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NOTES

Public Injunctions as a Way Around *Concepcion*: California's Continued Resistance to the Federal Arbitration Act

Kilgore v. KeyBank, N.A., 718 F.3d 1052 (9th Cir. 2013)

I. INTRODUCTION

In *Kilgore v. KeyBank, National Association*, known as *Kilgore I*, students alleged that KeyBank conspired with a bankrupt aviation school, which they attended, in order to profit from their loans.¹ The students sought a public injunction in order to prevent the KeyBank from collecting on their loans or reporting default to credit agencies.² In March 2012, the Ninth Circuit decided that California's rule prohibiting the arbitration of claims for public injunctive relief did not survive the Supreme Court's decision in *Concepcion* and, therefore, was preempted by the Federal Arbitration Act (FAA).³ The Ninth Circuit held that California's rule was no longer viable.⁴

On December 11, 2012, less than one year after the court issued the *Kilgore I* opinion, the Ninth Circuit reheard the case *en banc*, known as *Kilgore II*.⁵ The court declined to reach the question of whether, after *Concepcion*, the FAA preempted California's rule against arbitrating claims for public injunctive relief.⁶ The court did not find the plaintiffs' claims to fall within the rule and did not need to reach that broader question.⁷

This note outlines the general applicability of the FAA and preemption. Next, it examines the Supreme Court's precedent concerning preemption, as it relates to class actions and public policy. This note argues that California's public injunction exception does prohibit outright the arbitration of a particular type of claim and is, thus, preempted by the FAA. The Supreme Court will likely see this rule as being at odds with the FAA and as another repudiation from the California courts of their long-standing FAA jurisprudence. Finally, this note argues that, despite the likely preemption of California's rule, there are strong policy arguments against arbitrating claims for public injunctive relief and that these claims should be exempted from the FAA.

1. *Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 953 (9th Cir. 2012) [hereinafter *Kilgore I*].

2. *Id.* at 953.

3. *Id.* at 951.

4. *Id.* at 947.

5. *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) [hereinafter *Kilgore II*].

6. *Id.* at 1060.

7. *Id.*

II. FACTS AND HOLDING

Matthew Kilgore and William Fuller filed a class action lawsuit against KeyBank, N.A., Key Education Resources, and Great Lakes Education Loan Services, Inc. (collectively, “KeyBank”).⁸ Both Kilgore and Fuller (“Plaintiffs”) attended a private helicopter school in Oakland, California, which was run by Silver State Helicopters, LLC (SSH).⁹ SSH’s preferred lender was KeyBank.¹⁰ The school gave students loan application forms and general information about educational loans from KeyBank.¹¹ In order to fund their education, Plaintiffs and class members borrowed between \$50,000 and \$60,000 from KeyBank.¹²

Plaintiffs alleged that the school was a sham and preyed upon low-income individuals who would have to take out student loans from SSH’s preferred lender, KeyBank.¹³ Plaintiffs and the members of the class signed a promissory note with KeyBank, which contained an arbitration clause.¹⁴ It explicitly stated in signing the note, Plaintiffs waived their rights to litigate claims against KeyBank and to participate in class actions.¹⁵ Additionally, Plaintiffs waived their rights to class arbitration, or to join or consolidate claims with other parties.¹⁶ The promissory note contained an opt-out provision, which allowed Plaintiffs to opt-out of the arbitration clause.¹⁷ The provision required the Plaintiffs to notify KeyBank of their decision to opt-out, within 60 days of signing the note.¹⁸

Both plaintiffs signed the notes, despite explicit, boldface language warning them that (1) they would not have the opportunity to litigate,¹⁹ (2) emphasized the importance of reading the whole contract,²⁰ and (3) stressed that the contract should not be signed until the signer had read it.²¹ The Service Contract Agreement required all training to be complete within 18 months.²² Plaintiffs were not able to fulfill all of their graduation requirements, required by the agreement, because the school closed and filed for bankruptcy in February of 2008.²³

8. *Id.* at 1056; *see Kilgore I*, 673 F.3d at 951.

9. *Kilgore I*, 673 F.3d at 951.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 952.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* The Note also contained a choice of law and forum-selection clause. *Id.* The forum was KeyBank’s principle place of business, Ohio. The District Court found that California had a “materially greater interest” than Ohio. *Id.* at 954. However, on appeal, KeyBank did not argue that the forum-selection clause should have been enforced. *Id.* at 952.

19. *Id.* at 952. The language was boldface and stated, “I understand that the master student loan promissory notes governing my loan contract contains an arbitration provision under which certain disputes ...between me and you and/or certain other parties will be resolved by binding arbitration, if elected by me or you or certain other parties. If a dispute is arbitrated, the parties will not have the opportunity to have a judge or jury resolve it and other rights may be substantially limited.” *Id.*

20. *Id.* Another statement in boldface warned, “Caution: It is important that I thoroughly read the contract before I sign it.” *Id.* at 952-53.

21. *Id.* at 953. “I will not sign this agreement/note before I read it (even if otherwise advised).” *Id.*

22. *Id.* In the Service Contract Agreement, SSH laid out the graduation and training requirements to include 175 flight hours, classes, and individual lessons as needed. *Id.*

23. *Id.* SSH described its services as including 175 flight hours, which Plaintiffs did exceed. *Id.* However, they did not get any kind of certification or diploma for their training. *Id.*

On June 17, 2008, Plaintiffs filed suit against KeyBank in California state court, alleging that KeyBank knew that the private student loan industry was in a state of emergency, but kept loaning money to students anyway.²⁴ After Plaintiffs filed a second amended complaint, KeyBank removed the case to the U.S. District Court for the Northern District of California.²⁵ Plaintiffs alleged unfair competition and requested a public injunction to keep KeyBank from reporting the Plaintiffs' default to any credit agency, enforcing the notes against them, and from entering into false and deceptive credit contracts.²⁶ KeyBank moved to compel arbitration, and the district court denied the motion.²⁷ The court held that California law, rather than Ohio law, controlled and that California's rule prohibiting the arbitration of claims for public injunctive relief applied to the case.²⁸

The district court held that the California Supreme Court's rule prohibited the arbitration of public injunctive relief claims, making the arbitration clause unenforceable.²⁹ KeyBank appealed the denial of its motion to compel arbitration and, while that appeal was pending, moved to dismiss the third amended complaint.³⁰ The district court granted the motion and the plaintiffs appealed.³¹ The Ninth Circuit Court of Appeals, in *Kilgore I*, vacated the district court's decision and stayed arbitration pursuant to California law and the Federal Arbitration Act.³² In *Kilgore II*, the Ninth Circuit, *en banc*, reversed the district court's dismissal of plaintiff's claims and remanded with instructions to compel arbitration.³³ The court held that the claim brought by the plaintiffs was not a claim for public injunctive relief and, as such, the California state law rule that prohibits arbitrating public injunctions does not apply.³⁴

III. LEGAL BACKGROUND

A. Application of the Federal Arbitration Act

The Federal Arbitration Act mandates the enforcement of arbitration agreements.³⁵ The FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁶ The Supreme Court has held that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.³⁷ The FAA is viewed as a congressional declaration

24. *Id.*

25. *Id.* Plaintiffs could not take action against SSH because of the automatic stay, 11 U.S.C. § 362. *Id.*

26. *Id.* at 953-54. Plaintiffs did not seek damages. *Id.*

27. *Id.*

28. *Id.* Ohio law, however, would have allowed arbitration of such claims. See also Hawkins v. O'Brien, No. 22490, 2009 WL 50616 (Ohio Ct. App. Jan. 9, 2009).

29. *Id.* This case was decided before the Supreme Court decided *Concepcion* and, as such, the District Court was not able to apply it to this case. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 952.

33. *Kilgore II*, 718 F.3d 1052 (2013).

34. *Id.*

35. 9 U.S.C. § 2 (1976).

36. *Id.* This is known as the FAA's "savings clause."

37. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural policies to the contrary.³⁸ The Court has enunciated Congress' intent in enacting the FAA as ensuring that parties are able to arbitrate quickly and easily.³⁹

In *Southland Corp. v. Keating*, the Court decided the applicability of the FAA to state court proceedings and gave a rationale for preemption.⁴⁰ The California Investment Law was applied to invalidate an arbitration agreement made pursuant to the FAA.⁴¹ The Court held that California's law conflicted with the FAA and therefore violated the supremacy clause.⁴² The FAA "rests on the authority of Congress to enact substantive rules under the Commerce Clause...and was an exercise of the Commerce Clause power [which] clearly implied that the substantive rules of the Act were to apply in state as well as federal courts."⁴³ While the Court did recognize that the legislative history of the FAA was not without ambiguities, it found indications that Congress intended that arbitration agreements to be enforceable beyond the federal courts.⁴⁴ "The problems Congress faced were therefore twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements."⁴⁵ Confining the scope to federal courts would, in the Court's opinion, frustrate Congress' intent that the FAA to be a broad enactment.⁴⁶ Therefore, the *Southland* Court viewed the "involving commerce" requirement the FAA savings clause not as a limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in both state and federal courts.⁴⁷

In his *Southland* dissent, Justice Stevens expressed his belief that the general rule of section 2 was also subject to the "implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses."⁴⁸ Drawing upon basic federalist principles, he argued that it is rare for a federal statute to completely and totally displace state authority.⁴⁹ Additionally, the legislative history of the FAA did not support the conclusion that Congress meant to entirely displace state authority in this particular field.⁵⁰ Justice Stevens argued that "the limited objective of the Federal Arbitration Act was to abrogate the general common law rule against the specific enforcement of arbitration agreements."⁵¹ He wanted the Court to recognize that, as the savings clause

38. *Id.* at 24.

39. *Id.* at 22.

40. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

41. *Id.*

42. *Id.* at 10.

43. *Id.* at 10-12. *See also* *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 395 (1967) (holding that the FAA fell under Congress' broad power to fashion rules under the Commerce Clause).

44. *Id.* at 12.

45. *Id.* at 14.

46. *Id.*

47. *Id.* at 14-15. *See also* 9 U.S.C. § 2 (1976).

48. *Id.* at 18 (Stevens, J., dissenting in part and concurring in part). Justice Stevens concurred with the majority that an arbitration clause enforceable in a federal court was just as enforceable in a state court action. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (citing S. REP. NO. 536, at 2-3 (1924)).

indicates, “[t]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”⁵²

In *Perry v. Thomas*, the Supreme Court applied its *Southland* reasoning and holding.⁵³ The Court was presented with the question of whether the California Labor Code (CLC), which provided that actions for the collection of wages may be maintained, “without regard to the existence of any private agreement to arbitrate, was preempted by the FAA.”⁵⁴ Again, the Court held that federal policy caused the FAA savings clause to directly conflict with California’s rule that litigants had to have access to a judicial forum to resolve disputes under the CLC.⁵⁵ Therefore, according to the Supremacy Clause, state statutes must give way.⁵⁶ Justice Stevens’ dissent, echoing his opinion in *Southland*, emphasized the fact that the Court had essentially rewritten the FAA, giving it preemptive scope beyond Congress’ original intent.⁵⁷ Stevens argued that, as a matter of public policy, states should be able to preclude waiver of a judicial forum.⁵⁸ Justice O’Connor also dissented, disagreeing with the Court’s holding that the savings clause required the arbitration of the appellee’s wages, despite clear state policy to the contrary.⁵⁹ In Justice O’Connor’s opinion, the California legislature clearly intended to preclude waiver of access to a judicial forum for certain claims, reflecting an important state policy entitled respect.⁶⁰

In *Hall St. Associates, LLC v. Mattel*, the Court decided whether statutory grounds for prompt vacatur and modification could be supplemented by contract.⁶¹ The arbitration agreement at issue authorized a district court to set aside an arbitrator’s award if “the arbitrator’s findings of facts [we]re not supported by substantial evidence” or “the arbitrator’s conclusions of law [we]re erroneous.”⁶² The Court examined sections 10 and 11 of the FAA, which provide “exclusive regimes for the review [of arbitration awards] provided by statute.”⁶³ The Court reasoned that these statutory regimes could not be expanded by the parties’ own arbitration agreement.⁶⁴ While the Court found the grounds for review in sections 10 and 11 of the FAA to be exclusive, the Court did not “purport to say that they exclude more searching review based on authority outside the statute as well.”⁶⁵

In the seminal FAA case, *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA preempted a California judicial rule, known as the *Discover Bank* rule, under which class arbitration waivers in consumer contracts were

52. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

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

54. *Id.* at 483; Cal. Lab. Code Ann. § 229 (West 1971).

55. *Id.* at 491.

56. *Id.* at 490-91.

57. *Id.* at 493. “Even though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigants even considered the possibility that the Act had preempted state-created rights.” *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 495.

61. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2007).

62. *Id.* at 579.

63. *Id.* at 590.

64. *Id.* at 581.

65. *Id.* at 590.

considered unconscionable.⁶⁶ The Court explained that “requiring class-wide arbitration interfered with fundamental attributes of arbitration, creating a scheme inconsistent with the FAA.”⁶⁷ The Court also identified two situations in which the FAA preempts a state law rule. First, “when state law prohibits outright the arbitration of a particular claim, the analysis is straightforward: the conflicting rule is displaced by the FAA.”⁶⁸ Second, the FAA preempts a state law rules apply generally applicable contract defenses, such as duress or unconscionability, in a way that disfavors arbitration.⁶⁹ Courts must ensure that state laws comply with the objectives of the FAA; to ensure that arbitration agreements are enforced according to their terms.⁷⁰ Therefore, the *Discover Bank* rule was preempted because “[r]equiring the availability of classwide arbitration interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.”⁷¹ The Court emphasized that the FAA does not hinge on a mechanical application of the words, but rather on accomplishing the Act’s objectives.⁷²

It is clear that the Supreme Court, through its FAA jurisprudence, continues to adhere to the view that there is a liberal federal policy favoring arbitration. Indeed, the Court has routinely ruled that the FAA preempts any conflicting state laws.

B. Class Actions

As a matter of state public policy, California courts have attempted to invalidate class action arbitration waivers. The courts reasoned that without access to class procedures plaintiffs would be unable to afford to pursue their low-value claims.⁷³

In *Stolt-Nielsen S.A. v. AnimalFeeds Int. Corp.*, AnimalFeeds brought a putative class action against Stolt-Nielsen asserting anti-trust claims regarding the overly competitive prices charged by Stolt-Nielsen.⁷⁴ AnimalFeeds demanded class arbitration.⁷⁵ The arbitrators concluded that the arbitration clause allowed for class arbitration, even though the contract itself was silent as to the availability of class procedures.⁷⁶ The proceeding was stayed in order for the parties to seek judicial review.⁷⁷ Based on Supreme Court precedent and the contractual nature of arbitration, the Court held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”⁷⁸ The arbitrators’ decision to impose class arbitration was in conflict with the foundational principles of the FAA: that arbitration is a

66. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). See also *Discover Bank v. Superior Ct. of L.A.*, 113 P.3d 1100 (2005).

67. *Id.* at 1748.

68. *Id.* at 1747.

69. *Id.* at 1748.

70. *Id.*

71. *Id.*

72. *Id.*

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

74. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010).

75. *Id.* at 668.

76. *Id.* at 669.

77. *Id.*

78. *Id.* at 684.

matter of consent.⁷⁹ Unless specifically stated in an agreement, class arbitration cannot be inferred because it dramatically changes the nature of arbitration.⁸⁰

In *AT&T Mobility LLC v. Concepcion*, the Court not only ruled on FAA preemption of conflicting state laws, but also on the availability of class procedures in arbitration.⁸¹ The rule at issue in *Concepcion*, known as the *Discover Bank* rule, provided that a class arbitration waiver was unconscionable if it was found in a consumer contract of adhesion.⁸² It applied where the dispute between the parties involved small amounts of damages and the party with superior bargaining power had carried out a scheme to cheat large numbers of consumers out of individually small sums of money.⁸³ Although the *Discover Bank* rule did not require class-wide arbitration, it allowed any party to a consumer contract to demand it.⁸⁴ The rule was limited to adhesion contracts, but as the majority pointed out, “the times in which consumer contracts were anything other than adhesive are long past.”⁸⁵ The Court explained that although the FAA savings clause preserves generally applicable contract defenses, it “does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”⁸⁶ The Court found that allowing class-wide arbitration interfered with fundamental attributes of arbitration, creating a scheme inconsistent with the FAA.⁸⁷

The Court provided three reasons why class arbitration is not preferable to bilateral arbitration.⁸⁸ First, class arbitration “sacrifices the principle advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”⁸⁹ Second, “class arbitration requires procedural formality.”⁹⁰ While parties could alter those procedures by contract, there is no obvious alternative.⁹¹ Therefore, “[i]f procedures are too informal, absent class members would not be bound by the arbitration.”⁹² Third, class arbitration increases the risks to defendants because “informal procedures . . . have a cost: the absence of multilayered review makes it more likely that errors will go uncorrected.”⁹³ The defendants were “willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts.”⁹⁴ “Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims.”⁹⁵

79. *Id.*

80. *Id.* at 685.

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

82. *Id.* at 1746 (citing *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76 (2005)).

83. *Id.*

84. *Id.* at 1750.

85. *Id.*

86. *Id.* at 1743.

87. *Id.* at 1748.

88. *Id.*

89. *Id.* at 1751.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1752.

94. *Id.*

95. *Id.*

The Supreme Court found *Stolt-Nielsen* instructive in analyzing the *Conception* case.⁹⁶ In *Stolt-Nielsen*, the Court held that an arbitration panel exceeded its power under section 10(a)(4) of the FAA.⁹⁷ The panel imposed class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation.⁹⁸ The Court explained that the agreement “could not be interpreted to allow [class procedures] because the ‘changes brought about by the shift from bilateral arbitration to class-action arbitration’ are ‘fundamental.’”⁹⁹ Although it would be possible for an arbitrator to have extensive knowledge of class action, arbitrators are not typically trained in the “often-dominant procedural aspects of certification, such as the protection of absent parties.”¹⁰⁰ Thus, the Court found arbitration poorly suited to the higher stakes of class litigation.¹⁰¹

C. Public Policy and Public Injunctions

During the FAA’s first sixty years, public policy was cited as a defense to arbitration.¹⁰² The Supreme Court found it problematic that arbitration involved lay judges, streamlined procedural rules, limited appellate rights, and provided no means to enforce arbitral awards.¹⁰³ The Court found arbitration insufficient to protect the people from “unconstitutional action under color of state law.”¹⁰⁴

However, the Court shifted its view in the *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* decision. In *Mitsubishi*, the Court held that an agreement to arbitrate a statutory claim did not waive a party’s substantive statutory rights.¹⁰⁵ According to the Court, the only difference between arbitration and adjudication was that instead of a judicial forum, the issue was submitted to an arbitral forum.¹⁰⁶ The Court reasoned that “if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history.”¹⁰⁷

In *Marmet Health Care Center, Inc. v. Brown*, West Virginia’s state court refused to enforce an arbitration clause in personal-injury or wrongful-death claim against a nursing home, as a matter of law.¹⁰⁸ The state court reasoned that Congress did not intend for the FAA to apply to such claims, especially where the

96. *Id.*

97. *Id.* See also 9 U.S.C. § 10(a)(4) (1976).

98. *Id.*

99. *Id.* at 1750.

100. *Id.* at 1750.

101. *Id.* at 1751.

102. *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting).

103. *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984). The FAA’s House Report stated that “its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs’ and to overrule the judiciary’s longstanding refusal to enforce” arbitration agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

104. *Id.* at 290.

105. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

106. *Id.*

107. *Id.*

108. *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012).

agreement involved a service that is a necessity for members of the public.¹⁰⁹ The Supreme Court found West Virginia's public policy argument unpersuasive and contrary to the Court's precedent, as the FAA provides "no exception for person-injury or wrongful-death claims."¹¹⁰ Rather, the FAA requires courts to enforce parties' agreement to arbitrate.¹¹¹

Despite the Supreme Court's consistent rulings that the FAA preempts conflicting state laws, some state courts have attempted to carve out a small exception under the savings clause, refusing to enforce arbitration agreements deemed to violate state public policy. California is one such state. In *Broughton v. Cigna Healthplans of California* and *Cruz v. PacifiCare Health Systems, Inc.*, the California Supreme Court refused to require arbitration of public injunction claims.¹¹² The court reasoned that arbitrators are poorly suited to order and ensure of the ongoing relief sought by such claims.¹¹³ In *Broughton*, the court relied on the Supreme Court's acknowledgment in *Mitsubishi* that "not all controversies implicating statutory rights are suitable for arbitration."¹¹⁴ The California court interpreted the Supreme Court's *Mitsubishi* decision to mean that "when the primary purpose and effect of a statutory remedy is not to compensate for an individual wrong but to prohibit and enjoin conduct injurious to the general public ... such a remedy may be inherently incompatible with arbitration."¹¹⁵

The court outlined two factors that, when considered together, create an "inherent conflict" between arbitration and the purpose of the state's injunctive relief remedy. First, that the relief sought benefits the public, rather than the private party bringing the action. Second, a judicial forum has significantly greater institutional advantages over arbitration "in administering a public injunctive remedy, which . . . will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators."¹¹⁶ The court held that "it would be perverse to extend the policy [favoring arbitration] so far as to preclude states from passing legislation the purposes of which make it incompatible with arbitration", or to force states to arbitrate substantive rights afforded by their own legislation.¹¹⁷ The Ninth Circuit also agreed with the *Broughton-Cruz* rule that there are certain public injunctions that are incompatible with arbitration and that these actions cannot be subject to arbitration, even under a valid arbitration clause.¹¹⁸

In *Kilgore I*, the Ninth Circuit Court of Appeals was faced with the decision of whether the *Broughton-Cruz* rule survived *Concepcion*.¹¹⁹ The court read the Supreme Court's decisions on FAA preemption to mean that the only way to keep

109. *Id.* at 1203.

110. *Id.*

111. *Id.*

112. See *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999); *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (2003).

113. *Id.*

114. *Broughton*, 988 P.2d at 73 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)) (internal quotations omitted).

115. *Id.* at 74. "[T]he benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered." *Id.* at 76.

116. *Id.* at 78.

117. *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (2003).

118. *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007).

119. *Kilgore I*, 673 F.3d 947 (2012). See also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

a statutory claim out of arbitration was “if Congress intended to keep that federal claim out of arbitration proceedings.”¹²⁰ The *Broughton-Cruz* rule prohibiting arbitration of claims for public injunctive relief was in direct conflict with the FAA.¹²¹ The court held that the FAA preempted California’s law because the court could not “ignore *Concepcion*’s holding that state public policy cannot trump the FAA when that policy prohibits the arbitration of a particular type of claim.”¹²²

IV. THE INSTANT DECISION

In the instant decision, styled “*Kilgore II*,” the Ninth Circuit reconsidered its *Kilgore I* decision *en banc*. In *Kilgore II*, the court again found that the agreement to arbitrate was not unconscionable because the contractual provision was neither procedurally nor substantively unconscionable.¹²³ The court recognized that *Concepcion* made the plaintiff’s argument, that a ban on class arbitration is substantively unconscionable, moot.¹²⁴ Plaintiffs claimed that students would not be able to afford arbitration fees, therefore the arbitration agreement was unconscionable.¹²⁵ The court held that the risk that plaintiffs would not be able to afford arbitration was speculative and not enough to justify an invalidation of an arbitration agreement.¹²⁶ The arbitration provision at issue in *Kilgore* was also not procedurally unconscionable because students could reject the provision within sixty days of signing the promissory note.¹²⁷ Additionally, the provision was not hidden or buried within the contract.¹²⁸ Rather, the arbitration provision was found in a separate section of the agreement, in capital letters and bold type.¹²⁹

In *Kilgore I*, KeyBank argued that *Concepcion* vitiated the *Broughton-Cruz* rule that prohibited arbitration for claims of public injunctive relief.¹³⁰ However, in *Kilgore II*, the court declined to accept KeyBank’s broad reading of *Concepcion* because the *Kilgore* plaintiffs’ claim was not one for public injunctive relief.¹³¹ In the present case, the requested injunctive relief would have only benefited the 120 putative class members, not the larger public, and therefore, was not governed by the *Broughton-Cruz* rule.¹³² Furthermore, KeyBank had completely withdrawn from the private school lending business and there was no allegation that they were continuing this practice, rendering it a past harm.¹³³ Therefore, there would be no “real prospective benefit to the public at large from the relief

120. *Id.* at 962.

121. *Id.* at 963.

122. *Id.* (internal quotations omitted).

123. *Kilgore I*, 718 F.3d 1052 (2013).

124. *Id.* at 1058. See also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

125. *Id.*

126. *Id.* See also *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000).

127. *Id.* at 1059.

128. *Id.*

129. *Id.*

130. *Kilgore I*, 673 F.3d 947, 958 (2012) (citing *Broughton v. Cigna Healthplans of Cal.*, 98 P.2d 67 (Cal. 1999)).

131. *Kilgore II*, 718 F.3d at 1060.

132. *Id.* at 1060-61.

133. *Id.*

sought.”¹³⁴ Because the court declined to reach the question of *Broughton-Cruz*'s viability, it is unclear whether or not the rule survived post-*Concepcion*.

V. COMMENT

Utilizing its discretionary power to rehear *Kilgore I*, the Ninth Circuit Court of Appeals left the narrow *Broughton-Cruz* exception to the FAA intact. Despite the Supreme Court's rejection of a “public interest” argument in *Mitsubishi* and *McMahon*, the Ninth Circuit has circumvented the Court's arbitration jurisprudence classifying it as “essentially private [in] nature”- the public benefits were merely incidental to the pursuit of a private remedy.¹³⁵

The *Broughton-Cruz* rule is a public policy exception to the FAA. The rule seeks to allow states to enact public policy exceptions to the enforcement of arbitration agreements. The FAA savings clause provides that arbitration agreements are to be “valid, irrevocable, and enforceable save upon grounds that exist at law or in equity for the revocation of any contract.”¹³⁶ However, in *Southland* the Supreme Court held that federal law preempts state law.¹³⁷ In *Concepcion*, the Court found that the objectives of the FAA broadly preempted conflicting state laws.¹³⁸ Then, in *Hall Street*, the Court limited exceptions to the enforceability of arbitration agreements under the FAA to federal statutory grounds.¹³⁹ If the Supreme Court's FAA jurisprudence is considered as a whole and establishes authoritative precedent, states may not establish public policy exceptions to the FAA. The Ninth Circuit Court of Appeals, in *Kilgore II*, avoided this quandary by addressing the eligibility of the class for public injunctive relief instead of deciding the viability of their public injunctive relief exception to the FAA.

While the *Broughton-Cruz* rule appeals to parties eager to avoid coercive arbitration agreements, it is unlikely to survive review by the Supreme Court.¹⁴⁰ The *Concepcion* Court clarified the scope in the FAA savings clause by emphasizing that the FAA will preempt a state public policy or doctrine, normally thought to apply to the defense of contract claims, when it is applied in a fashion that disfavors arbitration.¹⁴¹ While California courts have argued that the *Broughton-Cruz* rule does not prohibit outright the arbitration of public injunctive relief claims, it has the effect of doing so. Even though the exception is narrow because it has only applied to public injunctive relief claims under the California Consumer Legal Remedies Act, the Business and Professions Code, and the Labor Code, the rule technically prohibits outright the arbitration of a particular type of claim— claims for broad public injunctive relief. As the dissent in *Broughton* enunciated, the Supreme Court's precedents concerning the preemptive effect of the FAA on state laws are broad and do not permit any exception.¹⁴²

134. *Id.*

135. *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 75 (Cal. 1999). See also *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

136. 9 U.S.C. § 2 (1976).

137. *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984).

138. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011).

139. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 583 (2007).

140. *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985).

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

142. *Broughton v. Cigna Healthplans of California*, 988 P.2d 67, 84 (Cal. 1999) (Chin, J., dissenting).

Concepcion also rejected the proposition that invalidating arbitration agreements using public policy rationales, like the one set forth in *Broughton-Cruz*, is allowed under the FAA.¹⁴³ The Court held that states cannot require a legal procedure that is inconsistent with the FAA, even if the procedure or policy is “desirable for other reasons.”¹⁴⁴ Furthermore, the dissent in *Broughton* correctly pointed out that Justice Stevens’ dissent in *Southland*, which called for voiding a contract as contrary to public policy, was rejected by the majority.¹⁴⁵ While Justice Stevens argued that the state’s rule that statutory claims were “void as a matter of public policy” was entitled to respect, his argument ultimately failed.¹⁴⁶ The state’s rule at issue would have allowed states to legislate around Congress’s goal of placing arbitration agreements on equal footing with other contracts.¹⁴⁷ Because the majority expressly rejected Justice Stevens’ public policy argument, it is likely that the current court would do the same if directly presented with this issue.

In *Concepcion*, the Supreme Court noted California courts’ hostility towards arbitration,¹⁴⁸ as manifested by its many “devices and formulas” for finding arbitration contrary to public policy.¹⁴⁹ The Court also noted that California courts have found contracts to arbitrate unconscionable more than other contracts.¹⁵⁰

Since *Concepcion* was decided California federal district courts have been working to discern whether the *Broughton-Cruz* rule survived, but they have come to different conclusions. The United States District Court of the Northern District of California has determined that the rule was preempted by the FAA and did not survive.¹⁵¹ The United States Court of the Central District of California found otherwise, concluding that *Broughton-Cruz* is still viable after *Concepcion*.¹⁵² The Central District court reasoned that the rule is not inconsistent with *Concepcion* because it protects “important public rights and remedies.”¹⁵³ The court explained that the *Broughton-Cruz* rule did not prohibit arbitration of a particular type of claim outright because “it did not prohibit arbitration of all injunctive relief claims, but only those brought on behalf of the general public.”¹⁵⁴

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

144. *Id.*

145. *Broughton*, 988 P.2d at 85 (Chin, J., dissenting). See also *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., dissenting).

146. *Southland*, 465 U.S. at 20.

147. *Id.*

148. *Concepcion*, 131 S. Ct. at 1747.

149. *Id.* (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

150. *Id.* (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 186-187 (2004)).

151. *Arellano v. T-Mobile USA, Inc.*, No. 10-05663-WHA, 2011 WL 1842712 (N.D. Cal. 2011). See also *In re Gateway LX6810 Computer Prods. Litig.*, No. SACV 10-1563-JST (JEMx), 2011 WL 3099862 (C.D. Cal. July 21, 2011) (holding that claims for injunctive relief must be resolved in arbitration pursuant to the dispute resolution provision of the warranty at issue); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, No. C10-2553 RMW, 2011 WL 2886407 (N.D. Cal. July 19, 2011) (following *Arellano*); *Zarandi v. Alliance Data Sys. Corp.*, No. CV 10-8309 DSF (JCGx), 2011 WL 1827228 (C.D. Cal. May 9, 2011) (rejecting Plaintiff’s request to bifurcate the claims seeking injunctive relief because the FAA preempts state law to the extent it prohibits arbitration of a particular type of claim).

152. *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litig.*, 810 F.Supp.2d 1060 (C.D. Cal. 2001).

153. *Id.* at 1073.

154. *Id.* at 1072.

The conflict between arbitration and public injunctive relief claims identified by the *Broughton* court was a tension between the FAA and a California law.¹⁵⁵ Federal law preemption requires that state laws give way to conflicting federal laws. Under the Supremacy Clause, the FAA is the supreme law of the land.¹⁵⁶ Absent federal authority to the contrary, it is likely that the Supreme Court will not see public injunctions or public interest claims as an exception within the FAA savings clause. As the *Broughton* and *Cruz* decisions noted, there are many compelling reasons that make arbitration unsuitable or the improper venue for vindicating such broad public rights, but none of these reasons will survive federal preemption after *Concepcion*.

Typically resistant to the FAA, the Ninth Circuit acted on important public policy considerations in creating its *Broughton-Cruz* rule. While the Supreme Court is not likely to uphold California's public policy exception, there is much at stake if the FAA preempts the exception for public-injunction unconscionability. Public injunctions are inherently different from other defenses available to contracting parties. The purpose of arbitration is to resolve private disputes in a fast, efficient, and simplified manner.¹⁵⁷ However, the purpose of a public injunction is to remedy a public wrong, not resolve a private dispute.¹⁵⁸ Public injunctions remedy wrongs committed against the general public.¹⁵⁹ Individual plaintiffs may not act as a private attorney general if forced to individually arbitrate claims for public injunctive relief.¹⁶⁰

The purpose of public injunctions is directly at odds with the purpose of arbitration, not because state legislatures or courts are resisting arbitration, but because arbitration is poorly suited to remedy public wrongs. For example, the Consumer Legal Remedies Act (CLRA), the law at issue in *Broughton*, was intended to "protect consumers against unfair and deceptive business practices."¹⁶¹ This purpose was achieved by providing consumers with efficient and economic procedures through which they could ensure such protection.¹⁶² The CLRA protected consumers from the deceptive business practices of falsely advertising goods or services, or making false representations about the status and quality of products.¹⁶³ A plaintiff bringing a CLRA claim, if forced to arbitrate, would force upon the consumer the duty to protect the general public by acting as a private attorney general attempting to enjoin future deceptive practices on behalf of the general public. The purpose of the public injunctive relief under the CLRA is not to resolve a public dispute, but to remedy a public wrong. Arbitrating these types of claims places the public in danger of falling prey to the same practices and allows the perpetrator to get away with it without being held accountable. Arbitration does not hold the offending party accountable to the public like a state's attorney general can by bringing a lawsuit.

The *Broughton-Cruz* rule relied on the institutional shortcomings of arbitration in enforcing a public injunction. Indeed, arbitrators in California are not able

155. *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (1999).

156. U.S. CONST. art. VI.

157. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

158. *Broughton*, 988 P.2d at 88.

159. *Id.*

160. *Id.*

161. *Id.* at 74.

162. *Id.*

163. *Id.*

to correct or modify any arbitration awards 30 days after entry of the award.¹⁶⁴ If plaintiffs want to modify or change an arbitral award, they must initiate an entirely new arbitration proceeding.¹⁶⁵ This process is not ideal for seeking public injunctive relief. Courts faced with claims for public injunctive relief are able to monitor their injunctions on an ongoing basis and are able to reassess the public interest and private rights as circumstances change.¹⁶⁶ Furthermore, under California law, even though the injunction would be public in scope, only the parties to the injunction would be able to enforce it.¹⁶⁷ Even if the behavior was harming the public, no one but the parties involved could move to enforce the judgment. The judges who monitor these public injunctions are held accountable to the public in ways that arbitrators are not. As such, judges and courts are the most appropriate forum for protecting the public.

Echoing the dissents in both *Southland* and *Perry*, the court in *Broughton* found nothing in the FAA legislative history indicating that the “universe of arbitration agreements [that the FAA] was attempting to enforce” extended to arbitration of claims for public injunctive relief.¹⁶⁸ The dissenting opinions in both *Southland* and *Perry* interpreted Congress’s intent in enacting the FAA as making agreements to arbitrate as enforceable as other contracts, but not more so.¹⁶⁹ The dissent thought that important state policies deserve respect.¹⁷⁰ There are rights that cannot be suitably enforced through arbitration, whether they are state or federal rights. *Kilgore II* was an attempt by the Ninth Circuit to avoid the Supreme Court’s ruling in *Concepcion*. Their concerns were apparent even in *Kilgore I* when the Court acknowledged that enforcing arbitration agreements for public injunctive relief claims “will reduce the effectiveness of state laws like the UCL. It may be that the FAA preemption in this case will run contrary to a state’s decision that arbitration is not conducive to broad injunctive relief claims as the judicial forum.”¹⁷¹ By rehearing *Kilgore*, the Court was able to get around *Concepcion* and keep its state public policy rule alive, proving that the court was not “blind to the concerns engendered” by their holding.¹⁷² Arbitration is inappropriate for a narrow category of actions, like those for public injunctive relief, because the arbitration of these claims would deny the public the substantive rights afforded to it by statute.

VI. CONCLUSION

Utilizing its discretionary power to rehear *Kilgore I*, *en banc*, the Ninth Circuit signaled to other circuits and courts that this issue is important, worth considering, and potentially viable post-*Concepcion*. While the rule against arbitrating public injunctive claims may be desirable and has strong public policy support, the Supreme Court’s precedent and broad FAA preemption articulated in *Concep-*

164. Cal. Civ. Proc. Code § 1284 (West 1982).

165. *Broughton*, 988 P.2d at 82.

166. *Id.* at 77.

167. *Id.* See also *Vandenberg v. Superior Court*, 982 P.2d 229 (1999).

168. *Id.*; *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984).

169. *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (O’Connor, J., dissenting).

170. *Id.*

171. *Kilgore I*, 673 F.3d at 960.

172. *Id.*

cion indicates that the Supreme Court will not accept the Ninth Circuit's argument. Unless the Court overrules *Southland* or contrary federal legislation is enacted, the FAA will preempt California's *Broughton-Cruz* rule. As it stands, the savings clause has been made ineffectual. The Court has overturned every state law or public policy that might be considered "grounds that exist at law or in equity for the revocation of any contract." While arbitration is not the appropriate forum to remedy public harms, the Court will likely continue to assume that parties do not give up their substantive rights in arbitration and that it is a suitable forum for public injunctive relief claims.

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