.

⁶⁹ *Id.* at *8.

⁷⁰ *Kristian v. Comcast Corp.*, 446 F.3d 25, 63-64 (1st Cir. 2006).

⁷¹ *Id.* at 37.

federal antitrust laws.⁷² Indeed, part of the rationale for striking down the class waiver was that it prevented the plaintiffs from vindicating their state and federally-granted *statutory rights*.⁷³ In finding the class waiver unconscionable, the court emphasized the difficulty an individual plaintiff would face when seeking to arbitrate a dispute involving small-dollar claims.⁷⁴ The relatively low damages available to an individual plaintiff, when compared with the weighty financial burden required to pursue a claim, would be “so prohibitive as to deter the bringing of claims” at all.⁷⁵ The court further found that the unconscionability of the class waiver, particularly in an antitrust context, made the general mandatory arbitration provision unenforceable.⁷⁶

Although the *Kristian* case centers primarily on the statutory antitrust rights of consumers, the rule articulated by the First Circuit arguably still applies to Massachusetts’s unconscionability law. The court relied heavily on the public policy grounds of balancing the cost of arbitration with the potential recovery in small-dollar claims in its decision to find the waiver unconscionable under Massachusetts law. This rationale is analogous to that articulated by the California Supreme Court in *Discover Bank*, which the U.S. Supreme Court roundly rejected in *AT&T Mobility*. As such, the *Kristian* holding, to the extent it is based on Massachusetts law, would likely be preempted by the FAA despite its additional reliance on federal antitrust law.⁷⁷

2. States in the Fourth Circuit

The North Carolina Supreme Court held class-wide waivers in arbitration clauses unconscionable in the plurality decision in *Tillman v. Commercial Credit Loans, Inc.*⁷⁸ In *Tillman*, the Court noted that the class waiver provision in an adhesive mortgage contract could be a factor evaluated by a court within the greater unconscionability analysis.⁷⁹ The Court based its rationale for the holding on the unavailability of effective counsel in small-dollar individual arbitrations, as well as the lopsided benefit a class waiver gives to lenders.⁸⁰

The *Tillman* rule could potentially be distinguished from similar rules in other states. In particular, the court noted that the class waiver, taken alone, may not be sufficient to render the arbitration clause in an adhesive contract unconscionable.⁸¹ In holding the arbitration clause

⁷² *Id.* at 63–64 (“As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis.”); *see also* Skirchak v. Dynamics Reas. Corp., 432 F. Supp. 2d 175, 181 (D. Mass. 2006) (finding class arbitration waiver unconscionable under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2011)).

⁷³ *Kristian*, 446 F.3d at 29.

⁷⁴ *Id.* at 59.

⁷⁵ *Id.* at 55.

⁷⁶ *Id.* at 59.

⁷⁷ The U.S. Court of Appeals for the Second Circuit has recently sought to confine *AT&T Mobility* to rules that do not rely on federal statutory rights to require the availability of class arbitration. *In re Am. Express Merchs. Litig.*, 667 F.3d 204, 213–14 (2d Cir. 2012) (distinguishing *AT&T Mobility* as pertaining only to judicially-crafted unconscionability rules disfavoring class action waivers and not applicable to cases relying on federal, statute-based, antitrust rights).

⁷⁸ *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

unconscionable, the Court also based its decision on the presence of a “loser-pays all” provision and the right for a loser to seek expensive, *de novo* appeal from the initial arbitration decision.⁸² A court evaluating whether the FAA preempts *Tillman* may note this distinction from *Discover Bank*. Given *AT&T Mobility*’s hostility towards the public policy rationale articulated in *Tillman*, however, this distinction may not be sufficient to save *Tillman* from FAA preemption.⁸³

West Virginia was an early proponent of striking class-wide arbitration waivers, as established in *State ex rel. Dunlap v. Berger*.⁸⁴ In *Berger*, the West Virginia Supreme Court addressed a class-wide arbitration waiver in a purchasing and finance agreement between jewelry distributors and their customers.⁸⁵ Along with a prohibition on punitive damages, the Court declared the class waiver in the contract of adhesion to be unconscionable.⁸⁶ The Court emphasized the small recovery amount involved in the dispute and its effect on a customer’s ability to find effective counsel to prosecute their claim.⁸⁷ Without the ability to pursue class actions, the Court reasoned that aggrieved customers would be unable to vindicate their protected consumer rights.⁸⁸ The rule articulated by the West Virginia Supreme Court in *Berger*, along with the public policy emphasis behind it, would seem to be analogous to the *Discover Bank* rule, and thus squarely within the preemptive reach of the FAA.⁸⁹

3. States in the Sixth Circuit

Michigan originally recognized an inherent unconscionability in class waivers in *Lozada v. Dale Baker Oldsmobile, Inc.*⁹⁰ Although the U.S. District Court for the Western District of Michigan primarily evaluated the class waiver at issue under federal statutory requirements—the court also found that class waivers were unconscionable under Michigan consumer protection laws.⁹¹ The court focused on Congress’s intent to protect borrowers in the federal Truth in Lending Act (TILA), holding that the statute required the availability of class arbitration.⁹² The court also stated that the class action waiver in the arbitration clause would also violate the Michigan Consumer Protection Act, which expressly permits class actions for aggrieved consumers.⁹³ Since the court’s analysis under Michigan law is devoid of any public policy rationale and is based on express statutory authorization, the holding may not be subject to FAA preemption in the same manner as *Discover Bank*. The absence of any specific unconscionability

⁸² *Id.* at 372.

⁸³ The U.S. District Court for the Western District of North Carolina discussed *Tillman*’s holding in the post-*AT&T Mobility* era, however, the Court did not address class arbitration waivers as a factor of substantive unconscionability, instead preferring to end its analysis after finding procedural unconscionability. *Klopper v. Queens Gap Mountain, LLC*, No. 1:10cv155, 2011 U.S. Dist. LEXIS 105097, at *16–22 (W.D.N.C. 2011).

⁸⁴ *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 280 (W. Va. 2002).

⁸⁵ *Id.* at 268.

⁸⁶ *Id.* at 280.

⁸⁷ *Id.* at 278–79.

⁸⁸ *Id.* at 279.

⁸⁹ Compare *id.* at 278–80, with *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

⁹⁰ *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000).

⁹¹ *Id.* (citing the Michigan Consumer Protection Act, MICH. COMP. LAWS § 445.911 (2011)).

⁹² *Id.* at 1104–05 (citing *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 270 (D. Del. 1999) (holding that inherent conflict existed between TILA right to class action and arbitration clause and refusing to enforce)).

⁹³ *Id.* at 1105; see MICH. COMP. LAWS § 445.911(3).

test under Michigan public policy would lead to difficulty for a court reviewing *AT&T Mobility*'s effect on *Lozada*.

The Kentucky Supreme Court held the class action waiver in an arbitration clause unconscionable in 2010 in *Schnuerle v. Insight Communications Co.*⁹⁴ The *Schnuerle* case involved an internet service agreement with an arbitration clause that waived class actions in both litigation and arbitration.⁹⁵ The court found the service agreement was a contract of adhesion and articulated the economic need to allow customers to proceed in class actions over small-dollar disputes (whether that be arbitration or litigation).⁹⁶ The court was also persuaded by other states that barred class action waivers, including California in *Discover Bank*, and held that “the absolute ban upon class action litigation is unenforceable in this case, and in like cases, as exculpatory, substantively unconscionable, and contrary to public policy.”⁹⁷

The Kentucky Supreme Court stripped the class action waiver provision from the contract, but the court upheld the rest of the arbitration provision.⁹⁸ Strong state interests favoring arbitration compelled the court to remand the case for binding arbitration, which could proceed on a class-wide basis.⁹⁹ Although the court's action distinguishes this case from *Discover Bank*, it likely will not save the court's rule from preemption by the FAA. The court's holding allowed the general arbitration provision to survive, but it had the effect of compelling class-wide arbitration on the parties. This action, and the public policy grounds upon which it was based, still conflicts with the U.S. Supreme Court's criticism of laws which require class-wide arbitration as an *ex post* option for small-dollar plaintiffs.

The Ohio Court of Appeals addressed class arbitration waivers under the state's consumer protection laws in *Schwartz v. Alltel Corp.*¹⁰⁰ In *Schwartz*, the plaintiff-consumer signed a cellular service contract containing a class arbitration waiver and a waiver of attorney fees.¹⁰¹ The court found the cellular agreement was a contract of adhesion, and that the combination of the class waiver and the attorney fee waiver was substantively unconscionable.¹⁰² In particular, the court believed that the class waiver “directly hinder[ed] the consumer protection purposes of the” Ohio Consumer Sales Protection Act.¹⁰³ The court reasoned that requiring individual arbitration was not cost-effective and would be of little use in ending abusive corporate practices like the one at issue in the litigation.¹⁰⁴

The *Schwartz* opinion is short on the court's rationale for finding the unconscionability of the class waiver. The Court's discussion of the inefficient cost of pursuing individual arbitration, however, indicates a concern for the ability of consumers to bring suits for small-dollar claims. As the U.S. Supreme Court articulated in *AT&T Mobility*, a consumer contract of adhesion involving small-dollar claims would almost always trigger the *Discover Bank* rule requiring class-

⁹⁴ *Schnuerle v. Insight*, Nos. 2008-SC-000789-DG, 2009-SC-000390-DG, 2010 WL 5129850, at *6 (Ky. Dec. 16, 2010), *reh'g granted*, ___S.W.3d___ (Aug. 25, 2011).

⁹⁵ *Id.* at *1.

⁹⁶ *Id.* at *5.

⁹⁷ *Schnuerle*, 2010 WL 5129850, at *6–7.

⁹⁸ *Id.* at *8.

⁹⁹ *Id.* at *11.

¹⁰⁰ *Schwartz v. Alltel Corp.*, No. 86810, 2006 WL 2243649, at *1 (Ohio App. 2006); *see* Ohio Consumer Sales Protection Act, OHIO REV. CODE ANN. §§ 1345.01–.99 (West 2011).

¹⁰¹ *Schwartz*, 2006 WL 2243649, at *2.

¹⁰² *Id.* at *4–5.

¹⁰³ *Id.* at *4.

¹⁰⁴ *Id.* at *5 (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980)).

wide arbitration.¹⁰⁵ Similarly, the *Schwartz* holding would have the same effect of providing de facto class arbitration in almost all consumer disputes. Although the holding did not state that the class waiver, on its own, would be unconscionable—similar to North Carolina’s *Tillman* holding—when viewed after *AT&T Mobility*, the FAA would likely preempt *Schwartz*.

4. *States in the Seventh Circuit*

The Illinois Supreme Court established its rule for the unconscionability of class waivers in *Kinkel v. Cingular Wireless LLC* when it reviewed the arbitration clause of a cellular service agreement.¹⁰⁶ The court determined that the overall arbitration provision was unconscionable and unenforceable because: (1) it was a contract of adhesion; (2) it waived a consumer’s right to class actions; (3) it did not reveal the cost of arbitration; and (4) it contained a liquidated damages clause (the penalty at issue over early termination fees).¹⁰⁷ The court relied heavily on the plaintiff’s argument that the cost of arbitrating her small-dollar claim against Cingular individually would generally be greater than any recovery she could receive if she won in arbitration.¹⁰⁸ Additionally, the court believed that the service agreement’s failure to disclose the costs for a consumer to pursue the arbitration would further preclude customers from vindicating their rights.¹⁰⁹ Like the Kentucky Supreme Court in *Schnuerle*, the Illinois Supreme Court stripped the offending class waiver provision from the contract and enforced the remainder of the arbitration agreement.¹¹⁰

Like *Tillman* and *Schwartz*, the *Kinkel* case singled out class waiver as one of several elements that made the arbitration clause unconscionable. Although the Illinois Supreme Court may not have considered the class waiver, in and of itself, unconscionable, the court’s emphasis on the need for class-wide arbitration in small-dollar claims is inherently a public policy argument. *AT&T Mobility* expressly stated that the FAA would preempt state unconscionability rules that were based on matters of “unrelated” public policy that favored plaintiffs in small-dollar claims.¹¹¹

5. *States in the Eighth Circuit*

The Missouri Court of Appeals, in *Whitney v. Alltell Communications, Inc.*, evaluated a class waiver in a cellular phone service agreement and determined that the arbitration clause’s class waiver was unconscionable because it restricted a consumer’s rights under the Missouri Merchandising Practices Act.¹¹² In its holding, the court considered the class waiver as one

¹⁰⁵ *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

¹⁰⁶ *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006).

¹⁰⁷ *Id.* at 274–75.

¹⁰⁸ *Id.* at 268.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 278.

¹¹¹ *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). In *Valentine v. Wideopen West Fin., LLC*, No. 09C07653, 2012 WL 1021809, at *4–6 (N.D. Ill. Mar. 26, 2012), the court examined plaintiff’s unconscionability arguments in light of *AT&T Mobility*, but upheld the arbitration agreement containing a class waiver because plaintiff had failed to present sufficient evidence to show the denial of class procedures would be prohibitive.

¹¹² *Whitney v. Alltell Commc’ns, Inc.*, 173 S.W.3d 300, 313–14 (Mo. Ct. App. 2005) (citing MO. REV. STAT. §§ 407.010–.130 (2011)).

factor, in addition to provisions that limited the defendant's liability and required plaintiff to bear the costs of arbitration up-front, in holding the arbitration clause unconscionable.¹¹³ When analyzing the combined effect of these restrictive contractual provisions, the Court was particularly concerned with the prohibitive effect they would have on small-dollar claims.¹¹⁴ The Court stated that "the costs would be so prohibitively expensive as to preclude, for all practical purposes, an aggrieved party from seeking redress for a violation of the Merchandising Practices Act."¹¹⁵

The Missouri Court of Appeals later evaluated the unconscionability of class waivers in adhesive contracts head-on in *Woods v. QC Financial Services, Inc.*¹¹⁶ The *Woods* case dealt with a payday loan agreement containing a class arbitration waiver.¹¹⁷ The Court of Appeals looked to both New Jersey's *Muhammad* rule and California's *Discover Bank* rule to expressly hold that class waivers in contracts of adhesion are unconscionable.¹¹⁸ In doing so, the Court's holding adopted the three-pronged *Discover Bank* rule as applicable to Missouri contract law.¹¹⁹

The Missouri Supreme Court adopted the *Whitney* and *Woods* holdings in *Brewer v. Missouri Title Loans, Inc.* in 2010, striking the class waiver in the arbitration clause as unconscionable and ordering class arbitration to proceed.¹²⁰ The defendant in *Brewer* requested certiorari from the U.S. Supreme Court, which promptly remanded the case back to the Missouri Supreme Court to be decided in light of *AT&T Mobility*.¹²¹ Based on Missouri's wholesale adoption of the *Discover Bank* rule in *Woods*, the Missouri Supreme Court will almost certainly have to reverse its holding in *Brewer* and order arbitration with the class waiver intact.¹²²

6. States in the Ninth Circuit

In *Cooper v. QC Financial Services, Inc.*, the U.S. District Court for the District of Arizona applied Arizona law to hold a class waiver in a payday loan agreement unconscionable.¹²³ The customer alleged QC Financial assessed "fees" on her payday loan, which eventually accrued to almost three times the principal of her loan.¹²⁴ In a lengthy discussion of the need for class actions in both litigation and arbitration, the court emphasized the necessity of class arbitration for disputes involving small recoveries.¹²⁵ In particular, the court

¹¹³ *Id.* at 309–10.

¹¹⁴ *Id.* at 313.

¹¹⁵ *Id.* at 314.

¹¹⁶ *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 99 (Mo. Ct. App. 2008).

¹¹⁷ *Id.* at 92–93.

¹¹⁸ *Id.* at 99.

¹¹⁹ *Id.*

¹²⁰ *Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 23–24 (Mo. 2010) (en banc), *cert. granted, vacated, remanded* by 131 S. Ct. 2875 (2011), *aff'd on other grounds*, No. SC90647, 2012 WL 716878, at *7–10 (Mo. Mar. 6, 2012) (en banc).

¹²¹ *Brewer*, 131 S. Ct. 2875.

¹²² Just recently, the Missouri Supreme Court reconsidered the case and reaffirmed its holding that the arbitration clause as a whole was unconscionable, however, it reversed its decision to strip the class waiver from the clause. *Brewer*, 2012 WL 716878, at *10. This recent decision demonstrates a state court's willingness to apply *AT&T Mobility* narrowly to uphold class waiver provisions, yet still reach the same finding of unconscionability through alternate provisions in the arbitration clause.

¹²³ *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1286–90 (D. Ariz. 2007).

¹²⁴ *Id.* at 1270.

¹²⁵ *Id.* at 1286.

believed the class waiver in the arbitration clause made it almost impossible for a customer to find an attorney for small-dollar claims, thus effectively “immun[izing] a defendant from scrutiny and accountability for its business practices.”¹²⁶ The court looked to the *Discover Bank* rule in neighboring California and found the situation analogous to the case *sub judice*. Persuaded by *Discover Bank*’s rationale, the court wholly adopted the *Discover Bank* rule and held the class waiver unconscionable and unenforceable.¹²⁷ Arizona’s wholesale adoption of *Discover Bank* means that the FAA would almost certainly preempt *Cooper*’s holding in Arizona.

The Nevada Supreme Court adopted a rule barring class waivers in arbitration clauses just before *AT&T Mobility* in *Picardi v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*.¹²⁸ In *Picardi*, the court found that the class waiver in a car sales contract was unconscionable as against state public policy favoring the availability of class actions.¹²⁹ The court looked to other jurisdictions that bar class waivers, including California, and found that the strong public policy of Nevada supported allowing class procedures for individual consumers with valid but small claims.¹³⁰ Since the *Picardi* court relies heavily on rules in other states that have already been preempted by the FAA in the wake of *AT&T Mobility*, it is likely that the *Picardi* rule would suffer the same fate if challenged.

7. States in the Tenth Circuit

The New Mexico Supreme Court established a decidedly pro-consumer rule when it evaluated the unconscionability of class waivers in *Fiser v. Dell Computer Corp.*, where the plaintiff agreed to the Dell website’s “terms and conditions” when he purchased a computer online.¹³¹ The “terms and conditions” included a binding class arbitration waiver, which the plaintiff challenged in his claim that Dell engaged in false advertising.¹³² The New Mexico Supreme Court delivered a lengthy discussion of the state’s strong public policy favoring the availability of class actions for injured consumers, particularly in small-dollar claims.¹³³ The court stated that “the class action functions as a gatekeeper to relief when the cost of bringing a single claim is greater than the damages alleged” in small-dollar disputes.¹³⁴ The court then invalidated the class waiver as substantively unconscionable and against New Mexico public policy.¹³⁵ Unlike similar rules articulated by other states, the court believed that class waivers were so “overwhelmingly” unconscionable that the court did not even need to determine whether the “terms and conditions” at issue was considered an adhesive contract.¹³⁶

The New Mexico Supreme Court’s rule in *Fiser* was tantamount to a blanket requirement for class-wide arbitration in any consumer contract that could involve small-dollar claims. This

¹²⁶ *Id.* at 1288–89 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005)).

¹²⁷ *Id.* at 1290.

¹²⁸ *Picardi v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 251 P.3d 723, 728 (Nev. 2011).

¹²⁹ *Id.* at 727.

¹³⁰ *Id.* at 727–28.

¹³¹ *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008); *see also Felts v. CLK Mgmt., Inc.*, 254 P.3d 124, 139 (N.M. Ct. App. 2011) (final case before *AT&T Mobility* to apply use *Fiser* to strike class action waiver in arbitration clause).

¹³² *Id.*

¹³³ *Id.* at 1219 (citing numerous New Mexico consumer protection statutes that grant class action relief).

¹³⁴ *Fiser*, 188 P.3d at 1220.

¹³⁵ *Id.* at 1221.

¹³⁶ *Id.*

rule goes much further than *Discover Bank*, which provides three prongs that must be met, one of which is that the contract be adhesive.¹³⁷ Given the U.S. Supreme Court's aversion to the relatively more narrowly-tailored *Discover Bank* rule, the broader *Fiser* rule would almost certainly fall prey to FAA preemption under *AT&T Mobility*.

8. *States in the Eleventh Circuit*

The Alabama Supreme Court tackled the unconscionability of class arbitration waivers early in 2002 in *Leonard v. Terminix International Co., L.P.*¹³⁸ In *Leonard*, the plaintiffs brought suit against Terminix for charging them yearly renewal fees while failing to conduct the yearly inspections in violation of both the agreement and Alabama consumer statutes.¹³⁹ In examining the class waiver in the arbitration clause, the court emphasized the disproportionately small recovery available to a plaintiff prosecuting small-dollar claims when compared to the costs of arbitration.¹⁴⁰ The court also highlighted how this disproportionate balance led to a dearth of attorneys who would be willing to represent a plaintiff in an individual arbitration.¹⁴¹ The court found the class waiver was unconscionable because the Terminix agreement was a contract of adhesion, which restricted the plaintiff to a forum where the expense of pursuing a claim far exceeded the amount in controversy.¹⁴² Due to the public policy rationale behind the rule, and the likelihood that it is even more broadly applicable to class waivers than the *Discover Bank* rule, the FAA would likely preempt this rule under *AT&T Mobility*.

IV. CONCLUSION

From the case law to date, federal courts have been very active in using the U.S. Supreme Court's holding in *AT&T Mobility* to strike down state rules against class-wide arbitration bans. The Circuit Courts of Appeals decisions of *Litman* and *Cruz*, in particular, articulate the breadth of the *AT&T Mobility* decision. Since almost all the states that have found class arbitration waivers unconscionable have relied on the same state public policy rationale of *Discover Bank*, it seems that the majority of these state laws would be subject to FAA preemption.

¹³⁷ See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

¹³⁸ *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 538 (Ala. 2002).

¹³⁹ *Id.* at 532; ALA. CODE § 2-28-9 (2011).

¹⁴⁰ *Leonard*, 854 So. 2d at 537 (“the impracticality of pursuing a claim for a small amount of money at a cost in excess of the value of the claim is just as much an obstacle to the wealthiest member of society as it is to a pauper.”).

¹⁴¹ *Id.*

¹⁴² *Id.* at 539.