

2012

New Use of the Doctrine of Unconscionability to Invalidate Arbitration Agreements in Consumer Contracts, The Note

Valerie Dixon

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Valerie Dixon, *New Use of the Doctrine of Unconscionability to Invalidate Arbitration Agreements in Consumer Contracts, The Note*, 2012 J. Disp. Resol. (2012)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2012/iss1/14>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

The New Use of the Doctrine of Unconscionability to Invalidate Arbitration Agreements in Consumer Contracts

*Manfredi v. Blue Cross and Blue Shield*¹

I. INTRODUCTION

Unconscionability was seldom a successful defense in the context of arbitration before the recent boom of arbitration agreement usage in the consumer context.² Even when unconscionability was raised as a defense, the general belief among practitioners was that such claims were rarely successful.³ However, as the practice of including arbitration provisions in consumer contracts has expanded, so has the number of unconscionability claims raised by unhappy consumers.⁴ The increase in the success of these claims speaks to a revived judicial hostility toward arbitration⁵ which is in conflict with the United States Supreme Court's stated preference for arbitrability.⁶

Manfredi v. Blue Cross and Blue Shield suggests that this old judicial hostility is alive and well in Missouri jurisprudence. In an effort to level the playing field between parties of unequal bargaining power, Missouri courts have applied the unconscionability doctrine as a way to sidestep the United States Supreme Court's asserted policy favoring arbitration over litigation.⁷ This note considers the new approach of Missouri courts in invalidating arbitration agreements through the doctrine of unconscionability in the consumer context.

II. FACTS AND HOLDING

Blue Cross and Blue Shield (BCBS),⁸ a healthcare insurance company, offers service agreements to employers, group health care plans, and individuals for

1. 340 S.W.3d 126 (Mo. App. W.D. 2011).

2. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004) (citing Joseph M. Perillo, *Avoidance and Reformation*, in 7 ARTHUR CORBIN, CONTRACTS § 29.4 (1962) (for the proposition that most claims of unconscionability fail)).

3. *Id.*

4. *Id.*

5. *Id.* In comparing contract provisions in arbitration agreements to nonarbitration agreements, Randall found that courts would uphold the same provision in a nonarbitration agreement that it would find unconscionable in an arbitration agreement. *Id.* at 197.

6. *Southland Corp. v. Keating*, 465 U.S. 1, 12-13 (1984); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 103 S. Ct. 927, 14 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985).

7. *See generally id.*

8. BCBS is the largest healthcare benefits provider in the Kansas City area, serving more than 880,000 members, or 44% of the entire metropolitan population. Brief for Respondent at 7, *Manfredi v. Blue Cross & Blue Shield*, 340 S.W.3d 126 (Mo. App. W.D. 2011) (No. WL71150).

covered medical services.⁹ Plaintiff Dr. Ronald Manfredi, a licensed chiropractor, has operated his chiropractic business in Raytown, Missouri since 1981.¹⁰ Manfredi signed his first service agreement with BCBS in 1986 and has continued to act as a healthcare provider in the BCBS network ever since.¹¹ In January 2002, Manfredi signed an Allied Provider Participation Agreement (the Agreement) with BCBS.¹² The Agreement, a form contract presented to Manfredi on a take-it-or-leave-it basis,¹³ named the terms under which BCBS agreed to reimburse Manfredi for chiropractic services he provided to BCBS insured.¹⁴ The Agreement also contained a mandatory arbitration clause that was not present in the previous agreements executed by BCBS and Manfredi.¹⁵

During the summer of 2004, BCBS notified healthcare providers, including Manfredi, that as of August 1, 2004, it would cease providing coverage for Electrical Stimulation Modalities (ESM) because it had reclassified ESM as an "investigational" treatment.¹⁶ Manfredi filed a petition for declaratory judgment and injunctive relief against BCBS in the Circuit Court of Jackson County on October 17, 2005.¹⁷ Manfredi's petition argued that, under the Agreement, BCBS did not possess the authority to remove coverage of services.¹⁸ As such, Manfredi asked the court for an injunction to preclude the elimination of services previously covered by BCBS under the Agreement, and an order requiring that ESM be reinstated as a covered service.¹⁹ Moreover, Manfredi asked the court to find as a matter of law that the Agreement's arbitration clause was unconscionable and, thus, unenforceable.²⁰ BCBS responded by filing an answer and a motion to compel arbitration of Manfredi's claims.²¹

A hearing was conducted, after which the circuit court denied BCBS's motion to compel arbitration, and concluded that the arbitration clause was both procedurally and substantively unconscionable.²² The court also found that, by failing to satisfy the one-year deadline for pursuing arbitration included in the Agreement, BCBS had waived its right to arbitration.²³

9. Brief for Appellant at 3, *Manfredi v. Blue Cross & Blue Shield*, 340 S.W.3d 126 (Mo. App. W.D. 2011) (No. WD71150). Covered services are defined by BCBS. *Id.*

10. *Id.* at 3.

11. *Id.* Healthcare providers participate in activities such as billing, compensation, and rate arrangements with BCBS, and agree to treat those insured by BCBS at an agreed on "participating provider" rate. *Id.*

12. *Manfredi*, 340 S.W.3d at 129.

13. *Id.* at 133. A contract presented on a take-it-or-leave-it basis refers to the idea that a party has little or no possibility of negotiating any of the terms.

14. *Id.*

15. *Id.*

16. *Id.* EMS is used as treatment for pain management and musculoskeletal disorders. *Id.* at 130.

17. *Id.* at 129-130.

18. *Id.* at 130.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* Procedural unconscionability refers to the formalities of creating an agreement while substantive unconscionability refers to undue harshness in the terms of the agreement. *Id.* at 132. In Missouri, there generally must be aspects of both procedural and substantive unconscionability for a contract or clause to be voided, however more of one will lessen the amount needed of the other. *Whitney v. Alltel Commc'ns., Inc.*, 173 S.W.3d 300, 308 (Mo. App. W.D. 2005).

23. *Manfredi*, 340 S.W.3d at 130.

BCBS brought an interlocutory appeal in the Missouri Court of Appeals for the Western District challenging the trial court's denial of its motion to compel arbitration.²⁴ BCBS argued five main points on appeal. First, BCBS asserted that Manfredi's claims fell within the scope of the arbitration clause because the language of the arbitration clause was broad and encompassed Manfredi's claims.²⁵ In its second and third points, BCBS contended that the trial court erred in finding the presence of procedural and substantive unconscionability by arguing the use of a form contract and lack of negotiation did not create automatic procedural unconscionability and also that the arbitration clause was not hidden in the agreement.²⁶ In its fourth point, BCBS argued that the trial court erred by invalidating the entire arbitration clause instead of severing the offending provisions.²⁷ Finally, BCBS argued it had not waived its right to pursue arbitration under the Agreement.²⁸

With regard to BCBS's first point, the majority found that Manfredi's petition did not raise the issue of scope, and thus the parties effectively conceded that the issues were within the scope of the arbitration agreement.²⁹ As to BCBS's second and third points, the appellate court noted the arbitration provision allowed BCBS to unilaterally alter or avoid the arbitration procedures, precluded review of a certain class of disputes, unfairly favored BCBS, and greatly limited the arbitrator's power in granting awards. As such, the court found the contract offered Manfredi no real remedies, and was, thus, both procedurally and substantively unconscionable.³⁰ Accordingly, the Missouri Court of Appeals for the Western District affirmed the holdings of the circuit court,³¹ finding the arbitration clause procedurally and substantively unconscionable, and, thus, wholly unenforceable.³²

III. LEGAL HISTORY

As to matters of substantive law, the Federal Arbitration Act (FAA)³³ provides that when a contract relates to interstate commerce, the FAA preempts the Missouri Uniform Arbitration Act (MUAA).³⁴ Although the FAA states that valid arbitration agreements affecting interstate commerce should be enforced unless a valid exception applies,³⁵ state law contract defenses such as fraud, duress, and unconscionability may be used to invalidate such arbitration agreements without

24. *Id.*

25. *Id.*

26. *Id.* at 133.

27. *Id.* at 135.

28. *Id.*

29. *Id.* at 132. Manfredi's petition did not assert that the issues he complained of were not within the scope of the arbitration Agreement. *Id.*; but see *id.* at 136 (Welsh, J. concurring) (arguing that he would have found the issues outside the scope of the agreement and would have upheld the lower court without further inquiry).

30. *Id.* at 134-35.

31. The case was decided, and the opinion filed, on February 22, 2011.

32. *Id.* Having concluded that the arbitration provision was unconscionable and should be struck in its entirety, the court found the provision was not severable, and did not address the effect of one year time limitation in the Agreement. *Id.*

33. 9 U.S.C. §§ 1-16 (2006).

34. See MUAA MO. REV. STAT. § 435.350 (2000); see also *Scharf v. Kogan*, 285 S.W.3d 362, 369 (Mo. App. E.D. 2009).

35. *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 20 (Mo. Banc 2010).

contravening the FAA.³⁶ This section will address the recent history of Missouri's unconscionability analysis regarding arbitration agreements and examine Missouri's interpretation concerning the scope of arbitration clauses.

A. Unconscionability

Missouri has generally defined unconscionability as "an inequality so strong, gross and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it."³⁷ Unconscionability is determined from the time the contract is executed and not thereafter.³⁸ In Missouri, unconscionability may be procedural, substantive, or a combination of both.³⁹ Procedural unconscionability refers to the contract formation process, centering on the "high pressure exerted on the parties, fine print of the contract, misrepresentation, or unequal bargaining position."⁴⁰ Substantive unconscionability refers to undue harshness present in the contract terms.⁴¹ Although most states require a showing of both types of unconscionability for a court to void a contract provision, Missouri requires only a showing of one type to invalidate a contract provision.⁴²

Until the 1980s, courts historically looked unkindly on arbitration as a method for resolving nonlabor disputes.⁴³ This reality has been acknowledged several times by the United States Supreme Court.⁴⁴ In response to this judicial disapproval, Congress passed the FAA in an effort to promote court enforcement of arbitration agreements.⁴⁵ Missouri's history of finding contracts invalid due to unconscionability is not terribly substantial, and, prior to 2005, there is scarcely little history of finding arbitration provisions unenforceable solely on that ground.⁴⁶ This resurgence of using unconscionability as a ground for invalidating arbitration provisions is not limited to Missouri courts, but has been observed across the nation.⁴⁷ A variety of reasons could explain some of the growth of

36. Swain v. Auto Servs., Inc., 128 S.W.3d 103, 107 (Mo. App. E.D. 2003).

37. See *State, Mo. Dept. of Soc. Serv., Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 277 (Mo. 2001) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981)).

38. *Richardson v. Richardson*, 218 S.W.3d 426, 430 (Mo. 2007).

39. *Manfredi v. Blue Cross & Blue Shield*, 340 S.W.3d 126, 132 (Mo. App. W.D. 2011) (citing *Brewer*, 323 S.W.3d at 22).

40. *Whitney v. Alltel Commc'ns., Inc.*, 173 S.W.3d 300, 308 (Mo. App. W.D. 2005).

41. *Id.*

42. See generally *Ruhl v. Lcc's Summit Honda*, 322 S.W.3d 136 (Mo. 2010).

43. 7 WILLISTON ON CONTRACTS § 15:11 (4th ed.).

44. See generally *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985).

45. *Id.* See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 87 S. Ct. 1801, 1806 (1967).

46. This information is based on searches of LexisNexis and Westlaw performed on October 23, 2011 by the author; see also *Spraguc v. Houshold Int'l*, 473 F. Supp. 2d 966, 971 (Mo. W.D. 2005) (noting Missouri cases "give little guidance on the subject of unconscionability." *Bracey v. Monsanto Co.* 823 S.W.2d 946, 949 (Mo. 1992)).

47. *Randall*, *supra* note 2, at 194-95. *Randall's* research found that in 2002-2003, litigants unconscionable in 235 cases, and courts found contracts or clauses unconscionable in 100 of those cases, or 42.5%. She also found that of those 235 cases, 161, or 68.5%, involved arbitration agreements and that courts found 50.3% of the arbitration agreements unconscionable, as opposed to 25.6% of other types of contracts. *Id.* *Randall* also noted that twenty years prior, courts held 12.5% of the arbitration

unconscionability findings by courts, such as an increase in litigation and stronger drafting of arbitration agreements.⁴⁸ Yet, as some commentators have pointed out, greater judicial readiness to declare arbitration agreements unconscionable implies a degree of underlying judicial hostility toward arbitration.⁴⁹

The use of unconscionability as a basis for invalidating an arbitration provision in Missouri was foreshadowed in the 2003 opinion in *Swain v. Auto Services, Inc.*,⁵⁰ where the Missouri Court of Appeals for the Eastern District addressed unconscionability as it applied to adhesion contracts containing arbitration provisions. Mr. Swain bought a car from a dealer and also bought a car service plan from Auto Services.⁵¹ After Auto Services declined to pay for certain repairs, Mr. Swain filed a petition challenging the enforceability of the arbitration provision in the agreement based on unconscionability and adhesion.⁵² Auto Services moved to compel arbitration, but the trial court denied its motion, instead holding that the provision was unconscionable.⁵³ While the appellate court found the contract was obviously one of adhesion, it determined the arbitration clause was not unconscionable because the arbitration provision was clearly stated in the contract such that a reasonable person would expect to arbitrate disputes when signing such an agreement.⁵⁴ Further, the court stated that an agreement that chose arbitration over litigation was not unconscionable, notwithstanding the fact the parties maintained uneven bargaining power.⁵⁵ Although the court ultimately rejected the argument that the arbitration clause was invalid due to unconscionability, the decision laid the groundwork for courts to begin to consider unconscionability as a basis for finding arbitration clauses unenforceable in the consumer context.

One of the first Missouri cases to advocate this new way of thinking was the 2005 case of *Whitney v. Alltel Communications, Inc.*⁵⁶ Mr. Whitney had been an Alltel customer for seven years when he filed a class action suit against Alltel for including a small charge disguised as a government tax.⁵⁷ Alltel filed a motion to compel arbitration based on the arbitration clause included in the agreement between the parties, but the motion was denied after the trial court held that the arbitration clause was unconscionable.⁵⁸ On appeal, the Missouri Court of Appeals for the Western District determined that the contract was one of adhesion, but in following the analysis first articulated in *Swain*, found that adhesion was not

agreements, as compared to 15.2% of other types of contracts, unconscionable. *Id.* at 196. This research led to Randall's conclusion that twenty years prior, courts were somewhat less likely to find arbitration agreements unconscionable than nonarbitration agreements while in 2002-2003, courts found arbitration agreements unconscionable twice as often as other categories of contracts. *Id.* at 196.

48. ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS (SECOND) § 22:5 (citing Randall, *supra* note 2, at 197).

49. *Id.*; see also Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1421-22 (2008); Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years After Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 251-52 (2006).

50. *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103 (Mo. App. E.D. 2003).

51. *Id.* at 105.

52. *Id.*

53. *Id.* at 105-06.

54. *Id.* at 107-108.

55. *Id.* at 108.

56. *Whitney v. Alltel Comm'ns., Inc.*, 173 S.W.3d 300, 300 (Mo. App. W.D. 2005).

57. *Id.* at 304.

58. *Id.* at 304-05.

enough to invalidate the arbitration provision.⁵⁹ Relying heavily on precedent from other states,⁶⁰ the court found unconscionability to exist,⁶¹ due largely to the unequal bargaining power of the parties and the lack of negotiation between the parties.⁶² As such, the court invalidated the arbitration provision.⁶³ This decision invited Missouri courts to begin invalidating arbitration agreements in the consumer context on the basis of the unconscionability doctrine.⁶⁴

In 2009, four years after *Whitney*, the Missouri Supreme Court in *Brewer v. Missouri Title Loans, Inc.*,⁶⁵ found an arbitration provision in a consumer contract unconscionable and thus, unenforceable.⁶⁶ Ms. Brewer borrowed \$2,215 from Missouri Title Loans (MTL) to purchase an automobile.⁶⁷ Ms. Brewer alleged that her agreement with MTL violated state law and filed a class action petition in circuit court.⁶⁸ MTL moved to compel arbitration per the agreement.⁶⁹ The trial court found, and the appellate court affirmed, that the class arbitration waiver in the loan agreement was unconscionable and could not be enforced.⁷⁰ The Missouri Supreme Court affirmed the findings of unconscionability⁷¹ and reinforced Missouri's new proclivity for invalidating arbitration provisions on this ground.

B. The Scope

The FAA has been interpreted by Missouri courts to convey a policy of preference for finding arbitration agreements enforceable.⁷² However, it has been

59. *Id.* at 310-11.

60. *Id.* at 311. The two most influential cases for the *Whitney* court included the Alabama case of *Leonard v. Terminix Int'l Co.*, 854 So.2d 529 (Ala. 2002) and the Florida case of *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. App. 1999), both of which held that the arbitration provisions were unconscionable.

61. *Whitney*, 173 S.W.3d at 310. The court found procedural unconscionability in that the contract provisions were presented on a take-it-or-leave-it basis, unequal bargaining power between the parties, lack of negotiation, and the provision was in hidden in the fine print of the agreement. *Id.* at 314 The court also found substantive unconscionability because it would be impractical to bring the small claims as individual arbitration disputes and the customer would bear all costs of arbitration, which in light of the small potential recovery, Alltel was basically immunized from liability. *Id.*

62. *Id.* at 310.

63. *Id.*

64. See *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. Banc 2010); *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. Banc 2010); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556 (Mo. App. E.D. 2009); *Repair Masters Const., Inc. v. Gary*, 277 S.W.3d 854 (Mo. App. E.D. 2009); *Woods v. Q.C. Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. E.D. 2008); *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. App. W.D. 2008).

65. 323 S.W.3d 18 (Mo. Banc 2009). The United States Supreme Court granted certiorari and vacated the Missouri Supreme Court's decision in *Brewer v. Missouri Title Loans, Inc.* on May 2, 2011, and remanded the case to the Missouri Supreme Court for consideration after the decision handed down in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). As of the submission date of this note for publication, the Missouri Supreme Court had not ruled on *Brewer* on remand.

66. *Id.* at 23

67. *Id.* at 20.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 22 (Mo. Banc 2010).

72. *Kansas City Urology, P.A. v. United Healthcare Serv.*, 261 S.W.3d 7, 11 (Mo. App. W.D. 2008); see also *Estate of Athon v. Conseco Finance Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002).

suggested that this preference, alone, is not sufficient to expand an arbitration agreement outside its intended scope.⁷³ As stated by the Missouri Supreme Court, “a party cannot be compelled to arbitrate unless the party has agreed to do so.”⁷⁴ Missouri courts have recognized this dominant presumption in support of arbitrability, and that any dispute that “touches the matters covered by the parties’ contract” should be ordered to arbitration if possible.⁷⁵

In construing arbitration agreements, Missouri courts have classified such agreements as “broad” or “narrow.”⁷⁶ A broad arbitration clause includes all disputes arising from an arbitration contract, while a narrow clause limits arbitration to particular categories of disputes.⁷⁷ Missouri has tended toward interpreting arbitration clauses more broadly.⁷⁸

In 2008, the Missouri Court of Appeals for the Western District illustrated this approach in *Kansas City Urology, P.A. v. United Healthcare Services*,⁷⁹ when interpreting the scope of an arbitration provision and what it considered to “touch the matters covered by the parties’ contract.”⁸⁰ The plaintiffs, Kansas City area physicians and medical organizations, entered into insurance contracts containing arbitration clauses with the defendants, United Healthcare and Blue Cross Blue Shield.⁸¹ The plaintiffs filed a petition claiming the defendants had joined together in a price fixing and monopolization scheme in violation of state antitrust statutes.⁸² The defendants moved to compel arbitration of the claims.⁸³ The trial court held the antitrust claims were not within the scope of the arbitration agreement and consequently denied the defendants’ motion.⁸⁴ On appeal, the appellate court broadly interpreted the arbitration agreement.⁸⁵ Thus, while the plaintiffs could maintain their action without reference to the underlying contracts, the court held the plaintiffs’ allegations did touch matters covered in the contracts between the parties.⁸⁶ The court found the plaintiffs’ were seeking damages due to the defendants’ alleged conspiracy, which were damages the plaintiffs would not have

73. *Kansas City Urology*, 261 S.W.3d at 11.

74. *Id.*

75. *Ruhl v. Lec’s Summit Honda*, 322 S.W.3d 136, 139 (Mo. Banc 2010).

76. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. 2003).

77. *Id.*

78. *Id.* at 428.

79. *Kansas City Urology*, 261 S.W.3d at 7.

80. *Id.* at 11.

81. *Id.* at 10-11. The plaintiffs signed one of five types of arbitration agreements with the defendants which can be divided into two categories. The first category made no mention to the underlying reimbursement contracts and broadly said that the parties agreed to arbitrate any disputes that arose between them. These agreements included language such as “if one of [the parties] does not agree with an action taken by the other[.]”; “Any and all disputes between them . . . including but not limited to all questions of arbitrability, the existence, validity, scope or termination of the Agreement or any term thereof.”; and “any disputes about their business relationship.” The second category referred to the underlying reimbursement contracts. These agreements included language such as “dispute . . . relating to or arising from this Agreement[.]”; and others mandated that the parties arbitrate any dispute which arose out of or was “related to this Agreement.” *Id.* at 11.

82. *Id.* at 10-11.

83. *Id.*

84. *Id.*

85. *Id.* at 11.

86. *Id.* at 13.

experienced but for their entering into contracts with the defendants.⁸⁷ Therefore the plaintiffs' antitrust claims touched matters covered by the agreements.⁸⁸

In the 2010 opinion of *Ruhl v. Lee's Summit Honda*,⁸⁹ the Missouri Supreme Court again took a broad view of the scope of the arbitration agreement. Ms. Ruhl bought and financed a new car from Honda and signed a retail purchase agreement which contained an arbitration clause and waiver to participate in a class action.⁹⁰ Ms. Ruhl brought suit against Honda on behalf of herself and two others for fees charged.⁹¹ Honda filed a motion to compel arbitration of the claims which the trial court denied, on the basis that those claims were outside the scope of the arbitration agreement based on the particular language of the agreement.⁹² On appeal, Honda argued that Ms. Ruhl's claims were within the scope of the arbitration agreement and the Missouri Court of Appeals for the Western District agreed.⁹³ The Missouri Supreme Court affirmed, finding that Ms. Ruhl's claims rested on the allegation that Honda was charging unlawful processing fees and thus whatever damages Ms. Ruhl might be awarded would be based on the fee charged under the contract.⁹⁴ The court held that this placed Ms. Ruhl's claim squarely within the scope of the arbitration agreement.⁹⁵ Missouri precedent illustrates a preference for an expansive interpretation of the scope of arbitration agreements, an interpretation clearly endorsed by the United States Supreme Court.⁹⁶

IV. INSTANT DECISION

A. Majority Opinion

In a unanimous decision, the *Manfredi* court addressed BCBS's appeal of the denial of its motion to compel arbitration.⁹⁷ As noted by the court, when a contract concerns interstate commerce, as this contract did, the FAA normally preempts the MUAA for issues involving substantive law.⁹⁸ However, state law contract defenses such as unconscionability, fraud, and duress, have the power to invalidate arbitration agreements without breaching the mandates of the FAA.⁹⁹

87. *Id.* at 14.

88. *Id.*

89. 322 S.W.3d 136 (Mo. Banc 2010).

90. *Id.* at 138.

91. *Id.*

92. *Id.* (finding the claim involving Honda's unauthorized practice of law not subject to arbitration because it involved an issue exclusively left to the courts to decide).

93. *Ruhl v. Lee's Summit Honda*, No. WD 70189, 2009 WL 3571309 at *2 (Mo. Ct. App. 2009).

94. *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 139 (Mo. Banc 2010).

95. *Id.* at 139.

96. *See Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984) ("To confine the scope of the [FAA] to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.").

97. *Manfredi v. Blue Cross & Blue Shield*, 340 S.W.3d 126 (Mo. App. W.D. 2011).

98. *Id.* at 130 (citing *Scharf v. Kogan*, 285 S.W.3d 362, 369 (Mo. App. E.D. 2009) ("Section 1 of the FFA provides that valid arbitration agreements that affect interstate commerce must be enforced unless an exception applies.")) (citing *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 20 (Mo. Banc 2010)).

99. *Id.* (citing *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003)).

After these observations, the court then began a point-by-point analysis of BCBS's arguments on appeal.

BCBS first contended that Manfredi's claims fell within the scope of the arbitration clause because the language of that clause was broad enough to cover those claims.¹⁰⁰ Addressing this argument, the court observed that there "is a strong presumption in favor of arbitrability," and, when an arbitration clause is expansive, that the trial court should require arbitration whenever possible.¹⁰¹ In applying that proposition to the case, the court noted that the Agreement between the parties was not only broad, but exceedingly so, in that it attempted to include any unsettled dispute that might arise.¹⁰² However, the court recognized that a vital part of analyzing the scope of any arbitration agreement includes a determination of whether any exclusions or exceptions are present in the agreement to limit the scope.¹⁰³ To that end, the court found the Agreement in this case put considerable limitations on the arbitration process.¹⁰⁴

The Western District Court focused on one such limitation, which, while seemingly meant to restrict the broad clause, essentially functioned to eliminate an entire important category from the arbitration agreement.¹⁰⁵ The Agreement provided that where the "disputed decision involved the discretion or medical judgment of one party, the arbitrators could not disturb that decision or determination"; thus, the arbitrators could not arbitrate any disputed discretionary judgments.¹⁰⁶ The majority held this exclusion to be almost as broad as the agreement to arbitrate itself, since all such disputes were considered outside the scope of the Agreement.¹⁰⁷ The court determined that if BCBS were able to use its discretion to reclassify formerly accepted treatments as experimental, any dispute arising from its decision was outside the scope of the Agreement and could be brought in court.¹⁰⁸ However, the court found that Manfredi never raised a scope argument beyond a tenuous reference to scope in alleging a breach of duty of good faith.¹⁰⁹ Accordingly, because neither party raised scope as an issue, the Western District Court held the parties "effectively conceded" the dispute was inside the scope of the Agreement.¹¹⁰ Thus, the majority assumed, for the purpose of the appeal, that the issues were within the scope.¹¹¹

Having determined that the dispute was within the scope of the arbitration agreement, the court then turned to what it perceived as the procedurally and substantively unconscionable aspects of the Agreement between Manfredi and

100. *Id.*

101. *Id.* (citing *Ruhl v. Lcc's Summit Honda*, 322 S.W.3d 136, 139 (Mo. Banc 2010)).

102. *Id.* at 131. The Agreement stated that if a dispute arose between the parties, "if . . . the dispute remains unresolved, the parties agree that they shall engage in binding arbitration in lieu of pursuing a remedy in any court of law or equity." *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 131-132. There was disagreement among the majority as discussed *supra* note 127.

110. *Id.* at 132.

111. *Id.* at 136. The court noted that the trial court did not make any express findings to the contrary. *Id.* Judge Welsh's concurrence disagreed with the majority on this point, determining that the dispute was outside the scope and thus dispositive. *Id.*

BCBS.¹¹² Citing *Brewer*¹¹³ for the proposition that an unconscionable arbitration provision in a contract will not be enforced,¹¹⁴ the majority noted that the overall degree of procedural and substantive unconscionability should be considered together to decide whether an arbitration clause is generally unconscionable.¹¹⁵

As to procedural unconscionability, the court found several factors in favor of finding the Agreement procedurally unconscionable.¹¹⁶ The Agreement was a standardized form contract with non-negotiable terms which was presented to Manfredi on a take-it-or-leave-it basis, and there was a significant disparity in bargaining power.¹¹⁷ BCBS argued that a pre-printed contract and lack of negotiation were not always procedurally unconscionable, and that the arbitration clause was not unconscionably hidden.¹¹⁸ The Western District rejected this argument and found the level of procedural unconscionability present meant that the Agreement could only be characterized as a contract of adhesion.¹¹⁹

The majority stated that merely including a general arbitration agreement in a contract of adhesion did not by itself require voiding the arbitration clause under the FAA,¹²⁰ but clauses that are substantively unconscionable in such an agreement could make mandatory arbitration unconscionable.¹²¹ The court found that the substantive provisions adjusting and limiting the arbitration agreement between the parties were plainly unconscionable because they gave BCBS “unfettered discretion to create, control and alter the arbitration process.”¹²² Moreover, the majority observed that the Agreement precluded review of a certain class of disputes which unfairly favored BCBS.¹²³ With regard to disputes involving discretion or medical judgments, the Western District found the arbitration agreement illusory since the Agreement required arbitration of all disputes, yet eliminated the power of arbitrators review this category of disputes.¹²⁴

112. *Id.* at 132.

113. 323 S.W.3d 18, 22 (Mo. Banc 2010).

114. *Manfredi*, 340 S.W.3d at 132.

115. *Id.*

116. *Id.* (citing *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. Banc 2010)).

117. *Id.* at 132-133. BCBS was the largest health insurer for more than 44% of the population of the Kansas City area and Manfredi was one of 3000 non-physician healthcare providers in the area. *Id.* at 133.

118. *Id.*

119. *Id.* (According to the Missouri Supreme Court in *State ex rel. Vincent*, 194 S.W.3d at 857, “a contract of adhesion . . . [i]s a form contract that is created and imposed by the party with greater bargaining power . . .”).

120. *Id.* (citing *Whitney v. Alltel Commc’ns., Inc.*, 173 S.W.3d 300, 310 (Mo. App. W.D. 2005)).

121. *Id.*

122. *Id.* at 134. (Paragraphs 9.6 and 9.61 of the Agreement provides: “In the event of a dispute between [BSBC] and Allied Provider, the parties agree that they shall abide by the procedures, processes and remedies set forth in this Agreement or otherwise established by BCBS for disputes of that type . . . [The dispute] shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association or other national ADR association acceptable to [BCBS].” (emphasis in original); Paragraph 8.1 further provides: “Except as specified herein, this Agreement or an Addendum or Attachment may be amended by [BCBS] upon ninety (90) days prior written notice to Allied Provider.”)

123. *Id.*

124. *Id.* The agreement also provided that arbitrators did not have the power to award consequential, special, punitive, or exemplary damages which the court found as further evidence of unconscionability. *Id.*

The majority noted that the Agreement effectively gave BCBS immunity for reprehensible behavior in proclaiming treatments medically unnecessary, or in reclassifying them as experimental, and, thus not subject to reimbursement.¹²⁵ Furthermore, the Western District determined that the limitations on the arbitrators' power precluded arbitration from granting any real remedy to possible complainants.¹²⁶ Citing *Brewer* again, this time for the proposition that "when the practical effect of forcing a case to arbitration would be to deny the injured party a remedy, requiring the case to be arbitrated is unconscionable,"¹²⁷ the court declared that the arbitration agreement was unconscionable.¹²⁸

BCBS next argued that if there were unconscionable provisions in the contract, those provisions should be severed and arbitration should be ordered as if the offending provisions did not exist.¹²⁹ The court stated that whether a contract provision is severable depended on the particular circumstances of the case, and is primarily an inquiry of the parties' intent.¹³⁰ Applying this principle, the court declared that, given the totality of the circumstances and lack of intent on the part of Manfredi, the arbitration provision was unconscionable as a whole and could not be severed.¹³¹

The court upheld the trial court's determination that the arbitration agreement was unconscionable and affirmed its denial of BCBS's motion to compel arbitration.¹³² The court struck the arbitration agreement in its entirety and instructed that the case continue to litigation.¹³³

B. Judge Welsh's Concurrence

Judge Welsh, finding the scope issue dispositive, began his concurrence by citing the arbitration agreement's exclusion of disputes resulting from either party's use of discretion or medical judgment.¹³⁴ He stated that this provision put the parties' dispute outside of the scope of the arbitration agreement and that the trial court's decision should be affirmed without reaching the issue of unconscionability.¹³⁵

125. *Id.* at 135.

126. *Id.*

127. *Id.* (citing *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 21-22 (Mo. Banc 2010)).

128. *Id.* The court considered the totality of the procedural and substantive characteristics present in the agreement in reaching its conclusion. *Id.*

129. *Id.*

130. *Id.* (citing *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 561 (Mo. App. E.D. 2009)).

131. *Id.* The court again noted that they were dealing with a contract of adhesion that had aspects of both procedural and substantive unconscionability.

132. *Id.*

133. The court did not reach BCBS's final point on appeal, which argued that the trial court erred in finding that BCBS had waived its right to engage in arbitration because it had not begun arbitration within the time limit provided in the Agreement. The court concluded that because the entire arbitration provision was unconscionable and unenforceable in its entirety, the court did not need to address BCBS's final objection to the trial court's ruling that it had waived its right to arbitration for failing to have begun arbitration within the time frame provided for in the agreement. *Id.*

134. *Id.* at 136.

135. *Id.*

Judge Welsh found the dispute in this case to be an issue of discretion or medical judgment of BCBS.¹³⁶ He interpreted the Agreement to only obligate BCBS to reimburse Manfredi for covered services, which included only medically necessary services that were “essential to the health of the Covered Individual for the diagnosis or care and treatment of a medical or surgical condition.”¹³⁷ The Agreement also provided that “a BCBS medical director or his/her authorized physician designee is the only person who may make a determination that a service or supply is not Medically Necessary.”¹³⁸ By applying these provisions to the facts, Judge Welsh found that, because BCBS’s decision to reclassify electrical stimulation modalities was based on its determination that the treatment was not medically necessary, the limitation on arbitrators to decide issues involving discretion or medical judgment effectively removed the dispute from the scope of the arbitration provision.¹³⁹ Judge Welsh stated that the majority acknowledged this dispute was outside the scope of the Agreement when it recognized that the practical effect of this limitation removed this class of disputes from the scope.¹⁴⁰

Judge Welsh further asserted that, because the parties did not contract to resolve disputes arising from the use of discretion by means of arbitration, the court could not compel the parties to do so.¹⁴¹ He suggested the majority was avoiding this simple result by determining that Manfredi did not argue the dispute was outside the scope of the Agreement and that the trial court did not rule on the scope issue.¹⁴² Furthermore, Judge Welsh argued the majority disregarded its stated standard of review, and that the majority was “concerned primarily with the correctness of the trial court’s result, not the route taken by the trial court to reach that result.”¹⁴³ Finding no significance in whether the scope was decided in the lower court or argued in this court, Judge Welsh asserted the issue was plain on the face of the record and thus dispositive.¹⁴⁴

As a result of Judge Welsh’s conclusion that the scope issue was dispositive, he found any discussion concerning unconscionability to be unnecessary, but concurred in the decision that the motion to compel arbitration was properly denied.¹⁴⁵

C. Judge Ahuja’s Concurrence

Judge Ahuja began his concurrence by noting that it was entirely plausible to construe the Agreement’s scope provision to exclude disputes such as the one in

136. *Id.*

137. *Id.* To be considered a medically necessary service, the service was required to be “consistent with acceptable medical practice according to the national Blue Cross and Blue Shield Association’s uniform medical policy, as amended from time to time.” *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 137 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010) for the proposition that absent an agreement to arbitrate, arbitration could not be compelled).

142. *Id.*

143. *Id.* (citing *Ruhl v. Lcc’s Summit Honda*, 322 S.W.3d 136, 138-39 (Mo. Banc 2010)).

144. *Id.*

145. *Id.*

this case, just as Judge Welsh and the majority recognized.¹⁴⁶ However, Judge Ahuja argued that the scope provision could also be construed as a constraint on the arbitrator's remedial power, instead of a limit on the types of disputes covered by the arbitration clause.¹⁴⁷ According to Judge Ahuja, if that interpretation were accepted, affirming the trial court's ruling would still be required due to BCBS's obligation to exercise discretion in good faith.¹⁴⁸

Judge Ahuja noted that numerous Missouri decisions have held arbitration clauses that immunize a contracting party from liability for material breaches of contractual duties are substantively unconscionable.¹⁴⁹ He argued that this would be the effect in this case if the discretionary limitation were construed to immunize BCBS from liability for its bad-faith utilization of discretion or medical judgment.¹⁵⁰ According to Judge Ahuja, disputes over discretionary decisions almost certainly comprise a large portion of potential disputes between the parties.¹⁵¹ Given the pivotal role in discretionary determinations in the parties' relationship, Judge Ahuja concluded that any provision that effectively denied a party "any remedy for the other party's abuse of its contractual authority" was oppressive,¹⁵² and inconsistent with reasonable expectations of the parties.¹⁵³ According to Judge Ahuja, this rendered the agreement unenforceable.¹⁵⁴

Judge Ahuja concurred in the result that the circuit court properly refused to compel arbitration.¹⁵⁵ Whether that conclusion was based on a finding that Manfredi's claims fell outside the scope of the arbitration clause, as Judge Welsh asserted, or that the clause denied Manfredi any remedy for claims arising from discretionary determinations by immunizing BSBC from liability, Judge Ahuja found the result reached by the lower court to be correct.¹⁵⁶

IV. COMMENT

Manfredi is an example of the recent attitude shift occurring in Missouri courts toward overturning arbitration agreements in the consumer context. While the *Manfredi* court was presented with a simple way of invalidating the arbitration clause by merely finding the dispute outside the scope of the agreement, the court nonetheless held the entire agreement unconscionable and unenforceable in a thinly veiled effort to avoid FAA preemption. Although unconscionability is a valid

146. *Id.* Judge Ahuja agreed with Judge Welsh that if the agreement did exclude such disputes, the trial court had no power to compel arbitration and its refusal to do so had to be affirmed. *Id.* at 137-38.

147. *Id.*

148. *Id.* "Missouri law implies a covenant of good faith and fair dealing in every contract." *Farmers' Elec. Coop., Inc. v. Missouri Dept. of Corrs.*, 977 S.W.2d 266, 271 (Mo. Banc 1998).

149. *Manfredi*, 340 S.W.3d at 136. *See, e.g.*, *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. Banc 2010); *Ruhl v. Lcc's Summit Honda*, 322 S.W.3d 136 (Mo. Banc 2010); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556 (Mo. App. E.D. 2009); and *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005).

150. *Manfredi*, 340 S.W.3d at 136.

151. *Id.* at 138-139. The trial court and majority noted that this discretionary class of disputes covers a significant share of the disputes that may take place between the parties. *Id.* at 134.

152. *Id.* at 139.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

state law contract defense in numerous circumstances, it has developed into a convenient tool for state courts to sidestep the FAA's preemption in areas affecting interstate commerce,¹⁵⁷ and is contrary to the Supreme Court's communicated preference for arbitrability.¹⁵⁸ This shift seems unwise given the advantages arbitration agreements offer to both parties, such as efficiency, economy, and privacy.¹⁵⁹

Missouri courts claim to adhere to the view that an arbitration clause should be construed in favor of arbitrability, and unless there is "positive assurance" that a dispute is not covered by the arbitration provision, an arbitration provision should be enforced.¹⁶⁰ Nonetheless, while the *Manfredi* court admitted the dispute would normally be considered outside the scope of the arbitration agreement, it undertook an artificial and unnecessary approach to avoid finding this issue dispositive. Relying solely on what it considered Manfredi's insufficient petition, the majority held the scope issue was not sufficiently raised and, therefore, the trial court ruling would have to be affirmed on other grounds.¹⁶¹ Judge Welsh's concurrence criticized the majority for concentrating on what he argued was an unnecessary discussion of unconscionability to arrive at a result that easily could have been reached without it.¹⁶² As Judge Welsh pointed out, an appellate court should be concerned first and foremost with whether a lower court's decision is correct, not the method the lower court employed to reach it.¹⁶³

The *Manfredi* court found evidence of both types of unconscionability in the arbitration agreement at issue, largely due to its perception of inequality between the parties. While the majority pointed to several factors it considered unfair to Manfredi,¹⁶⁴ it overvalued its determination that the contract was one of adhesion,¹⁶⁵ especially in light of the clear precedent that an adhesion contract is not a basis for automatic invalidation of an arbitration provision.¹⁶⁶ This raises the question of why the *Manfredi* court chose to void the provision in this way when it was unnecessary to accomplish their preferred result of unenforceability. The answer to this question may lie in the judges' personal feelings of fairness, and their perceptions that fairness was not being served by BCBS's use of arbitration in its agreement with Manfredi.

157. 9 U.S.C. § 2 (2006).

158. *Id.* See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). The court described section 2 of the FAA as implicating a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." *Id.*

159. Joyce J. George, *The Advantages of Administered Arbitration When Going It Alone Just Won't Do*, DISP. RESOL. J. Aug-Oct. 2002, at 66 (2002) (noting the cost and time savings arbitration provides as well as the ability for parties to structure the process governing their disputes).

160. *JBS Farms, Inc. v. Fireman's Fund Agribusiness, Inc.*, 205 S.W.3d 910, 912 (Mo. Ct. App. 2006).

161. *Manfredi*, 340 S.W.3d at 132.

162. *Id.* at 137.

163. *Id.*; see also *Business Men's Assurance Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. Banc 1999).

164. The form agreement was offered on a take-it-or-leave-it basis, there existed unequal bargaining power between the parties, BCBS controlled a significant portion of the relevant market, the terms were not negotiated, and Manfredi's statements in his affidavit that he could not afford to reject the agreement. *Manfredi*, 340 S.W.3d at 132-133.

165. *Id.* at 133.

166. *Id.*; see also *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107-108 (Mo. App. E.D. 2003).

Missouri courts seem to have lost sight of the fact that arbitration results from both parties' acceptance of the agreement, entered into voluntarily and by mutual assent.¹⁶⁷ By using unconscionability as a basis for invalidation as opposed to scope, the court seemed to be sending a message that requiring consumers to arbitrate will not be met with blanket approval in Missouri. However, courts should consider whether it is wise to continue this policy of consumer protection it has seemingly adopted. The decision to disregard a competent consumer's choice to enter an agreement containing an arbitration provision, and, thus, to take advantage of the accompanying benefits the arbitration process has to offer, should not be made lightly.¹⁶⁸ If a particular case truly warrants invalidation for unconscionability, an adjudicating court should adhere to the original meaning of this doctrine and not resort to treating arbitration agreements as a specific category singled out for disparate treatment.

Several recent decisions by Missouri courts have invalidated arbitration clauses on the basis of unconscionability.¹⁶⁹ This can be seen as an apparent manifestation of Missouri courts' reluctance to enforce arbitration clauses in consumer situations, especially when the contracts at issue are classified as adhesion. While the MUA A states that all contracts of adhesion are exempted from the normal rule that a written provision or agreement to arbitrate any dispute arising between the parties is enforceable,¹⁷⁰ the FAA has no such exception.¹⁷¹ Because the FAA preempts the MUA A in all agreements involving interstate commerce, as almost all consumer contracts do, this preemption renders the MUA A exception powerless in most situations. However, as often cited by Missouri courts, the "generally applicable state law contract defenses, such as fraud, duress and unconscionability, may be used to invalidate arbitration agreements without contravening the FAA."¹⁷² Missouri courts appear to possess a certain preference for finding arbitration provisions unconscionable when applying Missouri substantive contract law to an arbitration provision in a contract of adhesion, which, as Missouri courts have repeatedly pointed out, is permitted under the FAA.

The United States Supreme Court has often reaffirmed the federal policy favoring arbitration¹⁷³ and has emphasized that courts may not use unconscionability as a means of treating arbitration agreements differently than other agreements.

167. 7 WILLISTON ON CONTRACTS § 15:11 (4th ed.).

168. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636 (2005) (noting that courts have "always supported the use of voluntary binding arbitration . . . [and] . . . historically enforced arbitral awards and postdispute agreements to arbitrate . . . [and] the passage of the FAA . . . has required US courts to grant motions to compel arbitration to such agreements.")

169. See *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. Banc 2010); *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. Banc 2010); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556 (Mo. App. E.D. 2009); *Repair Masters Const., Inc. v. Gary*, 277 S.W.3d 854 (Mo. Ct. App. 2009); *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. Ct. App. 2008); *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. Ct. App. 2008); *Whitney v. Alltel Commc'ns., Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005); and *Swain*, 128 S.W.3d 103.

170. MO. REV. STAT. § 435.350 (2000).

171. Compare MO. REV. STAT. § 435.350 (2000) with 9 U.S.C. § 2 (2006).

172. *Whitney*, 173, S.W.3d at 308.

173. Steven J. Burton, *The New Judicial Hostility to Arbitration. Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 476 (2006) (citing *Moses H. Conc Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (noting the United States Supreme Court's announcement of a federal policy favoring arbitration)).

Rather, courts should regard arbitration agreements as being “upon the same footing as other contracts.”¹⁷⁴ As recently stated in *AT&T v. Concepcion*, when a generally applicable state-law doctrine such as unconscionability is applied in way that seems hostile to arbitration, the FAA’s preemptive quality may extend to “grounds traditionally thought to exist at law or in equity for the revocation of any contract.”¹⁷⁵

It appears the United States Supreme Court was responding to the tendency of state courts to employ state-law contract defenses to avoid enforcing arbitration clauses where state courts perceive unfairness in agreements.¹⁷⁶ Yet this recognition has not deterred state courts, including Missouri, from employing unconscionability to this end.¹⁷⁷ Time will tell whether the United States Supreme Court, or perhaps the United States Congress, will step in to rectify this situation. In the meantime it appears Missouri courts are not backing down from their use of the unconscionability doctrine to invalidate arbitration provisions offensive to judges’ personal notions of fairness. This approach is unwise in an already-clogged judicial system and evinces disregard for the personal autonomy of consumers in deciding whether to enter an agreement to arbitrate. It also creates perverse incentives for large parties when drafting arbitration agreements. Instead of encouraging clear arbitration provisions that lay out the agreement in a way both parties can easily grasp, this judicial shift toward unconscionability encourages large parties to utilize ever more cunning and sly methods to avoid unenforceability.

VI. CONCLUSION

It has been suggested that judges are still hostile toward arbitration.¹⁷⁸ To that end, state courts have resorted to the expansion of the unconscionability doctrine beyond its historical bounds in an effort to invalidate arbitration agreements.¹⁷⁹ *Manfredi* represents the revival of this old judicial hostility toward arbitration agreements in the consumer context in Missouri. The *Manfredi* decision is just another in a recent line of cases indicating Missouri courts’ hostile attitude toward arbitration clauses in consumer contracts and sadly this attitude does not appear to be changing any time soon. In Missouri courts’ endeavor to protect consumers against what it considers unfair situations, the judiciary has resurrected the unconscionability doctrine as a way to circumvent the FAA’s preemptive effect in arbitration agreements. However, Missouri’s approach has led to a conflict with the

174. *Doctor’s Assocs., Inc., v. Casarotto*, 116 S. Ct. 1652, 1656 (1996).

175. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

176. *Id.*

177. See Randell, *supra* note 2, at 194-195 (recognizing an increase in the number of unconscionability claims raised in recent years by noting that judges are finding arbitration agreements unconscionable at a rate twice that of nonarbitration agreements and that twenty years before the article was published, judges had found arbitration and nonarbitration agreements unconscionable at approximately equal rates).

178. *Id.* at 186 (noting that federal and state judges maintain some level of judicial hostility concerning arbitration, and that they have enlarged the unconscionability doctrine past its normal uses in an effort to revoke arbitration agreements and allow litigation of claims brought by parties subject to arbitration clauses)

179. *Id.*

No. 1] *The New Use of the Doctrine of Unconscionability* 333

United States Supreme Court's stated preference for arbitrability. Whether this trend will continue is yet to be seen, but if the *Manfredi* decision is any indication, this misguided trend is here to stay.

VALERIE DIXON