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# Stripping Away Employment Rights: The Unconscionability of Class Waivers in Employment Agreements

*Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829 (E.D. Pa. 2015).

NIKKI CLARK\*

## I. INTRODUCTION

In 1925, Congress passed the Federal Arbitration Act (FAA), which established a public policy in favor of arbitration.<sup>1</sup> For the next six decades, courts undermined the FAA by not allowing arbitration for federal statutory claims through the nonarbitrability doctrine.<sup>2</sup> Not until the 1980s did the Supreme Court reverse its stance on arbitration and began to require arbitration under the FAA for certain federal statutory claims.<sup>3</sup>

As support for arbitration clauses began to grow, employers began to include arbitration clauses in employment agreements because it lowers the cost and uncertainty of litigation.<sup>4</sup> Many of these arbitration clauses contain waivers of the right to class action.<sup>5</sup> Recently, in *AT&T Mobility v. Concepcion*, the United States Supreme Court held that the FAA preempts state laws that prohibit contracts from disallowing class-wide contracts.<sup>6</sup>

The constitutionality of arbitration clauses in contracts did not end with *Concepcion*. Employment contracts that contain arbitration clauses are still an issue for the courts. In *Herzfeld v. 1416 Chancellor*, the district court found that the arbitration clause included in the employment agreement was unconscionable.<sup>7</sup> A case decided in Connecticut that involved the same employers found the arbitration

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1. Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL'Y & L. 519, 522 (2004).

2. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1232 (2013). For six decades, courts refused to compel arbitration of federal statutory claims. The nonarbitrability doctrine rested on the premise the litigation was superior to arbitration. *Id.*

3. *Id.* at 1233. *See also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that arbitrating a federal statutory claim did not mean the surrender of substantive rights but “trading the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

4. Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J.L. & PUB. POL'Y 581, 582-83 (2004).

5. Thomas G. Yoxall & Seth Roberts, *Class Action Waiver Provisions*, 39 ADVOC. (TEX.) 26, 26 (2007).

6. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempts state laws that prohibit contracts from disallowing class-wide arbitration).

7. *Id.* *Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829 (E.D. Pa. 2015).

clause included in the employment agreement was not unconscionable.<sup>8</sup> This Note discusses how courts have handled arbitration clauses in employment contracts and whether waivers of class and collective arbitration action are unconscionable. A federal circuit court split currently exists concerning whether waivers of class and collective arbitration actions are unconscionable. This Note argues that a waiver of collective action, whether express or unknowing, should be per se unconscionable to provide consistency and to resolve the inconsistency between and even within federal circuits.

## II. FACTS AND HOLDING

Jessica Herzfeld began working at the Gold Club, an exotic dance club in Pennsylvania, while she was in college in 2006.<sup>9</sup> After she began working, Herzfeld signed an agreement but could not recall the subject or terms of the agreement and the managers who worked at the Gold Club when Herzfeld was first hired could not recall giving Herzfeld any paperwork to sign.<sup>10</sup> The club owner, who claimed that Herzfeld signed an arbitration agreement when she first began working in 2006, alleged that a 2009 flood destroyed that agreement.<sup>11</sup> Herzfeld continued working for four more years after the 2009 flood without a signed agreement.<sup>12</sup> During this time period, Herzfeld also worked at other clubs.<sup>13</sup>

On August 30, 2013, the Club presented Herzfeld with a new Stage Rental License Agreement, which contained an arbitration agreement.<sup>14</sup> This agreement was the subject of their dispute.<sup>15</sup> Kristen Angelucci, a representative of the Gold Club, told Herzfeld that she could no longer work at the Gold Club if she did not sign the agreement.<sup>16</sup> When asked to sign the document, Herzfeld asked if she could take the document home because she had already paid for her stage time and she wanted more time to review the document at home.<sup>17</sup> Herzfeld was told that she could not take the document home, so she then quickly read over the document and signed it.<sup>18</sup>

During Herzfeld's time at the Gold Club, the owners classified all dancers that worked at the club as independent contractors instead of employees.<sup>19</sup> Because the

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8. *D'Antuono v. Serv. Rd.*, 789 F.Supp. 2d 308, 327-30 (2011) (holding that the arbitration clause was not procedurally or substantively unconscionable because the clause was located on the same page where the dancers signed their name and the dancers did not have unequal bargaining power).

9. *Herzfeld*, 2015 WL 4480829, at \*1.

10. *Id.* At trial, the owner of the Gold Club alleged that Herzfeld signed an arbitration agreement when she first began working. Absent a signed document, the owner looked to its standard paperwork that is usually given to a new hire: an "Entertainer Information Sheet," a "Commitment to a Drug Free Environment," a "Stage Rental License Agreement," and an "Entertainer's Rules, Regulations, and Proper Conduct." Absent the allegation by the club owner, there is no proof that any document Herzfeld signed before 2013 contained an arbitration clause. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at \*2.

15. *Herfeld*, 2015 WL 4480829, at \*2.

16. *Id.*

17. *Id.*

18. *Id.*

19. Complaint at \*1, *Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829 (E.D. Pa. 2015) (No. 14-4966).

dancers were classified as independent contractors, they were not paid the applicable minimum wage under Pennsylvania law.<sup>20</sup> Under this classification, dancers were also required to work in excess of 40 hours per week and were not paid for any overtime.<sup>21</sup> Further, the Gold Club collected a portion of the dancers' tips from customers.<sup>22</sup>

Herzfeld filed a lawsuit under the Fair Labor Standards Act of 1938 (FLSA) on behalf of herself and other similarly situated individuals.<sup>23</sup> Herzfeld filed suit for unfair practices, seeking (1) unpaid minimum wages for hours worked for which the club owner did not pay the mandatory minimum wage, (2) unpaid overtime wages, and (3) liquidated damages.<sup>24</sup> Herzfeld alleged that she and the other dancers that worked at the Gold Club were employees under the FLSA.<sup>25</sup> The Gold Club claimed it did not have to pay the dancers the mandated minimum wage as the club classified the dancers as independent contractors.<sup>26</sup> Along with Herzfeld's FLSA claim, Herzfeld also brought a class action suit in the United States District Court for Eastern District of Pennsylvania on behalf of all dancers who worked at the Gold Club in Pennsylvania.<sup>27</sup> Herzfeld's suit included a claim for unfair practices under the Pennsylvania Minimum Wage Act of 1968 and the Pennsylvania Wage Payment and Collection Law, claiming the Gold Club unfairly classified the dancers as independent contractors instead of employees.<sup>28</sup> Herzfeld's suit also included a claim for unfair enrichment under Pennsylvania common law.<sup>29</sup>

The Gold Club moved to compel arbitration or, in the alternative, stay the trial court proceeding on any claim not referred to arbitration.<sup>30</sup> The district court granted both parties limited discovery on arbitrability.<sup>31</sup> The court held that the arbitration clause was procedurally and substantively unconscionable, and thus unenforceable as it caused an unknowing loss of an individual's statutory right to bring a collective or class arbitration action.<sup>32</sup>

### III. LEGAL BACKGROUND

Herzfeld's claim raises important questions about unconscionability of arbitration clauses in employment contracts. In 2011, the Supreme Court decided in *AT&T Mobility v. Concepcion* that the FAA preempts state laws that prohibit contracts from disallowing class-wide arbitration.<sup>33</sup> *Concepcion*, however, dealt only with

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20. *Id.* at \*1-2.

21. *Id.* at \*2.

22. *Id.*

23. *Herzfeld*, 2015 WL 4480829, at \*2.

24. *Id.*

25. Complaint at \*16, *Herzfeld*, 2015 WL 4480829.

26. *Id.*

27. *Id.* at \*18.

28. *Herzfeld*, 2015 WL 4480829, at \*2.

29. Complaint at \*19, *Herzfeld*, 2015 WL 4480829.

30. *Herzfeld*, 2015 WL 4480829, at \*3.

31. *Id.* The Supreme Court distinguishes between challenges to the contract in general and challenges to the arbitration provision specifically. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). An arbitrator decides challenges to the validity of the contract as a whole and the court decides specific challenges to the arbitration clause. *Id.* at 444, 449.

32. *Herzfeld*, 2015 WL 4480829, at \*13.

33. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 334 (2011).

consumer contracts—not employment contracts.<sup>34</sup> The district court’s ruling in *Herzfeld* addressed a question left open by the Supreme Court’s ruling in *Concepcion*. The court in *Herzfeld* and other federal courts have found that waivers of collective arbitration are unconscionable. This section examines (1) the history of the FAA and how the Act impacts arbitration and state law, (2) how the Fair Labor Standards Act changes the implications of the FAA, and (3) the current circuit split on the unconscionability of arbitration clauses in employment contracts.

### A. Federal Arbitration Act

The FAA was enacted on February 12, 1925 in response to widespread judicial hostility to arbitration agreements.<sup>35</sup> The FAA provides that any contract that includes an arbitration provision is enforceable except where a contract is unenforceable by law.<sup>36</sup>

The United States Supreme Court held that the FAA was designed “to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate . . . and place such agreements upon the same footing as other contracts.”<sup>37</sup> The House Report that accompanied the FAA explained Congress’ intention in passing the FAA, which was to minimize the costs of litigation and the solution was to make sure that arbitration clauses included in enforceable contracts would be upheld and enforceable.<sup>38</sup> When passing the FAA, Congress was attempting to enforce agreements into which parties had willingly entered.<sup>39</sup> With the passage of the FAA, issues concerning arbitration would be resolved in favor of arbitration and thus would eliminate the costs of litigation to determine if arbitration clauses were enforceable.<sup>40</sup>

The FAA is not without its limits, however. While the Act clearly favors arbitration, it does not require arbitration in all instances. The FAA only concerns arbitration where parties have agreed to arbitrate, and the Act does not prevent parties who have agreed to arbitrate from excluding certain claims from the scope of an arbitration agreement.<sup>41</sup>

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34. *Id.* at 341.

35. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

36. 9 U.S.C. § 2 (2012). “A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

37. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).

38. *Byrd*, 470 U.S. at 219-20. “It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.” *Id.* (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)).

39. *Byrd*, 470 U.S. at 220.

40. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* 460 U.S. 1, 24-25 (1983). The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Id.*

41. *Volt*, 489 U.S. at 511.

In general, for a court to exercise jurisdiction under the FAA, a valid arbitration agreement arising out of a commerce or maritime transaction must exist.<sup>42</sup> However, as the FAA does not provide an independent basis of federal jurisdiction, a federal court must already have subject matter jurisdiction through a source other than an arbitration agreement, such as diversity or a claim involving a federal question, before the FAA can be applied.<sup>43</sup> The Supreme Court has stated that under the FAA, an arbitrator will decide a claim unless the arbitration clause itself is at issue.<sup>44</sup> Generally, arbitrators decide challenges to the validity of contracts as a whole and courts decide challenges to arbitration clauses.<sup>45</sup> Thus to decide whether Herzfeld could bring a collective class arbitration claim, the district court looked to Pennsylvania state contract law.<sup>46</sup> While the FAA preempts state laws that disallow waivers of class actions, the right to collective action is a statutory right guaranteed by the Fair Labor Standards Act, which is a federal law.

### *B. Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA)<sup>47</sup> was passed in 1938 and established a 40-hour workweek, set the national minimum wage, and guaranteed time-and-a-half pay for overtime hours.<sup>48</sup> Congress enacted the FLSA to correct labor conditions found to be “detrimental to the maintenance of the minimum standard of living that is necessary for health, efficiency, and well being of workers.”<sup>49</sup> Under the FLSA, employees have the right to bring a collective action against an employer on behalf of him or herself and similarly situated employees.<sup>50</sup> This guarantee is only available to those individuals who are considered employees, not independent contractors.<sup>51</sup> The FLSA defines an employee as “any individual employed by an employer.”<sup>52</sup> To determine whether an individual is covered under the FLSA as an employee, courts apply an economic reality test, which considers six factors:

- (1) the degree of control exerted by the alleged employer over the worker;
- (2) the worker’s opportunity for profit or loss;
- (3) the worker’s investment in the business;
- (4) the permanence of the working relationship;
- (5) the degree of skill required to perform the work; and
- (6) the extent to which the work is an integral part of the alleged employer’s business.<sup>53</sup>

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42. 9 U.S.C. § 1 (2012).

43. 9 U.S.C. § 4 (2012).

44. *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 445-46 (2006).

45. *Id.* at 445.

46. *Quilloin v. Tenet Health System Philadelphia, Inc.* 673 F.3d 221, 228 (2012) (“State contract principles also generally determine whether an arbitration agreement is unenforceable based on any of the ‘applicable contract defenses, such as fraud, duress, or unconscionability.’”).

47. 29 U.S.C. §§ 201-19 (2012).

48. 29 U.S.C. § 207(a)(2) (2012).

49. 29 U.S.C. § 202 (2012).

50. 29 U.S.C. § 216(b) (2012).

51. 29 U.S.C. § 206 (2012).

52. 29 U.S.C. § 203(e)(1) (2012).

53. *Baker v. Flint Engineering & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (citing *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567 (10th Cir. 1994)).

None of the above factors are by themselves dispositive and courts must employ a totality of the circumstances approach.<sup>54</sup>

The provisions of the FLSA protect individuals classified as employees so employers who hire independent contractors are not subject to the provisions of the FLSA.<sup>55</sup> Generally, independent contractors generally have more bargaining power than employees and have a greater degree of control over their work hours and schedules.<sup>56</sup>

Under the FLSA, employees have a statutory right to bring collective action suits.<sup>57</sup> A collective action under the FLSA differs from a class action within the meaning of Rule 23 of the Federal Rules of Civil Procedure.<sup>58</sup> In a collective action, res judicata extends only to named parties, unlike class actions under Rule 23 where res judicata extends to the entire class.<sup>59</sup> Members of a class under Rule 23 must request exclusion from a lawsuit, or they will be bound by the decision.<sup>60</sup> In a collective action, members must file a consent to join a lawsuit, but they are not bound by the judgment if they do not consent.<sup>61</sup> Courts have treated a collective action under the FLSA and a Rule 23 class action as separate causes of action since the passage of the FLSA.<sup>62</sup>

Although employees have a statutory right to collective action under the FLSA, courts have found that the right can be waived.<sup>63</sup> Under Pennsylvania law, a waiver of a right is the “voluntary and intentional abandonment or relinquishment of a known right.”<sup>64</sup> To constitute a waiver of a right, there must be a “clear, unequivocal and decisive act of the party” with knowledge of the right and an “evident purpose to surrender” the right.<sup>65</sup>

### C. Unconscionability

There is currently a circuit split concerning the unconscionability of arbitration clauses in employment contracts. *D’Antuono v. Service Road Corporation*, a case factually similar to *Herzfeld*, was decided in 2011.<sup>66</sup> However, unlike the *Herzfeld* court, the court in *D’Antuono* found that the arbitration clause in the Stage Rental License agreement was not unconscionable.<sup>67</sup> In *D’Antuono*, three exotic dancers filed suit against the Gold Club, the same entity sued in *Herzfeld*, in the Federal District Court of Connecticut.<sup>68</sup> The dancers filed suit under the FLSA, asserting a

54. *Id.* at 1441.

55. *Bolduc v. National Semiconductor Corp.*, 35 F.Supp. 2d 106, 111 (D. Me. 1998).

56. *Baker*, 137 F.3d at 1441.

57. 29 U.S.C. § 216(b) (2012).

58. Amelia W. Koch, et al., *Individualizing the FLSA: Collective Action Waivers and the Split in the Federal Courts*, 13 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 99, 99 (2012).

59. *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 579-80 (7th Cir. 1982).

60. *Roshto v. Chrysler Corp.*, 67 F.R.D. 28, 29 (E.D. La. 1975).

61. *Id.*

62. Koch, et al., *supra* note 58, at 99.

63. *Herzfeld v. 1416 Chancellor Inc.*, 2015 WL 4480829, at \*10 (E.D. Pa. 2015) (citing *AT&T Mobility v. Concepcion*, 563 U.S. 333, 341-42 (2011)).

64. *Kamco Indus. Sales, Inc., v. Lovejoy, Inc.*, 779 F.Supp. 2d 416, 423 (E.D. Pa. 2011) (quoting *Prime Medical Assocs. v. Valley Forge Ins. Co.*, 970 A.2d 1149, 1156 (Pa. 2009)).

65. *Id.* at 423 (quoting *Brown v. City of Pittsburgh*, 409 Pa. 357, 360 (Pa. 1962)).

66. *D’Antuono v. Serv. Rd. Corp.*, 789 F.Supp.2d 308 (2011).

67. *Id.* at 328.

68. *Id.* at 317.

claim of unfair practices because the owners classified the dancers as independent contractors instead of employees.<sup>69</sup>

### 1. *D'Antuono v. Service Road Corp.*

The plaintiffs in *D'Antuono* objected to the arbitration clause in their Stage Rental License agreement for three reasons.<sup>70</sup> First, the arbitration clause provided that entertainers could not bring collective or class arbitration claims.<sup>71</sup> Second, the clause obtained a cost- and fee-shifting provision requiring the losing party to pay for costs incurred for court proceedings and reasonable attorney's fees.<sup>72</sup> Third, under the arbitration clause, all claims against the Gold Club had to be filed within six months after the dancers' last day of work.<sup>73</sup> The arbitration clause in *Herzfeld* also contained a cost- and fee-shifting provision, but it did not contain an explicit provision prohibiting class arbitration.<sup>74</sup> The arbitration clause instead stated, "[A]ny disputes arising out of this agreement . . . shall be settled by arbitration."<sup>75</sup>

The first issue the court had to address in *D'Antuono* was whether the plaintiffs agreed to arbitration.<sup>76</sup> Plaintiffs conceded they signed the Stage Rental License, which contained an arbitration clause.<sup>77</sup> After determining that plaintiffs had agreed to arbitration, the court determined whether the arbitration clause was enforceable.<sup>78</sup> The Gold Club filed a Motion to Dismiss/or Stay the Action.<sup>79</sup> After oral argument on the motion to dismiss, the district court issued an order that directed the Gold Club to give the court a "yes" or "no" answer concerning whether the Gold Club intended to enforce the cost- and fee-shifting provision and the statute of limitations provision.<sup>80</sup> The Gold Club filed notice that it would not enforce either provision of the arbitration clause.<sup>81</sup>

In Connecticut, an unconscionable contract is one that "no man in his senses, not under delusion would make, on the one hand, and which no fair and honest man would accept on the other."<sup>82</sup> The contract must be so unfair and unreasonable that no reasonable person would willingly enter into the contract.<sup>83</sup> Under Connecticut law, to succeed on an unconscionability claim the moving party must show that an

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69. *Id.* at 313.

70. *Id.* at 320-21.

71. *Id.* at 320-22. "Entertainer agrees that all claims between her and the club will be litigated individually and that she will not consolidate or seek class treatment for a claim." *Id.* at 316-17.

72. *D'Antuono*, 789 F.Supp. 2d at 320-21 ("Any judgment, order, or ruling arising out of a dispute between the parties shall award costs incurred for the proceedings and reasonable attorney fees to the prevailing party.").

73. *Id.* at 321 ("Entertainer further agrees not to commence any action, suit or arbitration proceeding relating, in any manner whatsoever, to this lease of the club, more than six months after she last performed at the premises, and further agrees to waive any statute of limitations to the contrary.").

74. *Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829, at \*2 (E.D. Pa. 2015) ("Licensor and licensee shall each pay their own costs and expenses of arbitration including but not limited to their own respective attorneys face if any.").

75. *Id.* at \*5.

76. *D'Antuono*, 789 F.Supp. 2d at 320.

77. *Id.* at 316.

78. *Id.* at 327.

79. *Id.* at 317.

80. *Id.* at 318.

81. *D'Antuono*, 789 F.Supp. 2d at 318.

82. *Id.* at 327.

83. *Id.*



absence of meaningful choice existed (procedural unconscionability) and that the terms of the agreement were unreasonably favorable toward the other party (substantive unconscionability).<sup>84</sup> A moving party must separately prove both procedural unconscionability and substantive unconscionability to succeed on a claim of unconscionability.<sup>85</sup> However, in some circumstances, Connecticut courts will find a contract is unenforceable on substantive unconscionability alone, even where procedural unconscionability does not exist.<sup>86</sup> By contrast, under Pennsylvania law, courts determine unconscionability on a sliding scale.<sup>87</sup>

### 2. Procedural Unconscionability

The *D'Antuono* court found that the plaintiffs could not prove the arbitration clause was procedurally unconscionable.<sup>88</sup> One of the plaintiffs in *D'Antuono* did not sign a Stage Rental License Agreement, and the court held that she was not bound by the arbitration agreement.<sup>89</sup> Two of the plaintiffs in *D'Antuono* argued that the arbitration clause was procedurally unconscionable because the clause was “hidden in a maze of fine print,” because no effort was made to alert the plaintiffs of the clause, and because the parties had unequal bargaining power.<sup>90</sup> The court disagreed, reasoning that the arbitration clause was written in ordinary size type and that it appeared on the same page where both plaintiffs signed their names.<sup>91</sup> After making that determination, the court addressed the plaintiff’s argument that the contract was presented in a take-it-or-leave-it manner, which was substantially the same argument that Herzfeld presented in her case.<sup>92</sup>

Some courts have held that the take-it-or-leave-it nature of a contract is *per se* procedurally unconscionable; Connecticut does not have such a rule.<sup>93</sup> In *D'Antuono*, the court found that the contract was presented in a take-it-or-leave-it manner, but this was not enough to make the contract procedurally unconscionable.<sup>94</sup>

### 3. Substantive Unconscionability

Not only did the court in *D'Antuono* find that the plaintiffs could not prove the contract was procedurally unconscionable, but the court also found that the plaintiffs could not prove the contract was substantively unconscionable.<sup>95</sup> The court first found that plaintiffs did not cite any case in which either the Connecticut Su-

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84. *Id.*

85. *Id.*

86. *Id.*

87. Herzfeld v. 1416 Chancellor, Inc., 2015 WL 4480829, at \*8 (E.D. Pa. 2015) (“[W]here the procedural unconscionability is very high, a lesser degree of substantive unconscionability may be required and presumably vice versa.”).

88. *D'Antuono*, 789 F.Supp. 2d at 327-28.

89. *Id.* at 325.

90. *Id.* at 328.

91. *Id.*

92. *Id.*; Herzfeld, 2015 WL 4480829, at \*9.

93. *D'Antuono*, 789 F.Supp. 2d at 328.

94. *Id.*

95. *Id.*

preme Court or Appellate Court, applying Connecticut law, struck down an arbitration clause as substantively unconscionable.<sup>96</sup> The only case that the court could point to where the Connecticut Supreme Court considered the issue of whether an arbitration clause was substantively unconscionable applied New York law.<sup>97</sup>

The court further stated that even if the owners of the Gold Club had decided to enforce the cost- and fee-shifting and statute of limitations provisions, the provisions of the arbitration clause were not enough to constitute substantive unconscionability.<sup>98</sup> The court held that the three provisions of the contract to which plaintiffs objected, taken together, were not enough to make the contract unconscionable.<sup>99</sup>

#### 4. *Circuit Split*

Of the 13 circuit courts, six have held that agreements that contain a waiver of collective action under FLSA are enforceable: First, Second, Fourth, Fifth, Eighth, and Eleventh Circuits.<sup>100</sup> Even among these circuits, a split still exists regarding what makes a permissible waiver and what level of stringency should be applied.<sup>101</sup> The First Circuit and many district courts in the Second Circuit have decided that employers have the burden to prove a permissive waiver occurred.<sup>102</sup> The Fourth, Fifth, Eighth, and Eleventh Circuits do not place a high burden on the employer to prove a permissive waiver.<sup>103</sup> The decision in *Concepcion*, although it provided major support for the FAA, it did not serve a solution to the circuit split.

#### D. *AT&T Mobility v. Concepcion*

In 2011, the Supreme Court issued its decision in *Concepcion* and held that arbitration clauses that disallowed class-wide arbitration were not presumptively unconstitutional.<sup>104</sup> *Concepcion* however, differs from both *Herzfeld* and *D'Antuono* in that it involved a consumer contract.

Vincent and Liza Concepcion bought cell phones from AT&T Mobility that were advertised as free.<sup>105</sup> The Concepcions were required to pay the sales tax on the phones.<sup>106</sup> The couple filed a complaint, which was consolidated with a class action, for false advertising.<sup>107</sup> The contract that the Concepcions signed contained an arbitration clause stating all disputes between the parties would be settled via arbitration and it required any claim brought by a plaintiff must be settled on an individual basis.<sup>108</sup> AT&T Mobility filed a motion to compel arbitration.<sup>109</sup> The district court denied the motion basing its decision on the California rule announced

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96. *Id.* at 329.

97. *Id.*

98. *Id.*

99. *D'Antuono*, 789 F.Supp. 2d at 329.

100. Koch, et al., *supra* note 58, at 104.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337 (2011).

106. *Id.*

107. *Id.* at 338.

108. *Id.* at 337.

109. *Id.* at 337-38.

in *Discover Bank v. Superior Court*.<sup>110</sup> In this case, the California Supreme Court held that a waiver of class arbitration in a consumer contract of adhesion is unconscionable under certain circumstances and should not be enforced.<sup>111</sup> The district court denied the motion because AT&T could not prove that the bilateral arbitration agreement substituted for the deterrent effects of class actions.<sup>112</sup> The Ninth Circuit affirmed this decision holding that the *Discover Bank* rule was not preempted by the FAA.<sup>113</sup>

The Supreme Court found that the FAA preempts any conflicting state law that prohibits the arbitration of a claim outright.<sup>114</sup> The Court found that class arbitration could be inconsistent with the FAA for three reasons.<sup>115</sup> First, class arbitration nullifies the main advantage of arbitration — its informality — and makes the process of arbitration slower and more expensive.<sup>116</sup> Second, class arbitration cannot be accomplished without procedural formality, which defeats the purpose of arbitration.<sup>117</sup> Third, class arbitration increases risks to defendants because multilayered review makes it more likely that errors will go uncorrected.<sup>118</sup> The Supreme Court found that the *Discover Bank* rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” and thus was preempted by the FAA.<sup>119</sup>

#### IV. INSTANT DECISION

The district court in *Herzfeld* addressed *Concepcion* but ultimately found that *Concepcion* did not address the question before the district court.<sup>120</sup> After Herzfeld brought suit, the owners of the Gold Club moved to compel arbitration under the arbitration clause in the Stage Rental License Agreement.<sup>121</sup> The district court granted limited discovery on arbitrability.<sup>122</sup> The court found that Herzfeld was not permitted to arbitrate her FLSA collective action or class action under the 2013 arbitration clause, but that the loss of the right to arbitrate a collective or class action was unconscionable under Pennsylvania contract law.<sup>123</sup>

The Third Circuit has held that the district court has the authority to decide if an agreement to arbitrate authorizes class arbitration absent “clear and unmistakable evidence” to the contrary.<sup>124</sup> Under Pennsylvania law, courts have found that reference to the American Arbitration Association’s rules on collective or class actions

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110. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Ca. 2005) *overruled by* *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

111. *Id.* at 114.

112. *Concepcion*, 563 U.S. at 338.

113. *Id.*

114. *Id.* at 343.

115. *Id.* at 348.

116. *Id.*

117. *Concepcion*, 563 U.S. at 348.

118. *Id.* at 349.

119. *Id.* at 350.

120. *Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829, at \*10 (E.D. Pa. 2015).

121. *Id.*, at \*2-3.

122. *Id.* at \*3.

123. *Id.* at \*8, \*13.

124. *Id.* at \*5 (citing *Opalinski v. Robert Half Intern, Inc.*, 761 F.3d 326, 329 (3d Cir. 2014)). The arbitration agreement provided for arbitration of any dispute of a FLSA claim arising out of or relating to their employment. It was silent on the availability of class arbitration. Consequently, the court of

constitutes clear and unmistakable evidence that the parties agreed to have an arbitrator decide whether he or she can resolve a class-wide claim.<sup>125</sup> The 2013 arbitration clause in the Stage Rental License Agreement did not reference the American Arbitration Association rules.<sup>126</sup> The agreement merely stated that the arbitration “shall be final and conclusive and binding upon both parties.”<sup>127</sup>

Because Herzfeld and the club owner did not clearly and unmistakably agree that an arbitrator would decide whether a party could bring a collective or class arbitration action, the district court looked to whether a collective or class arbitration action fell within the scope of the 2013 arbitration clause.<sup>128</sup> The clause refers to arbitration involving “both parties” and does not make mention of any other parties.<sup>129</sup> Thus, the district court found that as a matter of law the 2013 arbitration clause did not permit Herzfeld to bring collective or class arbitration action.<sup>130</sup>

After determining that the 2013 arbitration clause did not permit Herzfeld to bring a class arbitration claim, the court then had to decide whether the arbitration clause was unconscionable.<sup>131</sup> Under Pennsylvania law, the burden of proof to prove that a clause is both procedurally and substantively unconscionable falls on the challenging party.<sup>132</sup> Courts look to the following factors to determine procedural unconscionability: (1) the take-it-or-leave-it nature of the standardized form of the document, (2) the parties’ relative bargaining positions, and (3) the degree of economic compulsion motivating the adhering party.<sup>133</sup>

The owners of the Gold Club admitted that the 2013 agreement was presented in a take-it-or-leave-it fashion.<sup>134</sup> The court found that a disparity in bargaining power existed between Herzfeld and the Gold Club.<sup>135</sup> Herzfeld was a student and an exotic dancer at the time.<sup>136</sup> While she worked at the club for six years, this was not enough to put her on equal bargaining power with the owners of the club.<sup>137</sup> The court found that while evidence of procedural unconscionability existed, procedural unconscionability was not Herzfeld’s strongest argument.<sup>138</sup> Procedural unconscionability is sometimes evaluated on a sliding scale dependent on the substantive unconscionability analysis.<sup>139</sup> This means that a contract can still be found unconscionable even if it is more substantively unconscionable than procedurally unconscionable.<sup>140</sup>

The court stated that substantive unconscionability refers to terms that are “unreasonably or grossly favorable to one side and to which the disfavored party does

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appeals found the district court must decide whether the arbitration agreement permitted class arbitration.  
*Id.*

125. *Chesapeake Appalachia LLC v. Burkett*, No. 12-3073, 2014 WL 5312829, at \*6 (M.D. Pa. 2014).

126. *Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829, at \*6 (E.D. Pa. 2015).

127. *Id.* at \*1.

128. *Id.* at \*5.

129. *Id.* at \*8.

130. *Id.*

131. *Id.*

132. *Herzfeld*, 2015 WL 4480829, at \*8.

133. *Id.* at \*9.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Herzfeld*, 2015 WL 4480829, at \*9.

138. *Id.*

139. *Id.* at \*8.

140. *Id.*

not assent.”<sup>141</sup> The FLSA provides that a party may bring an action against an employer on behalf of him or herself or other similarly situated employees.<sup>142</sup> The court found that the arbitration agreement caused an unknowing loss of Herzfeld’s statutory right to collective action.<sup>143</sup> To waive her right to collective and class arbitration, Herzfeld would have needed to know about the right and there must have been a clear showing that she intended to give up that right.<sup>144</sup> The arbitration clause made a collective or class arbitration action unavailable and as a result imposed an involuntary unknowing loss of the right to a class arbitration action.<sup>145</sup> Thus the court found that the arbitration clause was substantively unconscionable.<sup>146</sup>

## V. COMMENT

The Supreme Court’s decision in *Concepcion* was an important decision in the growing trend of courts upholding arbitration agreements in contracts. The Supreme Court concluded that class arbitration waivers in consumer contracts are presumptively constitutional when it held the FAA preempts state laws that prohibit contracts from disallowing class-wide arbitration.<sup>147</sup> After this case was handed down, the question of whether arbitration clauses in contracts appeared to have been finally answered. However, *Concepcion* and *Herzfeld* are distinguishable. *Herzfeld* and other cases dealing with arbitration clauses in employment contracts concerned the FLSA, a federal law, while *Concepcion* addressed a state law.<sup>148</sup> Furthermore, the FLSA guarantees employees the right to a collective action on behalf of other similarly situated employees.<sup>149</sup> The Supreme Court has not addressed the issue of collective action waivers in employment and lower courts, as in *Herzfeld*, have attempted to answer this question with little consensus among the circuits.

Part of the problem facing courts in considering collective action waivers is the inconsistency of state unconscionability law. Under the FAA, an arbitration agreement is not enforceable if the formation of the arbitration agreement is made under fraud or duress, or if the terms of the agreement are unconscionable.<sup>150</sup> Most employees challenge arbitration agreements for unconscionability.<sup>151</sup> Under an unconscionability analysis, federal courts must interpret state law,<sup>152</sup> which results in inconsistency. In *Herzfeld*, the court analyzed procedural and substantive unconscionability on a sliding scale.<sup>153</sup> In *D’Antuono*, the court treated procedural and substantive unconscionability as separate prongs of a two-part test.<sup>154</sup> The district court in *D’Antuono* mentioned that some courts have held that the take-it-or-leave-

141. *Id.* at \*10.

142. 29 U.S.C. § 216(b) (2012).

143. *Herzfeld*, 2015 WL 4480829, at \*11.

144. *Id.*

145. *Id.*

146. *Id.*

147. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

148. *Compare id.* at 352-53, with *Herzfeld*, 2015 WL 4480829, at \*2-3.

149. 29 U.S.C. § 216(b) (2012).

150. *Concepcion*, 563 U.S. at 353 (Thomas, J. concurring).

151. *See, e.g., id.* at 336; *Herzfeld*, 2015 WL 4480829, at \*1; *D’Antuono v. Service Road Corp.*, 789 F.Supp. 2d 308, 323 (D. Conn. 2011).

152. *Herzfeld*, 2015 WL 4480829, at \*8.

153. *Id.*

154. *D’Antuono*, 789 F.Supp. 2d at 327.

it nature of a contract is *per se* procedurally unconscionable.<sup>155</sup> Connecticut does not have this rule.<sup>156</sup> Prior to the *D'Antuono* case, the Connecticut Supreme Court had only ruled on whether an arbitration clause is substantively unconscionable once and the court was interpreting New York unconscionability law and not Connecticut unconscionability law.<sup>157</sup> Because of this inconsistency, collective action waivers should be considered *per se* unenforceable.

This approach appears similar to the law that the Supreme Court struck down in *Concepcion*. However, *Concepcion* invalidated state laws that prohibited *class* arbitration. The concerns listed by the Supreme Court are less of an issue under the FLSA. The FLSA grants employees the statutory right to collective action, and courts have treated collective and class actions as two separate bodies of law.<sup>158</sup> The right to collective action under the FLSA is not an “opt-in” version of Rule 23 of the Federal Rules of Civil Procedure.<sup>159</sup> Collective action would not nullify the informality of arbitration, because an arbitrator does not have to adhere to the requirements laid out in Rule 23, but the Supplementary Rules for Class Arbitrations.<sup>160</sup> Collective action can be accomplished without procedural formality because collective actions are less formal than class actions. Since the passage of the FLSA, courts have treated class and collective actions as separate, non-interchangeable bodies of law.<sup>161</sup>

Treating the waiver of collective action as *per se* unconscionable would eliminate differing court decisions when applying state unconscionability law. A single rule is better for the same reason that courts have upheld consumer agreements precluding class arbitration under the FAA: efficiency. There is a split among the circuits and the Supreme Court should address this issue. Furthermore, the right to a collective action is a remedy under the FLSA. By allowing a waiver of a collective action, an employee is not afforded the full scope of the remedies that Congress intended the FLSA to offer. While courts have favored arbitration, that preference should not come at the expense of a statutory right. Congress passed the FLSA to prevent unfair practices in employment. The waiver of the right to collective action is an unfair practice that the FLSA is designed to protect.

By adopting a bright line rule that the waiver of collective action is *per se* unconscionable, would not render the FAA unenforceable. In *Concepcion*, the Supreme Court found that the FAA preempts state laws that ban class arbitration provisions that disallow *class* arbitration.<sup>162</sup> Even if we were to completely ignore that *Concepcion* concerned state law rather than a federal law like the FLSA, the FLSA and the FAA can still coexist because the FLSA allows for collective action, which courts have treated as a separate body of law from class actions.

Some courts have decided that arbitration agreements can contain a waiver of collective action; however, those courts are split on what makes a permissible

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155. *Id.* at 328.

156. *Id.*

157. *D'Antuono*, 329.

158. See generally Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1322 (2008).

159. Rule 23 requires that the class be certified, that named parties are representative and typical of the entire class, and how discovery is to be conducted. FED. R. CIV. P. 23.

160. Thomas J. Cunningham, *Class Actions in Arbitration*, 92 ILL. B.J. 532, 533 (2004).

161. Koch, et al., *supra* note 58, at 99.

162. *Concepcion*, 563 U.S. at 349.

waiver.<sup>163</sup> Should the employee be told that the arbitration agreement includes a waiver of collection action? Should the waiver be in bold print so that it draws the employee's attention to the clause? What specific language should be included in the agreement to constitute a permissible waiver? Among the circuits that have decided that the right to collective action can be waived, there is no consensus. While not as extreme as the bright line rule, the circuits who have decided that the right to collective action can be waived still have not provided a clear and consistent rule as to what constitutes a permissive waiver of a collective action.

The per se bright line rule would not come without its disadvantages. As with any federal law that might conflict with a state law, there is always the possibility of limiting the applicability of state law similar to the decision in *Concepcion*. Furthermore, applying a bright line rule in employment contracts could cause potential confusion because it does not always provide for exceptions. In this case, because the FLSA provides for collective action as a statutory remedy, the bright line rule is appropriate.

## VI. CONCLUSION

The FAA can preempt state laws that prohibit class-wide arbitration; the question still remains whether it can preempt federal laws. The *Herzfeld* case presented an opportunity to explore enforcement of the FAA in the context of employment contracts. The ruling provided that an arbitration clause is procedurally and substantively unconscionable when it causes an unknowing loss of a statutory right. This case also added to the circuit split regarding whether waivers of collective actions under the FLSA are unconscionable. The right to a collective action is a statutory remedy provided under the FLSA. As the court stated in *Herzfeld*, an "arbitrator cannot offer . . . the full scope of the FLSA remedies in arbitration."<sup>164</sup>

The increasing trend of courts favoring arbitration should not and needs not come at the expense of a statutory right. The FLSA and the FAA can coexist with one another. While a per se bright line rule does not come without its problems, the efficiency it will provide outweighs any disadvantages that could arise.

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163. Koch, et al., *supra* note 58, at 104.

164. *Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829, at \*11 (E.D. Pa. 2015).