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Delicate Balancing of Paternalism and Freedom to Contract: The Evolving Law of Unconscionability in Missouri, A Law Summary

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LAW SUMMARY

A Delicate Balancing of Paternalism and Freedom to Contract: The Evolving Law of Unconscionability in Missouri

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I. INTRODUCTION

The contracts defense of unconscionability – infrequently exercised and less frequently successful – requires that a contractual provision be so odious that it "shocks the conscience" of the adjudicator.[1] Case law suggests that during the last century, unconscionability has been argued successfully less than twenty times in the state of Missouri.[2] The nature of an overall unconscionability analysis is rather tenuous, given that the defense is highly fact-intensive, and a range of factors, rather than elements, controls.[3] Despite this, Missouri courts had applied a uniform test in nearly every contract situation for decades, including contracts whose terms included a mandatory arbitration clause.

After the adjudication of the highly anticipated case *AT&T Mobility LLC v. Concepcion*,[4] the Missouri judiciary was faced with the prospect of examining its own unconscionability test and applying the new ruling. The *Concepcion* case, decided within the context of mandatory arbitration contracts, held that state unconscionability laws will be pre-empted by the Federal Arbitration Act where such state unconscionability laws stand as an obstacle to the goals of the Federal Arbitration Act. Along with providing a

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1. Carter v. Boone Cnty. Trust Co., 92 S.W.2d 647, 657 (Mo. 1935) (en banc).

2. *See infra* Parts II.A, C.

3. *See, e.g.*, Whitney v. Alltell Commc'ns, Inc., 173 S.W.3d 300, 309 (Mo. App. W.D. 2005) (noting that a finding of unconscionability should be "based upon the totality of the circumstances").

4. 131 S. Ct. 1740 (2011).

general history of Missouri unconscionability law, this Summary will also examine the major impact of *Concepcion* upon the state.

II. LEGAL BACKGROUND

The unconscionability doctrine is rooted in legal precepts dating to the late 1900s, but the defense has only become widespread in Missouri during the last ten years or so.[5] The Legal Background section will investigate the beginnings of the defense in Missouri, examine the formation of the old and new unconscionability tests (including a brief overview of the Federal Arbitration Act), and provide a general overview of the most important Missouri unconscionability cases.

A. Unconscionability Generally

1. The Origin of the Defense

The first judicial definition of "unconscionability" in United States history appears in *Hume v. United States*, a Supreme Court of the United States case decided in 1889.[6] *Hume* colorfully illustrates an unconscionable agreement as one that "no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other[.]"[7] The first Missouri court case to mention the concept came two decades later in *Ball v. Reyburn*, where the court adopted the same definition.[8] Thereafter, Missouri courts applied a fact-specific analysis to unconscionability claims, resulting in several independent rulings[9] that offered little basis for reliable precedent.[10]

For example, in *Carter v. Boone County Trust*, the Supreme Court of Missouri determined the validity of an agreed-upon rental value for "the most

5. *See infra* Parts II.A, C.

6. 21 Ct. Cl. 328, *aff'd*, 132 U.S. 406 (1889). The case involved an agreement between Hume and the United States government, oddly resulting in the government's contractual obligation to purchase "shucks" from Hume for $1,200 a ton, when the going market rate for shucks was no more than $35 per ton. *Id.* at 329-30. The court struck down the agreement as unconscionable. *Id.* at 332.

7. *Id.* at 330 (quoting BOUVIER'S LAW DICTIONARY).

8. 118 S.W. 524 (Mo. App. W.D. 1909). The court refused to rule that the contract was unconscionable. *Id.* at 524-25. The court reaffirmed this definition several months later in *Wenninger v. Mitchell*, 122 S.W. 1130, 1132 (Mo. App. W.D. 1909).

9. *See* Carter v. Boone Cnty. Trust Co., 92 S.W.2d 647, 658 (Mo. 1935) (en banc); *Wenninger*, 122 S.W. at 1132; *Ball*, 118 S.W. at 524-25.

10. Oldham's Farm Sausage Co. v. Salco, Inc., 633 S.W.2d 177, 182 (Mo. App. W.D. 1982) (describing judicial precedent on unconscionability in Missouri as "scant").

valuable business property in Columbia[, Missouri]."[11] The plaintiff argued that the contracted rental price for the property paid by Boone County Trust was "so inadequate" that it should have "shock[ed] the conscience of the court" and have been set aside.[12]

In addressing the plaintiff's claim, the court first referenced the treatise *Page on Contracts* and produced the definition for unconscionability noted in *Hume*.[13] Additionally, the opinion concluded that the threshold for determining whether unequal consideration might qualify as "unconscionable" could only be stated in "abstract terms" and thus offered no practical help.[14] Turning to alternative definitions of unconscionability, the court stated, "where the inadequacy of price is so great that the mind revolts at it, the [c]ourt will lay hold of the slightest circumstances of oppression or advantage to rescind the contract."[15] Finally, the *Carter* opinion revisited a rule that was "everywhere understood" – if a party was incompetent to understand the nature of the contract, or if it was necessary to otherwise guard and protect the rights of a party, courts would interfere on that party's behalf.[16] Beyond these maxims, the court applied no other test in ultimately finding that the contracted rental price was not unconscionable.[17]

Other early Missouri unconscionability decisions conducted similar analyses.[18] However, in the 1955 case *Miller v. Coffeen*, a Missouri court struck down a contractual agreement using reasons similar to the modern unconscionability defense.[19] The matter involved two private individuals engaged in a sale of real property.[20] Miller[21] contracted with a seventy-year-old seller, Coffeen,[22] for the sale of a home located in Kansas City.[23] The home had a fair market value somewhere between $11,000 and $12,000.[24]

11. *Carter*, 92 S.W.2d at 658.

12. *Id*. at 656.

13. *Id.* at 657 (citation omitted) ("An unconscionable contract is said to be one 'such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.'").

14. *Id.*

15. *Id.* The court also referenced the "shock the conscience" standard. *Id.*

16. *Id.*

17. *Id.* at 658.

18. *See* cases cite *supra* note 9.

19. 280 S.W.2d 100 (Mo. 1955) (en banc).

20. *Id.* at 102.

21. Miller, described as having "superior natural acuteness" compared to Coffeen, held a "very responsible" position with the Pacific railroad, and completed schooling throughout the sixth grade. *Id.* at 104.

22. Coffeen was largely uneducated, but did finish grammar school and attended night school for several months. *Id.*

23. *Id.* at 103-04.

24. *Id.*

Coffeen offered to sell Miller the home for $2,400.[25] A day after the papers were executed, and after consulting with his lawyer, Coffeen expressed his desire to back out of the sale.[26] The two parties attempted to reach a monetary figure upon which Coffeen could pay to be relieved of his contractual obligations to sell the home.[27] Unsatisfied with the negotiations, Miller initiated legal action and stated his desire that the trial court enforce the sale through specific performance.[28]

The trial court rendered a verdict for Miller, and Coffeen appealed.[29] On review, the Supreme Court of Missouri examined the facts of the case, commenting on several factors surrounding the formation of the contract.[30] First, the court noted that Miller had intimate knowledge of Coffeen's property, including the sale price of $12,000 that Coffeen originally paid for the property.[31] Second, Coffeen's lawyer stated at trial that "[Coffeen] didn't know what he was doing," and he "ought to be adjudicated [incompetent]."[32] Finally, the court noted that in addition to Miller's knowledge of the fair value of the property, the parties "did not negotiate and consummate their contract alone and on equal terms."[33] In fact, Miller declined to use Coffeen's lawyer for the sale, and the parties subsequently visited Miller's personal attorney.[34] Without counseling Coffeen in any way, Miller's attorney examined the property's papers and drafted a purchase agreement that was signed immediately.[35]

In making its decision, the court discussed strong Missouri precedent regarding specific performance.[36] Particularly, the court observed that absent circumstances that would make the contract "unfair, overreaching, [or] biting," and in situations where a contract's terms are plain and fair, a specific performance remedy is generally a matter of right.[37] Also, mere inadequacy in value between the property and the sale price is not a ground for refusing specific performance unless it is accompanied by other inequitable factors, including "the fairness and reasonableness of the consideration in view of all

25. *Id.* at 105. Coffeen first offered to sell the home for $2100. *Id.* at 104.
26. *Id.* at 105.
27. *Id.*
28. *Id.* at 102.
29. *Id.*
30. *Id*. at 102-03.
31. *Id.* at 103-04. Coffeen purchased the property only twelve days prior to entering into the transaction with Miller. *Id*.
32. *Id.* at 105. Although Coffeen's attorney made this claim, and although it was mentioned in the opinion, the court did not conclude that Coffeen was mentally incompetent to enter into a contract. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 102-04.
37. *Id.* at 102.

the circumstances."[38] The judicial system values the importance of enforcing contracts voluntarily entered into, even if they are a "hard one,"[39] but the *Coffeen* court clearly believed the circumstances of the case rose to such a level as to render specific performance unavailable as a remedy.[40] Considering the facts of the case, and that various other damage remedies for breach were available to Miller (who had not yet suffered an adverse financial change of position due to the sale),[41] the court concluded that, "in view of the shocking inadequacy of the consideration and the presence of the noted inequitable factors, enforcement of the contract would impose an unreasonable, disproportionate hardship upon [Coffeen]."[42] Therefore, the court denied Miller's request to mandate the sale of property through specific performance.[43]

Although *Coffeen* did not specifically mention unconscionability, the modern framework for the defense is derived from the reasoning in that case.[44] The factors applied by the *Coffeen* court, including unequal bargaining power and oppressive terms,[45] stand as the basis in Missouri for both procedural and substantive unconscionability analyses seen in modern day courts.

2. The Missouri Approach

The first Missouri case to establish the modern "substantive and procedural unconscionability" test appeared in *Funding Systems Leasing Corporation v. King Louie International, Inc.*[46] *King Louie* involved a dispute between several parties over the effect of a liability disclaimer in a lease-purchase agreement for equipment that subsequently malfunctioned.[47] The trial court entered judgment against King Louie.[48] On appeal, King Louie argued, among other things, that the express liability disclaimer was unconscionable.[49]

38. *Id.* at 103.

39. *Id.* at 101 (noting that courts will enforce contracts even where those contracts produce unfair or unwanted results).

40. *Id.* at 106.

41. *Id*. The court made it clear that "there was no possible loss to [Miller]" that could *not* have been recoverable as damages for breach of contract. *Id.*

42. *Id.*

43. *Id.*

44. *See infra* Part II.A.2.

45. *See Miller*, 280 S.W.2d at 103.

46. 597 S.W.2d 624, 633-34 (Mo. App. W.D. 1979).

47. *Id.* at 626-29.

48. *Id.* at 629.

49. *Id.*

The court of appeals inferred that, in order to find unconscionability, a proper definition of the defense would be necessary to investigate the claim.[50] Noting that the Uniform Commercial Code offered no definition,[51] the majority referenced a test proposed in a 1967 University of Pennsylvania Law Review article[52] that had been accepted by various legal commentators and New York courts.[53] The test distinguished between two facets of unconscionability: "substantive" and "procedural."[54] According to the court of appeals, the substantive aspect related to "undue harshness" in the actual terms of the contract.[55] An unduly harsh term might provide for the total destruction of the right to relief in case of breach.[56] The procedural portion related to problems in the contract formation process, such as unequal bargaining power between the parties[57], high-pressure tactics, fine print, and misrepresentation.[58]

The *King Louie* majority established that in order for an unconscionability claim to succeed, there must generally be both substantive *and* procedural aspects to the claim.[59] However, a sliding scale was also introduced.[60] The sliding scale evaluation permits a court to find a term unconscionable even if, for example, there is little substantive unconscionability but the procedural

50. *See id.* at 633-34.

51. *Id.* at 633. The UCC does offer a "test." U.C.C. § 2-302 (2011). According to the official comment to U.C.C. § 2-302, "the basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of making the contract." *Id.* cmt. 1. The test is rather circular in nature as "the basic test [for deciding if a term is unconscionable] is whether . . . the term or contract involved is so one-sided as to be unconscionable." *See id.* Therefore, the *King Louie* court pursued other options. *King Louie*, 597 S.W.2d at 633-34.

52. *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

53. *King Louie*, 597 S.W.2d at 633-34.

54. *Id.* at 634 (citing Leff, *supra* note 52).

55. *Id.*

56. *Id.*

57. *See* Leasco Data Processing Equip. Corp. v. Starline Overseas Corp., 346 N.Y.S.2d 288, 289 (N.Y. App. Term 1973) (noting that the parties involved were "well-advised, alert, knowledgeable business men" dealing at arm's length).

58. *King Louie*, 597 S.W.2d at 634.

59. *Id.* (citing SINAI DEUTCH, UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY (1976)); *see also* Lawrence v. Beverly Manor, 273 S.W.3d 525, 531 (Mo. 2009) (en banc) (noting that under Missouri law, a contractual provision will not be deemed unconscionable unless elements of both substantive *and* procedural unconscionability are present).

60. *King Louie*, 597 S.W.2d at 635.

elements are overwhelming.[61] Thus, in a typical contract, if procedural factors of unconscionability are grossly inequitable, the relative absence of unduly harsh terms in the contract could still warrant a finding that the contract is unconscionable. However, the reverse is generally untrue; a claim of unconscionability will almost assuredly fail where aspects of procedural unconscionability are missing.[62]

Although the court in *King Louie* did not ultimately find the applicable contract provision unconscionable,[63] the reasoning in the case has proven to be a watershed moment in Missouri unconscionability law. As we will see, the reasoning adopted by *King Louie* became the judicial touchstone.[64] The following case exemplifies that the *King Louie* opinion was also applied in situations where one corporate entity contracted with another.

Oldham's Farm Sausage Company v. Salco, Inc. is a rare Missouri case in which the court found a term to be unconscionable in a contract between two corporate entities.[65] The twenty-eight-page contract involved the sale of a refrigeration system.[66] The plaintiff/buyer, Oldham's, sought $200,000 in damages against the defendant/seller, Salco, for breach of contract and breach

61. *Id.* at 634 (citing John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969)).

62. *See* Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 25-26 (Mo. 2010) (en banc) (Price, C.J., dissenting) ("Courts are . . . hesitant to substitute their judgment for that of freely acting parties. That is why a showing of procedural unconscionability is necessary – it flags circumstances in which one of the parties may not have freely consented to the bargain."), *vacated*, 131 S. Ct. 2875 (2011) (mem.); *cf.* State *ex rel.* Vincent v. Schneider, 194 S.W.3d 853 (Mo. 2006) (en banc) (exemplifying the first case in Missouri history where the Supreme Court of Missouri struck an arbitration agreement on the basis of substantive unconscionability alone).

63. *King Louie*, 597 S.W.2d at 636. The court held that "a finding here of unconscionability would be contrary to the weight of the evidence[.]" *Id.*

64. *See Brewer*, 364 S.W.3d at 500 (Mo. 2012) (en banc) (Price, J., dissenting) (citing *King Louie*, 597 S.W.2d at 633-34) (stating that "[t]raditional unconscionability law in Missouri requires a showing that the contract is both procedurally and substantively unconscionable"); Bracey v. Monsanto Co., 823 S.W.2d 946, 952-53 (Mo. 1992) (en banc) (noting that although there was "little" Missouri case law on unconscionability, *King Louie* provided the framework); Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 94-95 (Mo. App. E.D. 2008) (citing *King Louie*, 597 S.W.2d at 634, to distinguish between substantive and procedural unconscionability); Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 300, 308-09 (Mo. App. W.D. 2005) (citing *King Louie*, 597 S.W.2d at 634, to distinguish between procedural and substantive unconscionability); Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp., 670 S.W.2d 40, 50 (Mo. App. E.D. 1984) (citing *King Louie*, 597 S.W.2d at 634); Oldham's Farm Sausage Co. v. Salco, Inc., 633 S.W.2d 177, 182 n.5 (Mo. App. W.D. 1982) (analogizing from *King Louie* to determine whether a contractual clause statutorily unconscionable).

65. 633 S.W.2d at 178. The most common scenario warranting a finding of unconscionability seems to be between a consumer and a corporate entity.

66. *Id.* at 179.

of express and implied warranties.[67] The trial court held for Oldham's, and Salco appealed.[68] Salco argued that warranty disclaimers within the contract effectively neutralized any express or implied warranties, and also that a "limitation of liability" clause excluded consequential damages (which constituted a huge portion of the damages award).[69]

The court of appeals first noted that the warranty disclaimers and the limitation of liability clause were both classic examples of "burying something in fine print,"[70] and because of that, the majority would not give effect to the warranty disclaimers.[71] Turning to the limitation of liability, the opinion stated that parties may exclude consequential damages so long as the exclusion is not unconscionable.[72] However, applying the *King Louie* factors, the court found this clause to be problematic.[73]

First, the limitation on liability was written in fine print amongst many other technical provisions on the backside of the signature page.[74] The court held that such a clause could surely present unfair surprise, and largely satisfied the procedural element of an unconscionability analysis.[75] Next, the court reviewed the practical effect of enforcing the consequential damages exclusion.[76] The trial court damages award of $214,167.45 largely consisted of consequential damages – without them, the total would have been only $4,422.27.[77] Unsatisfied with that result, the majority stated that:

> "[I]t is the very essence of a sales contract that at least minimum adequate remedies be available." . . . [Enforcing the provision] can hardly be said to be a "minimum adequate remedy" for the myriad losses and costs suffered by [Oldham's] from the constant and long-term malfunctioning of the [refrigerator].[78]

Thus, because the limitation on liability was unduly harsh, it met the threshold for substantive unconscionability.[79] Given that the limitation provi-

67. *Id.* at 178.
68. *Id.*
69. *Id.*
70. *Id.* at 181.
71. *Id.* at 182.
72. *Id.* (citing MO. REV. STAT. § 400.2-719(3)).
73. *Id.* at 183 ("[T]he consequential damages exclusionary clause here was unconscionable and will not be allowed.").
74. *Id.* at 182.
75. *Id.* at 182-83 (citing Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624 (Mo. App. W.D. 1979)).
76. *See id.* at 183.
77. *Id.*
78. *Id.* (quoting MO. REV. STAT. § 400.2-719 cmt. 1).
79. *See id.*

sion satisfied both the procedural and substantive aspects of unconscionability, the majority struck it as unconscionable.[80]

Looking to case law, it is evident that any number of reasons could lead a court to conclude that a particular contractual term is unconscionable. The previous cases involved "shocking" inadequacies of consideration, the denial of particular kinds of relief, and the enforcement of waiver provisions. Since the year 2003, however, a major surge of unconscionability rulings has sprung up in Missouri revolving around a solitary issue: mandatory arbitration provisions in consumer contracts. The legal background of those cases, in addition to the aforementioned history of early unconscionability cases in Missouri, provides a foundation for understanding the current state of unconscionability law in Missouri. But first, it is necessary to review the Federal Arbitration Act, which provides a crucial backdrop for this new wave of rulings.

B. The Federal Arbitration Act (FAA)[81]

The Federal Arbitration Act was enacted in 1925 by Congress primarily to set agreements to arbitrate "on equal footing" with other contractual agreements.[82] In other words, the goal was to prevent judiciaries from refusing to enforce arbitration agreements solely because they perceived arbitration as a less-desirable method of dispute resolution.[83] Lately, the importance of one particular section within the FAA has increased mightily – chapter 1, section 2.[84]

This section indicates that arbitration agreements should be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract."[85] This line, known as section 2's "savings clause," has been inter-

80. *See id.*

81. 9 U.S.C. §§ 1-307 (2006).

82. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12, 423 (1967) (making arbitration agreements as enforceable as other contracts). The High Court still aims to achieve this goal. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-44 (2006).

83. *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 581 (2008) (quoting *Buckeye Check Cashing, Inc.*, 546 U.S. at 443) (stating that the FAA was instituted in response to widespread judicial hostility to arbitration agreements); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 265 (1995) (noting that "the Act has the basic purpose of overcoming judicial hostility to arbitration agreements").

84. 9 U.S.C. § 2 (2006).

85. *Id.* The Supreme Court of the United States has repeatedly held that federal policy favors arbitration, and issues regarding the scope of arbitration shall also be resolved in favor of arbitration. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475-76 (1989) (stating that federal policy favors arbitration); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 2-3 (1983) (stat-

preted by courts to mean that although the Act is federal in nature, it will apply to states, and state law contract principles may invalidate arbitration agreements.[86] The savings clause purports to "give[] States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision."[87] To that end, courts have historically applied traditional contract principles such as fraud, duress, and unconscionability to invalidate arbitration agreements.[88] Missouri, in particular, has utilized its general unconscionability test to nullify several arbitration agreements over the past decade.[89] Some of those cases are examined below.

C. The "Arbitration Era" of Missouri Unconscionability Cases

From 1909-2002, a span of nearly a century, only a handful of Missouri cases struck down a contract clause as unconscionable.[90] However, since *Swain v. Auto Services, Inc.* was handed down in 2003,[91] Missouri courts have declared certain contract clauses as unconscionable on an almost annual basis. Each ruling finding unconscionability since *Swain* has involved mandatory arbitration clauses in consumer contracts. The reasoning in these cases provides a framework for understanding some of the most current issues relating to unconscionability law today.

Swain v. Auto Services, Inc. involved the enforceability of an arbitration clause existing in a car-servicing plan provided by the company Auto Services.[92] After Auto Services refused to pay for certain car repairs that Swain believed were covered by the plan, Swain sued to enforce the servicing plan in a St. Louis Circuit Court.[93] Auto Services brought a motion to compel arbitration that the trial court denied.[94] On appeal, the Eastern District looked to the circumstances of the case to determine what would and would not be enforceable.[95]

The court first noted that because the contract involved parties in different states, and therefore interstate commerce, the FAA pre-empted Missouri

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ing that issues regarding scope of arbitration should be resolved in favor of arbitration).

86. Southland Corp. v. Keating, 465 U.S. 1, 14-15 (1984) (holding that the FAA was designed to apply in both federal and state courts).

87. *Dobson*, 513 U.S. at 281.

88. Manfredi v. Blue Cross & Blue Shield of Kan. City, 340 S.W.3d 126, 130 (Mo. App. W.D. 2011) (en banc) (quoting Swain v. Auto Servs., Inc., 128 S.W.3d 103, 107 (Mo. App. E.D. 2003)).

89. *See infra* Part II.C.

90. *See supra* Part II.A.

91. 128 S.W.3d 103.

92. *Id.* at 105.

93. *Id.*

94. *Id.* at 105-06.

95. *See id.* at 107-08.

arbitration law on the matter.[96] The majority declared that although the FAA would control, "generally applicable [common law] contract defenses, such as . . . unconscionability may be used to invalidate arbitration agreements without contravening the FAA."[97] Examining the factors surrounding the case, the court stated that because Auto Services was a corporation, and because Swain was an individual consumer, the bargaining power was *per se* unequal.[98] Also, the plan was offered on a pre-printed form, virtually all of the terms were non-negotiable,[99] no other warranties were available for the car Swain purchased, and he was not told of the arbitration clause prior to signing.[100] The arbitration clause also stated that all disputes would be resolved via arbitration in Arkansas (although Swain was from Missouri).[101] Based on these facts, the court ascertained that the contract was one of adhesion.[102]

However, the Eastern District stated that such pre-printed, non-negotiable contracts are not "'inherently sinister and automatically unenforceable,'" and that broadly outlawing the enforceability of pre-printed contracts would be "'completely unworkable.'"[103] Rather, only the "reasonable expectations of the parties" would be enforced.[104] The majority stated that an average consumer could reasonably expect that such contracts include arbitration as a means of dispute resolution,[105] but an average consumer would not expect that he would have to leave his own state to do so.[106] The venue selection clause was unconscionably unfair because it limited Auto Service's obligations and was unduly harsh on any non-Arkansas consumer.[107] After noting that an unconscionable term of a contract may simply be severed if it is

96. *Id.* at 106.

97. *Id.* at 107.

98. *Id.*

99. *Id.* The length of service was negotiable. *Id.*

100. *Id.*

101. *Id.* at 105.

102. *Id.* at 107. Under Missouri arbitration law, a contract of adhesion is not enforceable. Missouri Uniform Arbitration Act (MUAA), MO. REV. STAT. § 435.350 (2000). However, under the FAA, contracts of adhesion do not receive the same treatment, and may be enforceable. *See Swain*, 128 S.W.3d at 106, 106 n.2.

103. *Swain*, 128 S.W.3d at 107 (quoting Heartland Computer Leasing Corp. v. Ins. Man, Inc., 770 S.W.2d 525, 527 (Mo. App. E.D. 1989).

104. *Id.* (citing *Hartland Computer Leasing Corp.*, 770 S.W.2d at 527-28).

105. *Id.* at 107-08 ("An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair.").

106. *Id.* ("An average consumer purchasing a car in Missouri would not reasonably expect that any disputes arising under the service plain accompanying the car would have to be resolved in another state.").

107. *Id.*

not essential to the entire agreement,[108] the court of appeals decided to do just that and otherwise enforced the arbitration provision.[109]

Two years later, the Missouri Court of Appeals considered another unconscionability argument in *Whitney v. Alltel Communications, Inc.*.[110] Whitney brought a class action to challenge the lawfulness of an eighty-eight cent monthly charge for Alltel customers.[111] However, sometime during the course of Whitney and Alltel's business relationship, Alltel changed its service agreement to include a mandatory arbitration clause that contained a class action bar.[112] Alltel moved to compel arbitration, and Whitney countered by declaring the arbitration clause to be in violation of the Merchandising Practices Act (MPA), which guarantees consumers certain rights, including the ability to bring a class action lawsuit and seek attorney fees.[113] The trial court agreed with Whitney, and Alltel appealed.[114]

On appeal, the Western District first briefly addressed the procedural unconscionability issue.[115] The court determined that aspects of procedural unconscionability were sufficiently present, referencing Alltel's "superior bargaining position," the fact that the arbitration provision was "sent to Whitney in the mail on a take it or leave it basis" without any chance of negotiation, and that the arbitration provision was inserted in fine print on the back side of a sheet sent with Whitney's monthly bill.[116]

The court then turned to the issue of substantive unconscionability.[117] The opinion noted that Whitney was statutorily granted special protective rights under Missouri's MPA.[118] Thus, when an arbitration agreement effectively deprives a consumer of his statutory rights, the agreement may be invalidated.[119] In this case, the arbitration agreement barred class actions (a type of relief expressly granted to consumers by the MPA) and required each party to bear the costs of arbitration (while the MPA allowed for the recovery of attorney's fees).[120] The court then stated that at the time of filing suit,

108. *Id.*

109. *Id.* at 109.

110. *See* 131 S. Ct. 1740 (2011).

111. *Whitney*, 173 S.W.3d at 304.

112. *Id.* The alteration was sent in the mail, and stated that a customer accepted the term changes by continuing to use the services provided by Alltel. *Id.*

113. *Id.*

114. *Id.* at 304-05.

115. *Id.* at 310.

116. *Id.*

117. *Id.*

118. *Id.* at 311.

119. *Id.* ("In some instances, where [an] arbitration provision is so prohibitive as to effectively deprive a party of his or her statutory rights, the arbitration agreement may be invalidated." (citing Leonard v. Terminix Int'l Co., 854 So. 2d 529 (Ala. 2002))).

120. *Id.* at 313.

Whitney had personally been billed a total of $24.64.[121] Even if Whitney took the case to an arbitrator and won, "the award could not possibly approach the amount that would have to be expended" throughout the arbitration process.[122] The costs associated with such action made it impractical for any Alltel customer to challenge the eighty-eight cent charge as a violation of the MPA.[123] The court noted that enforcing the arbitration provision would enable Alltel to collect millions of dollars from allegedly improper billing practices, all while insulating the company from liability because of the prohibitive costs needed to put a stop to the conduct.[124]

The *Whitney* court turned to the "reasonable expectation" standard presented in *Swain*, and declared that no Alltel customer would reasonably expect to spend potentially thousands of dollars to combat an eighty-eight cent claim.[125] In conclusion, the court held that enforcing the class action bar would be unconscionable and in direct conflict with the public policy of the MPA.[126] The arbitration agreement was unenforceable.[127]

The final pre-*Concepcion* arbitration case pitted a title loan borrower against her lender in *Brewer v. Missouri Title Loans, Inc. (I)*.[128] Brewer took out a $2,215 loan on her car from Missouri Title Loans, and the accompanying paperwork included an agreement to arbitrate individually.[129] The agreement expressly prohibited class arbitration.[130] Brewer subsequently attempted to file a class action based on allegations that Missouri Title Loans had, *inter alia*, violated the MPA.[131] Missouri Title Loans filed a motion to compel individual arbitration, but the trial court denied it and declared the arbitration agreement to be unconscionable.[132] Missouri Title Loans appealed.[133]

When the Supreme Court of Missouri reviewed the case,[134] it first began by reiterating that parties must agree to arbitrate.[135] By putting a class waiver

121. *Id.*
122. *Id.* at 313-14.
123. *Id.* at 314.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Brewer v. Mo. Title Loans, Inc. (*Brewer I*), 323 S.W.3d 18, 20 (Mo. 2010) (en banc), *vacated*, 131 S. Ct. 2875 (2011) (mem.).
129. *Id.*
130. *Id.*
131. *Id.* Brewer claimed to suffer at least $4,000 in damages by herself due to Missouri Title Loans' conduct. *Id.* at 27 (Price, C.J., dissenting).
132. *Id.* at 20 (majority opinion).
133. *Id.* at 19.
134. The case was received on transfer from the Missouri Court of Appeals. *Id.*

into the arbitration agreement, Missouri Title Loans explicitly signaled that it would not agree to such a remedy.[136] However, the court noted, that did not mean Brewer was forced to arbitrate her matter individually.[137] It simply meant that class arbitration was not an option in this case.[138]

In its unconscionability analysis, the majority discussed basic Missouri precedent.[139] However, it also reached a new conclusion seen only once before in Missouri. The opinion stated that a previous Missouri unconscionability case, *State ex rel. Vincent v. Schneider*,[140] stood for the proposition that a clause could be found unconscionable based on either procedural *or* substantive grounds, or a combination of both.[141] Despite such declaration, the majority continued to find the presence of both procedural and substantive unconscionability.[142] On the procedural side, the court stated that the non-negotiable nature of the agreement, as well as the superior bargaining power held by Missouri Title Loans added to the unconscionability of the contract.[143] The majority also pointed out that the average consumer would have been unable to understand the terms of the agreement, and the high-interest loan agreement was offered to the financially-distressed on a "take-it or leave-it" basis.[144] Based upon those factors, the *Brewer (I)* court held that the procedural aspect of the test was satisfied.[145]

The majority then listed the substantive unconscionable aspects of the agreement.[146] First, three experts testified that it would have been incredibly difficult for Brewer to obtain counsel for her individually arbitrated claim.[147] The arbitration agreement, by limiting Brewer's ability to obtain representation, left her without a "meaningful avenue of redress[]" in pursuing such a complicated claim.[148] Second, the class arbitration waiver essentially gave Missouri Title Loans the ability to wrongfully extract small sums from thou-

135. *Id.* at 20 (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1774-75 (2010)).

136. *Id.* at 21.

137. *Id.*

138. *Id.*

139. *Id.* at 22.

140. 194 S.W.3d 853 (Mo. 2006) (en banc).

141. *Brewer*, 323 S.W.3d at 22 (noting that although the *Vincent* court did not explicitly state that a Missouri court could find unconscionability based solely upon substantive factors, the analysis relating to the facts in *Vincent* appears to suggest the court did just that). This holding is important in Missouri's new unconscionability test, discussed below.

142. *Id.* at 23.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

sands of customers without fear of liability.[149] Because the agreement eliminated any "practical remedy to bring about a stop to the conduct," the majority struck the entire arbitration agreement as unconscionable.[150]

In a heated dissent, Chief Justice Ray Price condemned the majority's statement that *Vincent* eradicated the requirement that procedural unconscionability must be found in order to find a clause unconscionable.[151] Instead, he argued that *Vincent* merely exemplified a court's power to "blue pencil" contractual provisions that imposed "unreasonable limitations" on a contract that would be otherwise reasonable.[152]

Chief Justice Price also argued that neither elements of procedural nor substantive unconscionability were present in *Brewer (I)*.[153] Although Price conceded that Missouri Title Loans had a superior bargaining position and that the non-negotiable agreement was offered on a "take it or leave it" basis, Price maintained that those facts were not prima facie proof of procedural unconscionability.[154] Rather, Missouri unconscionability precedent required the plaintiff to show that she was unable to look elsewhere for a more attractive contract.[155] In that respect, Brewer offered no evidence.[156] In a self-defeating move, Brewer previously did offer proof that twenty competing companies could have provided her with the same service and may have had different contractual terms.[157] Additionally, Brewer's ignorance to the arbitration terms provided her with no valid defense.[158]

The dissent continued by arguing that substantive unconscionability was not shown.[159] First, the amount in controversy was over $4,000 and currently accruing interest.[160] Such an amount would surely garner representation from a lawyer in individual arbitration and thus, Brewer was not left without a practical remedy.[161] Chief Justice Price also referenced several in-state and federal court cases that affirmed the enforceability of class arbitration waiv-

149. *Id.*

150. *Id.* at 23-24. The court remanded the case to an arbitrator in order to evaluate the "propriety" of going forward with a class arbitration proceeding. *Id*.

151. *Id.* at 26 (Price, C.J., dissenting). One other judge joined Chief Justice Price in his dissent. *Id.*

152. *Id.* (quoting Mid-States Paint & Chem. Co. v. Herr, 746 S.W.2d 613, 616 (Mo. App. E.D. 1988) (internal quotation marks omitted)).

153. *Id.* at 24-25.

154. *Id.* at 26-27.

155. *Id.* at 27.

156. *Id.*

157. *Id.*

158. *Id.* at 26.

159. *Id.* at 27.

160. *Id.*

161. *Id.*

ers.[162] In conclusion, the dissent would have held that public policy decisions regarding class arbitration waivers are best left to the legislature.[163]

The holding in *Brewer (I)* is a clear continuation of several Missouri cases finding unconscionability due to the presence of a class action waiver.[164] However, the reasoning employed by those cases was subject to major overhaul by the impending Supreme Court of the United States case of *AT&T Mobility LLC v. Concepcion*.[165]

III. RECENT DEVELOPMENTS

A. AT&T Mobility LLC v. Concepcion

1. Facts and Procedural Posture

In 2011, the Supreme Court of the United States issued an opinion regarding a California court's decision to strike an arbitration agreement that included a class action waiver.[166] The case, first called *Laster v. T-Mobile USA*,[167] involved plaintiffs Vincent and Liza Concepcion against defendant AT&T.[168] The Concepcions alleged that AT&T, which had advertised free cellular phones upon a customer's agreement to enter into a two-year service contract, lured them into purchasing mobile phones.[169] However, after the Concepcions agreed to do so, they were given "free" phones in a transaction that included sales tax of $30.22.[170] The Concepcions believed that charging $30 in sales tax on a free phone was in violation of the agreement, and they sought to form a class action suit with similarly aggrieved purchasers.[171]

162. *Id.* at 28.

163. *Id.* A second dissent, filed by Judge Patricia Breckenridge, stated that she believed the arbitration waiver was also enforceable. *Id.* (Breckenridge, J., dissenting). However, she felt that discussion regarding the impact of *Vincent* was best left for the future, considering neither the majority nor Price's dissent turned on it. *Id.*

164. *See* Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 99 (Mo. App. E.D. 2008) (adopting reasoning from the *Discover Bank v. Superior Court,* 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740 (2011)); Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 300, 314 (Mo. App. W.D. 2005).

165. 131 S. Ct. 1740.

166. *Id.* at 1745.

167. No. 05cv1157 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). The *Laster* and *Concepcion* cases were consolidated, and the published name of the case changed twice by the matter reached the Supreme Court of the United States.

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

169. *Id.*

170. *Id.* The sales tax was based on the retail value of the phone. *Id.*

171. *Id.*

AT&T argued that the purchase agreement clearly prohibited AT&T customers from forming a class arbitration suit and that the Concepcions instead had to pursue their claims individually.[172] Furthermore, a revised version of the arbitration provision had recently been put into effect, offering $7,500 to customers who succeeded in individual arbitration and were awarded an amount higher than AT&T's last settlement offer.[173] The Concepcions argued that the individual arbitration clause was unconscionable.[174]

The suit was first heard in one of California's federal district courts.[175] That court relied significantly on the "*Discover Bank* rule," which was a test implemented by the California Supreme Court in response to ever-increasing usage of mandatory arbitration contracts that included class action waivers.[176] The purpose of the rule, according to the California Supreme Court, was to put a stop to "virtual [corporate] immunity" from consumer class actions.[177] If the three prongs of the test were met, the clause would be declared unconscionable and therefore unenforceable.[178] The three prongs were: "(1) whether the agreement [was] a consumer contract of adhesion drafted by a party of superior bargaining power; (2) whether the agreement occur[ed] in a setting [that] . . . predictably involve[ed] small amounts of damages; and (3) whether [the plaintiff(s) simply alleged] that the party with superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of . . . small sums of money."[179]

Examining the first element of the *Discover Bank* rule, the district court noted that the plaintiffs lacked the opportunity to negotiate the terms of the

172. *See id.* at 1744-45.

173. *Id.* at 1744. A 2009 provision revision stated that AT&T customers who prevailed at arbitration would be eligible for a $10,000 award and payment of double the customer's incurred attorney's fees. *Id.* at 1744 n.3.

174. *Id.* at 1745.

175. Laster v. T-Mobile USA, Inc., No. 05cv1157 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

176. *Id.* at *8.

177. *Id.* (quoting Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Conception, 131 S. Ct. 1740 (2011)) (internal quotation marks omitted)). In this case, the consumer's minimum cost of arbitration was $1700, which highly exceeded the amount in controversy, $30. *Id* at *10, *10 n.5.

178. *See id.* at *8. The three prongs of the test embodied the requirements under California law of substantive and procedural unconscionability. Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983 (9th Cir. 2007). If all three prongs were met, for purposes of state unconscionability law, the requirements for substantive and procedural unconscionability would therefore also be met. *See id.* Even if all three prongs are *not* met, such a result would not necessarily warrant the conclusion that a particular clause *is* conscionable. *Id.*

179. *Laster*, 2008 WL 5216255, at *8.

agreement, and it was offered to them on a "take it or leave it" basis.[180] The contract was one of adhesion, and even though the facts surrounding the case warranted only a minimal finding of procedural unconscionability, the first prong was considered met.[181] The second part of the test required a showing that the matter at hand involved a predictably small amount of damages.[182] Because the current individual dispute involved thirty dollars' worth of damages, the second element of the *Discover Bank* test was also fulfilled.[183] Moving on to the final requirement for a showing of unconscionability, the district court reinforced that plaintiffs must allege that the other party put a scheme in place to deliberately cheat its customers out of individually small amounts of money.[184] No factual showing was necessary here, and because the plaintiffs did allege that AT&T was fraudulently cheating its customers out of small amounts of money, the third prong was also satisfied.[185] The district court, in conclusion, held that because the three prongs of the *Discover Bank* test were shown, the class action waiver contained in the arbitration provision was therefore unenforceable, and AT&T's motion to compel arbitration was denied.[186]

On appeal, the Ninth Circuit reviewed the decision of the lower court and, in response to arguments raised by AT&T, engaged in a dialogue about the favorable terms later added into the arbitration provision by AT&T.[187] The appellate court reasoned that the $7,500 premium payment[188] did not destroy the second element of the *Discover Bank* test because that prong focused only on whether damages are *predictably* small in a particular scenario,

180. *See id.* at *9.

181. *Id.*

182. *Id.* at *9-10.

183. *Id.* at *10. The court did reference the $7500 premium payment offered by AT&T to its customers who won at arbitration, but declared that the monetary efforts and time spent on individual arbitration were outweighed by the "minuscule benefits of arbitration." *Id.* A reasonable inference to be made is that if a customer did not win at arbitration, he or she would be completely out of luck and in the hole for thousands of dollars over a $30 claim.

184. *Id.* at *12.

185. *Id.*

186. *Id.* at *14.

187. Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

188. The payment would only be made if the customer succeeded at arbitration and was awarded an amount greater than AT&T's last settlement offer. *Id.* The expected result at arbitration would be an award of $30.22 (for the amount of monetary harm suffered), and thus, it was in AT&T's interest to simply offer a settlement amount slightly higher than $30.22 in order to avoid paying $7500 to a single customer. *Id.* at 856. The predictable result is that AT&T would simply pay the face value of the claim before arbitration, which was $30.22; but, this result does not alleviate the concern that AT&T would simply continue its harmful practices. *Id.*

and in this case, the predictable damages were approximately $30.[189] The Ninth Circuit ultimately affirmed the ruling of the district court.[190]

2. The Majority Opinion

AT&T appealed and the Supreme Court of the United States granted certiorari in May of 2010.[191] AT&T originally claimed, *inter alia*, that the FAA pre-empted California's *Discover Bank* rule regarding the unconscionability of class action waivers.[192] The effect of AT&T's claim, if successful, was that the FAA's general policy toward enforceability of arbitration agreements would override the California unconscionability test as introduced in *Discover Bank*.[193]

The Court began with a general background of the FAA and its sections.[194] The Supreme Court first reiterated that the FAA's section 2 savings clause did permit generally-applicable state law contract principles to invalidate arbitration agreements; however, defenses that "apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue" cannot invalidate arbitration agreements (in which case the FAA would pre-empt state law).[195] Similarly, if an existing state common law right is wholly inconsistent with the provisions of a congressional act, then the state right cannot be enforced.[196] "In other words, the act cannot be held to destroy itself."[197] Finally, the Court declared that "the inquiry becomes more complex" when a generally applicable state law contract defense, e.g. unconscionability, is applied in a fashion that disfavors arbitration.[198]

The majority opinion, written by Justice Scalia,[199] held that it would be inconsistent with the goals of the FAA for a court to require the availability of class-wide arbitration.[200] The Court listed several reasons in reaching that conclusion. First, the majority reiterated that the over-arching purpose of the FAA was to ensure that agreements to arbitrate are enforced according to the agreement's terms.[201] But, a second goal of the FAA was to streamline pro-

189. *Id.*
190. *Id.* at 859.
191. AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010).
192. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011).
193. *See id.* at 1747.
194. *Id.* at 1745-46.
195. *Id.* at 1746.
196. *Id.* at 1748.
197. *Id.* (quoting Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 228 (1998)) (internal quotation marks omitted).
198. *Id.* at 1747.
199. *Id.* at 1744.
200. *Id.* at 1748.
201. *Id.*

ceedings and produce an expeditious result.[202] *Concepcion*, the majority argued, frustrated a primary purpose of the FAA – to accelerate proceedings.[203]

Next, the opinion expressed concern with the three elements of the *Discover Bank* rule.[204] When examining the requirement that the contract be one of adhesion, the majority noted that "the times in which consumer contracts were anything other than adhesive are long past."[205] The second element, which demands that damages be predictably small, was also unconvincing to the Court.[206] Because California courts had previously ruled that damages amounting to even $4,000 would be considered "predictably small," the requirement was therefore "toothless and malleable."[207] Finally, the majority rejected the requirement that a consumer allege that the defendant employed a scheme to cheat customers, mainly because it was "limitless" and required only an allegation and no measure of proof.[208] In short, the *Discover Bank* rule made it too easy for a court to strike a class arbitration waiver as unconscionable.

The majority also established that arbitration was not fit for the higher stakes that class litigation entails.[209] For example, class arbitration would sacrifice the main advantage of arbitration in general – its informality.[210] The arbitration process would then become "slower, more costly, and more likely to generate procedural morass than final judgment."[211] Additionally, the *Concepcion* court stated that it did not believe Congress intended to allow an arbitrator to decide the stringent procedural requirements associated with all class actions.[212] The majority also declared that class arbitration "increase[ed] risk to defendants": a lack of multi-layered review in arbitration, combined with the narrow standards for judicial review of an arbitrator's decision (based on misconduct, rather than mistake) could set a company back millions of dollars on a non-reviewable mistake by the arbitrator.[213] Finally, the opinion reiterated that a defendant would not likely "bet the com-

202. *Id.* at 1749.

203. *Id.*

204. *Id.* at 1750 ("California's *Discover Bank* rule . . . interferes with arbitration.").

205. *Id.*

206. *See id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1752.

210. *Id.* at 1751.

211. *Id.* The majority noted that the American Arbitration Association had 283 class action arbitrations on record since 2009, yet not a single one "had resulted in a final award on the merits[;]" moreover, the average time from start to finish in one of those class arbitrations not decided on the merits was 630 days. *Id.*

212. *Id.*

213. *Id.* at 1752.

pany with no effective means of review," and additionally, Congress would have never allowed state courts to require class arbitration.[214]

In response to the argument that enforcing class arbitration waivers would effectively immunize companies from small-dollar claims, the *Concepcion* court declared that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[215] Because the *Discover Bank* rule stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Supreme Court held that the rule was pre-empted by the FAA, and the class arbitration waiver was not unconscionable and therefore enforceable.[216]

3. Thomas' Concurrence

Justice Thomas "reluctantly" concurred,[217] offering his own textual interpretation of the savings clause within section 2 of the FAA.[218] His reading would clarify section 2 by using section 4, which states that a court must order enforcement of the terms of an arbitration agreement "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."[219] Accordingly, Thomas would read section 4 and section 2's savings clause harmoniously, resulting in enforcement of an arbitration provision unless a party successfully asserts a defense relating to the formation of the contract.[220] The concurring opinion determined that because the *Discover Bank* rule did not pertain to the making of a contract, yet was used to invalidate terms of an agreement to arbitrate, it was therefore pre-empted by the FAA.[221] Under Thomas' reasoning, the class arbitration waiver should still have been enforced.[222]

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214. *Id.*

215. *Id.* at 1753.

216. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

217. *Id.* at 1754 (Thomas, J., concurring) ("[W]hen possible, it is important in interpreting statutes to give lower courts guidance from a majority of the court." (citing US Airways, Inc. v. Barnett, 535 U.S. 391, 411 (2002) (O'Connor, J., concurring)).

218. *Id.* Thomas declared that his textual approach would usually produce the same result as the majority's ruling. *Id.*

219. *Id.* (quoting 9 U.S.C. § 4 (2006)).

220. *Id.* at 1754-55. Justice Thomas noted that valid defenses to the formation of a contract would include fraud, duress, or mutual mistake. *Id.* at 1755. However, "[c]ontract defenses unrelated to the making of the agreement – such as public policy – could not be the basis for declining to enforce an arbitration clause." *Id.*

221. *Id.* at 1756.

222. *Id.*

4. The Dissenting Opinion

Justice Breyer authored the dissent in the 5-4 decision.[223] Citing Supreme Court precedent, the dissent affirmed that states may define unconscionability as they wish, so long as the definition does not create a special rule disfavoring arbitration.[224] Breyer looked to the *Discover Bank* rule and noted that it applied to any contract – including contracts containing class arbitration waivers and class action litigation waivers.[225] Importantly, the *Discover Bank* rule also does not ban all class arbitration waivers, but instead bans only those agreements that fail general unconscionability standards.[226]

The dissent further discussed that although arbitration's procedural and cost advantages are often major reasons that lead parties to agree to arbitrate in the first place, the main goal of the FAA did not concern efficient resolution of claims.[227] Congress also was not blind to the many advantages offered by arbitration; however, the FAA was not enacted to guarantee those benefits.[228] Rather, Congress' primary objective was to secure the enforcement of agreements to arbitrate by putting them "upon the same footing" as other contracts.[229] Even if one of the basic purposes of the FAA was to ensure speedy resolution of claims, Breyer argued, class arbitration would certainly be preferable to the alternative: individually arbitrating hundreds, if not thousands, of claims.[230] In that case, the *Discover Bank* rule would actually reinforce, not destroy, the purpose of the Act.[231] The dissent ultimately concluded that because the unconscionability test in *Discover Bank* treated agreements to arbitrate and agreements to litigate on the same level, it therefore fulfilled the requirements of the FAA.[232]

223. *Id.* (Breyer, J., dissenting).

224. *Id.* at 1760.

225. *Id.* at 1757. The majority agreed with that interpretation. *Id.*

226. *Id.*

227. *Id.* at 1757-58.

228. *Id.* ("Congress was fully aware that arbitration could provide procedural and cost advantages . . . [b]ut we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages.").

229. *Id.* at 1758.

230. *Id.* at 1759.

231. *Id.* at 1759-60.

232. *Id.* at 1762 (noting that this case does "not concern the merits and demerits of class actions; [it concerns] equal treatment of arbitration contracts and other contracts," and "[s]ince it is the latter question that is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision").

B. Missouri's Application of Concepcion*:* Brewer v. Missouri Title Loans (Brewer II)

1. The Majority Opinion

The majority decision in *AT&T Mobility LLC v. Concepcion* compelled the Supreme Court of the United States to also vacate the original ruling in *Brewer v. Missouri Title Loans (I)*.[233] The Court remanded the case "for further consideration in light of *AT&T Mobility LLC v. Concepcion*,"[234] which prompted the Supreme Court of Missouri to reconsider its reasoning and the result reached in *Brewer (I)*.[235] This review served as the first application of the *Concepcion* case in the Supreme Court of Missouri.

On remand, the Supreme Court of Missouri first returned to the facts and holding of *Concepcion*.[236] In its view, the Supreme Court of the United States departed from Missouri's traditional analysis of unconscionability in terms of substantive and procedural elements.[237] Instead, the dictate from the United States Supreme Court was that lower courts should only consider unconscionable factors related to the formation of the agreement to arbitrate.[238] Any examination beyond those factors, i.e. substantive aspects, would no longer be necessary.[239]

The Supreme Court of Missouri also declared that the current issue involved whether the entire arbitration agreement between Brewer and Missouri Title Loans was unconscionable.[240] To consider only the unconscionability of the class action waiver would constitute unequal treatment of arbitration agreements, which is expressly prohibited by the FAA.[241] Thus, the

233. Mo. Title Loans, Inc. v. Brewer, 131 S. Ct. 2875, 2875 (2011) (mem.).

234. *Id.*

235. Brewer v. Mo. Title Loans (*Brewer II*) 364 S.W.3d 486, 487 (Mo. 2012) (en banc), *cert. denied*,, (No. 11–1466), 2012 WL 2028610 (U.S. Oct. 1, 2012).

236. *Id.* at 487-88.

237. *Id.* at 492 n.3 ("While Missouri courts traditionally have discussed unconscionability under the lens of *procedural* unconscionability and *substantive* unconscionability, *Concepcion* instead dictates a review that limits the discussion to whether state law defenses such as unconscionability impact the *formation* of a contract." (internal citations omitted)).

238. *Id.*

239. *Id.* at 493 ("Future decisions by Missouri's courts addressing unconscionability likewise shall limit review of the defense of unconscionability to the context of its relevance to contract formation.").

240. *Id.*

241. *e* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 990 (9th Cir. 2007) (noting that the FAA's purpose is to put arbitration clauses on the "same footing" as other contracts).

court looked to whether unconscionable elements were present in the formation of the entire contract to arbitrate.[242]

In determining that there were such elements of unconscionability in the agreement to arbitrate, the court noted that Missouri Title Loans was in a superior bargaining position, the agreement was non-negotiable, and the agreement was difficult for the average consumer to understand.[243] Despite its earlier declaration that only the unconscionable aspects relating to the formation of the agreement would be considered,[244] the majority also delved into an examination of the substantive terms of the contract, classifying them as "extremely one-sided."[245]

In doing so, the court drew a distinction between the facts of *Brewer* and those in *Concepcion.* In *Concepcion*, AT&T would shoulder the costs of arbitration in certain scenarios, and even offered to pay a large sum if the arbitrator awarded an amount higher than AT&T's last settlement offer.[246] In *Brewer*, however, Missouri Title Loans offered no such incentives.[247] Arbitration was required for any dispute at the cost of the customer.[248] Additionally, three experts in *Brewer (I)* stated that it would be nearly impossible for Brewer to obtain counsel for her case.[249] There was no similar evidence in *Concepcion*.[250] Although inability to retain counsel could not be a dispositive reason for invalidating the agreement to arbitrate, it was certainly relevant.[251] Brewer had no practical, viable means of even pursuing individual arbitration.[252] The majority continued to note that a "particularly onerous" provision within the text of the arbitration agreement allowed Missouri Title Loans to pursue both arbitration and litigation, while limiting Brewer to only resolution through arbitration.[253] In conclusion, the Supreme Court of Missouri held that because no sane person would agree to the arbitration agreement, and because it was formed under unconscionable circumstances, the arbitration clause in the contract was unconscionable and unenforceable.[254]

The Supreme Court of Missouri included a crucial footnote in its opinion.[255] Footnote three stated:

242. *Brewer II*, 364 S.W.3d at 493.
243. *Id.*
244. *Id.* at 492 n.3.
245. *Id.* at 493.
246. *Id.*
247. *Id.*
248. *Id.* at 495.
249. *Id.* at 493-94.
250. *Id.* at 494.
251. *Id.*
252. *Id.*
253. *Id.* at 494-95.
254. *Id.* at 495-96.
255. *See id.* at 492 n.3.

> While Missouri courts traditionally have discussed unconscionability under the lens of *procedural* unconscionability and *substantive* unconscionability, *Concepcion* instead dictates a review that limits the discussion to whether state law defenses such as unconscionability impact the *formation* of a contract. In fact, in his concurring opinion, Justice Thomas specifically delineated past precedent of the Supreme Court applying defenses relevant to the *formation* of a contract. Accordingly, the analysis in this Court's ruling today – as well as this Court's ruling in *Robinson v. Title Lenders, Inc.*, – no longer focuses on a discussion of procedural unconscionability or substantive unconscionability, but instead is limited to a discussion of facts relating to unconscionability impacting the formation of the contract. Future decisions by Missouri's courts addressing unconscionability likewise shall limit review of the defense of unconscionability to the context of its relevance to contract formation. [256]

The majority, by putting this footnote within the opinion, demanded that Missouri courts henceforth limit analysis regarding the sufficiency of an unconscionability defense insofar as contract formation is concerned. This dictate officially changed the unconscionability analysis in Missouri courts.

2. The Dissenting Opinions

Both Judge Fischer and Judge Price issued dissenting opinions in the second *Brewer* case.[257] Judge Fischer's dissent centered on the fact that the circuit court's judgment was too narrow; had it been given the benefit of *Concepcion*, it would have been able to look at the contract as a whole.[258] Thus, Judge Fischer would have reversed the entire decision in *Brewer (I)* and remanded the matter for consideration at the circuit court level.[259]

Judge Price wrote his own dissent, basing it upon the theory that the majority established a rule "directed solely at invalidating arbitration agreements" (although the FAA requires that rules governing unconscionability must be applied evenly in agreements to arbitrate and in agreements to litigate).[260] Additionally, the majority based its reasoning upon Justice Thomas' concurring opinion in *Concepcion*, although Thomas clearly stated that he joined in the majority opinion of that Court.[261] Even when looking to problems associated with the formation of the contract, as Justice Thomas sug-

256. *Id.* (citation omitted).
257. *Id.* at 496 (Fischer, J., dissenting) (Price, J., dissenting).
258. *Id.* at 496-97 (Fischer, J., dissenting).
259. *Id.* at 497.
260. *Id.* (Price, J., dissenting)
261. *Id.* at 499.

gested, Price argued that the *Brewer (II)* majority failed.[262] He argued it also failed to meet the actual standards set forth by the *Concepcion* majority.[263]

Judge Price reiterated that Missouri still requires a showing of both procedural and substantive unconscionability.[264] The procedural element of an unconscionability test involves the formation of an agreement (reflecting the factors most important to Justice Thomas), but Judge Price argued that no unconscionable factors relating to the formation of the agreement were shown.[265] Specifically, Brewer failed to prove that she did not understand the contract, she did not prove that the terms of the contract were actually non-negotiable because she never tried to negotiate them, and she did not prove a disparity in bargaining power because she clearly could have taken her business elsewhere and received different terms.[266]

Judge Price then moved on to show that the majority's reasoning also failed the standard set forth by *Concepcion*.[267] The basic holding in *Concepcion* was that a state law may not single out and disfavor agreements to arbitrate.[268] However, the majority rule in *Brewer (II)* did just that. By ruling that the arbitration agreement was unconscionable partly due to the fact that it would be difficult for Brewer to obtain representation in individual arbitration,[269] the majority "[created] a new 'common law right' to an attorney; extend[ed] it to a right to class arbitration proceedings; and then us[ed] those two new rights as a contract defense just to strike agreements to arbitrate."[270] Such a result was "absolutely inconsistent" with the FAA's goal of enforcing agreements to arbitrate individually.[271] Thus, Judge Price would have enforced the agreement to arbitrate individually.[272] Finally, he asserted that the majority refused to abide by the Supreme Court of the United States' precedent simply because it "disfavor[ed] the use of individual arbitration clauses in consumer contracts[,]" and that those decisions were better left to the legislature.[273]

262. *Id.*
263. *Id.*
264. *Id.* at 499-500.
265. *Id.* at 501.
266. *Id.* at 501-02.
267. *Id*. at 503-04.
268. *See id.* at 499, 503.
269. Price noted that such a conclusion was inaccurate; in fact, under the Missouri Merchandising Act, a plaintiff may recover attorney's fees and be awarded punitive damages if the circumstances were appropriate. *Id.* at 504.
270. *Id.* at 503.
271. *Id.*
272. *Id.* at 504.
273. *Id.*

IV. DISCUSSION

The status of Missouri unconscionability law is unclear. In *Brewer (II)*, the majority stated that based upon precedent in *Concepcion*, it would no longer apply the traditional substantive and procedural unconscionability test.[274] Instead, the court opted to look at unconscionability arguments simply by whether such factors existed during the formation of the agreement, in accordance with Justice Thomas' concurrence.[275] However, whether this will be applied to every unconscionability claim – or merely those involving the FAA – remains a mystery.

The third footnote within *Brewer (II)* is pivotal, and could easily be interpreted to read in one of two ways: (1) unconscionability law in general will no longer be viewed in the lens of procedural or substantive unconscionability, but rather in terms of unconscionability in the formation of the agreement alone, or (2) unconscionability law, as it is applied in situations invoking the FAA, will no longer be viewed in the lens of procedural or substantive unconscionability, but rather in terms of unconscionability in the formation of the agreement alone. [276] The first option generally seems more likely given that the footnote does not specifically mention that the new test applies only in the context of arbitration.[277] Moreover, in a practical sense, if the new test did only apply to arbitration contracts, such a result would clearly run afoul of the FAA. As stated in *Concepcion*, state courts are prohibited from forming rules that single out and treat arbitration agreements unfavorably.[278] By changing the test and requiring proof of objectionable circumstances only in the "formation of the agreement" (i.e. the procedural side) when examining arbitration agreements – without having to prove the accompanying substantive factors – the Supreme Court of Missouri has made it easier to invalidate arbitration agreements. The FAA undoubtedly precludes this. Thus, the only possible reading of footnote three is that the landscape of Missouri unconscionability law, in its totality, has changed.

If the traditional substantive and procedural unconscionability test has been discarded, *Brewer (II)* presents a remarkable change in direction from historical application of the defense. Although the test is different, undesirable circumstances regarding "the formation of the contract" sound suspi-

274. *Id.* at 492 n.3 (majority opinion).

275. *Id.* Despite ruling in such a manner, the *Brewer (II)* majority continued to perform a typical substantive unconscionability analysis. *Id.* at 493 ("The evidence also demonstrated that the terms of the agreement are extremely one-sided."). Such an examination would be unnecessary under the new holding.

276. *See id.* at 492, n.3; *supra* note 256 and accompanying text..

277. Over the last decade, nearly every case involving a successful unconscionability defense claim has involved arbitration contracts; thus, it is possible that the Missouri Supreme Court meant to limit its application to the arbitration arena. *See supra* Part II.C.

278. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011).

ciously like the procedural requirement in past unconscionability analyses.[279] A Missouri court has only once invalidated a contract as unconscionable on the basis of procedural elements alone.[280]

Traditional problems in the formation of an agreement for the purposes of an unconscionability analysis generally include superior bargaining power, form contracts presented on a "take it or leave it" basis, high-pressure sales tactics, and fine print.[281] While in some scenarios, an unusually high presence of these factors could "carry the day" in an unconscionability analysis, we have seen many findings of unconscionability already that contain only a slight amount of procedural factors (where a significant portion of substantive aspects are shown). When looking at past opinions, Missouri courts often accepted simple reasons for finding inherent procedural unconscionability in consumer contracts, often because the substantive elements were so pervasive.[282] By striking the necessity of the substantive portion of an unconscionability defense, consumers are not left with much to prove. The obvious result is that agreements between consumers and companies have become easier to invalidate.

Finally, if the only unconscionable elements that need to be proven relate to the formation of the agreement, at what point are there "enough" to justify non-enforcement of a contract? Parties used to rely on the sliding scale presented in *King Louie*, but perhaps Missouri courts should now institute a minimum number of procedurally objectionable factors that must be met in order to make a finding of unconscionability. For example, simply proving superior bargaining power and a "take it or leave it" form contract would not be enough.[283] But, showing those elements along with the fact that a party is unable, for example, to secure a contract elsewhere with differing terms might be "enough" to invalidate a clause.

The practical effect of making consumer contracts more susceptible to winning unconscionability claims is that the power to contract, and to be held to the terms of such contract, is diminished. An unconscionability argument is often a losing one, and for good reason – courts have long respected the right of individuals and entities to enter into contracts with one another. To declare a contract unconscionable is to say that one party was not fit to exer-

279. *See* Repair Masters Const., Inc. v. Gary, 277 S.W.3d 854, 857 (Mo. App. E.D. 2009) (noting that procedural unconscionability "deals with the formalities of making the contract").

280. State *ex rel.* Vincent v. Schneider, 194 S.W.3d 853 (Mo. 2006) (en banc).

281. *Id.* at 857-58.

282. A possible reason for this could be attributed to the "sliding scale" interpretation offered in *King Louie*, which states that a court may still find a contract unconscionable if a small amount of procedural unconscionability can be shown, but is heavily outweighed by substantive elements (and vice versa). Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624, 634 (Mo. App. W.D. 1979).

283. As noted in *Concepcion*, those factors are characteristic of nearly all adhesion contracts, which have gained immense popularity in modern times.

cise the right to contract; such judicial interference should be reserved for the most extreme scenarios. By halving the burden of proving unconscionability, consumers can practically assert a successful claim by merely affirming that they entered into a contract with a corporation.

V. CONCLUSION

In virtually all unconscionability cases, one can see that Missouri courts have engaged in a delicate balancing act; on the one hand, courts strive to preserve the everlasting principle that individuals should be able to enter contracts, even if they are unwise.[284] On the other, there is a sense that certain weakly positioned parties need paternalistic courts to ensure that they are not being taken advantage of. As years progressed, judicial protection of parties has increased, as have the levels of sophistication and education of parties who claim they deserve such protection.[285] Many feared that the ruling in *AT&T Mobility LLC v. Concepcion* would incentivize corporations to simply insert class action waivers in all consumer contracts, which would effectively result in immunity for relatively small harms leveled against consumers. However, the Supreme Court of Missouri appears to have adopted Justice Clarence Thomas' concurrence in the matter, and as a result, it created an entirely new unconscionability test to mitigate such fears. One can only wait to see how Missouri courts apply this test and shape it for years to come.

284. First United Partners 9 v. Williams Meat Co. (*In re* First United Partners 9), 58 B.R. 685, 690-91 (Bankr. W.D. Mo. 1986) (quoting Smith v. Guaranty State Bank & Trust (*In re* Smith), 15 B.R. 691, 693 (Bankr. W.D. Mo. 1981)).

285. *See* Manfredi v. Blue Cross & Blue Shield of Kan. City, 340 S.W.3d 126, 129 (Mo. App. W.D. 2011) (en banc) (involving a successful unconscionability claim offered by a doctor).