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Concerning Preemption: Upholding Consent under the Federal Arbitration Act Note

Shane Blank

Concerning Preemption: Upholding Consent Under the Federal Arbitration Act

AT&T Mobility LLC v. Concepcion[1]

I. INTRODUCTION

State and federal governments have long been at odds regarding the application of arbitration clauses in private contractual agreements. Congress, aware of such disdain by the states to enforce arbitration, created the Federal Arbitration Act (FAA) in 1925 to curtail state efforts to illegitimize arbitration.[2] Unable to entirely invalidate arbitration agreements after the enactment of the FAA, state legislatures attempted to regulate such agreements instead.[3] One of the newest forms of state regulation to test the preemptive power of the FAA is the use of state law to require the availability of class-wide arbitration in arbitration agreements.[4]

Concepcion represents the latest failed effort by a state to assert some level of control over consensual arbitration agreements. It also represents an affirmation by the U.S. Supreme Court of a long-standing notion that arbitration agreements, standing on equal footing with other contracts, must be enforced according to their terms—holding consent to be the paramount consideration in judicial analysis.[5] This note will examine the lengthy history of the FAA's preemptive power under the Supremacy Clause, explore the U.S. Supreme Court's time-honored rationale for choosing when to exercise its preemptive powers to invalidate state law, and evaluate potential implications resulting from the Supreme Court's recent decision to preempt state law efforts to invalidate class-action waiver provisions found in arbitration agreements.

II. FACTS AND HOLDING

In 2002, AT&T Mobility LLC began advertising a range of "free" and substantially discounted phones to customers who also purchased one of its service

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

2. *See* Southland Corp. v. Keating, 465 U.S. 1, 13-14 (1984); *see also* H.R. REP. NO. 68-96, at 1 (1924).

3. The Supreme Court has permitted state regulation of arbitration clauses where they operate under "general contract law principles." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exists at law or in equity for the revocation of any contract'" (quoting 9 U.S.C. § 2 (2011))).

4. *See, e.g.*, Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).

5. *Concepcion*, 131 S. Ct. at 1748-49. *See also* Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) ("Arbitration under the [FAA] in [sic] a matter of consent, not coercion, and parties are generally free to structure arbitration agreements as they see fit").

plans.[6] These advertisements contained fine print language indicating customers would be responsible for sales tax and other applicable charges.[7] Under the terms of the offer, customers would be required to pay a sales tax between 6% and 28% of the phone's suggested retail value, despite such phones being advertised as either "free" or discounted.[8]

Enticed by AT&T's advertisements, customers Liza and Vincent Concepcion purchased two phones from AT&T and signed a two-year service agreement.[9] The first phone was reduced by one hundred dollars ($100), while the second phone was free-of-charge.[10] As part of that sale, the Concepcions were charged an additional $30.22 in sales tax—an amount reflecting taxation on the full suggested retail value of the first phone and not on the price of the phone deducted by a one hundred dollar ($100) discount. [11]

The service agreement included language requiring arbitration for all disputes arising between the parties.[12] An important term of the arbitration clause was a class waiver provision requiring claims to be bilaterally arbitrated between the Concepcions and AT&T, with no rights to arbitrate as a class-action proceeding.[13] An amended version of the service agreement provided a number of favorable provisions to the Concepcions should they elect to arbitrate a claim against AT&T.[14]

Rather than pursing their claims through arbitration, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California in March 2006.[15] The Concepcions argued AT&T had engaged in false advertising practices and had committed fraud by charging its customers a sales tax on phones it advertised as free or discounted.[16] This complaint was eventually consolidated into an already-pending class action in September 2006.[17] In

6. Brief for Appellee at 4, Concepcion v. AT&T Mobility LLC, 584 F.3d 849 (2009) (No. 08-56394), 2009 WL 2494187.

7. *Id.* at 3. Such language included: "taxes and other charges additional," "sales tax applies to the retail value of the phone," "sales tax based upon MSRP of all phones," and "[s]ome restrictions apply. See store for details." *Id.*

8. *Id.*

9. *Id.* at 4.

10. *Id.*

11. *Id.* ("The Concepcions were charged $30.22 in sales tax, equal to 7.75% of $399.98 and not the discounted amount actually charged"). *Id.*

12. *Concepcion*, 131 S. Ct. at 1744.

13. *Id.* The contract provided "for arbitration of all disputes between the parties . . . [on an] individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* (citing App. to Pet. for Cert. 61a.)

14. These favorable provisions included the following: 1.) AT&T is required to pay all costs for non-frivolous claims; 2.) Arbitration must take place in the county where customer is billed; 3.) Claims worth $10,000 or less may proceed in arbitration by phone, in person, or based solely upon submissions, at the customer's sole preference; 4.) Either party may bring a claim in small claims court rather than in arbitration; 5.) The arbitrator may award any form of relief, including punitive damages and injunctions; 6.) AT&T may not seek attorney's fees; and 7.) In the event a customer receives arbitration awards greater than the amount offered in settlement by AT&T, AT&T must pay a $7,500 minimum including twice the amount of the claimant's attorney's fees. *Concepcion*, 131 S. Ct. at 1744.

15. *Id.*

16. *Id.*

17. Liza and Vincent Concepcion filed their original class action complaint on March 27, 2006. On May 25, 2006, AT&T filed a motion to consolidate the Concepcions' case with another case entitled Laster v. T-Mobile. 407 F. Supp. 2d 1181 (S.D. Cal. 2005). AT&T and T-Mobile were co-defendants

response, AT&T moved to compel arbitration pursuant to the class waiver provision of the service agreement.[18] Although the district court favored the language of the service agreement's arbitration clause, it ultimately found the clause to be unconscionable because AT&T failed to show that "bilateral arbitration adequately substituted for the deterrent effects of class actions."[19] Relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*[20]—holding unconscionable any consumer contract of adhesion which includes a class-action waiver clause where disputes would foreseeably involve small amounts of damage and the party with superior bargaining power is alleged to have carried out a scheme to deliberately cheat the consumer—the district court denied AT&T's motion to compel arbitration.[21]

Upon review, the Ninth Circuit Court of Appeals affirmed the District Court's ruling, finding *Discover Bank* to be dispositive.[22] It also rejected a claim by AT&T that the *Discover Bank* rule was preempted by § 2 of the FAA,[23] making all arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[24] The Ninth Circuit found the *Discover Bank* rule was not preempted because it did not stand as an obstacle to the purposes of the FAA; rather, the court found the rule functioned merely as "a refinement of the unconscionability analysis applicable to contracts generally in California."[25]

The U.S. Supreme Court granted certiorari and found the FAA preempts state common law where such common law makes "preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'"[26] The Supreme Court also agreed with the Ninth Circuit that § 2 of the FAA does not extend so far as to preserve state laws which would "stand as an obstacle to the accomplishment of the FAA's objectives."[27] However, the Supreme Court found the *Discover Bank* rule did interfere with the objectives of the FAA.[28] Thus, the FAA preempted *Discover Bank* insofar as it permitted a party to

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in Laster which, at the time of AT&T's motion to consolidate Concepcion, had been stayed pending a decision by the Ninth Circuit on whether class waivers were unconscionable and therefore unenforceable as held by the district court. On September 7, 2006, the district court granted AT&T's motion and consolidated the Concepcion case into Laster. Despite the Ninth Circuit's eventual holding in Laster that class waivers were unconscionable, AT&T moved to compel the Concepcions to arbitrate in 2008. Brief for Appellee at 9-10, Concepcion v. AT&T Mobility LLC, 584 F.3d 849 (2009) (No. 08-56384), 2009 WL 2494187.

18. *Concepcion*, 131 S. Ct. at 1744-45.

19. *Id.* at 1745.

20. Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76 (Cal. 2005).

21. *Concepcion*, 131 S. Ct. at 1745. The district court relegated discussion of FAA preemption to a footnote, briefly stating "the Court declines to conclude the FAA preempts any holding that ATTM's arbitration provisions is unenforceable under California law." Laster v. T-Mobile USA, Inc., No. 05CV1167, 2008 WL 5216255, at *14 n.11 (S.D. Cal. Aug. 11, 2008).

22. *Concepcion*, 131 S. Ct. at 1745.

23. 9 U.S.C. § 2 (2011).

24. Laster v. AT&T Mobility LLC, 584 F.3d 849, 857-58 (9th Cir. 2009).

25. *Id.* at 857.

26. *Id.* at 1748.

27. *Id.* The Supreme Court goes on to say "a federal statute's saving clause 'cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" *Id.* (quoting Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907)).

28. *Id* at 1750.

demand class arbitration "ex post" in direct contradiction with the explicit terms and expectations of the parties' agreement.[29] Because the *Discover Bank* rule was preempted by the FAA, where it attempts to "manufacture" class arbitration rather than allowing it to be consensual, the Supreme Court reversed the Ninth Circuit's denial of AT&T's motion to compel bilateral arbitration and remanded the case for further proceedings.[30]

III. LEGAL BACKGROUND

A. The Interplay Between the Federal Arbitration Act of 1925 and the U.S. Constitution

The United States Arbitration Act of 1925—commonly referred to as the Federal Arbitration Act (FAA)[31]—was enacted by Congress to "make valid and enforceable agreements for arbitration contained in contracts *involving interstate commerce* or within the jurisdiction of admiralty, or which may be the subject of litigation in the Federal courts."[32] By invoking the term of art "involving interstate commerce," Congress made clear use of its Commerce Clause powers under the U.S. Constitution when enacting the FAA.[33] The Commerce Clause, therefore, necessarily limits the scope of the FAA, though its reach is still broadly defined.[34] The U.S. Supreme Court has held the reach of the FAA, empowered by the full authority of the Commerce Clause, extends to any such transactions which touch upon "the flow of interstate commerce."[35] The scope of the FAA, then, can be said to reach any contract—alone not having a substantial effect on interstate commerce—that pertains to "general practices . . . [which] bear on interstate commerce in a substantial way."[36]

Enacted under the Commerce Clause, the FAA gains an important power: the power of preemption. The preemption doctrine, derived from the Supremacy Clause,[37] requires valid federal law to supersede state law where such state law stands incongruent to the objectives and purposes of the federal law.[38] The doc-

29. *Id.*

30. *Id.* at 1753.

31. 9 U.S.C. §§ 1–16 (2011).

32. H.R. REP. NO. 68-96, at 1 (1924) (emphasis added).

33. *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause Power"); *see also* U.S. CONST. art. I, § 8, cl. 3.

34. *See Citizens Bank*, 539 U.S. at 56.

35. *Id.* ("the [FAA] provides for the enforcement of arbitration agreement within the full reach of the Commerce Clause . . . the FAA encompasses a wider range of transactions than those actually 'in commerce'—that is, 'within the flow of interstate commerce'" (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995))).

36. *Id.* at 57.

37. U.S. CONST. art. VI, § 2.

38. Put another way, "[the Supremacy Clause] requires courts to ignore state law if (but only if) state law contradicts a valid rule established by federal law, so that applying the state law would entail disregarding the valid federal rule." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000).

trine can come in the form of either express or implied preemption.[39] When a federal statute preempts state law through its structure or purpose, rather than express language, such conflict is known as "implied conflict preemption."[40] Under the implied conflict preemption doctrine two preemption categories emerge: either the state law stands as an obstacle inconsistent to the purposes and objectives of federal law ("obstacle preemption")[41] or state law makes it impossible for a party to comply with both federal and state law simultaneously ("impossibility preemption").[42]

B. The FAA and State Law Preemption: Southland Corp. v. Keating

It was not until 1984 that the U.S. Supreme Court first held the FAA to be enforceable in state court and preemptive of conflicting state law—this pivotal decision was expressed in *Southland v. Keating*.[43] Southland Corporation, the owner and franchisor of 7-Eleven convenience stores, was sued by approximately 800 of its franchisees in a California state court under a class action spearheaded by Richard Keating, arguing, amongst other claims, that Southland violated disclosure requirements under the California Franchise Investment Law (FIL).[44] In response, Southland moved to compel arbitration under the terms of its standard franchise agreements with franchisees.[45] Upon reaching the California Supreme Court, FIL claims were held not to be a valid subject of arbitration because the FIL required judicial consideration of any such claims brought under it.[46] Additionally, the California Supreme Court noted the FIL did not contravene the FAA

39. *See* Altria Group, Inc. v. Good, 555 U.S. 70, 76 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose").

40. Determining whether a federal statute preempts a state law falls largely on congressional intent. *See* Retail Clerk Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 375 U.S. 96, 103-04 (1963) ("The purpose of Congress is the ultimate touchstone. Congress under the Commerce Clause may displace state power . . . or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime"). In attempting to interpret congressional intent, courts will use a categorial approach. The first category is an express preemption, under which courts analyze the language of the federal statute to determine if it expressly removes powers from the states. The second category is a two-part implied preemption analysis, under which courts determine whether federal legislation occupies a field so pervasively that it entirely precludes state laws which touch upon the same subject ("implied field preemption") or whether federal legislation directly conflicts with state law ("implied conflict preemption"). *See generally* Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149 (1998).

41. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see also* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 397-98 (2004).

42. *Id.*

43. *See generally* Southland Corp. v. Keating, 465 U.S. 1 (1984).

44. *Id.* at 4; *see* California Franchise Investment Law, CAL. CORP. CODE §§ 31000-31516 (West 1977).

45. *Southland Corp.*, 465 U.S. at 1. The standard franchise agreement provided that "any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof." *Id.* Southland's motion to compel arbitration under these terms was at first denied by the trial court. *Id.* On appeal, the California Court of Appeals reversed, finding the arbitration clause, as written, compelled the parties to arbitrate all claims arising under the agreement, including those under the FIL. In the alternative, the court of appeals argued that, to the extent the FIL conflicts with the FAA, it is preempted by the FAA under the Supremacy Clause. *Id.* at 5.

46. *Id.*

and therefore was not preempted by it, quelling an earlier concern first proposed by the California Court of Appeals.[47]

The U.S. Supreme Court disagreed with the latter and reversed the California Supreme Court's ruling, finding an anti-waiver provision of the FIL to be in direct conflict with the FAA.[48] This anti-waiver provision provided that any term attempting to bind persons acquiring a franchise to waive compliance to a provision encompassed in the FIL is void.[49]

In analyzing whether the anti-waiver provision violated the provisions of the FAA, the Supreme Court began by saying "in enacting § 2 of the [FAA],[50] Congress declared a national policy favoring arbitration."[51] The Court also stated the enactment of the FAA under the Commerce Clause clearly implied the substantive rules of the FAA were equally applicable to both state and federal courts.[52] Consequently, the Court found § 2—the substantive law of the FAA—to apply to state proceedings.[53] However, the Court prudently clarified neither § 3 nor § 4, which purports to command use of the Federal Rules of Civil Procedure in proceedings to compel arbitration, apply to state court proceedings.[54] Because § 2 of the FAA reached state-made law such as the FIL, the majority concluded the FIL substantively violated the FAA where it attempted to undercut the enforceability of arbitration agreements insofar as judicial consideration was required for any claims brought under it.[55] Accordingly, because an anti-waiver provision of the FIL invalidated any attempt to circumvent mandatory judicial consideration of FIL disputes, the Court held the FIL stood in direct conflict with federal law and so was preempted by the FAA as an exercise of the Supremacy Clause power.[56]

47. *Id.*

48. *Id.* at 10.

49. The language of the statute reads: "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or rule or order hereunder is void." CAL. CORP. CODE § 31512 (West 1977).

50. Section 2, the keystone of the FAA, states in pertinent part: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2011).

51. *Southland Corp.*, 465 U.S. at 10. Recalling that Congress enacted the FAA under authority of the Commerce Clause, the Court also noted the FAA was limited to only those contracts concerning maritime or commerce concerns. *Id.*

52. *Id.* at 12 ("the [FAA] was an exercise of the Commerce Clause power [which] clearly implied that the substantive rules of the Act were to apply to state as well as federal courts.").

53. *Id* at 14-15 ("[w]e therefore view the 'involving commerce' requirement in § 2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts").

54. *Id.* at 16 n. 10.

55. *Id.* at 16.

56. *Id.* ("[i]n creating a substantive rule applicable to state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that [the anti-waiver provision] of the California Franchise Investment Law violates the Supremacy Clause").

C. Considering an Early Standard for Applying Preemption Under the FAA: Perry v. Thomas

The Supreme Court took up the issue of FAA preemption again in *Perry v. Thomas*, a case decided in 1987.[57] In *Perry*, the Court again held that § 2 of the FAA preempted a California state law, this time in the form California Labor Code § 229.[58] The majority of the case concerned whether a prior decision, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, had already decided the issue of preemption under § 229.[59] Specifically, *Ware* held that § 229 was not preempted by the Supremacy Clause and did not interfere with the federal regulatory scheme.[60] The Court in *Perry* noted, however, that *Ware* was limited in scope and resolved only the preemptive effect of the Securities Exchange Act of 1934 on § 229—it did not consider whether § 229 was preempted by the FAA.[61] Considering whether the FAA preempted § 229, the majority found "clear federal policy places § 2 of the [FAA] in unmistakable conflict" with § 229 where it commands the use of judicial forums for resolving wage disputes.[62] Thus, the Court found, § 229 was preempted by the FAA under the Supremacy Clause.[63]

An argument that the arbitration agreement in *Perry* constituted an unconscionable and unenforceable contract of adhesion was relegated to a footnote and summarily dismissed.[64] The Court commented, however, on the choice-of-law issue arising from potential defenses asserting unconscionability as a valid justification for voiding arbitration clauses by expressing its opinion that state law is applicable only where such law arose to govern the enforceability of contracts generally—in contrast to those state laws which derive meaning only from the fact that arbitration is at issue.[65] Thus, the Court warned, any state attempts to capitalize on the uniqueness of arbitration agreements as a means of invalidating such agreements as unconscionable would be met with disfavor.[66]

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57. Perry v. Thomas, 482 U.S. 483 (1987).

58. *Id.* at 483. The disputed state law held that actions for collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate." CAL. LAB. CODE § 229.

59. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973).

60. *Id.* at 139-40.

61. *See Perry*, 482 U.S. at 491 ("[t]he oblique reference to the Federal Arbitration Act in footnote 15 of Ware cannot fairly be read as a definitive holding that [§ 229 is not in conflict with § 2 of the FAA]").

62. *Id.*

63. *Id.* at 491-92.

64. *Id.* at 492 n. 9.

65. *Id.* ("[a]n agreement to arbitrate is valid, irrevocable, and enforceable *as a matter of federal law* . . . save upon such grounds as exists at law or equity for the revocation of any contract. Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the FAA]").

66. *Id.* ("a court [may not] rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot").

D. Tackling the Effect of Choice-of-Law Clauses on FAA Preemption: Volt v. Board of Trustees

In 1989, the Supreme Court tackled the issue foreseen in *Perry v. Thomas*, the effect choice-of-law clauses have on FAA preemption.[67] In *Volt Info Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, the parties entered into a construction contract which contained both an agreement to arbitrate all disputes and a choice-of-law clause requiring application of California law.[68] The California Arbitration Act (CAA)[69] contained a provision, § 1281.2(c), providing state courts the ability to stay an arbitration proceeding when a third party not bound to the arbitration was involved in related litigation.[70] Leland Stanford Junior University sued Volt Information Sciences in California state court while simultaneously seeking indemnity from two other companies involved in the construction contract at issue, who were not a part of the arbitration agreement.[71] Volt moved to compel arbitration and Stanford, in turn, moved to stay arbitration pursuant to § 1281.2(c).[72] The trial court denied Volt's motion and stayed the arbitration proceeding until the conclusion of the indemnity claims against the two third-party companies pursuant to § 1281.2(c), which the court of appeals affirmed.[73]

Upon denial by the California Supreme Court to hear the case, the U.S. Supreme Court again took up the matter of interpreting the preemptive effect of the FAA and turned first to § 4, which allows a party to an arbitration agreement to petition a federal district court for an order directing arbitration in a manner consistent with the terms of the agreement.[74] The Court found § 4 of the FAA "does not confer a right to compel arbitration of any dispute at any time" and so found no conflict between the FAA and § 1281.2(c) of the CAA, which does not prevent arbitration but merely provides an ability to postpone it pursuant to the terms agreed upon by the parties.[75] The Supreme Court reasoned that, although the contract in dispute falls squarely within the scope of the FAA, the FAA contains neither express language nor does it purport to occupy the entire field of arbitration with which to preempt § 1281.2(c).[76]

The Court relied heavily on its determination that the FAA "was motivated, first and foremost, by a congressional desire to enforce agreements into which

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67. *See generally* Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468 (1989).

68. *Id.* at 468. The choice-of law clause provided that "the Contract shall be governed by the law of the place where the Project is located." The project, which involved installing a system of electrical conduits, was to take place on the campus of Leland Stanford Junior University in California. *Id.* at 470.

69. CAL. CIV. PROC. CODE §§ 1280-1284 (West 1982).

70. *Volt Info. Sciences, Inc.*, 489 U.S. at 470; *see* CAL. CIV. PROC. CODE § 1281.2(c) (West 1982).

71. *Volt Info. Sciences, Inc.*, 489 U.S. at 470-71.

72. *Id.* at 471.

73. *Id.*

74. *Id.* at 474; *see* 9 U.S.C. § 4 (2011).

75. *Volt Info. Sciences, Inc* , 489 U.S. at 474-75. Recall also that the Supreme Court had already declared § 4 of the FAA does not apply to state court proceedings. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 n.10 (1984).

76. *Volt Info. Sciences, Inc.*, 489 U.S. at 476-77. The language used by the court also serves as a good example of a court's use of the "categorical approach" to interpreting preemption effects under the FAA. *See* Jordan, *supra* note 40, at 1150; *see supra* note 28.

parties had entered."[77] Therefore, the majority concluded that arbitration under the FAA was a matter of consent as opposed to coercion, promoting the notion that parties are free to bargain for the terms incorporated into an arbitration agreement.[78] Here, the parties' consensual intent to abide by state rules of arbitration lie congruent to the purposes of the FAA, even if arbitration is stayed under state law where it would otherwise press on under the FAA.[79]

E. Applying the Principles of Perry *Footnote #9:* Doctor's Assoc., Inc. v. Casarotto

In 1996, the Supreme Court circled back to its important footnote in *Perry*[80] to mark a clear distinction between the differences of generally applicable contract defenses and those defenses which "rely on the uniqueness of an agreement to arbitrate" as a basis for holding arbitration clauses unenforceable.[81] In *Doctor's Assoc., Inc. v. Casarotto*, the Court wrestled with a Montana statute which declared arbitration clauses found in franchise agreements unenforceable unless proper notice of the requirement to arbitrate was provided to the franchisee.[82] Proper notice, in this case, required typing in underlined capital letters on the first page of the contract a notification that the franchise agreement was subject to arbitration.[83] The Court was quick to point out the state statute's first-page notice requirement did not govern over contracts generally but, instead, applied specifically to the enforceability of arbitration agreements.[84] Accordingly, the law was preempted by § 2 of the FAA under the Supremacy Clause.[85] In an oft-quoted phrase, the Court summed up congressional intent in its enactment of the FAA by saying "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"[86]

77. *Volt Info. Sciences, Inc.*, 489 U.S. at 478.

78. *Id.* at 479.

79. *Id.* ("arbitration under the [FAA] in [sic] a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit . . . where, as here, the parties agreed to abide by state arbitration rules, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed when the [FAA] would otherwise permit it to go forward").

80. Recall the Supreme Court distinguished state laws applying to contracts generally from state laws which derive meaning solely from the fact arbitration is at issue. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) ("state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principles that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.").

81. *See* Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996); *see also Perry*, 482 U.S. at 492 n.9.

82. *Doctor's Assoc., Inc* , 517 U.S. at 683; *see also* MONT. CODE ANN. § 27-5-114(4) (1997).

83. MONT. CODE ANN. § 27-5-114(4) (1997).

84. *Doctor's Assoc , Inc.*, 517 U.S. at 687.

85. *Id.*

86. *Id* at 687.

F. The Early Stages of Class Arbitration & Preemption Under the FAA

In 2003, the Supreme Court faced yet another attack on the scope of the preemption powers under the FAA—whether a state court, pursuant to state law, could order class-wide arbitration where the arbitration agreement had been silent on the issue.[87] In *Green Tree Financial Corp. v. Bazzle*, Lynn and Burt Bazzle obtained a loan from Green Tree which contained an agreement requiring arbitration of all disputes, claims, or controversies arising out of the agreement.[88] The Bazzles sought class certification against Green Tree in a South Carolina state court, alleging Green Tree violated § 37-10-102 of the South Carolina Code[89]—providing debtors a right to name their own lawyers and insurance agents.[90] Upon reaching the South Carolina Supreme Court, the Bazzles' class arbitration claim was authorized pursuant to a state court order under state common law since the arbitration agreement appeared silent concerning class arbitration.[91] The U.S. Supreme Court agreed the arbitration clause was vague on the permissibility of class arbitration under the terms of the contract.[92] However, the Court found the vagueness of the arbitration clause did not permit automatic application of state common law.[93] Instead, under the terms of the arbitration clause, the Court found "the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question" of whether to permit class-wide arbitration.[94] Avoiding a

87. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003).

88. The arbitration clause reads in full:

> ARBITRATION–All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. § 1 . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY U.S. (AS PROVIDED HEREIN) . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

Id. at 447-48 (capitalization in original).

89. S.C. CODE ANN. § 37-10-102 (2002).

90. *Green Tree Fin. Corp.*, 539 U.S. at 448-49.

91. *Id.* at 450; *see also* Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (S.C. 2002) ("No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order consolidation of claims subject to mandatory arbitration without any contractual or statutory directive to do so." (citing Episcopal Hous. Corp. v. Fed. Ins. Co., 255 S.E.2d 451 (S.C. 1979))).

92. *Green Tree Fin Corp.*, 539 U.S. at 451.

93. *Id.*

94. *Id.* The Supreme Court looked to the construction of the arbitration clause itself for guidance, which stated an arbitrator was to decide "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." Thus, the Court opined the parties had agreed an arbitrator was to decide the dispute whether class-wide arbitration was permissible under the terms of the contract. This finding harkens back, in spirit at least, to the choice-of-law principles under *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, such that the dispute between parties was more appropriately resolved by a thorough consideration of the contractual terms agreed upon by the parties rather than create a superfluous conflict of federal and state law under the preemption doctrine typically applied. This methodology holds true to the general principle that "arbi-

preemption analysis altogether, the plurality remanded the case so that the arbitrator could interpret the vague elements found in the contract consistent with the express terms of the parties' arbitration agreement, whereby the parties' agreed an arbitrator would manage any disputes, claims or controversies arising out of such agreement.[95]

The Supreme Court was forced to clarify its decision in *Bazzle* seven years later, when once again an arbitration clause fell silent on the permissibility of class arbitration.[96] In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, AnimalFeeds sought class arbitration under its charter party with Stolt-Nielsen based upon allegations that Stolt-Nielsen was engaged in illegal price fixing.[97] The parties entered into a subsequent agreement under which the question of class arbitrability was to be submitted to a panel of arbitrators for decision—stipulating that the arbitration clause was "silent" on such issue.[98] The panel, influenced by several arbitral rulings after *Bazzle* which allowed "a wide variety of clauses in a wide variety of settings" to permit class arbitration, concluded class arbitration was permitted under the charter party's terms.[99]

Upon reaching the Supreme Court, the Court found the panel had overstepped its contractually granted authority when it failed to consider whether a default rule existed under the FAA, federal maritime law, or state law which permits class arbitration "in the absence of express consent."[100] The Court clarified that *Bazzle* was not to be viewed as the general rule of deciding whether class arbitration is permissible under the terms of an agreement, so far as it suggests an arbitrator is to make the final decision in every instance of vagueness or silence.[101] The Court

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tration is a matter of contract" first and foremost. *See generally* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

95. *Green Tree Fin. Corp.*, 539 U.S. at 454. Chief Justice Rehnquist, of whom Justice O'Connor and Justice Kennedy joined, wrote in a dissent that the South Carolina court had not enforced the parties' arbitration agreement according to its terms and so the court's decision was thereby preempted by the FAA. The Chief Justice believed the arbitration clause gave Green Tree "the contractual right to choose an arbitrator for each dispute [it had] with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon [Green Tree] to resolve those claims as well." Thus, because class arbitration necessarily extinguished Green Tree's rights under contract, the state court's decision to authorize class arbitration was in conflict with the arbitration agreement and therefore preempted by the FAA. *Id.* at 455-60.

96. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1764 (2010).

97. The charter party contained the following arbitration clause:

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [i.e., the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

Id. at 1765.

98. *Id.* at 1765-66.

99. *Id.*

100. *Id.* at1769. The Supreme Court, instead, relegated the panel's approach to nothing more than an attempt to act as if it had common-law authority to "develop what it viewed as the best rule to be applied in such a situation"—something the charter party had not granted the panel authority to do. *Id.* at 1768-69.

101. The Supreme Court informatively stated:

went on to say that the parties are generally free to devise an arbitration agreement as they see fit, limiting the issues to be arbitrated, agreeing on the rules arbitration will abide by, and designating who will handle specific disputes.[102] Taken together, the majority concluded the parties could not be compelled under the FAA to submit to class arbitration where no contractual basis exists for inferring the parties had consented to do so.[103] Because the arbitration panel attempted to assert authority on an issue which the parties stipulated they had not agreed upon, the Court found the arbitration panel ventured beyond its contractually granted authority when it ordered class arbitration.[104] In sum, the majority eloquently stated "we see the question as being whether the parties *agreed to authorize* class arbitration."[105]

G. The Immediate History Leading Up to AT&T Mobility LLC. v. Concepcion

Unlike either *Bazzle* or *Stolt-Nielsen*, the California decision at issue in *Concepcion—Discover Bank v. Superior Court*—dealt with an arbitration clause expressly forbidding class arbitration.[106] In *Discover Bank*, Christopher Boehr sued Discover Bank for deceptive practices after it levied late charges on Boehr's credit account despite prior representations by Discover Bank that no such charges would be assessed if payment was received by a certain date.[107] Against the express terms of their agreement,[108] Boehr sought class arbitration in pursuing his

> Unfortunately . . . both parties and the arbitration panel seem to have misunderstood Bazzle . . . [in believing] that it established the standard to be applied by a decision maker in determining whether a contract may permissibly be interpreted to allow class arbitration . . . Bazzle did not establish the rule to be applied in deciding whether class arbitration is permitted.

Id at 1772.

102. *Id.* at 1774.

103. *Id.* at 1775.

104. *Id.* This decision is reconcilable with *Green Tree Fin. Corp. v. Bazzle* in that the arbitrator in Bazzle was tasked with interpreting a vague arbitration clause which neither confirmed nor denied the permissibility of class arbitration. In contrast, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* dealt with an arbitration clause whereby the parties had expressly stipulated no agreement on class arbitration was reached. Ergo, consent was the question at issue in the former, permitting the arbitrator an ability to make a determination on class arbitrability. Consent was wholly missing in the latter and so precluded the arbitrators from making a decision on class arbitrability.

105. *Id.* at 1776 (emphasis in original). Once again, the Supreme Court reminds us arbitration is a matter of contract and thus, ultimately, "a matter of consent, not coercion." Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

106. Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76, 79 (Cal. 2005).

107. Specifically, the plaintiff alleged in his petition that Discover Bank represented to its credit cardholders that late fees would be charged against their accounts only if payment had not been received by a certain date. In actuality, however, Discover Bank would charge late fees against cardholders' accounts if payment was not received by at least 1PM on such date. *Id.* at 78.

108. The agreement provided: "In the event you or [Discover Bank] elect to resolve any claims or disputes between us by arbitration, neither you nor we shall have the right to litigate that claim in court or to have a jury trial on that claim . . . [n]either you nor [Discover Bank] shall be entitled to join or consolidate claims in arbitration by or against other cardmembers with respect to other accounts, or arbitrate any claim as a representative or member of a class in a private attorney general capacity." *Id.* at 79.

claim against *Discovery Bank*, arguing California law made class arbitration waivers unconscionable.[109]

Upon reaching the California Supreme Court, class arbitration was upheld and the class-action waiver was severed from the agreement as unconscionable, despite a prior finding by the court of appeals that state law is preempted by the FAA where such law attempts to invalidate class arbitration waivers as unconscionable.[110] The California Supreme Court found the court of appeal's conclusion "puzzling" because it seemingly ignored the distinction made in *Perry*—in considering the language of § 2 of the FAA—between state laws which apply to contracts generally and those which derive meaning solely from the fact that arbitration is at issue.[111] Thus, the California Supreme Court held that "when [a class-arbitration] waiver is found in a consumer contract of adhesion," it shall be deemed unconscionable if disputes would foreseeably involve small amounts of damages and the party with superior bargaining power is alleged to have carried out a scheme to deliberately cheat the consumer.[112] Believing such a ruling to be applicable to contracts generally, and therefore satisfying the requirements of § 2 of the FAA, the court found the class arbitration waiver in the agreement between Boehr and Discover Bank to be both unconscionable and unenforceable.[113]

IV. INSTANT DECISION

In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court again considered the effect California state law had on the FAA, where such law attempted to wholly proscribe the use of class arbitration waivers seeking to prevent the use of class arbitration in commercial service agreements.[114] Justice Scalia delivered the plurality opinion, with whom Justice Roberts, Justice Kennedy, Justice Alito, and Justice Thomas joined. Justice Thomas wrote a separate concurring opinion. Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan joined, wrote the dissenting opinion.

A. Plurality Opinion

The plurality disagreed with the Concepcions' contention that the *Discover Bank* rule—holding unconscionable all class arbitration waivers which are part of a contract of adhesion—is a ground that "exist[s] at law or in equity for the revocation of any contract" pursuant to § 2 of the FAA.[115] The Court considered two primary objectives of the FAA which are incongruent with the *Discover Bank* rule: enforcement of private agreements according to their terms and encourage-

109. *Id.* at 80.
110. *Id.* at 81.
111. The California Supreme Court believed its holding in *Discover Bank* did not just apply to class-action waiver in arbitration agreements, but to any contract. In essence, the court believed it was merely refining the definition of unconscionability to be applied to all contracts generally. *Id.* at 89.
112. *Id* at 87.
113. *Id.*
114. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
115. *Id.* at 1746.

ment of efficient and speedy dispute resolution.[116] Thus, the Court reiterated, as it had in numerous decisions before *Concepcion*, that "the overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements *according to their terms*."[117] Concordantly, the Court stated, as it had in *Stolt-Nielsen*, that are free to devise an arbitration agreement as they see fit, limiting the issues to be arbitrated, agreeing on the rules arbitration will abide by, and restricting the parties for whom arbitration will occur.[118] Thus, the Court found that, so far as the *Discover Bank* rule can be held to require the *availability* of class arbitration—even if it does not expressly require class arbitration itself—it runs afoul of the protections afforded under the FAA in the event that it might vary the terms agreed upon by the parties "ex post."[119]

The Court also found the *Discovery Bank* rule interfered with the goal of encouraging efficient and speedy dispute resolution for three reasons.[120] First, switching from bilateral to class arbitration sacrifices informality for a slower, more costly process which is more likely to promote convoluted uncertainty than expedited finality.[121] Second, class arbitration requires procedural formality because informal procedures would cause the class representative to inadequately represent the interests of absent class members, resulting in those members being unbound by the determinations of the arbitration process.[122] Third, class arbitration increases the risk to defendants—who might ordinarily accept minor errors in informal bilateral arbitration as a worthwhile tradeoff—where the aggregation of every possible claim, to be decided all at once, makes such complete and uncorrectable finality insufferable in the eyes of defendants.[123] For these reasons, the Court found "arbitration [to be] poorly suited to the higher stakes of class litigation."[124]

In sum, the plurality found the *Discover Bank* rule, rather than applying to contracts generally, created a unique burden particularly discriminatory to arbitration agreements.[125] Thus, *Discover Bank* was preempted by the FAA because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[126] Additionally, the plurality was unimpressed by the self-imposed limitations of the *Discover Bank* rule, which purportedly applied

116. *Id.* at 1749.

117. *Id.* at 1748 (emphasis added).

118. *Id.* at 1748-49 ("parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its dispute" (quoting *Stolt-Nielsen S.A.*, 130 S. Ct. at 1763)).

119. The Supreme Court rationalized that the *Discover Bank* rule ultimately manufactured class arbitration rather than allowing it to be consensually agreed upon by the parties and was thus inconsistent with the principles of the FAA. *Id.* at 1748, 1750-51.

120. *Id.* at 1749-50.

121. *Id.* at 1751 ("the principal advantage of arbitration—its informality—[is sacrificed] and makes the process slower, more costly, and more likely to generate procedural morass than final judgment").

122. *Id.* ("[i]f procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class" (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985))).

123. *Id.* at 1752.

124. *Id.*

125. *Id.* at 1750-53.

126. *Id.* at 1753.

only to arbitration agreements found in contracts of adhesion, finding such requirements to be "toothless and malleable . . . [and of] no limiting effect."[127]

B. Justice Thomas' Concurring Opinion

While agreeing with the plurality's outcome, Justice Thomas' rationale for his concurrence differed slightly. Justice Thomas reasoned that § 2 and § 4 of the FAA, when read together, demand something more than a mere requirement that "a defense [must] apply to 'any contract'"[128] when attempting to invalidate an arbitration provision;[129] instead, "there must be some additional limit on the contract defenses permitted by § 2."[130] Justice Thomas believed a combined reading of § 2 and § 4 permitted exceptions to the enforceability of arbitration agreements only on those contractual grounds "related to the making of the agreement . . . such as fraud, duress, or mutual mistake."[131] Because the *Discover Bank* rule does not touch upon the making of an agreement—such that it cannot be irrefutably established that a person would sign an unconscionable agreement only when under the influence of fraud, duress, or delusion—Justice Thomas concluded it was preempted by the FAA.[132]

C. Dissenting Opinion

The dissent found the *Discover Bank* rule could not be appropriately categorized as one which stood as an obstacle to the purposes and objectives of the FAA.[133] It believed the *Discover Bank* rule applied to contracts generally, without imposing undue restraint upon arbitration agreements specifically.[134] In other words, the *Discover Bank* rule was consistent with the FAA because it refused to enforce arbitration "on grounds that exist for the revocation of any contract" per the language of § 2 of the FAA.[135] The dissent also attacked the plurality's postulation that bilateral arbitration is a fundamental attribute of arbitration, finding no meaningful precedent which demonstrates a preference for bilateral arbitration over

127. *Id.* at 1750. The *Discover Bank* rule has three specific requirements: (1) the arbitration clause must be found in a contract of adhesion; (2) damages under the contract must be predictably small; and (3) the consumer must allege a scheme under the contract to cheat consumers. *Id*

128. *Id.* at 1753 (Thomas, J., concurring). Recall that § 2 of the FAA requires that an arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such ground as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006).

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

130. *Id.* Justice Thomas looks to the language of § 4 to clarify the scope of § 2, whereby a federal court must first be "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue" before ordering arbitration "in accordance with the terms of the agreement." *Id.* at 1754.

131. *Id.* at 1754-55.

132. *Id.* at 1755-56.

133. *Id.*

134. *Id.* at 1757 ("the Discover Bank rule is consistent with the [FAA]'s language. It 'applies equally to class action litigation waivers in contracts without arbitration agreement as it does to class arbitration waivers in contracts with such agreements'" (quoting Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76, 88-89 (Cal. 2005))).

135. *Id.*; *see also* 9 U.S.C. § 2 (2006) ("an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract").

class arbitration.[136] Finally, the dissent claimed the availability of class arbitration under the *Discovery Bank* rule was necessary to protect the integrity of small-value claims.[137] The plurality, however, responded to this particular concern by stating that states cannot require the availability of procedures such as class arbitration when such procedure stands inconsistent with the FAA and against the consensual agreement of the parties, even if doing so would produce desirable results.[138]

V. COMMENT

One might consider *Concepcion* to be nothing more than an age-old affirmation of the FAA's principle purpose: holding private arbitration agreements to the terms agreed upon by the parties. In fact, *Concepcion* serves as but one part of a triad of modern cases by the U.S. Supreme Court signifying a broad intent to hold parties to the terms bargained for in arbitration agreements. In the first, *Green Tree Financial v. Bazzle* held that vagueness on the issue of class arbitration is to be interpreted by the dispute-resolving entity agreed upon by the parties, whether in the form of state law under a choice-of-law provision or a specified arbitrator tasked with resolving disputes.[139] In the second, *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.* held class arbitration to be impermissible where the parties had not affirmatively agreed to it—silence being insufficient to enforce class arbitration.[140] In the third, *AT&T Mobility v. Concepcion* found class arbitration to be precluded where it was specifically waived by the parties in their agreement.[141] Thus, the focus of the Supreme Court lies firmly upon the element of consent: where parties have been silent, no consent can be found; where parties have been vague, contractual interpretation is necessary to unearth the parties' intent; where parties have explicitly incorporated a term into their agreement, consent or lack thereof has been elucidated and must therefore be followed according to such term. Considering the precedent set forth by *Bazzle* and *Stolt-Nielsen*, it is difficult to be surprised by the Supreme Court's direction in *Concepcion*.

It is undisputed that *Concepcion*'s reach was not limited to California's *Discover Bank* rule, and it has since been used to strike down many different state laws which attempt to incorporate similar provisions to *Discover Bank*.[142] Howev-

136. *Concepcion*, 131 S. Ct. at 1759, 1762.

137. The dissent points out that AT&T could avoid the $7,500 payout under its agreement with the Concepcions—"the payout that supposedly makes the Concepcions' arbitration worthwhile"—by instead paying the face value of the Concepcions' claim, in this case $30.22. Low-value amounts such as these would, in the dissent's opinion, all but nullify any realistic attempt to sue and would therefore foreclose potential claimants' ability to collect on their claims. The dissent then imagines situations in which claiming the $30.22 would require "filling out many forms that require technical legal knowledge or waiting a great length while a call is placed on hold"—situations the *Discover Bank* rule was designed to inhibit. *Id.* at 1760-61.

138. *Id.* at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons").

139. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S 444, 454 (2003).

140. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1762 (2010).

141. *See Concepcion*, 131 S. Ct. at 1751, 1753.

142. *See* Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1215 (11th Cir. 2011) (striking down Florida state law); Litman v. Cellco Partnership, No. 08-4103, 2011 WL 3689015, at *5 (3d Cir. Aug. 24, 2011) (striking down New Jersey state law).

er, a few brave courts have ventured into unknown territory, attempting to temper the broad implications of *Concepcion*. A California case following the *Concepcion* decision, *Kanbar v. O'Melveny & Myers*, emphasized that the Supreme Court left open the capacity of state legislatures to create laws attempting to address the concerns attending class arbitration waivers in contracts of adhesion, even though not being able to outright proscribe them.[143] For example, the Supreme Court itself suggested the use of state law to require that class waivers be highlighted to notify customers engaging in commercial contracts.[144] The *Kanbar* court concluded this language implied not all state laws concerning unconscionable arbitration agreements in contracts of adhesion are preempted by the FAA.[145] The *Kanbar* court then took a clever turn away from the influences of *Concepcion* when it found two terms in an arbitration agreement concerning notice and confidentiality to be unconscionable and thereby unenforceable.[146] The court held the non-enforcement of these problematic terms did not warrant preemption under the FAA because non-enforcement did not constitute an "anti-arbitration" action which would interfere with the fundamental purposes of arbitration—namely informality, expeditiousness, and inexpensiveness.[147]

A Colorado case, *Daugherty v. Encana Oil & Gas, Inc.*, bypassed the influences of Concepcion in much the same way.[148] Here, the court found two arbitration provisions concerning attorney's fees and the requirement of using the Commercial Rules of the American Arbitration Association (AAA) to be unconscionable, unenforceable, and therefore severable from the arbitration agreement as a whole.[149] Having brought a claim under the Fair Labor Standards Act (FLSA), the plaintiff argued generally that the terms of the arbitration agreement undermined the policy objectives of the FLSA by denying access "to a judicial forum without fear of unbearable costs."[150] The court agreed, striking down first the arbitration provision requiring the use of the Commercial Rules of the AAA.[151] The court found such a provision would require plaintiff to pay one-half of the total costs of arbitration—estimated between $15,000 and $76,000—per the Commercial Rules and thus struck it down as unenforceable since it had the effect of precluding the

143. *See* Kanbar v. O'Melveny & Myers, No. C-11-0892, 2011 WL 2940690, at *7 (N.D. Cal. Jul. 21, 2011).

144. *See Concepcion*, 131 S. Ct. at 1750 n.6 ("States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waivers provisions in adhesive arbitration agreements to be highlighted.").

145. *See Kanbar*, 2011 WL 2940690 at *6.

146. *Id.* at *1-2. The notice provision required an employee to make known his claim against his employer within one year, effectively acting as a one-year statute of limitation. The confidentiality provision barred employees from speaking to anyone not directly involved in the arbitration process about what took place during arbitration, effectively preventing employees involved in arbitration from consulting with other employees to build a case against the employer. *Id.*

147. The Court held non-enforcement would not have an "anti-arbitration" effect because the non-enforcement of the notice and confidentiality provisions would only amount to: "(1) a rule requiring the same . . . statute of limitations as provided by applicable law; (2) a rule barring overly broad confidentiality provisions that would stifle an employee's ability to investigate and gather evidence." *Id.* at *9.

148. *See* Daugherty v. Encana Oil & Gas, Inc., No. 10-cv-02272-WJM-KLM, 2011 WL 2791338 (D. Colo. Jul. 15, 2011).

149. *Id.* at *10-13.

150. *Id.* at *10.

151. *Id.* at *11.

plaintiff from pursuing his claim.[152]Equally, the court struck down a provision awarding attorney's fees to the "prevailing party" as opposed to the "prevailing plaintiff," finding such opportunistic contract construction to substantially frustrate the statutory schemes of the FLSA.[153] The court then looked to the severability laws of Colorado and concluded both opportunistic terms should be severed from the arbitration agreement as a whole.[154]

Considering the implications of both *Kanbar* and *Daugherty*, it is clear courts intend to limit the potential effect of *Concepcion*, and rightly so. Though some legal commentators have decried its perceived ramifications—arguing the Supreme Court's holding offers little more than a boon to big business who can now utilize class waivers in adhesion contracts to disclose the future possibility of class action[155]—the intent of *Concepcion* was not to hold parties hostage to contracts of adhesion no matter how manifestly unfair the terms or procedures; this is evident by footnote 6 of the plurality's opinion.[156] It is equally evident by the Supreme Court's past recognition that federal statutory claims are fully arbitrable under the terms of an agreement only so far as arbitration preserves the ability for a party to fully vindicate its statutory rights.[157] Instead, *Concepcion* seeks only to enforce the fundamental expectations of arbitration where it is consensual. As *Kanbar* and *Daugherty* point out, this leaves open the possibility of severing unfair and unexpected terms from arbitration agreements where they attempt to pervert the basic consensual expectations of arbitration itself, especially where such terms prevent vindication of one's rights. This outcome makes sense when considering the nature of consent, where it would be difficult, if not impossible, to substantiate its existence when a contractual term delivers either unexpected results or complete impairment of one's statutorily protected rights. Equally, as Justice Thomas pointed out in his concurring opinion of *Concepcion*, arbitration agreements should be wholly invalidated where the formation of such agreements were made under fraud or duress—attacking the assumption that consent ever existed to begin with.[158]

152. This result was distinguishable from AT&T Mobility, which did not prevent the Concepcions from pursuing a claim against AT&T by use of a grossly unfair technicality. The service agreement between AT&T and the Concepcions did not levy an exorbitant cost upon the Concepcions for attempting to pursue a claim against AT&T. *Id.*

153. *Id.*

154. *Id.* at *12. The court took note the contract between employee and employer contained a savings clause and so, under Colorado law, the "agreement should not be completely obliterated because some provisions are beyond the legal limits . . . unless such illegal provisions permeate the complete contract to such an extent as to affect its enforceability entirely" which was not the case here. *Id.* (quoting N.L.R.B. v. Tulsa Sheet Metal Works, Inc., 367 F.2d 55, 60 (10th Cir. 1966)).

155. *See, e.g* , Scott L. Nelson, *For Consumers, a Raw Deal*, EXECUTIVE COUNSEL, Oct. 2011, at 42.

156. *Concepcion*, 131 S. Ct. at 1750 n.6. Qualifying its statement that "the times in which consumer contracts [are] anything other than adhesive are long past," the Supreme Court states in full: "Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforce according to their terms." *Id.*

157. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 637 (1985).

158. Justice Thomas writes: "As 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 providing fraud or duress." *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring).

Alongside the element of consent, it is also important to recall the literal language of the FAA's savings clause codified in § 2, whereby all arbitration agreements are "valid, irrevocable, and enforceable, safe upon such grounds as exist at law or in equity for the revocation of *any* contract."[159] By its very nature, the *Discover Bank* rule does not apply to any contract; it applies instead to a particular breed of contract: those "consumer contract[s] of adhesion" which contain a class-arbitration waiver provision.[160] Thus, the *Discover Bank* rule effectuates a non-rebuttable finding of both procedural and substantive unconscionability on quick-look, pliable criteria, rather than permitting a fact-driven inquiry normally attributable to unconscionability analysis.[161] This sort of strict liability finding of unconscionability disproportionately affects arbitration agreements found in consumer contracts in violation of the FAA's requirement that such agreements stand equivalent to contracts generally.[162]

Justice Breyer argues in his dissent that, linguistically speaking, the *Discover Bank* rule was valid under the FAA because it equally applied to contracts both with and without arbitration clauses.[163] However, while the general principles of unconscionability as a defense against contract enforcement may apply to all contracts in California, the near automatic finding of unconscionability under *Discover Bank* cannot be said to stand on grounds which applies to any contract. A simple illustration demonstrates this point: had the Concepcions sought to invalidate as unconscionable a class-action waiver found in a user agreement issued by Pandora Media, Inc. as part of its free-to-play internet music radio service—which arguably cannot constitute a "consumer contract" by definition under the third requirement of *Discover Bank*[164]—the lax standards of *Discover Bank* in finding

159. 9 U.S.C. § 2 (2006) (emphasis added).

160. Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76, 87 (Cal. 2005).

161. Recall that Discover Bank requires only that a consumer contract of adhesion contain "small amounts of damages" and "[allegations] that the party with the superior bargaining power ha carried out a scheme to deliberately cheat a large number of consumers." *Discover Bank*, 30 Cal. Rptr. 3d at 87. Neither of these elements promote the same level of scrutiny normally applicable to an unconscionability analysis—whereby courts are often hesitate to displace the agreed-upon terms of the parties. *See generally* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 1989).

162. *Compare* Linda J. Demaine & Deborah R. Hensley, *Volunteering to Arbitrate Through Predispute Arbitration Clauses*, 2004 Law & Contemp. Probs. 55 (2004) (finding arbitration clauses appeared in 35% of consumer contracts), *with* Elizabeth Rolph, Erik Moller, & John E. Rolph, *Arbitration Agreements in Health Care: Myths and Reality*, 60 Law & Contemp. Probs. 153 (1997) (finding only 9% of physicians and hospitals use arbitration agreements), *and* Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado About Nothing?*, in BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 45, 47-48 (Omri Ben-Shahar ed., 2007) (finding arbitration clauses in only 6% of 597 online end-user licenses).

163. *Concepcion*, 131 S. Ct. at 1757.

164. In defining the scope of the *Discover Bank* Rule, the California Supreme Court requires an allegation be made that "the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." Thus, one can infer that "consumer contracts" under *Discover Bank* mean contracts between merchants and consumers involving monetary transactions. Accordingly, with free-to-play services like Pandora Radio, it would be impossible for the consumer to satisfy this third requirement of *Discover Bank*: that an allegation be made that the superior power cheated the consumer out of small amounts of money. By its terms, Discover Bank is thereby limited to contracts involving monetary transactions and would not cover user agreements for free-to-play services. *Discover Bank*, 30 Cal. Rptr. 3d at 87.

unconscionability would be inapplicable.[165] Therefore, *Discover Bank* is available in some instances involving contractual relations between individuals and companies and not available in others.

What requires proper framing, then, is the consistency of *Discover Bank*'s applicability over the broad spectrum of contractual relationships. While *Discover Bank* appropriately regulates both contracts with arbitration agreements and those without, showing no particular discrimination against arbitration agreements as Justice Breyer's suggested, it inappropriately serves to alienate consumer contracts—which tend to utilize arbitration agreements more frequently—from the larger majority of contracts in general.[166] Given the precise language of § 2 of the FAA, it would appear the *Discover Bank* rule, as a refinement to the general principles of the unconscionability doctrine, is applicable to some types of contracts but is not applicable to *any* contract as required—being limited by its very language to a particular flavor of contractual agreement. Thus, the fact that *Discover Bank* both results in a nearly ineluctable finding of unconscionability and is applicable only to a narrow category of contractual agreements, as opposed to all contractual agreements, makes it a clear violation of § 2 of the FAA when applied against agreements to arbitrate.

In sum, *Concepcion* should not be hastily viewed as a disfavorable bane against consumers; its principle purpose is not to champion big business seeking to profit from the misfortunes of the proverbial "little guy." Rather, upon scrupulous inspection, *Concepcion* stands as little more than a reaffirmation of an age-old belief by the U.S. Supreme Court, in upholding congressional intent, that agreements to arbitrate are to stand on the same footing as any other contract.[167] To such effect, state common law which disfavors arbitration as applied, or which seeks to rob the element of consent from the basic equation of contractual agreement, will undoubtedly meet judicial hostility from a Supreme Court which has stood resolute in its general position that one's consent shall rule the day.[168]

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165. This hypothetical is inspired by a case entitled *Deacon v. Pandora Media Inc.*, in which the plaintiff filed a class action lawsuit against Pandora alleging, amongst other things, a violation of privacy. No. 11-4674 (N.D. Cal. filed Sept. 20, 2011). At the time of writing this casenote, the case remains in its infancy and a brief reading of Pandora's "Terms of Use" does not indicate whether arbitration will come into play so as to incite the use of the FAA or Concepcion. Pandora Terms of Use, http://www.pandora.com/legal/ (last visited Oct. 24, 2011).

166. *See supra* note 162.

167. *Concepcion*, 131 S. Ct.. at 1745 (citing 9 U.S.C. § 2 (2006)).

168. Consent being something congruent to the basic expectations of the parties, whereby unfairness is only relevant when it attempts to distort or otherwise corrupt such expectations. The Concepcions had free choice whether or not to purchase a phone from AT&T and abide by its terms of agreement; other mobile phone carriers provided varying terms. By purchasing said phone, the Concepcions made a conscious decision to agree to the terms encompassed in AT&T's service agreement as against all other competitors. These terms, specifically the class arbitration waiver, did not serve to pervert the basic notion of arbitration—informality, expeditiousness, and inexpensiveness—and in fact promoted the opposite effect. It is difficult to find that, had the Concepcions read the agreement, they would be surprised with the manner in which arbitration was to be carried out under AT&T's service agreement. Thus, the dispute between the parties was properly categorized as one party's attempt to circumvent the bargained-for terms of the other party on a legal technicality, attacking the basic protections of consensual agreement. The district court noted the agreement was not unduly burdensome against the Concepcions, in fact it provided several consumer-friendly effects to arbitration. Thus, the class arbitration waiver clause could not be said to rob the Concepcions of a meaningful way in which to settle a dispute—upholding the arbitration clause did not necessarily demand injustice or attack the basic sensibilities of contract law. Such a clause was nothing more than a bargained-for exchange between

VI. CONCLUSION

Concepcion reaffirms a principle purpose of the FAA's enactment in 1925: to hold agreements to arbitrate on equal footing alongside other contractual agreements. It aggregates a series of cases into a general, but long-held, position by the U.S. Supreme Court to enforce arbitration agreements according to their terms. Consent, then, becomes the paramount consideration and must serve as the starting point for any analysis determining whether state law encroaches on the protections afforded by the FAA. To say, however, that consent overwhelms any consideration of unfairness when scrutinizing the explicit terms of an arbitration agreement is a misinterpretation of *Concepcion*'s holding. As subsequent cases show, when manifestly unfair terms serve to rob an arbitration agreement of its basic expectations, it is difficult to show true consent ever existed in the first place. Whether these post-*Concepcion* decisions hold up to Supreme Court scrutiny is unknown, but a sweeping look at the long history of the FAA and the Supreme Court's treatment of it suggests they will.

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the parties and, as such, must be upheld where it does not promote a manifest injustice to the Concepcions or pervert the objectives of the FAA so greatly as to warrant a justifiable exclusion of such term being previously bargained for.