

2012

The Federal Arbitration Act Preempts a State Law That Renders Unconscionable a Class Arbitration Waiver in a Consumer Adhesion Contract Likely to Involve Disputes Over Small Sums of Money: *AT & T Mobility LLC v. Concepcion*

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The Federal Arbitration Act Preempts a State Law
that Renders Unconscionable a Class Arbitration
Waiver in a Consumer Adhesion Contract Likely to
Involve Disputes over Small Sums of Money: *AT&T
Mobility LLC v. Concepcion*

ALTERNATIVE DISPUTE RESOLUTION—CONTRACTS—
ARBITRATION—UNCONSCIONABILITY—The Supreme Court
of the United States held that the Federal Arbitration Act (“FAA”)
preempts California’s law that a class arbitration waiver is uncon-
scionable if it is found in a consumer adhesion contract wherein
disputes are likely to involve small amounts of damages and
where the party of inferior bargaining power has alleged the de-
frauding of many customers out of small sums of money, because
such a law conflicts with the purposes and objectives of the FAA.

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

I.	THE FACTS OF <i>AT&T MOBILITY</i>	920
II.	THE PROCEDURAL HISTORY OF <i>AT&T MOBILITY</i>	921
III.	<i>AT&T MOBILITY</i> AT THE UNITED STATES SUPREME COURT	922
	A. <i>Issue and Holding on Certiorari</i>	922
	B. <i>Justice Scalia’s Majority Opinion</i>	922
	C. <i>Justice Thomas’s Concurring Opinion</i>	926
	D. <i>Justice Breyer’s Dissenting Opinion</i>	929
IV.	THE HISTORICAL NEXUS OF ARBITRATION, UNCONSCIONABILITY, AND THE CLASS MECHANISM	932
	A. <i>Stolt-Nielsen v. AnimalFeeds International Corp.</i>	933
	B. <i>Discover Bank v. Superior Court</i>	935
	C. <i>The Circuit Split Embodied in the Decisions of the Third and Ninth Circuits</i>	938
V.	HOW JUSTICE SCALIA DEFTLY PREVENTS A PER SE UNCONSCIONABILITY THREAT TO THE FEDERAL ARBITRATION ACT, AN EXAMINATION OF <i>AT&T MOBILITY</i> VIA TWO ALTERNATIVE METHODS OF ANALYSIS, AND WHAT THE FUTURE HOLDS	940

A.	<i>The AT&T-Concepcion Arbitration Clause</i>	942
B.	Discover Bank— <i>Unconscionability Per Se?</i>	944
C.	<i>What’s “Leff” to Discuss?</i>	944
D.	<i>Did the Concepcions Assume the Risk of a Class Arbitration Waiver?</i>	945
E.	<i>What the Future Holds</i>	948

I. THE FACTS OF AT&T MOBILITY

*AT&T Mobility LLC v. Concepcion*¹ addresses the unconscionability of class arbitration waivers in consumer adhesion contracts. Vincent and Liza Concepcion entered into a cellular telephone contract with AT&T Mobility LCC (“AT&T”) in 2002.² Their contract provided for arbitration of all disputes.³ However, the contract required that the Concepcions bring any claims in their individual capacity.⁴ Class-wide arbitration was forbidden.⁵ The contract also permitted AT&T to unilaterally amend the agreement—and the company did make several such amendments to the arbitration clause.⁶ The controlling revised agreement of 2006 required that customers initiate a claim by completing a Notice of Dispute form.⁷ If their claim was not resolved within thirty days, customers could seek arbitration by filing a Demand for Arbitration.⁸ The arbitration provision stipulated that AT&T had to pay the costs of all nonfrivolous claims; that either party could bring its claim in small claims court instead of arbitration; that the arbitrator had discretion to award whatever form of relief he deemed appropriate; and that for disputes involving amounts less than \$10,000, the Concepcions could conduct arbitration by telephone, in person, or by paper submission.⁹ The agreement further required that arbitration take place in the

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

2. *AT&T Mobility*, 131 S. Ct. at 1744.

3. *Id.*

4. *Id.* (citing Petition for Writ of Certiorari at app. C, *AT&T Mobility*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 6617833, at *61a).

5. *See id.* The arbitration provision stipulated that “the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.” *Id.* at 1744 n.2 (quoting Petition for Writ of Certiorari, *supra* note 4).

6. *Id.* at 1744.

7. *AT&T Mobility*, 131 S. Ct. at 1744.

8. *Id.*

9. *Id.*

county of the customer's billing address.¹⁰ The arbitration provision forbade AT&T from requesting that the claimant reimburse AT&T's attorney's fees.¹¹ Finally, if the arbitrator awarded the claimant damages greater than the company's final settlement offer, AT&T had to pay that claimant both a minimum award of \$7,500¹² and double the claimant's attorney's fees.¹³

The Concepcions bought AT&T cellular telephone service that the company marketed as including free cell phones.¹⁴ Accordingly, AT&T did not charge the Concepcions for their phones under the contract.¹⁵ Instead, the company charged the Concepcions a sales tax of \$30.22, based on the retail value of the customers' "free" phones.¹⁶

II. THE PROCEDURAL HISTORY OF *AT&T MOBILITY*

In 2006, the Concepcions brought suit against AT&T in the United States District Court for the Southern District of California.¹⁷ Their suit was consolidated with a class action alleging, *inter alia*, that by requiring the Concepcions to pay sales tax on phones it marketed as "free," AT&T had falsely advertised its services and committed fraud.¹⁸ AT&T filed a motion to compel arbitration pursuant to the contract, and the Concepcions opposed the motion.¹⁹ They argued that the arbitration agreement was unconscionable, because it prohibited class arbitration.²⁰ The district court denied AT&T's motion.²¹ It held that the arbitration clause was unconscionable, based on the California Supreme Court's decision in *Discover Bank v. Superior Court*.²² The Ninth Circuit

10. *Id.*

11. *Id.* at 1744.

12. *AT&T Mobility*, 131 S. Ct. at 1744. In 2009 this amount was increased to \$10,000. *Id.* at 1744 n.3 (citing Brief for Petitioner at 7, *AT&T Mobility*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3017755 at *8).

13. *Id.* at 1744.

14. *Id.*

15. *Id.*

16. *Id.*

17. *AT&T Mobility*, 131 S. Ct. at 1744; *see* *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008).

18. *Id.*

19. *Id.* at 1744-45.

20. *Id.* at 1745.

21. *Id.*

22. *AT&T Mobility*, 131 S. Ct. at 1745 ("When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consum-

Court of Appeals affirmed the district court's decision, further stating that *Discover Bank* did not unjustly target arbitration agreements—it merely reflected the unconscionability analysis generally applicable to contracts in California.²³ Therefore, the Federal Arbitration Act (“FAA”) did not preempt the *Discover Bank* rule.²⁴ The Supreme Court of the United States granted certiorari.²⁵

III. AT&T MOBILITY AT THE UNITED STATES SUPREME COURT

A. *Issue and Holding on Certiorari*

The question before the Supreme Court in *AT&T Mobility* was whether § 2 of the FAA²⁶ preempted California's *Discover Bank* rule, which recognizes as unconscionable a class arbitration waiver in a consumer adhesion contract wherein disputes are likely for small damages, and the party of inferior bargaining power has alleged the defrauding of many customers out of small amounts of money.²⁷ Justice Scalia delivered the Court's opinion.²⁸ The majority, in a 5-4 decision, held that the FAA preempts the *Discover Bank* rule, because the rule conflicts with Congress' purposes and objectives in creating the Act.²⁹

B. *Justice Scalia's Majority Opinion*

Justice Scalia starts by recognizing the complexity of the issue at hand.³⁰ If California law placed a blanket prohibition on arbitration of a particular claim, that law would clearly be preempted

ers out of individually small sums of money, then . . . such waivers are unconscionable under California law and should not be enforced.” (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740)). Apart from its final ruling, the district court acknowledged that the arbitration provision did have some positive attributes. *Id.* The court praised the \$7,500 minimum award as a “substantial inducement for the consumer to pursue the claim in arbitration” if the informal dispute resolution process was of no avail. *Id.* (quoting *Laster*, 2008 WL 5216255, at *11). Further, the court recognized that AT&T consumers would be at a disadvantage in a class action. *Id.* (citing *Laster*, 2008 WL 5216255, at *11-12).

23. *Id.* (citing *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009)).

24. *Id.*

25. *Id.*

26. 9 U.S.C. §§ 1-14 (2006).

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

28. *Id.* at 1744.

29. *Id.* at 1753.

30. *Id.* at 1747.

by the FAA,³¹ the primary purpose of which is to “ensur[e] that private arbitration agreements are enforced according to their terms.”³² Justice Scalia acknowledges that the issue becomes complicated when a party alleges, as did AT&T, that a state court applied a standard contract defense, i.e., unconscionability, in such a way as to inhibit arbitration.³³ The majority classifies *AT&T Mobility* as such a case.³⁴ The majority asserts that the overall purpose of the FAA, evident in §§ 2, 3, and 4 of the Act, is to provide for the enforcement of arbitration agreements pursuant to their terms so as to promote efficient proceedings.³⁵ Justice Scalia concludes that a law requiring class arbitration to be available, such as *Discover Bank*, undermines arbitration’s basic attributes and therefore contravenes the FAA.³⁶

The majority then attacks the dissent’s reference to *Dean Witter Reynolds, Inc. v. Byrd*,³⁷ wherein the Supreme Court rejected the proposition that the FAA’s overall purpose is to promote efficient proceedings.³⁸ The majority states that the dissent misleads by taking the *Dean Witter Reynolds, Inc.* reference wholly out of context.³⁹ Justice Scalia notes that after the Court addressed the FAA’s overall purpose in *Dean Witter Reynolds, Inc.*, it then recognized that Congress was quite aware that the FAA facilitates efficient dispute resolution.⁴⁰ Justice Scalia avers that the Supreme Court has repeatedly referred to the FAA as reflecting both a state pro-arbitration policy⁴¹ and a federal pro-arbitration policy—

31. *Id.* (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

32. *AT&T Mobility*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989)).

33. *Id.* at 1747.

34. *Id.*

35. *Id.* at 1748. Justice Scalia underscores that this purpose is readily apparent from the FAA’s text in stating that:

Section 2 makes arbitration agreements “valid, irrevocable, and enforceable” as written (subject, of course, to the savings clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims “in accordance with the terms of the agreement;” and § 4 requires courts to compel arbitration “in accordance with the terms of the agreement” upon the motion of either party to the agreement . . .

Id. (quoting 9 U.S.C. §§ 2-4 (2006)).

36. *Id.*

37. 470 U.S. 213 (1985).

38. *AT&T Mobility*, 131 S. Ct. at 1749 (citing *AT&T Mobility*, 131 S. Ct. at 1757 (Breyer, J., dissenting)).

39. *Id.*

40. *Id.* (“This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it . . .” (quoting *Dean Witter Reynolds, Inc.*, 470 U.S. at 220)).

41. *Id.* at 1749 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

regardless of any opposing state policies.⁴² Accordingly, Justice Scalia writes that in *Preston v. Ferrer*,⁴³ the Supreme Court held that the FAA preempted a state law calling for a party to exhaust its administrative remedies before going to arbitration, as this requirement would frustrate arbitration's efficient resolution of claims.⁴⁴

The majority analogizes *Discover Bank* as a similar hindrance to arbitration.⁴⁵ When the *Discover Bank* rule permits a party to a consumer adhesion contract to demand class arbitration, the rule interferes with the fundamental characteristic of arbitration—the efficient resolution of controversies.⁴⁶ The majority contends that *Discover Bank*'s facially narrow rule is anachronistic, as nowadays most, if not all, consumer contracts are adhesion contracts.⁴⁷ Furthermore, Justice Scalia writes that the requirement of small damages is at best vague and the requirement that a consumer allege fraud is overly broad.⁴⁸ Justice Scalia holds that the broad scope of the *Discover Bank* rule contravenes the FAA.⁴⁹

The majority premises its holding on *Stolt-Nielsen v. AnimalFeeds International Corp.*⁵⁰ In *Stolt-Nielsen*, the Supreme Court determined that an arbitration panel went beyond the scope of its power under the FAA's § 10(a)(4)⁵¹ when it used public policy—rather than the arbitration provision at issue or any contract law principle in general—to compel class procedures.⁵² The Court held that the provision in question could not be construed to permit class procedures when, in fact, the provision made no mention

42. *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

43. 552 U.S. 346 (2008).

44. *AT&T Mobility*, 131 S. Ct. at 1749 (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results,’ which objective would be ‘frustrated’ by requiring a dispute to be heard by an agency first.” (quoting *Preston*, 552 U.S. at 357-58)).

45. *Id.* at 1750.

46. *Id.* (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740).

47. *Id.* (citing *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004); *Hill v. Gateway 2000*, 105 F.3d 1147, 1149 (7th Cir. 1997)).

48. *Id.* (citation omitted).

49. *AT&T Mobility*, 131 S. Ct. at 1750.

50. *Id.* (citing 130 S. Ct. 1758 (2010)).

51. 9 U.S.C. § 10(a)(4) (2006) (“[T]he United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”).

52. *AT&T Mobility*, 131 S. Ct. at 1750 (citing *Stolt-Nielsen*, 130 S. Ct. at 1773-76).

of the mechanism, because the differences between bilateral arbitration and class arbitration are quite significant.⁵³ Justice Scalia contends that *Discover Bank* embodies the same manufactured class arbitration, ignorant of the fundamental differences between the two arbitration mechanisms and is therefore, as in *Stolt-Nielsen*, inconsistent with the FAA.⁵⁴ The majority then discusses the significant aforementioned differences.⁵⁵

Class arbitration does not have the cardinal advantage of arbitration—informality.⁵⁶ Rather, class arbitration's collateral procedural requirements (i.e., determining whether the named parties adequately represent the class) are costly and slow down arbitration proceedings.⁵⁷ Class arbitration by definition requires procedural formality, and therefore, expressly contradicts arbitration's cardinal advantage of informality.⁵⁸ The majority finds it doubtful that Congress' intent in drafting the FAA was to give the arbitrator the responsibility of addressing these additional procedural requirements.⁵⁹ Rather, the majority highlights that the California Supreme Court admitted in *Discover Bank* that class arbitration is a more recent phenomenon.⁶⁰

Finally, Justice Scalia writes that the risk to defendants is amplified with class arbitration.⁶¹ Bilateral arbitration presents a risk of uncorrected error because it lacks an appellate process.⁶² This risk is exponentially increased when thousands of claimants

53. *Id.* at 1750 (citing *Stolt-Nielsen*, 130 S. Ct. at 1776).

54. *Id.* at 1750-51.

55. *Id.* at 1751.

56. *Id.*

57. *AT&T Mobility*, 131 S. Ct. at 1750-51. Scalia cites the following statistic: “[a]ccording to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months” *Id.* at 1751 (citing *Analysis of the AAA’s Consumer Arbitration Caseload*, AM. ARB. ASS’N, http://www.adr.org/aaa/ShowPDF.jsessionid=kbxxPbvFTQmmP8cycYdvLjfxmgYV4dLDBNsfjxlgH347bx1GqLLl-1786312740?doc=ADRSTG_004325 (last visited Aug. 13, 2012)). Further, Scalia writes, “[a]s of September 2009, the AAA had opened 283 class arbitrations. *Id.* Of those, 121 remained active, and 162 had been settled, withdrawn, or dismissed. Not a single one, however, had resulted in a final award on the merits.” *Id.* (citing Brief for Am. Arbitration Ass’n as Amicus Curiae Supporting Neither Party, *Stolt-Nielsen*, 130 S. Ct. 1758 (No. 08-1198), 2009 WL 2896309).

58. *Id.* at 1751 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)).

59. *Id.*

60. *Id.* at 1751-52 (“[C]lass arbitration is a relatively recent development’ . . . [a]nd it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied.” (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740).

61. *Id.* at 1752.

62. *AT&T Mobility*, 131 S. Ct. at 1752.

can join in a class proceeding that will conclude in a single decision on the merits of each claim.⁶³ Justice Scalia juxtaposes class arbitration with class litigation, wherein a claimant has the option of multilayered review when de novo review is applied to questions of law.⁶⁴ In contrast, the FAA's review provision is limited to misconduct, not mistake of law.⁶⁵ Justice Scalia notes that the district court determined that the Concepcions would have been better off with their bilateral arbitration agreement than as members of a class, where their claim would likely take years to resolve and culminate only in a small percentage of a small class award.⁶⁶ In conclusion, the majority reverses and remands the judgment of the Court of Appeals for the Ninth Circuit, and holds that the *Discover Bank* rule contravenes the express purposes and objectives of Congress⁶⁷ and is thus preempted by the FAA.⁶⁸

C. Justice Thomas's Concurring Opinion

Justice Thomas concurs with the majority's decision, writing separately to discuss how he would narrow the scope of § 2 contract defenses to exclude unconscionability via a close analysis of the FAA text.⁶⁹ Justice Thomas argues that it would be ridiculous to propose that § 2 mandates that the arbitration defense applies to just "any contract."⁷⁰ Section 2 suggests that courts cannot use a state public policy disfavoring arbitration as a basis for ruling that arbitration agreements are unenforceable.⁷¹ Justice Thomas

63. *Id.*

64. *Id.* The majority quotes § 10 of the FAA, wherein a court is permitted to: [V]acate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made."

Id. at 1752 (quoting 9 U.S.C. § 10 (2006)).

65. *Id.*

66. *Id.* at 1753 (citing *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255, at *12 (S.D. Cal. Aug. 11, 2008)).

67. *AT&T Mobility*, 131 S. Ct. at 1753 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

68. *Id.*

69. *Id.* (Thomas, J., concurring). Justice Thomas starts his concurrence by quoting § 2 of the FAA, that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (quoting 9 U.S.C. § 2 (2006)).

70. *Id.*

71. *Id.*

asserts that there is a further limit on the contract defenses allowable under § 2.⁷²

Arguing a textual interpretation, Justice Thomas contends that the FAA requires an arbitration agreement to be enforced, except when a party successfully challenges that agreement's formation, such as on the basis of fraud or duress.⁷³ Under this analysis, Justice Thomas would reverse the Ninth Circuit Court of Appeals' ruling, because the district court erroneously relied on *Discover Bank*, which had nothing to do with a deficiency in the formation of an agreement and everything to do with the substance of an agreement.⁷⁴

Justice Thomas juxtaposes § 2's text requiring that an arbitration provision be "valid, irrevocable, and enforceable," with the exception clause, "save upon such grounds as exist at law or in equity for the *revocation* of any contract."⁷⁵ Justice Thomas places great meaning on the lack of parallelism between the two clauses; only "irrevocable" has its counterpart in the latter clause.⁷⁶ Justice Thomas acknowledges that the exact difference between "valid," "irrevocable," and "enforceable" is unclear and that the terms are not defined in the statute.⁷⁷ However, he argues that this does not mean that one can dismiss Congress' conspicuous omission.⁷⁸

72. *AT&T Mobility*, 131 S. Ct. at 1753 (Thomas, J., concurring). The concurring opinion later acknowledges that the majority's analysis will frequently lead to the same result as the concurrence's textual interpretation. *Id.* at 1754.

73. *Id.* (citing 9 U.S.C. §§ 2, 4). Justice Thomas writes, "[a]s I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id.* Further, the concurrence argues:

The interpretation I suggest would be consistent with our precedent . . . every specific contract defense that the Court has acknowledged is applicable under § 2 relates to contract formation. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), this Court said that fraud, duress, and unconscionability "may be applied to invalidate arbitration agreements without contravening § 2."

Id. at 1755.

74. *Id.*

75. *Id.* at 1754 (emphasis added) (quoting 9 U.S.C. § 2).

76. *Id.* Thomas analyzes:

Significantly, the statute does not parallel the words "valid, irrevocable, and enforceable" by referencing the grounds as exist for the "invalidation, revocation, or nonenforcement" of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforceability. The use only of 'revocation' and the conspicuous omission of 'invalidation' and 'nonenforcement' suggest that the exception does not include all defenses applicable to any contract but rather some subset of these defenses.

Id. (quoting 9 U.S.C. § 2).

77. *AT&T Mobility*, 131 S. Ct. at 1754 (Thomas, J., concurring).

78. *Id.*

Rather, Justice Thomas contends that this ambiguity can be resolved through a classic statutory interpretation technique of seeking clarification in the text of the statute as a whole.⁷⁹

Justice Thomas finds clarification in § 4, which mandates that when a party is in federal court to enforce an arbitration agreement, the court must order arbitration per the terms of the agreement after concluding that the making of the arbitration agreement is not at issue.⁸⁰ Justice Thomas synthesizes § 2 and § 4 and concludes that the grounds for revocation would be the grounds associated with the making of the agreement.⁸¹ Thus, contract defenses not associated with the making of an agreement,⁸² such as public policy concerns, cannot be used to argue the unenforceability of an arbitration provision.⁸³

Returning to the *Discover Bank* rule, Justice Thomas determines the question to be whether the rule pertains to the making of an arbitration agreement.⁸⁴ Justice Thomas finds that it does not.⁸⁵ Justice Thomas argues that the California Supreme Court's holding in *Discover Bank*⁸⁶ regarding class arbitration waivers in consumer adhesion contracts pertains to the degree to which the waiver is unlawfully exculpatory.⁸⁷ He points out that the California Supreme Court did not hold that a consumer would enter into such a contract only because of fraud or duress—defects in the formation of a contract, as opposed to its substance.⁸⁸ The concurrence cites *Arthur L. Corbin, Corbin on Contracts*⁸⁹ as stating that exculpatory contracts are the classic example of contracts unenforceable under public policy.⁹⁰

79. *Id.* (citing *Robinson v. Shell Oil*, 519 U.S. 337, 341 (1997)).

80. *Id.* (“[U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court must order arbitration ‘in accordance with the terms of the agreement.’” (quoting 9 U.S.C. § 4)).

81. *Id.* at 1754-55.

82. *AT&T Mobility*, 131 S. Ct. at 1755 (Thomas, J., concurring) (listing duress, fraud, or mutual mistake as examples of contract defenses relating to the formation of an arbitration agreement).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1753. Justice Thomas states the *Discover Bank* holding as: “class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory.” *Id.* at 1755 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

87. *AT&T Mobility*, 131 S. Ct. at 1755 (Thomas, J., concurring).

88. *Id.* at 1755-56.

89. GRACE M. GIESEL, *CORBIN ON CONTRACTS* §§ 85.1, 85.17, 85.18 (rev. ed. 2003).

90. *AT&T Mobility*, 131 S. Ct. at 1756 (Thomas, J., concurring).

Justice Thomas concludes that finding a contract unenforceable on public-policy grounds relates to the substance of an agreement, not the making of an agreement.⁹¹ Therefore, Justice Thomas finds that the *Discover Bank* rule is not a basis for a contract's revocation, as referenced in § 2.⁹² The concurrence concludes that the FAA preempts the *Discover Bank* rule and that the Concepcions' bilateral arbitration agreement must be enforced.⁹³

D. Justice Breyer's Dissenting Opinion⁹⁴

Justice Breyer argues that the *Discover Bank* rule is consistent with the primary objective of § 2, because it merely refers to particular circumstances in which class waivers would be unenforceable in any contract.⁹⁵ The foundation of the *Discover Bank* rule, Justice Breyer writes, is in section 1668 of the California Civil Code, which mandates that contracts attempting to exempt a party from its legal responsibility are unlawful.⁹⁶ Second, section 1670.5(a) permits courts to render unenforceable an unconscionable contract clause.⁹⁷ The dissent contends that the California Supreme Court merely applied these legal principles to conclude that some class waivers in consumer arbitration provisions are unconscionable—not that every class waiver is unconscionable.⁹⁸ Justice

91. *Id.*

92. *Id.*; 9 U.S.C. § 2 (2006).

93. *AT&T Mobility*, 131 S. Ct. at 1756 (Thomas, J., concurring).

94. *Id.* (Breyer, J., dissenting). Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's dissent. *Id.*

95. *Id.* (explaining that an arbitration provision “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*” (quoting 9 U.S.C. § 2)).

96. *Id.* (stating that contracts are unlawful “which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law” (quoting CAL. CIV. CODE § 1668 (West 1985))).

97. *Id.* (stating that courts may “‘limit the application of any unconscionable clause’ [to] ‘avoid any unconscionable result’” (quoting CAL. CIV. CODE § 1670.5(a) (West 1985))).

98. *AT&T Mobility*, 131 S. Ct. at 1756 (Breyer, J., dissenting). The dissent quotes *Discover Bank* as follows:

[W]hen a class action waiver “is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party from responsibility ‘for [its] own fraud, or willful injury to the person or property of another’ . . . [In such a situation, the] “waivers are unconscionable under California law and should not be enforced.”

Id. at 1756-57 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)). Justice Breyer contends that “[t]he *Discover Bank* rule does not create a ‘blanket policy in California

Breyer avers that *Discover Bank* is compatible with the FAA's language, because the California Supreme Court noted that the rule applies to both contracts with class arbitration waivers and contracts with class action waivers.⁹⁹ Therefore, Justice Breyer concludes, the rule falls directly within the purview of the § 2 exception allowing courts to refuse to enforce arbitration provisions on grounds that would lead to any contract's revocation.¹⁰⁰

Further, the dissent argues that the *Discover Bank* rule is consistent with the FAA's primary purpose, which Justice Breyer states is to provide for the judicial enforcement of arbitration agreements.¹⁰¹ The dissent refutes the majority's argument that the *Discover Bank* rule contravenes the intent of the FAA because it renders arbitration procedures more inefficient.¹⁰² Justice Breyer contends that, in reality, class arbitration is harmonious with the general function of arbitration.¹⁰³ Indeed, the dissent writes, the American Arbitration Association stated to the United States Supreme Court that class arbitration is fair and efficient.¹⁰⁴ Further, class arbitration is a familiar procedure in California and other jurisdictions.¹⁰⁵

Moreover, the dissent strongly objects to the majority's comparison of class arbitration with bilateral arbitration, as part of the majority's argument that *Discover Bank* is inconsistent with the FAA.¹⁰⁶ Rather, Justice Breyer writes that the applicable compar-

against class action waivers in the consumer context.” *Id.* at 1757 (quoting *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006)). Rather, *Discover Bank* is an “application of a more general [unconscionability] principle.” *Id.* (quoting *Gentry v. Superior Court*, 165 P.3d 556, 564. (2007)). Accordingly, the dissent points out that courts analyzing such waivers under California law have enforced these waivers when general unconscionability standards have been met. *Id.* at 1756 (Breyer, J., dissenting) (citing *Walnut Producers of Cal. v. Diamond Foods*, 114 Cal. Rptr. 3d 449, 459-62 (Cal. Ct. App. 2010); *Arguelles-Romero v. Superior Court*, 109 Cal. Rptr. 3d 289, 305-07 (Cal. Ct. App. 2010); *Smith v. AmeriCredit Financial Servs.*, No. 09cv1076, 2009 WL 4895280, at *3-9 (S.D. Cal. Dec. 11, 2009)).

99. *Id.* at 1757 (quoting *Discover Bank*, 113 P.3d at 1112).

100. *Id.* (citing 9 U.S.C. § 2).

101. *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

102. *Id.* at 1758.

103. *AT&T Mobility*, 131 S. Ct. at 1758 (Breyer, J., dissenting)

104. *Id.* (quoting Brief for Am. Arbitration Ass'n as Amicus Curiae Supporting Neither Party, *supra* note 57).

105. *Id.* (citing *Keating v. Superior Court*, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980) (depublished); JAMS, THE RESOLUTION EXPERTS, CLASS ACTION PROCEDURES (2009), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf; *Supplementary Rules for Class Arbitrations* (2003), AM. ARB. ASS'N, <http://www.adr.org/sp.asp?id=21936> (last visited Apr. 25, 2011)).

106. *Id.* at 1759 (citing *AT&T Mobility*, 131 S. Ct. at 1749 (majority opinion)).

ison is between class arbitration and class actions.¹⁰⁷ The dissent cites statistics in the American Arbitration Association's Amicus Brief demonstrating that class arbitration takes more time than bilateral arbitration, but less time than class actions.¹⁰⁸ Therefore, if efficient resolution of claims is the primary aim of the FAA, then, argues Justice Breyer, the *Discover Bank* rule would reinforce that "primary purpose."¹⁰⁹

Justice Breyer writes that California simply applied the same unconscionability analysis to the class arbitration waiver in the Concepcions' contract as it would have applied to a class action waiver in any other contract.¹¹⁰ Justice Breyer adamantly argues that there is no support for the majority's views in United States Supreme Court precedent.¹¹¹ The Court has ruled on a significant number of cases relating to FAA requirements, but the FAA has never been used to preempt a state statute placing arbitration on the same footing as judicial proceedings.¹¹²

The States have a significant role, pursuant to the § 2 savings clause, to determine the exact grounds for a contract's revocation.¹¹³ This reflects the basic federal principle that Congress cannot brusquely pre-empt state law.¹¹⁴ Justice Breyer firmly concludes that the Supreme Court must reflect this basic principle in its actions by upholding the text of the FAA in affirming California's law and the ruling of the Ninth Circuit.¹¹⁵

107. *Id.*

108. *AT&T Mobility*, 131 S. Ct. at 1759 (Breyer, J., dissenting) (noting that AAA statistics "suggest . . . class arbitration proceedings take more time than the average commercial arbitration, but may take *less time* than the average class action in court" (quoting Brief for Am. Arbitration Ass'n as Amicus Curiae Supporting Neither Party, *supra* note 57)).

109. *Id.*

110. *Id.* at 1760. Justice Breyer asks, "[i]f California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?" *Id.*

111. *Id.* at 1761.

112. *Id.* ("Courts are not at liberty to shirk the process of [contractual] construction under the empire of a belief that arbitration is beneficent any more than they may shirk it if their belief happens to the contrary." (quoting *Marchant v. Mead-Morrison Mfg.*, 169 N.E. 386, 391 (N.Y. 1929)).

113. *AT&T Mobility*, 131 S. Ct. at 1762 (Breyer, J., dissenting) (citing 9 U.S.C. § 2 (2006)).

114. *Id.* ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

115. *Id.*

IV. THE HISTORICAL NEXUS OF ARBITRATION, UNCONSCIONABILITY, AND THE CLASS MECHANISM

The FAA promulgated the judicial enforcement of arbitration agreements pursuant to their terms.¹¹⁶ Section 2, its cornerstone, mandates that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹⁷ Accordingly, the Supreme Court of the United States maintains that arbitration agreements are to be analyzed just like a contract.¹¹⁸

The contract defense at issue in *AT&T Mobility* is unconscionability,¹¹⁹ which is best defined as “an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.”¹²⁰ Courts make the determination as to whether a contract or a clause therein is unconscionable by considering all of the circumstances surrounding the formation of the contract.¹²¹ There is no litmus test, which has resulted in much judicial consternation and a morass of law relating to the doctrine.¹²²

A frequent attempt at solidifying a clear-cut formula is the “procedural” versus “substantive” unconscionability analysis.¹²³ This analysis sets forth the proposition that a contract or clause therein is unenforceable if it evidences both procedural unconscionability and substantive unconscionability.¹²⁴ Some jurisdictions, including California, implement this analysis via a sliding-scale test.¹²⁵ Procedural unconscionability addresses the manner in which a

116. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

117. 9 U.S.C. § 2 (2006).

118. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Only “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. . . . Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citations omitted).

119. *AT&T Mobility*, 131 S. Ct. at 1745.

120. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

121. *Id.*

122. John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 2 (1969).

123. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003); *see also Murray*, *supra* note 122, at 21.

124. *Ingle*, 328 F.3d at 1171 (quoting *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 783 (9th Cir. 2002)).

125. *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003); *see also Ingle*, 328 F.3d at 1170 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (2000)).

contract is negotiated and the circumstances of the parties at the time of that negotiation.¹²⁶ Surprise and oppression are key features.¹²⁷ Substantive unconscionability addresses the actual terms of the agreement and whether those terms favor one party enough to “shock the conscience.”¹²⁸ The cumbersome nature of the unconscionability doctrine¹²⁹ has significantly reduced its fruitful application.¹³⁰ Currently, it is most frequently used to analyze consumer service adhesion contracts and employment arbitration provisions.¹³¹

Class arbitration is a relatively recent phenomenon.¹³² Congress did not conceive of it when the FAA was enacted.¹³³ Before *AT&T Mobility*, the United States Supreme Court infrequently analyzed class arbitration, but the Court set the stage for its *AT&T Mobility* ruling with *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*¹³⁴

A. *Stolt-Nielsen v. AnimalFeeds International Corp.*

Stolt-Nielsen's shipping companies provide parcel tankers¹³⁵ to customers needing to transport small quantities of liquids.¹³⁶ *AnimalFeeds* was such a customer and filed a class action anti-trust suit against the company for price-fixing.¹³⁷ *AnimalFeeds*

126. *Ingle*, 328 F.3d at 1171.

127. *Id.*

128. *Id.* (quoting *Kinney v. United HealthCare Servs., Inc.*, 83 Cal. Rptr. 2d 348, 353 (Cal. Ct. App. 1999)). The adhesion contract is an example of when this two-step analysis hits a roadblock. An adhesion contract is procedurally unconscionable, regardless of the contract's substance—the weaker party has been denied an opportunity to negotiate. JOHN E. MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* 470-71 (6th ed. 2006). However, this same adhesion contract may be absent of any harmful terms, rendering it free of any substantive unconscionability. *Id.* Consumer contracts nowadays are almost exclusively contracts of adhesion. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (citing *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004)). Courts now analyze a contract's quality of adhesion as one factor of many in an unconscionability analysis. MURRAY, *supra*, at 470. Therefore, procedural unconscionability alone is not dispositive. *Id.* Accordingly, some jurisdictions reach an unconscionability determination based solely on substantive unconscionability. *Id.*

129. Murray, *supra* note 122, at 13.

130. MURRAY, *supra* note 128, at 472.

131. *Id.*

132. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740 (2011).

133. *AT&T Mobility*, 131 S. Ct. at 1751 (2011).

134. *Id.* (citing *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1764 (2010)).

135. Parcel tankers are tankers with separately chartered compartments. *Stolt-Nielsen*, 130 S. Ct. at 1764.

136. *Id.*

137. *Id.* at 1761.

sought arbitration, pursuant to its standard contract¹³⁸ with Stolt-Nielsen.¹³⁹ The parties consented to submit the question to a panel of arbitrators of whether their arbitration agreement provided for class arbitration.¹⁴⁰ The arbitration clause in their contract was completely silent on the issue.¹⁴¹ The panel concluded that the parties' arbitration clause did provide for class arbitration.¹⁴² However, the district court vacated the award and concluded that the panel's decision contradicted the federal maritime law rule mandating that contracts must be construed in light of custom and usage.¹⁴³ The Court of Appeals for the Second Circuit reversed, arguing that Stolt-Nielsen cited no authority that used maritime custom and usage to contravene class arbitration.¹⁴⁴

The Supreme Court of the United States granted certiorari. Justice Alito wrote for the majority, which held, *inter alia*, that to require parties to submit their claims to class arbitration when those parties have not agreed to such arbitration contravenes the Federal Arbitration Act—at the core of which is the principle that arbitration is a matter of consent.¹⁴⁵ Justice Alito wrote that the first fundamental difference between the two mechanisms is that class arbitration is designed to resolve hundreds or perhaps thousands of parties' disputes.¹⁴⁶ Second, there is no presumption of privacy and confidentiality in class arbitration as exists in bilateral arbitration.¹⁴⁷ Third, a class arbitrator's award binds not only the parties present, but also the parties that are absent.¹⁴⁸ Fourth, the commercial stakes of class arbitration are comparable to class action litigation: they are exponentially greater than in bilateral arbitration, and judicial review is only available under very limited circumstances.¹⁴⁹ In *AT&T Mobility*, Justice Scalia used Justice Alito's discussion of these fundamental differences to

138. *Id.* A standard contract in the maritime trade is called a "charter party." *Id.*

139. *Id.*

140. *Stolt-Nielsen*, 130 S. Ct. at 1761.

141. *Id.*

142. *Id.* at 1761.

143. *Id.* at 1766.

144. *Id.*

145. *Stolt-Nielsen*, 130 S. Ct. at 1766 (internal citations omitted).

146. *Id.* (citations omitted).

147. *Id.* 1776 (citation omitted). "Under the Class Rules, 'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations 'shall not apply in class arbitrations.'" *Id.* (quoting Brief for Am. Arb. Ass'n as Amicus Curiae Supporting Respondents at add. A, *Stolt-Nielsen*, 130 S. Ct. 1758 (2009) (No. 08-1198), 2009 WL 2896309 at *10a).

148. *Id.* (citation omitted).

149. *Id.* (citation omitted). See discussion *infra* Part V.E.

abrogate *Discover Bank*, a landmark Ninth Circuit Court of Appeals case prohibiting class arbitration waivers in certain types of consumer adhesion contracts.¹⁵⁰

*B. Discover Bank v. Superior Court*¹⁵¹

Californian Christopher Boehr entered into a credit card agreement with Discover Bank.¹⁵² The agreement's choice-of-law clause provided that Delaware law controlled the parties' agreement.¹⁵³ The credit card company subsequently amended the agreement unilaterally to include an arbitration clause that, inter alia, prohibited either party from seeking class arbitration.¹⁵⁴ If cardholders did not agree to the new provision, they had to notify Discover Bank and close their accounts.¹⁵⁵ Otherwise, they would be deemed to have accepted the new arbitration clause.¹⁵⁶

Plaintiff Boehr did not notify Discover Bank about his objection to the clause.¹⁵⁷ Two years after the amendment, Boehr filed a putative class action against Discover Bank for breach of contract and violation of the Delaware Consumer Fraud Act.¹⁵⁸ Boehr alleged that Discover Bank had breached its agreement with Boehr by charging him a late fee on payments that were received on their due date but after 1:00 p.m.—Discover Bank's undisclosed cut-off time.¹⁵⁹ Also, Discover Bank charged a periodic finance charge on new purchases when it received payments on their due date but after the undisclosed 1:00 p.m. cut-off time.¹⁶⁰

Discover Bank moved to compel bilateral arbitration and to dismiss Boehr's class action pursuant to the parties' arbitration agreement.¹⁶¹ Boehr opposed the motion and argued, inter alia, that the class action waiver was unconscionable, and therefore, unenforceable pursuant to California law.¹⁶² Defendant Discover

150. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740.

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

152. *Id.* at 1103.

153. *Id.*

154. *Id.*

155. *Id.* at 1104.

156. *Discover Bank*, 113 P.3d at 1104.

157. *Id.*

158. *Id.* (citation omitted).

159. *Id.*

160. *Id.*

161. *Discover Bank*, 113 P.3d at 1104.

162. *Id.* (internal citation omitted).

Bank countered that the FAA requires an arbitration agreement to be enforced pursuant to its terms, whether or not those terms include class waivers.¹⁶³ The credit card company argued that § 2 of the FAA prohibits a court from declaring an arbitration agreement unenforceable pursuant to state laws solely pertaining to arbitration clauses.¹⁶⁴

The trial court granted Discover Bank's motion to compel arbitration.¹⁶⁵ However, the tables turned shortly thereafter when the Fourth District Court of Appeals decided *Szetela v. Discover Bank*.¹⁶⁶ It held that a nearly-identical class action waiver was unconscionable.¹⁶⁷ Boeher moved for reconsideration of the trial court order enforcing *Discover Bank's* class action waiver.¹⁶⁸ The trial court determined that *Szetela* was now the controlling authority, and held that a class arbitration waiver was unconscionable and unenforceable.¹⁶⁹ The trial court severed the class arbitration waiver from the parties' agreement and ordered Boeher to submit his claims to bilateral arbitration, with an option to seek certification of an arbitration class.¹⁷⁰

However, the trial court's reconsideration was to no avail.¹⁷¹ The Court of Appeals granted Discover Bank's writ petition requesting reinstatement of the trial court's original order enforcing the entire arbitration clause and held that the FAA preempted California's law that class arbitration waivers are unconscionable.¹⁷² The California Supreme Court then granted review.¹⁷³ It reaffirmed California's support of class action lawsuits and underscored the United States Supreme Court's recognition that the fundamental policy behind the class mechanism is to solve the problem of small-damages claims being a disincentive for an individual to bring a claim on his own.¹⁷⁴ The California Supreme Court asserted that it had repeatedly determined that class actions and class arbitration in the context of consumer agreements

163. *Id.*

164. *Id.*

165. *Id.* (citation omitted).

166. *Discover Bank*, 113 P.3d at 1104 (citing *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 866-68 (Cal. Ct. App. 2002)).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1104-5.

171. *Discover Bank*, 113 P.3d at 1105.

172. *Id.*

173. *Id.*

174. *Id.* at 1105-06.

are frequently inseparable from the assertion of substantive rights.¹⁷⁵

The court reversed and remanded and held that a class arbitration waiver in a consumer contract of adhesion is unconscionable when disputes are likely to be for small damages, and the claimant has alleged that the party of superior bargaining power deliberately defrauded many customers out of small sums of money.¹⁷⁶ Addressing the issue of whether § 2 of the FAA preempted California law barring class arbitration waivers, the California Supreme Court concluded that it did not.¹⁷⁷

The *Discover Bank* dissent argued that the majority erred in concluding that the Court of Appeals should address the Delaware choice-of-law issue on remand after not having previously addressed whether the controlling Delaware law would mandate the class arbitration waiver's enforcement.¹⁷⁸ The dissent emphasized that the parties explicitly agreed that Delaware law would control their agreement.¹⁷⁹ Irrespective of California's fundamental public policy against class arbitration waivers, the dissent averred that the court was required to evaluate the arbitration provision solely under Delaware law.¹⁸⁰ Delaware enforces class arbitration waivers in consumer contracts of adhesion.¹⁸¹ Therefore, the dissent concluded that the class arbitration waiver should be enforced.¹⁸² Further, the dissent adamantly rejected the majority's equation of the inability of one party to seek a class remedy with the other party's exculpation.¹⁸³ The dissent emphasized that class remedies are meant to facilitate the assertion of legal rights—they are not meant as the sole means to assert those legal rights.¹⁸⁴

175. *Id.* at 1109.

176. *Discover Bank*, 113 P.3d at 1109. The court made a point to state that it did not hold that all waivers are per se unconscionable. *Id.*

177. *Id.* at 1110.

178. *Id.* at 1118 (Baxter, J., dissenting).

179. *Id.*

180. *Id.*

181. *Discover Bank*, 113 P.3d at 1118 (Baxter, J., dissenting).

182. *Id.* at 1119.

183. *Id.* at 1120.

184. *Id.*

C. *The Circuit Split Embodied in the Decisions of the Third and Ninth Circuits*

Discover Bank embodies the contentious circuit split on the issue of class arbitration waivers.¹⁸⁵ The Court of Appeals for the Ninth Circuit was the first circuit to strike down a class arbitration waiver in *Ting v. AT&T*.¹⁸⁶ Darcy Ting, as part of a class action, filed suit against AT&T for violating California's Consumer Legal Remedies Act and the state's Unfair Practices Act.¹⁸⁷ Ting alleged, inter alia, that AT&T prohibited customers from pursuing class claims against AT&T.¹⁸⁸ The district court found the parties' agreement unconscionable and in violation of California public policy, issuing a permanent injunction against enforcement of two of its sections.¹⁸⁹ AT&T appealed and argued, inter alia, that the FAA preempted California consumer-protection laws.¹⁹⁰ The Ninth Circuit Court of Appeals affirmed in part and reversed in part.¹⁹¹ The court asserted that it already recognized that federal courts may apply state-law contract defenses involving the validity, enforceability, and revocability of contracts—provided that these defenses are generally applied to all contracts, and not solely to arbitration agreements.¹⁹²

The Ninth Circuit Court of Appeals found the arbitration clause unconscionable due to its quality of adhesion, its confidentiality requirement, and its fee-splitting arrangement.¹⁹³ Regarding AT&T's claim that the lower court applied California unconscionability law in direct contravention of the FAA, the court reasoned that the district court had merely directed its animosity at the oppressive and self-exculpating means by which AT&T imposed arbitration on its customers.¹⁹⁴

The Third Circuit Court of Appeals' *Gay v. CreditInform*¹⁹⁵ decision epitomizes the alternative view in the circuit split.¹⁹⁶ Appel-

185. *Id.* at 1118.

186. *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003).

187. *Id.* at 1130.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Ting*, 319 F.3d at 1130.

192. *Id.* at 1148 (quoting *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001)).

193. *Id.* at 1149-52.

194. *Id.* at 1152.

195. 511 F.3d 369 (2007).

196. *Gay*, 511 F.3d at 369.

lant consumer Mary Gay bought credit repair services from defendant, Intersections.¹⁹⁷ For seven months she paid \$4.99 per month to Intersections, pursuant to the parties' agreement, and made those payments before Intersections finished performing its agreed-upon services.¹⁹⁸ Appellant brought a putative class action suit, and claimed that the credit repair company violated the Credit Repair Organizations Act and the Pennsylvania Credit Services Act when the company required her to waive particular rights that these statutes provided.¹⁹⁹

Intersections moved to compel arbitration, and the district court ordered that the parties resolve the dispute via bilateral arbitration, pursuant to the class arbitration waiver in the parties' purchase agreement.²⁰⁰ Mary Gay appealed the order and argued, *inter alia*, that the arbitration clause was unconscionable, pursuant to Pennsylvania law.²⁰¹ Intersections contended that Virginia law controlled the contract's terms of use, pursuant to the choice-of-law clause in the parties' agreement.²⁰² The Third Circuit Court of Appeals recognized that the core principle of the FAA is that arbitration is a "matter of consent."²⁰³ This freedom, therefore, covers any choice-of-law clause that governs an arbitration agreement.²⁰⁴

The Third Circuit Court of Appeals began its unconscionability analysis of the arbitration provision pursuant to the Virginia choice-of-law clause.²⁰⁵ The court found no foundation in Virginia law for Gay's contention that the arbitration clause was unconscionable, because she had not negotiated it.²⁰⁶ The Third Circuit Court of Appeals concluded that while Mary Gay did not have Intersections' degree of bargaining power, the parties' agreement did not "shock the conscience."²⁰⁷

197. *Id.* at 375.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Gay*, 511 F.3d at 387.

202. *Id.*

203. *Id.* at 388-89 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)).

204. *Id.* at 389.

205. *Id.* at 389-91.

206. *Gay*, 511 F.3d at 391 (defining an unconscionable agreement as one wherein "no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other." The inequality must be so gross as to shock the conscience" (quoting *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992))).

207. *Id.* at 391-92 (quoting *Mgmt. Enters., Inc.*, 416 S.E.2d at 231).

After the court dismissed Mary Gay's unconscionability claim pursuant to Virginia law, the court analyzed, as an aside, the unconscionability claim pursuant to Pennsylvania law.²⁰⁸ In Pennsylvania, a two-prong unconscionability analysis is used to determine whether (1) the terms of the agreement are unreasonably favorable to the contract drafter, and (2) there is no meaningful choice for the disfavored party.²⁰⁹ The Third Circuit Court of Appeals determined that Pennsylvania courts would also enforce the agreement, because inequality of bargaining power on its own was not a sufficient basis to render a class arbitration waiver unenforceable.²¹⁰ Further, the court wrote that class arbitration waivers address a procedural right, which can always be waived.²¹¹

The court of appeals concluded that Mary Gay based her unconscionability argument on what the arbitration agreement itself stipulated.²¹² This contravened the FAA's explicit mandate that a court can find an arbitration agreement unenforceable solely pursuant to general contract principles.²¹³ The Third Circuit Court of Appeals affirmed the district court's order to compel bilateral arbitration and held, *inter alia*, that the arbitration provision was not unenforceable pursuant to state contract laws regarding unconscionability.²¹⁴

V. HOW JUSTICE SCALIA DEFTLY PREVENTS A PER SE
UNCONSCIONABILITY THREAT TO THE FEDERAL ARBITRATION ACT,
AN EXAMINATION OF *AT&T MOBILITY* VIA TWO ALTERNATIVE
METHODS OF ANALYSIS, AND WHAT THE FUTURE HOLDS²¹⁵

The United States Supreme Court has been consistent and rigorous in its broad construction of the FAA, holding that the FAA preempts state laws that in any way hinder the enforceability of

208. *Id.*

209. *Id.* at 392 (quoting *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999)).

210. *Id.* (quoting *Harris*, 183 F.3d at 183).

211. *Gay*, 511 F.3d at 392 (quoting *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000)).

212. *Id.* at 395.

213. *Id.* at 378 (quoting 9 U.S.C. § 2 (2006)).

214. *Id.*

215. The author expresses much appreciation to Professor John E. Murray, Jr. for his generosity of time, spirit, and guidance during the preparation of this case note.

arbitration clauses.²¹⁶ Towards that end, the Court reasserts in *AT&T Mobility* that the FAA's purpose is a liberal federal policy promoting the enforcement of arbitration clauses pursuant to their terms.²¹⁷

216. John E. Murray, Jr., *Unconscionability and the Apotheosis of Arbitration* 9-10 (Sept. 23, 2011) (unpublished manuscript). Charles L. Knapp offers a case history of the United States Supreme Court's consistent broad construction of the FAA:

See the following United States Supreme Court cases (in chronological order): *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-05 (1967) (finding that FAA was based on full reach of interstate commerce power; charge of fraud in inducement of contract arbitrable unless fraud directed specifically to arbitration clause); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (“[The FAA establishes] liberal federal policy favoring arbitration agreements . . . [A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”); *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984) (holding that the FAA is binding on state courts and the California statute requiring judicial resolution of claims preempted by the FAA); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985) (holding that federal antitrust claims are arbitrable under the FAA; arbitration clause upheld); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding customers' claims against brokerage house arbitrable, both under Securities Exchange Act and under RICO); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that federal age discrimination claims are arbitrable in absence of clear showing of congressional intent to the contrary); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (finding that Congress intended the FAA to extend to full reach of commerce power and declining invitation to overrule *Southland*); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that FAA preempts state statute imposing formal requirements on arbitration agreements); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (holding that the risk that plaintiff with claim under Truth In Lending Act would be prevented from pursuing claim by costs of arbitration not sufficient to avoid arbitration in absence of specific showing of prohibitive costs); *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 115-19 (2001) (stating that FAA's exception for employees “engaged in commerce” would be narrowly construed, limited to persons actually engaged in “transportation”).

Id. (quoting Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 776 n.59 (2002)). Since Knapp's article, further United States Supreme Court cases continue to reflect a liberal federal policy favoring arbitration. See *Rent-A-Center., West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (“[W]here the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract—we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.”); *Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008) (“[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (“[R]egardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (“[T]here is a sufficient nexus with interstate commerce to make enforceable, pursuant to the FAA, an arbitration provision included in [a debt-restructuring] agreement [executed in Alabama by Alabama residents].”).

217. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

A. *The AT&T-Concepcion Arbitration Clause*

AT&T's claim that the FAA preempts the *Discover Bank* prohibition of particular class arbitration waivers required the Supreme Court to determine that bilateral arbitration, pursuant to the parties' agreement, is an adequate mechanism for defending the parties' statutory rights.²¹⁸ Under such a determination, a clause precluding class arbitration is not unconscionable, because it is not a term that is unreasonably favorable to one party to the contract.²¹⁹

The district court held in *AT&T Mobility* that the arbitration provision was unconscionable, because its bilateral arbitration clause was not an adequate substitute for class arbitration.²²⁰ However, after a close examination of that bilateral arbitration provision, it is overwhelmingly apparent that AT&T provided its consumers every possible concession to avoid the hazards of unconscionable arbitration clauses.²²¹ Moreover, the parties' arbitration clause put the *Concepcions* in as good a position, if not better, than they would have been in had their cellular telephone contract been correctly performed. The district court repeatedly acknowledged this reality.²²²

The parties' agreement stipulated that all disputes between AT&T and its customers could be resolved in either small-claims court or bilateral arbitration.²²³ Therefore, arbitration was by no

218. *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006).

219. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

220. *Laster v. T-Mobile USA*, No. 05cv1167, 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008).

221. *Id.* at *2-3. *See Murray, supra* note 216, at 11-12 (recognizing the primary factors that render an arbitration clause unconscionable: fee-splitting, "loser-pays," choice of venue favoring the stronger party, remedy preclusion, and court-of-law claims for the favored party).

222. *Laster*, 2008 WL 5216255, at *11-12. "Nearly all consumers who pursue the informal claims process are very likely to be compensated promptly and in full." *Id.* at *11. "In contrast, it appears that consumers who are members of a class do not fare as well." *Id.* "[T]he incentive for a class member to file a claim form is low." *Id.* ATTM cites studies that show class members rarely receive more than pennies on the dollar for their claims . . ." *Id.* "Plaintiffs do not dispute these statistics . . ." *Laster*, 2008 WL 5216255, at *11. "The new arbitration provision 'allows both customers and ATTM to win: Customers' claims are resolved quickly and fully, and ATTM achieves significant savings on transaction costs . . . while retaining good relations with its customers.'" *Id.* at *12. "The Court agrees." *Id.* "The record before the Court demonstrates that a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.*

223. *Id.* at *2.

means required.²²⁴ The agreement compelled AT&T to assume considerable financial responsibility for arbitration.²²⁵ The company had to shoulder all arbitration costs, and the agreement prohibited AT&T from seeking attorney's fees and other expenses—even upon prevailing.²²⁶ Further, the arbitrator could award punitive damages.²²⁷ If the arbitrator awarded damages to the consumer that were greater than AT&T's last settlement offer, AT&T was required to pay the consumer a minimum of \$7,500, in addition to twice the customer's attorney's fees.²²⁸ The parties' agreement also provided for arbitration that was very convenient for the consumer—proceedings had to take place in the county of the customer's billing address.²²⁹ For claims of less than \$10,000, AT&T customers could choose whether the arbitration took place in person, or via telephone or document submission.²³⁰

While not discussed in *AT&T Mobility*, the underlying purpose of contract law is to make the non-breaching party whole—to place the non-breaching party in the position it would have occupied had the contract been performed correctly.²³¹ Were the Concepcions to enter bilateral arbitration for \$30.22 in actual damages, the amount of their potential recovery in arbitration would be exponentially larger, thus rendering the Concepcions not only whole, but in a significantly better position than they would have occupied had they not lost \$30.22 via an allegedly improper tax.

Taking into consideration the terms of the bilateral arbitration provision as stipulated in the parties' agreement, the Concepcions would have been better off via their bilateral arbitration agreement than as members of a class. Therefore, the class arbitration waiver was not disproportionately favorable to AT&T, and the parties' arbitration agreement was not substantively unconscionable.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Laster*, 2008 WL 5216255, at *2.

228. *Id.*

229. *Id.*

230. *Id.*

231. *MURRAY*, *supra* note 128, at 12 (quoting *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1271 (11th Cir. 1999)).

B. Discover Bank—*Unconscionability Per Se*?

It follows that the *Discover Bank* rule, which would have rendered unconscionable the AT&T-Concepcion arbitration agreement, is unacceptably broad in its application. Justice Scalia recognized that while the *Discover Bank* rule does not mandate the availability of class arbitration, it mandates that a party to a consumer contract of adhesion may demand it.²³² Nowadays consumer contracts are overwhelmingly contracts of adhesion,²³³ and Justice Scalia correctly observed that the required accompanying circumstances of small damages and a disfavored party's allegation of fraud, with no requirement of proof, are at best vague nullities and dangerously broad in scope.²³⁴ Thus, the California Supreme Court's determination that such contracts are unconscionable is dangerously close to a determination that such arbitration clauses are unconscionable *per se*—a direct contravention of the FAA's mandate that arbitration agreements are valid, irrevocable, and enforceable, except on general state-law grounds to revoke a contract.²³⁵ Arbitration agreements cannot be invalidated by defenses that are exclusively focused on the mechanism of class arbitration,²³⁶ of which the *Discover Bank* rule is a paradigm.²³⁷

C. What's "Leff" to Discuss?

Justice Scalia's conclusion that the *Discover Bank* rule fails as a § 2 ground for revocation forestalls his discussion of the parties' arbitration agreement pursuant to California unconscionability law. However, it is important to note that if the Concepcions' unconscionability argument made it past the § 2 savings clause of the FAA, their class arbitration waiver would not have been deemed unconscionable. Under California law, and pursuant to the unconscionability analysis developed by Professor Arthur Leff, an unconscionability finding requires the ingredients of both pro-

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

233. *Id.* See also Murray, *supra* note 216, at 11 (discussing the pervasiveness of arbitration clauses in telephone, television, Internet, medical insurance, and mortgage loan agreements).

234. *AT&T Mobility*, 131 S. Ct. at 1750.

235. 9 U.S.C. § 2 (2006).

236. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

237. See also *Faber v. Menard*, 367 F.3d 1048, 1053 (8th Cir. 2004) (holding that a court cannot conclude that an arbitration clause is unconscionable solely because it is an adhesion contract).

cedural and substantive unconscionability.²³⁸ These ingredients are analyzed on a sliding scale.²³⁹ A contract of adhesion is, as characterized by Professor John E. Murray, Jr., “the paradigm of procedural unconscionability.”²⁴⁰ Thus, the procedural unconscionability element in the parties’ agreement is easily met, because it is a contract of adhesion. However, nowadays an agreement’s quality of adhesion is analyzed merely as one factor of many in an unconscionability analysis, given the extraordinary prevalence of adhesion contracts in the consumer industry.²⁴¹

As to the presence of substantive unconscionability in the AT&T-Concepcion agreement, the class arbitration waiver is the sole provision circumscribing the Concepcions’ acts.²⁴² Otherwise, as discussed *supra*, the Concepcions can pursue their claim via small-claims court or bilateral arbitration that is free of charge, exceedingly convenient, and with the potential for an award that is nearly 250 times what the Concepcions originally claimed.²⁴³ Taking these factors into account, the parties’ arbitration agreement hardly demonstrates contract terms that are unreasonably favorable to AT&T, as would be required for a finding of substantive unconscionability in the parties’ agreement.²⁴⁴

D. *Did the Concepcions Assume the Risk of a Class Arbitration Waiver?*

Professor Murray finds the procedural versus substantive unconscionability analysis “devoid of analytical value.”²⁴⁵ The terms “procedural unconscionability” and “substantive unconscionability” are merely legal conclusions that provide only “the delusion of an analytical construct.”²⁴⁶ Professor Murray pro-

238. *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). *See also* CAL. CIV. CODE § 1670.5 (West 2011) (mandating that a contract or clause therein is unenforceable if it was unconscionable at the time it was made); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

239. *Ting*, 319 F.3d at 1148.

240. Murray, *supra* note 216, at 7-8.

241. MURRAY, *supra* note 128, at 470 (citation omitted).

242. *Laster v. T-Mobile USA*, No. 05cv1167, 2008 WL 5216255, at *2 (S.D. Cal. Aug. 11, 2008) (internal citation omitted).

243. As discussed *supra*, if the arbitrator awarded damages to the consumer that were greater than AT&T’s last settlement offer, AT&T was required to pay the consumer a minimum of \$7,500, in addition to twice the customer’s attorney’s fees, despite the fact that the Concepcions claimed only \$30.22 in damages. *Laster*, 2008 WL 5216255, at *2.

244. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

245. Murray, *supra* note 216, at 9.

246. *Id.*

poses²⁴⁷ an alternative unconscionability analysis—one that courts can execute via a three-step analysis focusing on the principle of assumption of risk.²⁴⁸ At the core of this analysis is the question of whether a reasonable person in the position of the disfavored party would have been aware of a particular risk when entering into the agreement.²⁴⁹

First,²⁵⁰ the court must determine whether the risk was expected, or at the very least not unexpected,²⁵¹ based on the parties' expression of intent or on the surrounding circumstances—such as “trade usage, prior course of dealing, or course of performance.”²⁵² If the risk is unexpected, the risk cannot be allocated when the facts indicate that a reasonable man would not assume the risk.²⁵³ However, if the clause is conspicuous, a reasonable disfavored party is more likely to see it, and therefore, assent to it.²⁵⁴

The AT&T-Concepcion agreement was a one-page document with terms primarily in small font.²⁵⁵ AT&T brought attention to the start of the arbitration clause by placing the word “**ARBITRATION**” in bold capital letters, followed by a sentence advising the AT&T consumer to “read this paragraph carefully.”²⁵⁶ A reasonable consumer would see this conspicuous clause, and therefore, have the opportunity to assent to it, as the Concepcions did by accepting their initial wireless service and renewing that service in May 2003, February 2005, and again in May 2006—two months after having filed their complaint in federal court.²⁵⁷

247. Murray, *supra* note 122. Professor Murray clarifies that his suggested analysis: [I]s not a panacea; it does not automatically answer every question posed in the unconscionability area. As the analysis itself suggests, there is no rote formula, which can accomplish such a feat. The analysis is but an effort to help courts focus upon the important questions to be decided under the heading of unconscionability.

Id. at 34.

248. *Id.* at 13-30 (citing ARTHUR L. CORBIN, CONTRACTS § 605 (1963)).

249. *Id.* at 13-14.

250. *Id.* at 14. The unique fact situation determines which step of the analysis is best pursued first. *Id.*

251. *Id.* Or alternatively, whether it was not unexpected for one of the parties to assume a certain risk. *Id.*

252. Murray, *supra* note 122, at 14.

253. *Id.*

254. *Id.* at 19. It must be noted that conspicuousness is merely evidence of assent—that a reasonable person in the position of the consumer would likely know that the risk alteration was included in the contract. *Id.*

255. Laster v. T-Mobile USA, Inc., No. 05cv1167, 2008 WL 5216255, at *2 (S.D. Cal. Aug. 11, 2008).

256. *Id.* at *2.

257. *Id.*

With such assent to an expected risk, the second step is for the court to determine whether the disfavored party's manifestation of assent, in reviewing the totality of the circumstances, was a genuine exercise of free will.²⁵⁸ If not, then the clause containing the allocated risk is unconscionable.²⁵⁹ With an adhesion contract, the characteristics to be weighed in considering the degree of exercised free will are, *inter alia*, the importance the subject has for the physical and economical well-being of the disfavored party, the parties' bargaining power, and the degree to which the disfavored party may seek out other sources for the contracted good or service.²⁶⁰

The Concepcions' use of their AT&T cell phones, albeit convenient, was hardly important for their physical and economical well-being. While the Concepcions had no bargaining power in the AT&T-Concepcion consumer adhesion contract, the Concepcions repeatedly renewed their AT&T contract with the conspicuous class arbitration waiver—even after filing a complaint against the company—instead of seeking out other means of acquiring cellular telephone service.²⁶¹ The Concepcions clearly exercised genuine free will in choosing to remain AT&T customers.

If after the first step of the assumption-of-risk analysis, the court were to determine that the risk allocation was unexpected, the court would take the second step of determining whether the unexpected risk was material.²⁶² A clause is not unconscionable if a party to whom an unexpected risk is allocated is not any worse off after that allocation. The Restatement (Second) of Contracts § 241 lists five guideline factors to be used in determining the materiality of a breach of contract.²⁶³ The first factor is most applicable

258. Murray, *supra* note 122, at 28. "If the risk alteration process is effective, there is apparent assent and only . . . verification of assent[] remains." *Id.* at 33.

259. *Id.* at 28-29. This is also true in the case of an unexpected, reallocated, material risk, discussed *supra* note 253.

260. *Id.* at 29 (quoting O'Callaghan v. Waller & Beckwith Realty Co., 155 N.E.2d 545, 550 (Ill. 1958)). Note that the court must look at these factors in the complete context of the factual scenario. *Id.*

261. Laster, 2008 WL 5216255, at *2.

262. Murray, *supra* note 122, at 23-24.

263. RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979). The five factors are:

[(1)] the extent to which the injured party will be deprived of the benefit which he reasonably expected; [(2)] the extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived; [(3)] the extent to which the party failing to perform or to offer to perform will suffer forfeiture; [(4)] the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

to the doctrine of unconscionability: “the extent to which the injured party will be deprived of the benefit which he reasonably expected.”²⁶⁴

Even if the court were to determine that the class arbitration waiver in the AT&T-Concepcion agreement was unexpected, the Concepcions would not be deprived of the benefit they reasonably expected via class arbitration—a full, prompt, and efficient compensation of their claim through an assertion of their substantive rights. As discussed *supra*, the district court acknowledged that the Concepcions likely would have been fully and promptly compensated via their bilateral arbitration agreement with AT&T. At the conclusion of this three-step assumption-of-risk analysis, it is evident that the Concepcions were reasonably aware of the class arbitration waiver from the conspicuous language of the contract and therefore assumed its risk. Thus, the class arbitration waiver in the Concepcion-AT&T agreement is not unconscionable.

E. What the Future Holds

The majority in *AT&T Mobility* held that the FAA preempts a state law recognizing as unconscionable a class arbitration waiver in a consumer adhesion contract wherein claims will likely involve small damages, and the party of inferior bargaining power has alleged fraud.²⁶⁵ Although an arbitration clause without AT&T’s recovery premiums or double attorney’s fees may still be deemed unconscionable, the Supreme Court’s continued broad construction of the FAA is of some concern, as this trend has the potential to undermine the enforceability of the States’ common law. Arbitration awards are not legal precedent—substantive law does not bind the arbitrators, and arbitration awards often contradict common law.²⁶⁶

Under § 10 of the FAA, an error of law is not a sufficient basis for vacating an award.²⁶⁷ Rather, the parties themselves determine the significance that substantive law plays in the arbitration process. A considerable threshold must be met in order to vacate an arbitration award. Section 10 mandates that an arbitration

[(5)] the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id.

264. *Id.*

265. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750-51 (2011).

266. *See Murray*, *supra* note 216, at 18.

267. 9 U.S.C. § 10 (2006).

award can only be vacated if it was made via corruption, fraud, the arbitrators' explicit partiality, or if the arbitrators exceeded their power under the FAA.²⁶⁸ There is a considerable amount of judicial action on the issue of the unconscionability of certain arbitration clauses, and it remains to be seen where the Supreme Court will draw the line in its consistent enforcement of the mechanism, so as to preserve the integrity of our common law.

Ginevra Ventre

268. *Id.*

