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CLICK TO ACCEPT (YOU NOW HAVE NO RIGHTS!)

Jason T. Brown * & Zijian Guan **

I. INTRODUCTION

Thanks to advances in technology with the simple touch of your phone and a click of “I accept,” you may have signed away your rights to sue and much more. The emerging trend for companies is to inundate the consumer with pages of language that they know people just don’t read which compels them to click “accept” to proceed and laugh with the greed of corporate villainy as the rights to bring a lawsuit in court are compromised, and the rights to bring a class action extinguished. Corporate accountability has clandestinely evaporated with the stroke of the mighty Supreme Court pen in *AT&T Mobility LLC v. Concepcion*¹ and *Am. Express Co. v. Italian Colors Rest.*² In both cases, the Supreme Court held that contractual waiver of class arbitration were not unconscionable, thereby ostensibly and effectively barring entry into court and killing most class actions.³

Class actions provide a collective mechanism for individuals to vindicate their rights when individual actions would be cost prohibitive. For example, if a utility company is knowingly overcharging a million consumers a quarter a month and the statute has a six year look back, the individual consumer has a case worth roughly \$18 in actual damages, and maybe with a nice punitive mechanism another \$36, for a grand total of \$54. The costs of prosecuting the action will far exceed the potential recovery, but as a conservative figure, assume there will be \$10 million in costs after a few depositions, other discovery costs, and expert costs, especially if the company digs in and refuses to settle. The company

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1. See *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011).
2. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).
3. *Concepcion*, 131 S. Ct. at 1740; *Am. Express*, 133 S. Ct. at 2304.

may spend a hundred thousand or more dollars defending a \$54 claim to create a deterrent effect. Plaintiff's counsel has just invested forty times the possible recovery in costs, a hundred thousand in fees and at the end of the day, and the arbitrator, will look at the disproportion of the fee to the recovery and hack away at any fee petition and possibly the expenses. Most logical people will conclude the process is cost prohibitive, so a complaint of this manner is usually dead on arrival.

However, if in the example above a million individuals are affected and the claims can be aggregated, then damages under the statute could be \$54 million. The company will robustly defend, but it is a beneficial economy of scale to all parties to consolidate the litigation as the operative set of facts and law can be litigated in one action rather than piecemeal. The consumers can obtain counsel to address their concerns and companies can more economically and efficiently defend the matter in its entirety. It's only fair that there is a day in Court, or perhaps a day in Arbitration, to globally address the unlawful practice.

If you want to read any further in this article, you are hereby revoking your rights to ever sue me, to bring a class or collective action against me, and you must name your next child after my alter-ego JB, aka SuperLawDude. Sounds goofy, correct? But in a recent modification of its arbitration agreement the credit card company Capital One added a clause stating that "we may contact you in any manner we choose," including calls, text messages, emails, faxes or a "personal visit."

Since the decision in *Concepcion* came down, many courts have been following the Supreme Court majority's track and granting motions to compel individual arbitration. But, some courts have diverged from *Concepcion* by going through great lengths to distinguish their fact pattern legally and factually to retain jurisdiction over the matter, rather than dispatching justice through a third party that often is paid by the defendant. This article will outline the tentacles of *Concepcion*, how it is trapping the unwitting into arbitration, killing class actions, and highlight departures from it that still enable people to avail themselves of the courts and vindicate their collective rights.

II. AT&T MOBILITY LLC V. CONCEPCION

The Supreme Court majority pronounced in *Concepcion* that the Federal Arbitration Act ("FAA") "makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or

in equity for the revocation of any contract.”⁴

Almost everyone has a mobile phone nowadays, and has signed some adhesion clause to activate its usage so the facts of *Concepcion* could easily be applicable to you. In February 2002, Vincent and Liza Concepcion (“the Concepcions”) entered into a cellular telephone sale and servicing agreement with AT&T (doing business at that time as Cingular Wireless). The agreement provided that all disputes arising between the parties should be arbitrated and brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”⁵ “The agreement authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions.”⁶ The revised arbitration provision that both parties admit controlled provided, *inter alia*, that “the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.”⁷ Hence, the revised agreement entered by the parties mandates individual arbitration and expressly forbids aggregating plaintiffs. It is known as a class arbitration waiver.

The Concepcions sued AT&T in March 2006 in the United States District Court for the Southern District of California because they were charged \$30.22 in sales tax based on the retail value of the phones they received for free.⁸ Later, the Concepcions’ complaint was “consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.”⁹

Two (2) years after the Concepcions commenced the lawsuit, AT&T moved to compel arbitration pursuant to the agreement.¹⁰ The District Court denied AT&T’s request primarily relying on the California Supreme Court’s decision in *Discover Bank v. Superior Court*.¹¹ In *Discover Bank*, the California Supreme Court held that:

[W]hen the waiver is found in a consumer contract of adhesion

4. *Concepcion*, 131 S. Ct. at 1744 (citing 9 U.S.C. § 2).

5. *Id.* at 1744 (emphasis added).

6. *Id.*

7. *Id.* at 1744 n.2 (emphasis added).

8. *Id.* at 1744.

9. *Id.*

10. *Laster v. T-Mobile USA, Inc.*, No. 05CV1167DMS(AJB), 2008 WL 5216255, at *2, *5 (S.D. Cal. Aug. 11, 2008), *rev’d sub nom.* AT&T Mobility L.L.C. v. *Concepcion*, 131 S. Ct. 1740 (2011).

11. *Id.* at *7-14.

in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.¹²

This was referred to as the *Discover Bank* rule. The California District Court found that the arbitration provision was unconscionable because AT&T had not shown that individual arbitration was an adequate substitute to address and deter the corporation from engaging in the wrongful conduct.¹³ To wit, an individual claim of \$30.22 arbitrated individually, is not likely to have a company reconsider its wrongful practice. The inverse is also true and without the class action mechanism it is the consumer who would be deterred from bringing an expensive action to recoup \$30.22.

The Ninth Circuit affirmed the District Court’s decision on the same grounds.¹⁴ It also noted that the *Discovery Bank* rule was not preempted by the FAA because the rule was “a refinement of the unconscionability analysis applicable to contracts generally in California.”¹⁵ Further, the Ninth Circuit rejected AT&T’s contention that “class proceedings will reduce the efficiency and expeditiousness of arbitration.”¹⁶

A. *The Supreme Court Majority Opinion in Concepcion*

The United States Supreme Court *Concepcion* majority asserted that Section 2 of the FAA reflected both “a liberal federal policy favoring arbitration” and the “fundamental principle that arbitration is a

12. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (2005) (citing Cal. Civ. Code Ann. § 1668).

13. *Concepcion*, 131 S. Ct. at 1745 (citing Laster, 2008 WL 5216255 at *14).

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

15. *Id.* at 857.

16. *Id.* at 858 (citing *Shroyer v. New Cingular Wireless Services*, 498 F.3d 976, 990 (9th Cir. 2007)).

matter of contract.”¹⁷ Further, it disfavored the California’s *Discovery Bank* rule, mentioning that “California courts have frequently applied this rule to find arbitration agreements unconscionable” and that “California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.”¹⁸

The Supreme Court majority based their decision on the following two major grounds. “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”¹⁹ The Supreme Court noted that “a court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.’”²⁰ To illustrate its point, the Court listed a few examples, such as, “a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery,” “a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence,” or “that disallow an ultimate disposition by a jury.”²¹ The majority believed that “the judicial hostility towards arbitration that prompted the FAA had manifested itself in ‘a great variety’ of ‘devices and formulas’ declaring arbitration against public policy.”²² Hence, in their interpretation, a finding that a class arbitration waiver is unconscionable is one of the devices that “stand as an obstacle to the accomplishment of the FAA’s objectives.”²³ In conclusion, the majority repeated that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”²⁴ The slight of hand here by the majority is how they reinforce objectives of the FAA, but evaporate the letter of the law with class actions. The traditional strict constructionists who comprised the majority had to “read into” a statute to extinguish the mechanisms provided outright in the letter of the law.

Furthermore, the Supreme Court through their opinion repeatedly emphasized that “[t]he point of affording parties discretion in designing

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

18. *Id.* at 1746-47.

19. *Id.* at 1747.

20. *Id.* (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

21. *Id.*

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

23. *Id.* at 1748.

24. *Id.*

arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”²⁵ Guided by *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, the Court made several observations of class arbitration: “[c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes;” “[c]onfidentiality becomes more difficult;” and “arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.”²⁶ In conclusion, the “class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”²⁷

The Court further provided three reasons for reaching this conclusion. “First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”²⁸ Bilateral arbitration, in contrast with class action litigation or class arbitration, is often chosen by big consumer product and/or service providing companies as a preferred method of resolving disputes arising out of the product or service providing agreement. The majority believes bilateral arbitration is more advantageous than class arbitration because “parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”²⁹

“Second, class arbitration *requires* procedural formality,” for example, “[f]or a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”³⁰ The Court found “it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator.”³¹ Again, the Court showing how it has read into a statute and desired to interpret the FAA to trump any rights provided in class action mechanisms.

25. *Id.* at 1749.

26. *Id.* at 1750.; *see also* *Stolt-Nielsen v. Animalfeeds Int’l Corp.*, 559 U.S. 662 (2010).

27. *Concepcion*, 131 S. Ct. at 1751.

28. *Id.*

29. *Id.* (citing *Stolt-Nielsen*, 559 U.S. at 684).

30. *Id.* at 1751.

31. *Id.*

“Third, class arbitration greatly increases risks to defendants.”³² “[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”³³ In this line of logic, the Court decided it is better to prejudice the rights of the consumer rather than risk an error on a corporate defendant.

The Supreme Court is saying since class arbitration manufactured by the *Discovery Bank* rule is incompatible with the purpose of the FAA, a waiver of class arbitration is inherently not unconscionable, and thus the case should proceed to individual arbitration. However, does the FAA anywhere on its face prohibit class arbitration? No. Do any of the statutes that provide for class actions state on their face that they can be bargained away or can be extinguished in arbitration? No. The Supreme Court made interpretations of the FAA to extinguish long standing statutory mechanisms and override the letter of the law, thereby crushing consumer rights.

B. *The Supreme Court Dissent in Concepcion*

In contrast with the majority opinion’s hostility towards the *Discovery Bank* rule, the dissenting opinion observed objectively that “[t]he *Discover Bank* rule does not create a blanket policy in California against class action waivers in the consumer context”³⁴ and that “[c]ourts applying California law have enforced class-action waivers where they satisfy general unconscionability standards.”³⁵

The dissenting opinion reasoned that “[t]he *Discover Bank* rule is consistent with the federal Act’s language.”³⁶ The majority opinion “linguistically” agrees that the rule falls “directly within the scope of the Act’s exception permitting courts to refuse to enforce arbitration agreements on grounds that exist ‘for the revocation of *any* contract.’”³⁷ “The *Discover Bank* rule is also consistent with the basic ‘purpose

32. *Id.* at 1752.

33. *Id.*

34. *Id.* at 1757 (dissenting opinion) (citing *Provencher v. Dell, Inc.*, 409 F. Supp. 2d. 1196, 1201 (C.D. Cal. 2006)).

35. *Id.*

36. *Id.*

37. *Id.* (alteration in original) (citing 9 U.S.C. § 2).

behind' the Act."³⁸ The primary purpose of the Act is to "secure the 'enforcement' of agreements to arbitrate."³⁹ In *Dean Witter Reynolds Inc. v. Byrd*, the Supreme Court rejected "the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."⁴⁰ Hence, the dissenting opinion concluded that judges "should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate 'upon the same footing.'"⁴¹ The majority actually has gone further and elevated the agreement to arbitrate and extinguished the rights to litigate for individuals and certainly to address classwide complaints.

The dissenting opinion also rebutted that "the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration."⁴²

To begin with, "a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require 'ultimate disposition by a jury' or 'judicially monitored discovery' or use of 'the Federal Rules of Evidence.'"⁴³ The American Arbitration Association ("AAA") has found class arbitration to be "a fair, balanced, and efficient means of resolving class disputes."⁴⁴

Second, "even though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States."⁴⁵ "California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration."⁴⁶

The dissenting opinion also asked a sharp and realistic question, "[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?"⁴⁷ Indeed, in reality, someone who spends tens of

38. *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

39. *Id.* at 1758 (citing *Dean Witter*, 470 U.S. at 221).

40. *Dean Witter*, 470 U.S. at 219 (1985).

41. *Concepcion*, 131 S. Ct. at 1758.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1760.

46. *Id.*

47. *Id.* at 1761.

thousands of dollars in expenses and hundreds of thousands in fees chasing \$30.22 while noble does not make good economic sense.

“Finally, the majority can find no meaningful support for its views in this Court’s precedent.”⁴⁸ The Supreme Court has not applied the FAA to “strike down a state statute that treats arbitrations on par with judicial and administrative proceedings.”⁴⁹ The dissenting opinion criticized the majority opinion for elevating an arbitration agreement over other forms of contract by immunizing it from judicial challenge on grounds applicable to all other contracts.⁵⁰

II. DIVERGENCE FROM *CONCEPCION*

While the vast majority of Courts have followed *Concepcion*, Courts all over the nation are wrestling with relinquishing jurisdiction and creating unjust results which insulate corporations from accountability. The troubled courts have found ways to evade *Concepcion*, and retain jurisdiction over matters thereby in some instances vindicating the rights of the consumer.

In *Noohi v. Toll Bros.*, the United States Fourth Circuit affirmed the Maryland District Court’s decision that the arbitration agreement in dispute was unenforceable for lack of mutual consideration pursuant to applicable Maryland law as articulated in *Cheek v. United Healthcare of Mid-Atlantic, Inc.*⁵¹ In *Cheek*, the arbitration policy between the plaintiff employee and defendant employer “left to the employer the unilateral right to ‘alter, amend, modify, or revoke the [p]olicy at its sole and absolute discretion at any time with or without notice.’”⁵² The Court of Appeals of Maryland “viewed the arbitration agreement as severable from the underlying employment relationship” and held “that the employer’s unfettered discretion to change the arbitration agreement rendered its promise to arbitrate illusory, and that the agreement was therefore unenforceable for lack of consideration.”⁵³

In *Noohi*, the plaintiffs, who were prospective luxury home buyers, brought a class action against the publicly traded real estate development company, Toll Brothers, for refusal to return deposits after the plaintiffs

48. *Id.*

49. *Id.*

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

51. *Noohi v. Toll Bros. Inc.*, 708 F.3d 599, 603 (4th Cir. 2013); *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 659 (Md. 2003).

52. *Noohi*, 708 F.3d at 606 (citing *Cheek*, 835 A.2d at 658).

53. *Id.* at 606-07.

could not obtain mortgage financing despite numerous good faith attempts to obtain a loan.⁵⁴ The total deposit was \$77,008.00.⁵⁵ The arbitration provision at issue provides the following:

13. ARBITRATION: Buyer, on behalf of Buyer, and all permanent residents on the Premises, including minor children, hereby agree that any and all disputes with Seller . . . shall be resolved by binding arbitration in accordance with the rules and procedures of Construction Arbitration Services, Inc. (“CAS”) or its successor or an equivalent organization mutually agreed upon by the parties In addition, Buyer agrees that Buyer may not initiate any arbitration proceeding for any Claim(s) unless and until Buyer has first given Seller specific written notice of each claim (at 250 Gibraltar Road, Horsham, PA 19044, Attn: Warranty Dispute Resolution) and given Seller a reasonable opportunity after such notice to cure any default, including the repair of the Premises in accordance with the Home Warranty. The provisions of this paragraph shall be governed by the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. and shall survive settlement.

BUYER HEREBY WAIVES THE RIGHT TO A PROCEEDING IN A COURT OF LAW (INCLUDING WITHOUT LIMITATION A TRIAL BY JURY) FOR ANY CLAIMS OR COUNTERCLAIMS BROUGHT PURSUANT TO THIS AGREEMENT. THE PROVISIONS OF THIS SECTION SHALL SURVIVE SETTLEMENT.⁵⁶

The Fourth Circuit agreed with the District Court that the provision lacked mutual consideration since it can be altered at any point by the defendants, and thus, was not enforceable.⁵⁷ It is noticeable that this arbitration provision was silent with respect to class arbitration.

In response to Toll Brothers’ argument relying on the Supreme Court’s decision in *Concepcion*, the Fourth Circuit differentiated *Noohi* from *Concepcion* because the Maryland *Cheek* rule, unlike the California *Discover Bank* rule, “neither increases formality nor risks to

54. *Id.* at 602-03.

55. *Id.* at 602.

56. *Id.* at 609-10.

57. *Id.* at 610.

defendants.”⁵⁸ The *Cheek* rule “merely requires that for an arbitration provision to be valid, both parties bind themselves to it.”⁵⁹ The Fourth Circuit further noted that “[t]he Supreme Court has never held that the FAA preempts state law rules requiring that arbitration provisions themselves contain consideration (i.e., that they not be illusory), and it would require a substantial extension of existing precedent to do so here.”⁶⁰ In its conclusion, the Fourth Circuit, although acknowledging the Supreme Court may eventually hold that the FAA preempts the *Cheek* rule, cautioned that following *Concepcion* now would require an extension of existing precedent and abrogation of their own laws.⁶¹ The Supreme Court denied certiorari, so an illusory clause can invalidate arbitration in the Fourth Circuit.

The Ninth Circuit itself parted from *Concepcion* as it struck down an arbitration agreement in *Smith v. Jem Group, Inc.*⁶² on the grounds of unconscionability. In *Smith*, the plaintiff filed a proposed class action against debt-relief/settlement firms, “alleging breach of fiduciary duty, unjust enrichment, aiding and abetting, civil conspiracy, and breach of Washington consumer protection statutes.”⁶³ In early April 2010, the plaintiff signed a four-page attorney retainer agreement (“ARA”) between her and the debt relief/settlement law firm which contained an arbitration clause buried on the fourth page.⁶⁴ “There was no explanation of the arbitration clause either in the ARA or the rest of the contract.”⁶⁵

Under the applicable Washington law, “a contractual provision is unenforceable if it is procedurally unconscionable.”⁶⁶ An ARA is procedurally unconscionable if the attorney has not complied with the Washington Rules of Professional Conduct.⁶⁷ “An attorney must provide a ‘reasonable and fair disclosure of material elements of the fee agreement’ to the client.”⁶⁸ Specifically, “the Washington State Bar Association (“WSBA”) specified that an arbitration provision may be included in an attorney fee agreement only if the attorney provides full

58. *Id.* at 612.

59. *Id.*

60. *Id.*

61. *Id.* at 613.

62. *See Smith v. Jem Grp.* 737 F.3d 636, 641-42 (9th Cir. 2013).

63. *Id.* at 639.

64. *Id.* at 638-39.

65. *Id.* at 639.

66. *Id.* at 640 (citing *Nelson v. McGoldrick*, 896 P.2d 1258, 1264 (Wash. 1995) (en banc)).

67. *Id.* at 641.

68. *Id.* (citing Wash. Rules of Prof'l Conduct R. 1.59(a)(9)).

disclosure of the provision to the client.”⁶⁹ Since there was no explanation or disclosure of the arbitration provision to the client that was buried in the fine print, the Ninth Circuit found that the defendant’s attorney did not comply with the Rules of Professional Conduct, and thus, was procedurally unconscionable and thus unenforceable.

The defendants in *Smith* tried to argue that the Washington state law, just like the California *Discover Bank* rule, was preempted by the FAA. The Ninth Circuit rejected the defendants’ argument and differentiated them from *Concepcion* on each and every ground: first, the Washington law, unlike the California law, did not unduly burden arbitration but only required attorneys to disclose the arbitration clause;⁷⁰ second, the Washington law “is concerned only with the process that results in the formation of the agreement” and, unlike the California law, “says nothing about the manner in which an arbitration is to be conducted;”⁷¹ and finally, the Washington law is “not specifically aimed at arbitration clauses” and only requires the attorneys to “disclose the arbitration agreement only to the same degree that he or she must disclose all material terms in an ARA.”⁷²

At the trial level in the Ninth Circuit, the Northern District of California struck down an arbitration agreement in *Trompeter v. Ally Fin., Inc.*⁷³ In *Trompeter*, the arbitration agreement included a waiver of class arbitration, like the one in *Concepcion*.⁷⁴ The plaintiff did not argue the waiver was unconscionable, but asserted that the arbitration agreement was both procedurally and substantively unconscionable under the California law, *Arguelles-Romero v. Superior Court*.⁷⁵ Under *Arguelles-Romero*, the party opposing arbitration bears the burden of proving that the arbitration provision is both procedurally and substantively unconscionable to establish the agreement is unenforceable.⁷⁶ The Northern District held “[w]hile the Supreme Court has overturned California law requiring the availability of class-wide relief in arbitration agreements, the Court has indicated that state law bearing on contracts of adhesion remains good law.”⁷⁷ The defendant

69. *Id.*

70. *Id.* at 641-642.

71. *Id.* at 642.

72. *Id.*

73. *Trompeter v. Ally Financial*, 914 F. Supp. 2d 1067, 1079 (N.D. Cal. 2012).

74. *Id.* at 1070; *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

75. *Trompeter*, 914 F. Supp. 2d at 1072-76; *Arguelles-Romero v. Superior Court*, 184 Cal. App. 4th 825, 836 (2010).

76. *Trompeter*, 914 F. Supp. 2d at 1072; *Arguelles-Romero*, 184 Cal. App. 4th at 837.

77. *Trompeter*, 914 F. Supp. 2d at 1072 (citing *Concepcion*, 131 S. Ct. at 1750 n.6).

Ally tried to argue for its position relying on *Concepcion*, but the Court observed that their reading of *Concepcion* was too broad and further explained:

Concepcion does not preclude this Court's finding that the arbitration agreement in the present case is unconscionable because the finding does not undermine the fundamental attributes of arbitration as an alternative form of dispute resolution that is neutral, speedy, economical and informal. The Court's review of the arbitration agreement applies the generally applicable contract principle of unconscionability and, thus, does not offend the FAA's policy objective favoring arbitration.⁷⁸

Hence, the arbitration agreement was unenforceable under the California general principle of unconscionability, and the plaintiff's proposed class action continued in court for litigation, rather than being forced into individual arbitration. Relying on general contract principle of unconscionability, the plaintiff successfully threw out the arbitration agreement.

The United States Third Circuit, post-*Concepcion*, allowed class arbitration in *Sutter v. Oxford Health Plans LLC*.⁷⁹ In *Sutter*, the Primary Care Physician Agreement between the plaintiff, Dr. Sutter, and Oxford contained a broad arbitration clause, and "neither the arbitration clause nor any other provision of the agreement [made] express reference to class arbitration."⁸⁰ Nevertheless, the arbitrator described the arbitration clause as "much broader even than the usual broad arbitration clause," and determined that it allowed for class arbitration.⁸¹ The relevant arbitration clause provides as follows: "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator."⁸²

Oxford conceded that the arbitrator "did articulate a contractual basis for his decision to order class arbitration" but argued that the

78. *Id.* at 1077.

79. *Sutter v. Oxford Health Plans L.L.C.*, 675 F.3d 215, 217 (3rd Cir. 2012), *aff'd*, 133 S. Ct. 2064 (2013).

80. *Id.* at 217.

81. *Id.* at 217-18.

82. *Id.* at 223.

arbitrator “exceeded his powers.”⁸³ The Third Circuit reasoned that “*Stolt-Nielsen* does prohibit an arbitrator from inferring parties’ consent to class arbitration solely from their failure to preclude that procedure, but the arbitrator did not draw the proscribed inference in this case. Rather, the arbitrator construed the text of the arbitration agreement to authorize and require class arbitration.”⁸⁴ The defendant petitioned for certiorari which was granted by the Supreme Court.⁸⁵ Surprisingly, the Supreme Court affirmed the Third Circuit decision in *Oxford Health Plans LLC v. Sutter*.⁸⁶ Based on this affirmation, the Supreme Court did not intend to automatically prohibit classwide arbitration, and where an arbitration agreement does not specifically forbid classwide litigation, the mechanism remains available. In other words, the drafter of the arbitration agreement will not receive the benefit of silence on the issue.

The United States District Court for Western District of Washington also allowed class arbitration in *Hesse v. Sprint Spectrum L.P.*⁸⁷ The plaintiffs in *Hesse* are former Sprint subscribers who filed the lawsuit for Sprint’s attempt to charge its customers for certain state taxes.⁸⁸ The case was certified as a class action in 2007.⁸⁹ Sprint moved for individual arbitration in 2011 relying on *Concepcion*.⁹⁰ After some discovery on the issue of arbitration was conducted, Sprint renewed its Motion for Individual Arbitration in 2012.⁹¹ The Court granted Sprint’s Motion for Arbitration but left the issue of whether the parties’ contract allowed class arbitration or only individual arbitration to be decided by the arbitrator.⁹² The arbitrator later determined that the agreement was broad enough to allow class arbitration.⁹³ In deciding Sprint’s Motion to Vacate the Arbitrator’s Determination, the Court followed the Supreme Court’s decision in *Oxford Health Plans LLC v. Sutter*, and allowed for class arbitration.⁹⁴

The Southern District of California denied a defendant’s request for relief from classwide arbitration in *Saincome v. Truly Nolen of Am.*,

83. *Id.* at 222-23.

84. *Id.* at 224.

85. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2064 (2013).

86. *Sutter*, 675 F.3d 215, *aff’d*, 133 S. Ct. 2064.

87. *Hesse v. Sprint Spectrum, L.P.*, No. C06-0592JLR (W.D. Wash. Feb. 20, 2014).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

*Inc.*⁹⁵ In *Saincome*, the plaintiff brought a proposed collective action lawsuit against the defendant for unpaid overtime wages under the Fair Labor Standards Act (“FLSA”).⁹⁶ The plaintiff signed an arbitration agreement whose relevant part reads as follows:

Any controversy, claim or dispute between a partner and Truly Nolen of America (hereafter “TNA”) . . . will be resolved by Binding Arbitration administered by the American Arbitration Association (hereafter known as “AAA”) The Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable, including any remedy that would have been available if the matter had been heard in court⁹⁷

The *Saincome* court differentiated its case from *Concepcion* and *Stolt-Nielsen*, and allowed for collective arbitration, reasoning that an agreement silent on collective litigation shouldn’t be construed to forbid it and, *inter alia*, that:

29 U.S.C. § 216(b)—the provision of the FLSA under which Plaintiff brings the instant suit as a class action—permits class members to participate in the suit on an *opt-in* basis only, eliminating what appears to be the *Concepcion* Court’s primary concern about the ability of an arbitrator to properly oversee a class arbitration.⁹⁸

The Second Circuit has had difficulty digesting *Concepcion*. In *Am. Express Co. v. Italian Colors Rest.*, the plaintiffs filed a class action antitrust suit against the charge-card issuer and the Southern District of New York granted issuer’s Motion to Compel Arbitration.⁹⁹ The plaintiff merchants appealed and the Second Circuit reversed, finding that the class-action waiver provision contained in the mandatory arbitration clause in the card acceptance agreement was unenforceable.¹⁰⁰ The Supreme Court vacated and remanded for reconsideration in light of its decision in *Stolt-Nielsen*.¹⁰¹ The Second

95. *Saincome v. Truly Nolen of America, Inc.*, No. 11-CV-825-JM (BGS), 2011 WL 3420604, at *11-12 (S.D. Cal. Aug. 3, 2011).

96. *Id.* at *1.

97. *Id.* at *2.

98. *Id.* at *12.

99. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2304 (2013).

100. *Id.*

101. *Id.*

Circuit again reversed the district court, but placed a hold on the mandate in order for the petitioner to writ of certiorari.¹⁰² While the mandate was on hold, the Supreme Court issued its decision in *Concepcion*.¹⁰³ The Second Circuit again reversed the district court and remanded with instruction, and consideration en banc was denied.¹⁰⁴ Certiorari was granted.¹⁰⁵ The Supreme Court reversed the Second Circuit's decision and rejected the exception to the class arbitration waiver that the Judge tried to establish, reaffirming *Concepcion*.¹⁰⁶

State courts have diverged from *Concepcion* as well. In *Baier v. Darden Restaurants*, the Missouri Court of Appeals invalidated an arbitration agreement under Missouri law.¹⁰⁷ In *Baier*, the plaintiff employee signed several documents in the beginning of her employment with the defendant Darden, including an acknowledgment of the receipt of a booklet describing Darden's Dispute Resolution Process ("DRP").¹⁰⁸ The acknowledgement states that "I understand that the company is equally bound to all of the provisions of the DRP."¹⁰⁹ The DRP provides:

The DRP is the sole means for resolving covered employment-related disputes, instead of court actions. Disputes eligible for DRP must be resolved only through DRP, with the final step being binding arbitration heard by an arbitrator. This means DRP-eligible disputes will NOT BE RESOLVED BY A JUDGE OR JURY. Neither the Company nor the Employee may bring DRP-eligible disputes to court. The Company and the Employee waive all rights to bring a civil court action for these disputes.¹¹⁰

However, no one signed the acknowledgement on Darden's behalf, and only had the plaintiff's signature.¹¹¹

The Missouri Court of Appeals applied the Missouri law to determine if a valid arbitration agreement existed. "The elements

102. *Id.*

103. *Id.*

104. *Id.* at 2034, 2038.

105. *Id.* at 2034.

106. *Id.* at 2312.

107. *See Baier v. Darden Rest.*, 420 S.W.3d 733 (Mo. Ct. App. 2014).

108. *Id.* at 734.

109. *Id.* at 734-35.

110. *Id.* at 735.

111. *Id.* at 734-35.

required to form a valid contract in Missouri are ‘offer, acceptance, and bargained for consideration.’”¹¹² Thus, under the Missouri law, the defendant, in order to prove the validity of the arbitration agreement, had to establish the offer, acceptance, and bargained for consideration. Given the fact that the plaintiff signed the acknowledgement but Darden did not, the Court of Appeals found that Darden failed to show its “assent to abide by the terms of the agreement.”¹¹³

III. CONCLUSION

Concepcion is not a complete death toll to consumer rights as long as industrious litigators and Courts find ways to depart from it, but the applicability of *Concepcion* itself with carefully crafted and executed arbitration agreements with class bans creates a serious blow to consumer rights. Courts that choose to mindlessly follow *Concepcion* without digging deep into the substance of the case will create a litany of more zombielike opinions shortchanging effective global relief for certain injustices and killing any relief for low dollar claims that are forced into arbitration. The conscientious litigator should not mindlessly assume that any arbitration clause must inherently be followed nor does it dictate a ban on classwide relief. The cases have shown that where an agreement is silent regarding a classwide ban, then the matter may proceed as a class in arbitration. Agreements unsigned by the company may not be agreements at all. If the company retains the right to unilaterally alter the agreement without assent, it may be illusory and unenforceable.

These exceptions or departures from *Concepcion* show plaintiffs and plaintiffs’ attorneys that they should not be deterred when they have to face an arbitration agreement and argument.

112. *Id.* at 737 (quoting *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988) (en banc)).

113. *Id.* at 738.

