

# Arbitration at the Tipping Point: Challenging Claim-Suppressing Arbitration Clauses

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*If you have entered into a contract for goods or services with a corporation recently, then chances are that an arbitration clause governs any potential legal claims you may have arising from that contractual relationship. In theory, arbitration is a cheap and efficient way to assert claims and allows a claimant to avoid the backlogged court system. For consumers, however, arbitration has morphed into a dispute resolution system that is no longer a fair alternative to the courts. Two recent Supreme Court decisions have validated corporations' use of the inequitable, claim-suppressing mechanism known as a class action arbitration waiver. The simple clause prevents claimants from forming groups to assert common claims and share costs in the arbitral proceeding. In practice, a corporation with an enforceable class action arbitration waiver will reap a windfall because an individual claimant will choose not to pursue a claim that will cost more to bring than she expects to recover. In court, the Federal Rules of Civil Procedure allow for class action lawsuits when individual claims would not be viable. Class action arbitration waivers eliminate the comparable mechanism in arbitration and provide corporations with a strong incentive to insert such clauses into contracts with consumers. This Note analyzes recent Supreme Court class arbitration precedent and considers potential challenges to these disadvantageous arbitration clauses.*

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## INTRODUCTION

Millions of consumers enter into contractual agreements with corporations every day. Disputes relating to these transactions are bound to occur, and both contracting parties have an incentive to settle disputes in a fair, quick, inexpensive, and informal manner over the alternative of slow and costly litigation. Arbitration has emerged as the most prominent dispute resolution system, with the Dominant Contracting Party (“DCP”)<sup>1</sup> often inserting arbitration clauses or provisions into

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1. This classification denotes a party dominantly situated during and after negotiating the agreement as a whole. The Dominant Contracting Party (“DCP”) may have such superior position because: they are wealthier and have a team of advisors on staff; are better-versed in the applicable law; have repeatedly contracted with similar parties and know how to respond in certain situations; or

contracts with consumers to restrict court access and prevent the adjudication of claims.<sup>2</sup>

An overwhelming majority of these arbitration clauses now contain class action arbitration waivers (“CAAWs”). CAAWs prohibit a representative from asserting the claims of a group of similarly affected individuals in an arbitral proceeding.<sup>3</sup> This forces the vulnerable contracting party (“VCP”),<sup>4</sup> often a consumer or small entity similarly lacking in bargaining leverage or the wherewithal for counsel to individually bear any and all costs not specifically assumed or shared by the DCP in the initial contract. The sentiment among leading arbitration commentators is that “[t]he ‘class waiver’ issue is the single most contentious issue surrounding arbitration provisions” in contracts of adhesion with consumers.<sup>5</sup>

In 2011, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*,<sup>6</sup> holding that the Federal Arbitration Act (“FAA”) preempted California’s *Discover Bank*<sup>7</sup> rule that prohibited certain CAAWs as “unconscionable.”<sup>8</sup> This past year, the Supreme Court determined in *American Express Co. v. Italian Colors Restaurant* that the “vindication of statutory rights” doctrine, which permits invalidation of arbitration agreements based on public policy grounds, did not apply to situations in which proving the underlying violations would be so costly that it would effectively prevent an individual from asserting a claim.<sup>9</sup>

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they have the market power to offer the contract on a take it or leave it basis. Many of the sources cited in this Note often refer to this type of party generally as “corporations”—the term used here seeks to clarify scholarship and encompass all of the different types of parties with the dominant contracting position.

2. See Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Preispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 56 (2004) (explaining how arbitration provisions proliferated in consumer contracts).

3. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 8–9 (2000); see also Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 142 (1997) (urging franchisors to adopt binding arbitration).

4. A Vulnerable Contracting Party (“VCP”) generally refers to the party offered a contract on a take it or leave it basis, without the leverage to cause meaningful change to the terms of the agreement. This term includes incorporated entities that have little or no bargaining power when dealing with a more powerful party.

5. Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 371 (2011). See generally Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It’s All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151 (2009) (explaining that class arbitration, though widely criticized, is an extremely valuable tool for consumer redress and marketplace control).

6. 131 S. Ct. 1740, 1747 (2011).

7. 113 P.3d 1100 (Cal. 2005).

8. The term “unconscionable” was originated by the Uniform Commercial Code section 2-302 and has been adopted in the California Civil Code § 1670.5 as a contract defense. See CAL. CIVIL CODE § 1670.5 (West 2011).

9. 133 S. Ct. 2304, 2312–13 (2013).

Taken together, these decisions leave consumers subject to CAAWs with little hope for redress and permit DCPs to contractually suppress individual claims.

This Note explains the consequences CAAWs have on consumer claims and how the Supreme Court's FAA and "effective vindication" analyses have rendered CAAWs almost unchallengeable, and outlines the possible strategies a VCP may employ to evade cost-prohibitive individual arbitration due to the presence of a CAAW. Specifically, this Note argues that either an amendment to the FAA or enactment of similar federal legislation is needed to provide claimants with the means to invalidate arbitration provisions containing CAAWs that immunize DCPs from liability.

## I. BACKGROUND

### A. THE RISE OF ARBITRATION AND CLASS ACTION ARBITRATION WAIVERS

Arbitration, the process of submitting disputes to a neutral party to render binding decisions and awards, was primarily utilized by commercial entities and trade associations from this country's inception to the early 1920s.<sup>10</sup> During this period, arbitration remained confined to the business world because the process of arbitrating disputes was considered "outside of and in tension with the legal system."<sup>11</sup> Common law courts refused to compel arbitration because they considered arbitration agreements to be revocable by either party at any time.<sup>12</sup> Courts expressed concern that arbitration agreements "ousted" the court of its jurisdiction<sup>13</sup> and that there was no way to ensure the process would be fair and equitable.<sup>14</sup> Therefore, parties had to litigate "disputes notwithstanding arbitration clauses," rendering them completely ineffective.<sup>15</sup>

#### I. *The Federal Arbitration Act*

Congress responded in 1925 by passing what is now known as the Federal Arbitration Act.<sup>16</sup> Specifically, section 2 of the FAA provides, in pertinent part: "A written provision in any . . . contract evidencing a

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10. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 971-72 (1999).

11. *Id.* at 973.

12. *Id.* at 975.

13. See *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.").

14. Van Wezel Stone, *supra* note 10, at 975.

15. Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 395 (2013).

16. 9 U.S.C. §§ 1-16 (2012). Initially the legislation was titled the United States Arbitration Act of 1925, ch. 213, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-307 (1994)) [hereinafter FAA].

transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any such contract.”<sup>17</sup>

Following the legislation’s passage, the Supreme Court interpreted the FAA to be a clear “congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>18</sup> Accordingly, arbitration provisions were to be evaluated on the same footing as all other contractual provisions.<sup>19</sup>

Many scholars question whether Congress intended the FAA to make arbitration provisions enforceable in all contracts, regardless of the identity of the contracting parties.<sup>20</sup> Some argue that the legislative history indicates that Congress intended the FAA to only govern arbitration provisions in contracts between commercial entities.<sup>21</sup> However, the Supreme Court determined that section 2 of the FAA extends to all arbitration provisions regardless of the type of contract, including those embedded in consumer contracts.<sup>22</sup> In *Perry v. Thomas*,<sup>23</sup> the Court identified the FAA as a valid exercise of congressional power under the Commerce Clause and extended its application to state courts in the context of transactions involving interstate commerce.<sup>24</sup> Under the

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17. 9 U.S.C. § 2.

18. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

19. *Id.*

20. *See, e.g.*, Margaret L. Moses, *Arbitration Law: Who’s in Charge?*, 40 SETON HALL L. REV. 147 (2010); *see also* Letter from Gary M. Paul, President, Am. Assoc. for Justice, to Monica Jackson, Office of the Exec. Sec’y, Consumer Fin. Prot. Bureau (June 23, 2012), *available at* [http://www.justice.org/cps/rde/xbcr/justice/CFPB\\_Arbitration\\_Comments\\_6-12\\_aaj.pdf](http://www.justice.org/cps/rde/xbcr/justice/CFPB_Arbitration_Comments_6-12_aaj.pdf).

21. *See, e.g.*, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 107 (2006) (referring to testimony of Julius Cohen, General Counsel for the New York State Chamber of Commerce, in Congressional hearings that the bill would not apply to contracts of adhesion); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 243 (2012) (concluding that “[a]rbitration under the FAA was not intended to be a claim-suppressing vehicle for the benefit of wealthier parties in one-sided contracts,” and it should never be extended to parties outside of the business or trade community); Wasserman, *supra* note 15, at 399 (“[T]he Act was not intended to validate arbitration clauses in contracts of adhesion, but rather to render enforceable voluntary arbitration agreements between merchants.”).

22. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) (rejecting the Ninth Circuit’s interpretation that the FAA does not apply to consumer contracts).

23. 482 U.S. 483 (1987).

24. *See* Stipanowich, *supra* note 5, at 328 (citing *Perry v. Thomas*, 482 U.S. 483, 490 (1987)); *see also* *Southland Corp. v. Keating*, 465 U.S. 1, 11–12 (1984).

Supremacy Clause, the FAA preempts state law<sup>25</sup> and thus all arbitration agreements except those that remain purely intrastate are enforceable.<sup>26</sup>

## 2. *Policy Rationale for Arbitration*

Congress unanimously passed the FAA in order to “reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.”<sup>27</sup> Supporters contend that arbitration “‘takes less time and costs less than litigation;’ it is ‘fair and effective;’ and it offers ‘a quick, cheap, and easy dispute resolution mechanism’ that is ‘more efficient’ than resolving disputes through litigation.”<sup>28</sup> Other benefits include the preservation of parties’ relationships,<sup>29</sup> confidentiality from disclosure,<sup>30</sup> and the increased predictability of outcomes due to arbitrator expertise and incentives.<sup>31</sup>

Arbitration is not universally lauded. Opponents argue that, while arbitration is in theory an inexpensive and quick alternative to the court system, in reality the system is rigged against VCPs.<sup>32</sup> The setup of arbitration inherently incentivizes arbitrators to lessen claimant damages to influence repeat players—almost always DCPs—to select those arbitrators for future dispute resolution.<sup>33</sup> Arbitration also tends to be a “less elaborate means of adjudication than litigation,” so the contracting parties “should not expect the full panoply of procedural and substantive

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25. U.S. Const. art. VI, § 2. *See generally* *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

26. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277–79 (1995) (noting the distinction between the typical “involving interstate commerce” test under the commerce clause and section 2’s “evidencing a transaction involving commerce,” but concluding that the FAA applies if there is commerce in fact).

27. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). For clarity’s sake, the Supreme Court often uses the terms “agreement to arbitrate” interchangeably with “arbitration provision.” This Note uses the less confusing “arbitration provision” or “arbitration clause” whenever possible.

28. Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 878 (2008) (citations omitted).

29. *See generally* NAT’L ARBITRATION FORUM, BUSINESS-TO-BUSINESS MEDIATION/ARBITRATION VS. LITIGATION: WHAT COURTS, STATISTICS & PUBLIC PERCEPTIONS SHOW ABOUT HOW COMMERCIAL MEDIATION AND COMMERCIAL ARBITRATION COMPARE TO THE LITIGATION SYSTEM (Jan. 2005).

30. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1222–26 (2006).

31. Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL. STUD. 549, 575 (2003).

32. *See, e.g.,* Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 303–04 (1999) (outlining the various ways in which arbitration makes consumer claims more difficult).

33. *See id.*; *see also* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum’s Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E01.

protection offered by a court of law.”<sup>34</sup> A sophisticated party might understand this point from the outset and use it to its advantage, while a party lacking experience in dispute resolution would likely not understand that this could make proving a claim difficult or even impossible. Further, arbitration limits claimants in a number of ways that litigation does not—it provides for minimal discovery, prevents the right to a jury trial, and seriously limits the right to appeal the decision or award.<sup>35</sup>

DCPs particularly prefer arbitration to litigation when handling disputes with VCPs, such as customers, employees, and smaller business entities, for a number of reasons. First, arbitration lowers defense costs and plaintiffs’ fees because discovery and pretrial motions are generally reduced or even eliminated.<sup>36</sup> Second, arbitration lowers damage awards, as arbitrators are more likely to “split the baby” by providing some recovery although giving less than what a jury would.<sup>37</sup> Third, arbitration provisions generally require absolute privacy, keeping any findings or decisions away from the public eye and preventing media coverage of a dispute or award.<sup>38</sup> This prevents other claimants from relying on the facts or conclusions uncovered in the proceeding. Finally, the Supreme Court’s FAA jurisprudence authorized a powerful contractual weapon that, when crafted carefully, can render VCPs unable to assert certain claims against DCPs. This weapon is the Class Action Arbitration Waiver.<sup>39</sup>

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34. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 453 (2010) (quoting *Bowles Fin. Grp. Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1011 (10th Cir. 1994)).

35. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 41–42 (2006).

36. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60.

37. *Id.* To be fair, this works both ways, because the arbitrator will sometimes award unmeritorious claims limited damages. See DOUGLAS SHONTZ ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES, at IX, 12 (2011), available at [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2011/RAND\\_TR781.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf). Overall though, when dealing with larger potential awards, this benefits the DCP because they have the deeper pockets.

38. *Id.* This exacerbates the problem presented by CAAWs because even if a claimant pursues individual arbitration, information or facts adduced from the proceeding cannot be shared with other potential claimants. See, e.g., UNIF. ARBITRATION ACT § 17(e) (2000) (“An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure.”).

39. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010) (explaining that an arbitration provision that is silent on the issue of class-wide arbitration “cannot be compelled to submit their dispute to class arbitration”). This decision implicitly suggests that contractual language preventing a class from forming would be upheld. See *Stipanowich*, *supra* note 5, at 333 (noting that the *Stolt* decision was “perceived by some as a clear signal of the Court’s lack of receptiveness to concerns about the impact of arbitration provisions on plaintiff’s ability to bring class actions”).

### 3. *Class Action Arbitration Waivers*

The Supreme Court has long endorsed the mechanism by which a representative asserts claims in court on the behalf of a class of similarly situated individuals. Class action lawsuits “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action . . . . A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”<sup>40</sup> Congress recognized the need to permit plaintiffs to form collectively and codified that practical necessity in Rule 23 of the Federal Rules of Civil Procedure.<sup>41</sup> Without the ability to form a class and share costs, individuals would be faced with an overwhelming disincentive to assert their personal claims, thus immunizing the defendant from liability.<sup>42</sup>

When Congress enacted the FAA’s precursor in 1925, the concept of forming a class to assert a common claim (whether in litigation or arbitration) was unprecedented.<sup>43</sup> Nonetheless, with the Supreme Court’s strict adherence to the notion that arbitration provisions must be enforced as written, DCPs began adding CAAWs to the arbitration provisions of consumer contracts while relying on the FAA to support their enforceability.<sup>44</sup> Current iterations of CAAWs typically require that any dispute arising from the contractual relationship may be arbitrated at the election of either side rather than litigated in court.<sup>45</sup>

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40. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

41. *See* FED. R. CIV. P. 23; *see also* *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) (reaffirming that under Rule 23, “[a plaintiff must demonstrate] numerosity, commonality, typicality, and adequacy of representation . . . and [a plaintiff] must also establish that ‘the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy’”).

42. *See* *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”).

43. *See* Wasserman, *supra* note 15, at 399 (“The FAA is silent on the issue of class-wide arbitration . . . [because] [w]hen Congress passed the [FAA] in 1925, the Federal Rules of Civil Procedure had not yet been promulgated and class action litigation for damages was virtually unknown.”); *see also* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110–11 (Cal. 2005) (providing historical context that still stands, despite being reversed by *AT&T Mobility v. Concepcion*).

44. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396 (2005) (explaining that many attorneys began recommending CAAWs after large jury verdicts and deferential Supreme Court arbitration jurisprudence).

45. The idea that the permissive language of “may” used in these agreements does not render them mandatory is illusory; rarely, if ever, will a DCP prefer to litigate rather than arbitrate if the CAAW is enforceable. *See* Schwartz, *supra* note 36, at 60–67 (listing several reasons corporations prefer arbitration to litigation).

An example of such a CAAW in the Comcast Residential Services Agreement (which many readers have probably not thought twice about looking over) reads as follows:

13. BINDING ARBITRATION

**a. Purpose.** If you have a Dispute (as defined below) with Comcast that cannot be resolved through an informal dispute resolution with Comcast, you or Comcast may elect to arbitrate that Dispute in accordance with the terms of this Arbitration Provision rather than litigate the Dispute in court. Arbitration means you will have a fair hearing before a neutral arbitrator instead of in a court by a judge or jury. Proceeding in arbitration may result in limited discovery and may be subject to limited review by courts.

...

**f. Restrictions:** . . . .

2. ALL PARTIES TO THE ARBITRATION MUST BE INDIVIDUALLY NAMED. THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED OR LITIGATED ON A CLASS ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS.<sup>46</sup>

While arbitration is now the norm in most contracts, many DCPs confine their use of CAAWs to agreements with VCPs. A 2004 study found that 30.8% of the arbitration clauses they surveyed contained a class action preclusion mechanism.<sup>47</sup> A more recent 2008 study found that while only 6% of non-consumer contracts contained arbitration clauses, 76.9% of consumer-DCP contracts contained arbitration clauses and every one of those clauses contained waivers for class-wide arbitration.<sup>48</sup>

Some commentators contend that CAAWs are used to intentionally suppress claims. The authors of the 2008 study suggested that DCPs' "selective use of arbitration clauses against consumers, but not against each other, suggests that their use of mandatory arbitration clauses may be based more on strategic advantage than on a belief that corporations are

46. *Comcast Agreement for Residential Services*, COMCAST, <http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html> (last visited June 1, 2014). As the reader can clearly see from this clause, some of the problems with arbitration explained in Part I.A.ii of this Note are noted in this clause itself. Comcast, like many other DCPs, permits consumers to opt out of the arbitration clause. However, the ability to opt-out is time-barred at thirty days. Due to the fact that most never read the fine print, few (if any) actually avoid arbitration.

47. Demaine & Hensler, *supra* note 2, at 66. The authors surveyed arbitration clauses across many industries, including financial services, insurance, retail services, healthcare, travel, and housing and home services. *Id.* at 63.

48. Eisenberg et al., *supra* note 28, at 883-84. In addition, sixty percent of those clauses deemed arbitration void if the arbitration process allowed for class-wide activity. *Id.* at 884. To place this in the context of avoiding collective activity as a whole through the FAA, the authors noted "[n]o litigation class action waivers were found in consumer or other contracts in the absence of an arbitration clause." *Id.*

better serving their customers.”<sup>49</sup> They further posited that “[t]he growth of mandatory consumer arbitration clauses appears to be part of a broader initiative by corporations to preclude or limit aggregate litigation.”<sup>50</sup> Thus, an enforceable CAAW fully prevents aggregate recovery.

Despite the already prevalent use of CAAWs in agreements with consumers, DCPs remained susceptible to the possibility that a court would invalidate an arbitration agreement due to the presence of a CAAW.<sup>51</sup> Challenges swept through the lower courts, with plaintiff-consumers anticipating that they would be foreclosed from arbitration due to cost.<sup>52</sup> The claimants would initially assert claims in court and then oppose the inevitable motions to compel individual arbitration based on state or federal contract defenses. In 2011, the Supreme Court delivered the *Concepcion* opinion, dismissing California’s attempt to invalidate certain CAAWs as unconscionable.<sup>53</sup> In 2013, with *Italian Colors*, the Supreme Court all but shut the door to CAAW challenges based on cost.<sup>54</sup>

## II. THE SUPREME COURT SOLIDIFIES THE ENFORCEABILITY OF CAAWS

The Supreme Court has struggled to balance the general purpose of the FAA to “reverse the longstanding judicial hostility to arbitration

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49. *Id.* at 895; *id.* at 888 (“Companies prefer individual over aggregate dispute resolution because aggregate treatment creates overwhelming settlement pressure and because few consumers will seek redress on an individual basis due to lack of information or the small amounts in dispute. Companies could attempt to address this problem by imposing waivers of class action litigation in their consumer contracts. But such waivers would be politically controversial and also would face a risk of being declared unconscionable by courts. The mandatory arbitration clause is a preferable alternative. Such clauses, if effective, may have the same result as class action waivers: they prevent class actions and remit consumers to individual actions which, in light of the stakes, are usually not worthwhile to pursue. But mandatory arbitration clauses are easier to sell and enforce than class action waivers. Because arbitration is often seen as cheaper and simpler than litigation, the company can claim that it is helping rather than hurting its customers. This reduces political costs and also increases the prospects that the clause will be upheld in court. In short, mandatory arbitration offers companies an opportunity to claim that they are concerned for consumer welfare while simultaneously denying their customers any practical avenue for redress.”).

50. *Id.*; cf. Drahozal & Ware, *supra* note 34, at 472–75 (citing Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008)) (explaining that the authors of *Summer Soldiers* only identified certain industries with higher than normal arbitration rates, and that concerns over class actions has not been definitively proven to be the explanation for the prevalence of arbitration clauses in consumer contracts).

51. See Benjamin R. Dwyer & Christopher M. Mason, *U.S. Supreme Court Upholds Class Action Waivers in Consumer Contracts: AT&T Mobility v. Concepcion*, NIXON PEABODY (Apr. 27, 2011), [http://www.nixonpeabody.com/Supreme\\_Court\\_upholds\\_class\\_action\\_waivers\\_in\\_consumer\\_contracts](http://www.nixonpeabody.com/Supreme_Court_upholds_class_action_waivers_in_consumer_contracts); see also *Class Action Waivers in Commercial and Consumer Arbitration Agreements After Concepcion*, BRYAN CAVE (June 8, 2011), <http://www.bryancave.com/files/Publication/35d9ae19-a177-4721-b601-069566c842e8/Presentation/PublicationAttachment/c5bccad8-16e3-49f5-9393-092ebo8305bf/Concepcion%20Client%20Alert.pdf>.

52. See Dwyer & Mason, *supra* note 51.

53. See *infra* Part II.A.ii.

54. See *infra* Part IV.

agreements”<sup>55</sup> with the practical reality that arbitration must remain a fair alternative to the courts. The Court produced opinions reflecting such a dilemma, leaving litigants unsure whether arbitration clauses would remain enforceable if the arbitration’s costs precluded the potential for positive recovery by claimants.

A. *AT&T MOBILITY LLC v. CONCEPCION*

The FAA’s text provides one straightforward means to escape an arbitration provision. Known as the FAA’s “savings clause,” the last phrase of section 2 permits the invalidation of agreements to arbitrate “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>56</sup> While the clause encompasses arguments based on state contract defenses, “[c]ourts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. . . . [because] Congress precluded States from singling out arbitration provisions for suspect status.”<sup>57</sup> Therefore, state law can only invalidate arbitration provisions if the law is applied evenhandedly to all contracts.<sup>58</sup>

1. *The Discover Bank Rule*

In California, courts are empowered by statute to refuse enforcement of unfairly one-sided or “unconscionable” contractual provisions.<sup>59</sup> The “unconscionability [defense] has both a ‘procedural’ and a ‘substantive element,’ the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.”<sup>60</sup> As arbitration provisions proliferated in consumer contracts, California courts commonly used a far less stringent test to evaluate the “unconscionability” of arbitration provisions than to assess all other contracts.<sup>61</sup>

In *Discover Bank*, the California Supreme Court determined that an arbitration provision was unenforceable because it contained a CAAW that would exculpate the defendant, Discover Bank, from small claim

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55. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

56. *See* 9 U.S.C. § 2 (2012) (referring to grounds such as fraud, duress, and unconscionability); *see also* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (explaining that the “savings clause” indicates that Congress intended the FAA to make arbitration agreements as enforceable as other contracts); *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 483–84 (1989) (reiterating the Supreme Court’s interpretation that the FAA upholds arbitration agreements, except under the grounds mentioned in the savings clause).

57. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

58. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (explaining that the FAA “makes any such state policy unlawful” because it “would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent”).

59. *See* CAL. CIV. CODE § 1670.5 (West 2008) (codifying the principal that a court can refuse to enforce an unconscionable provision in a contract); *see also* *Perdue v. Crocker Nat’l Bank*, 702 P.2d 503, 511 (Cal. 1985).

60. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (citations omitted).

61. *See generally* *Broome*, *supra* note 35.

liability.<sup>62</sup> The *Discover Bank* court noted that the CAAW acted to “deliberately cheat large numbers of consumers out of individually small sums of money” because no consumer would rationally bring an individual claim.<sup>63</sup> The court determined that CAAWs are “unconscionable” if they “operate to insulate a party from liability that otherwise would be imposed under California law.”<sup>64</sup>

## 2. *Concepcion* Overrules *Discover Bank*

The *Discover Bank* rule did not withstand scrutiny from the United States Supreme Court for long. In *Concepcion*, two AT&T customers sought to avoid individual arbitration of their state-law fraud and false advertising claims in federal court.<sup>65</sup> The district court denied the motion to compel arbitration, relying on the *Discover Bank* rule.<sup>66</sup> The Ninth Circuit affirmed, additionally holding that the FAA did not preempt the rule because the *Discover Bank* rule was a “refinement of the unconscionability analysis applicable to contracts generally in California.”<sup>67</sup>

The Supreme Court reversed and held that the FAA preempted the *Discover Bank* rule, rejecting *Concepcion*’s argument against enforceability of the CAAW.<sup>68</sup> Specifically, the *Concepcion* Court determined that the *Discover Bank* rule was inconsistent with the FAA and therefore preempted because it fundamentally altered the written arbitration agreement when it required the availability of class-wide arbitration.<sup>69</sup> The Court highlighted some key problems that arise when parties are forced to shift from bilateral to class action arbitration: decreased efficiency of the process, the need for procedural formality, increased risk to defendants, and limited opportunity for appeal.<sup>70</sup>

In response to the dissent’s claims that class action arbitration may be necessary to prevent small claims from slipping through the cracks,

62. 113 P.3d 1100, 1110 (Cal. 2005) (“[W]hen the [CAAW] is found in a consumer contract of adhesion 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, at least to the extent the obligation at issue is governed by California law, 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.’ (Civ. Code, § 1668). Under these circumstances, such waivers are unconscionable under California law and should not be enforced.”).

63. *Id.*

64. *Id.* at 1109.

65. AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1749, 1774 (2011).

66. *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255, at \*1 (S.D. Cal. Aug. 11, 2008) (holding that the arbitration provision was unconscionable because AT&T failed to show that the arbitration adequately substituted for the deterrent effects of class actions).

67. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009) (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)).

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

69. *Id.* at 1748–49 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

70. *Id.* at 1752–53.

the Court strongly emphasized that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>71</sup> In addition, the Court noted that AT&T’s arbitration clause was extremely claimant-friendly, and that, due to beneficial fee-shifting provisions, small claims brought individually would likely be resolved.<sup>72</sup> Therefore, there was no risk that the claimants would end up in the red if they engaged in individual arbitration with AT&T.<sup>73</sup>

*Concepcion* established that the FAA preempted state-law doctrines designed to invalidate agreements to arbitrate, regardless of the public policy concerns they are designed to serve.<sup>74</sup> Thus, plaintiffs were left only to rely on either state law applicable equally to all contracts or federal law to challenge the enforceability of a CAAW. Until recently, federal common law permitted cost-based challenges to CAAWs under a doctrine first enunciated in *Green Tree Financial Corp.-Alabama v. Randolph* as the “effective vindication of statutory rights.”<sup>75</sup>

#### B. THE “VINDICATION OF STATUTORY RIGHTS” DOCTRINE

In the 1980s, the Supreme Court issued a string of decisions that ostensibly left the door open to challenging CAAWs when arbitration of federal claims would be too costly to undertake as an individual.<sup>76</sup> The litigation theory went that if a party to a dispute governed by an arbitration provision had no incentive to bring a federal cause of action due to high fees and net-negative potential recovery, then the arbitration itself would effectively deny that individual the ability to vindicate his or her federal statutory rights in the arbitral forum.

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71. *Id.* at 1753.

72. *Id.* The clause provided that AT&T would pay claimants a minimum of \$7500 and twice their attorney’s fees if the claimant obtained an arbitration award greater than AT&T’s last settlement award. The district court, Ninth Circuit, and Supreme Court all agreed that the arbitration clause inured to the customer’s benefit due to these beneficial terms. *Id.*; see Stipanowich, *supra* note 5, at 371 (noting that the Court selected an arbitration provision with “an artful eye to the desired (and eventual) result”). The clause has been widely praised and many commentators have weighed in on how to model consumer arbitration clauses after AT&T’s to avoid court challenges to their enforceability. See, e.g., Yvette Ostolaza, *Enforceability of Arbitration Clauses in Consumer Financial Services Contracts*, BNA CLASS ACTION LITIG. REP. (Nov. 11, 2011), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012\\_ccle\\_materials/9\\_1\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_ccle_materials/9_1_authcheckdam.pdf); Arthur J. Rooney, *How Safe Is Your Arbitration Agreement Post-AT&T Mobility v. Concepcion*, SEYFARTH SHAW CLIENT ALERTS (Jan. 6, 2012), <http://www.seyfarth.com/publications/S1010612>.

73. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1749, 1753 (2011). The majority cited the Ninth Circuit’s opinion in *Laster* that aggrieved customers who filed claims would be “essentially guarantee[d]” to be made whole in the arbitration scheme. See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009).

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

75. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2315 (2013); see also *infra* Part II.B.

76. See generally *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

With arbitration provisions spreading to all sorts of contracts, the Supreme Court repeatedly heard cases that dealt with whether federal statutory claims could be appropriately resolved through arbitration.<sup>77</sup> In every case, the Court answered in the affirmative, permitting the underlying federal claims to be subject to arbitration absent congressional intent to require court access.<sup>78</sup> However, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court qualified the expansive use of arbitration, stating that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,” that federal statute’s purpose would continue to be served and arbitration would be permitted.<sup>79</sup>

In *Mitsubishi Motors*, the plaintiff worried that the international arbitrator would not apply treble damages in an antitrust action.<sup>80</sup> The Court explained that there was no reason to assume that international arbitration would not provide adequate relief, but if arbitration indeed operated “as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy.”<sup>81</sup> This precedent gave cost-based challenges a lifeline.

The Court revisited the “effective vindication” doctrine, as it relates to arbitration, in 2000.<sup>82</sup> In *Green Tree*, the plaintiff alleged that the defendant, Green Tree, violated the Truth in Lending Act<sup>83</sup> and the Equal Credit Opportunity Act<sup>84</sup> by failing to disclose an additional insurance charge.<sup>85</sup> The plaintiff challenged Green Tree’s motion to compel arbitration pursuant to Green Tree’s standard lending arbitration clause because “she lacked the resources to arbitrate, and as a result, would have to forgo her claims against [Green Tree].”<sup>86</sup> The Court rejected her argument because the agreement did not expressly delineate costs, and

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77. See generally Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012).

78. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (finding that Age Discrimination in Employment Act of 1967 claims could be arbitrated); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (finding that Securities Act of 1933 claims were arbitrable); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (concluding that Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act claims were arbitrable); *Mitsubishi Motors*, 473 U.S. at 629 (permitting arbitration of Sherman Act claims); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (determining that the FAA is a congressional determination that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”).

79. *Mitsubishi Motors*, 473 U.S. at 637.

80. *Id.* at 635.

81. *Id.* at 637 n.19.

82. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 79 (2000).

83. 15 U.S.C. §§ 1601–16 (2012).

84. 15 U.S.C. §§ 1691–91(f) (2000).

85. *Green Tree*, 531 U.S. at 83.

86. *Id.* at 83–84.

she therefore failed to carry her burden to show that the arbitration was cost prohibitive.<sup>87</sup>

However, the *Green Tree* Court provided a legal theory upon which to base future challenges to arbitration provisions, writing that where “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”<sup>88</sup> The Court had never before endorsed the concept that an arbitration provision could be defeated on the basis of excessive cost.<sup>89</sup> The *Green Tree* Court established that if the plaintiff made a sufficient factual showing, then the court could potentially invalidate the arbitration agreement for being cost-prohibitive.

### III. CONFUSION AMONG THE CIRCUITS AFTER *CONCEPCION*

Prior to *Concepcion*, lower courts generally applied *Green Tree* to arbitration clauses containing various waivers, including CAAWs.<sup>90</sup> However, those courts often found the plaintiff unable to meet the high burden of proof necessary for *Green Tree* to apply.<sup>91</sup> Only one circuit court pre-*Concepcion* invalidated a CAAW under the *Green Tree* doctrine, severing the clause from the original agreement.<sup>92</sup> After *Concepcion*,

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87. *Id.* at 91–92.

88. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

89. Stephen G. Harvey, *Decision in the Green Tree Case a Victory for Lenders and Borrowers*, PEPPER HAMILTON LLP (Jan. 11, 2001), [http://www.pepperlaw.com/publications\\_article.aspx?ArticleKey=74](http://www.pepperlaw.com/publications_article.aspx?ArticleKey=74) (“Although the Court’s ruling upheld the use of arbitration clauses in consumer finance contracts, it should not be read as a signal that the Court will permit arbitration agreements that foist excessive arbitration costs on consumers.”).

90. *See, e.g., In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (“[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate and agreement.”); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (agreeing with the *Kristian* court’s determination that the enforceability of a particular CAAW includes an inquiry into “the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff’s potential recovery”); *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (severing the CAAW and determining that the class ban on arbitration would undoubtedly preclude the plaintiff from vindicating his federal statutory rights in the arbitral forum due to high costs). *Compare Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) (reaffirming the applicability of the *Green Tree* test, while noting that the party resisting arbitration bears a high burden of showing that the terms of the arbitration interfere with effective vindication of statutory rights, and that burden cannot be satisfied by “mere speculation”), *with Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (“[A]n arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.”).

91. *See, e.g., Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 780 (10th Cir. 2010) (referring to *Green Tree*’s high threshold to explain that plaintiff failed to meet its burden); *Cicle v. Chase Bank USA*, 583 F.3d 549, 556–57 (8th Cir. 2009) (explaining that the plaintiff had not submitted sufficient evidence to satisfy the *Green Tree* standard); *In re Cotton Yarn Antitrust Litig.*, 50 F.3d at 285 (acknowledging the validity of cost-based challenges to arbitration but concluding the plaintiff had not adequately established such a challenge); *Lowry v. JP Morgan Chase Bank, N.A.*, No. 4:12-o816, 2012 U.S. Dist. LEXIS 128907, at \*8–9 (N.D. Ohio Sept. 12, 2012) (rejecting plaintiff’s cost-based argument because he provided a “mere estimate” that did not satisfy his burden).

92. *Kristian*, 446 F.3d at 64.

circuit courts have split on the issue of whether factually supported cost-based challenges could render CAAW's unenforceable, applying either *Green Tree's* vindication of statutory rights doctrine or *Concepcion's* mandate of strict adherence to the FAA without regard to policy, or cost-based, concerns.

A. THE MAJORITY OF LOWER COURTS FOLLOW *CONCEPCION*

The majority of circuit courts concluded that *Concepcion* rejected cost-based challenges to CAAWs, therefore eliminating the *Green Tree* arbitration challenge.<sup>93</sup> In *Coneff v. AT&T Corp.*, the plaintiff asserted both state unjust enrichment and breach of contract claims as well as violations of the Federal Communications Act against defendant AT&T.<sup>94</sup> The *Coneff* court found the “vindication of statutory rights” argument unpersuasive and granted the defendant’s motion to compel arbitration, observing that *Concepcion* had rejected “such unrelated policy concerns, however worthwhile, [because they] cannot undermine the FAA.”<sup>95</sup>

Other circuit court decisions track similar reasoning. The Eleventh Circuit dealt with a challenge to the same plaintiff-friendly AT&T arbitration clause after plaintiffs asserted state causes of action on behalf of a class.<sup>96</sup> The court rejected a Florida law voiding CAAWs as against public policy despite an evidentiary showing by the plaintiffs that they could not obtain adequate representation individually.<sup>97</sup> The court noted that “[t]he Plaintiffs’ evidence goes only to substantiating the very public policy arguments that were expressly rejected by . . . *Concepcion*—namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted.”<sup>98</sup> This

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93. See, e.g., *Homa v. Am. Express Co.*, 494 F. App'x 191 (3d Cir. 2012); *Quillion v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221 (3d Cir. 2012); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1157 (9th Cir. 2012); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011).

94. *Coneff*, 673 F.3d at 1157.

95. *Id.* at 1159 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1749, 1753 (2011)).

96. *Cruz*, 648 F.3d at 1206.

97. *Id.* at 1214.

98. *Id.* The Eleventh Circuit also noted that *Concepcion* foreclosed challenges to CAAW's under the unconscionability doctrine. *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1233–34 (11th Cir. 2012).

line of reasoning is commonplace among circuit courts<sup>99</sup> and some district courts in circuits that have yet to confront the issue on appeal.<sup>100</sup>

#### B. THE SECOND CIRCUIT FOLLOWS *GREEN TREE*

On the other side of the split, the Second Circuit distinguished *Concepcion* and applied *Green Tree* to invalidate a cost-prohibitive CAAW. In *In re American Express Merchant's Litigation* (“*AMEX I*”), a group of merchants who contracted with American Express (“AMEX”) filed a class action suit against AMEX, alleging a “tying” violation of antitrust law.<sup>101</sup> The Second Circuit held that the merchants had met their *Green Tree* burden by showing that, if forced into individual arbitration, each merchant would have to finance an economic antitrust study that could run from “about \$300 thousand to more than \$2 million.”<sup>102</sup> The court further found that, if successful, an individual plaintiff could only expect an average damages reward between \$9,046 and \$38,549.<sup>103</sup> The *AMEX I* court concluded that AMEX’s CAAW could not be enforced “because to do so would grant AMEX de facto immunity from antitrust liability by removing the plaintiffs’ only reasonably feasible means of recovery.”<sup>104</sup>

After two rounds of re-analyzing the case to incorporate newly issued Supreme Court decisions, the Second Circuit, sitting en banc, finally

99. See, e.g., *Homa v. Am. Express Co.*, 494 F. App’x 191, 196 (3d Cir. 2012) (citation omitted) (“Even if Homa cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not. Though some persons might regard our result as unfair, [the FAA] requires that we reach it.”); *Quillion v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) (explaining that if an agreement explicitly contained a CAAW, a Pennsylvania law prohibiting CAAW’s would be preempted by the FAA after *Concepcion*); *Bellows v. Midland Credit Mgmt.*, No. 09-1951, 2011 U.S. Dist. LEXIS 48237, at \*11 (S.D. Cal. May 4, 2011) (rejecting plaintiffs’ contention that the agreement to arbitrate was substantively unconscionable because it included a CAAW in light of *Concepcion*).

100. See, e.g., *Dean v. Draughons Junior Coll., Inc.*, 917 F. Supp. 2d 751, 673 (M.D. Tenn. 2013) (explaining that state law cost-prohibitiveness defenses are precluded after *Concepcion*); *King v. Capital One Bank (USA), N.A.*, No. 3:11-0068, 2012 U.S. Dist. LEXIS 163562, at \*24-25 (W.D. Va. Nov. 15, 2012) (explaining *Concepcion* forecloses the argument that CAAW’s “make it more difficult to pursue small claims”); *Brokers’ Servs. Mktg. Grp. v. Celco P’ship*, No. 10-3973, 2012 U.S. Dist. LEXIS 42721, at \*12-14 (D.N.J. Mar. 28, 2012) (rejecting plaintiffs’ vindication of statutory rights defense because *Concepcion* foreclosed unrelated policy concerns); *Reed Elsevier, Inc. v. Crockett*, No. 3:10-0248, 2012 U.S. Dist. LEXIS 23947, at \*40 (S.D. Ohio Feb. 24, 2012) (rejecting plaintiff’s argument that a class arbitration should be permitted even though it would be “impractical” to pursue [their claims] independently); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012) (granting defendant’s motion to compel because the plaintiff’s cost-based defense cannot survive *Concepcion*).

101. *In re Am. Express Merchs.’ Litig.*, No. 03-9592, 2006 U.S. Dist. LEXIS 11742, at \*6 (S.D.N.Y. Mar. 16, 2006). Specifically, the plaintiffs alleged that they were forced to accept all American Express cards if they chose to accept the charge card. *Id.*

102. *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 316 (2d Cir. 2009).

103. *Id.* at 317. These numbers include the standard treble damages awarded in antitrust cases. See 15 U.S.C. § 15 (2014).

104. *In re Am. Express Merchs.’ Litig.*, 554 F.3d at 320.

affirmed its ruling in *AMEX I* and denied rehearing (“*AMEX IV*”).<sup>105</sup> The court reiterated that *Concepcion* does not address federal statutory rights and is instead wholly focused on the issue of preemption of state law by federal law.<sup>106</sup> The Second Circuit was unequivocal about the continuing vitality of *Green Tree*, explaining that its decision to invalidate the CAAW “gives full effect to a long line of Supreme Court precedent preserving plaintiffs’ ability to vindicate federal statutory rights, rather than eviscerating more than 120 years of antitrust law by closing the courthouse door to all but the most well-funded plaintiffs.”<sup>107</sup>

The *AMEX IV* court distinguished *Concepcion* and *Coneff* further by explaining that, whereas the plaintiffs there lacked adequate “incentive” to arbitrate their claims individually, “the fee-shifting provisions ensured that a damaged plaintiff could be made whole.”<sup>108</sup> In contrast, the court explained that the AMEX plaintiffs did not lack incentive to arbitrate; rather, they were faced with such substantial upfront expenditures that the only economically feasible means to enforce their statutory rights was by class action.<sup>109</sup> No fee-shifting provisions were available to ever make the plaintiffs whole.<sup>110</sup> In the fall of 2012, the Supreme Court granted AMEX’s petition for certiorari to resolve the circuit split.<sup>111</sup>

#### IV. *ITALIAN COLORS* RADICALLY ALTERS THE ARBITRATION LANDSCAPE

Many commentators accurately predicted that the Supreme Court would use the *Italian Colors* case to reverse the Second Circuit and refine the scope of the *Green Tree* doctrine.<sup>112</sup> Indeed, the deck seemed stacked against the plaintiffs because Justice Sotomayor, a *Concepcion* dissenter, was forced to recuse herself because she was part of the opinion below.<sup>113</sup> The result was exactly as predicted.

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105. *In re Am. Express Merchs.’ Litig.*, 681 F.3d 139 (2d Cir. 2012).

106. *Id.* at 140.

107. *Id.* at 142.

108. *Id.* at 141.

109. *Id.* Interestingly, the *Coneff* court actually noted the incentive/feasibility distinction had some merit in its decision. See *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 n.3 (9th Cir. 2012).

110. *Id.*

111. *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012).

112. See, e.g., Archis A. Parasharami, *Supreme Court Appears Poised to Reject Second Circuit’s Articulation of “Effective Vindication of Federal Statutory Rights” Defense for Avoiding Class Arbitration Waivers*, MAYER BROWN (Feb. 28, 2013), <http://www.classdefenseblog.com/2013/02/28/supreme-court-appears-poised-to-reject-second-circuits-articulation-of-effective-vindication-of-federal-statutory-rights-defense-for-avoiding-class-arbitration-waivers>; *SCOTUS Hears Argument in American Express v. Italian Colors Restaurant*, WAGE LAW (Mar. 1, 2013), [http://www.californiawagelaw.com/wage\\_law/2013/03/scotus-hears-argument-in-american-express-v-italian-colors-restaurant.html](http://www.californiawagelaw.com/wage_law/2013/03/scotus-hears-argument-in-american-express-v-italian-colors-restaurant.html); *Oral Argument in Italian Colors*, WORKPLACE PROF BLOG (Mar. 1, 2013), [http://lawprofessors.typepad.com/laborprof\\_blog/2013/03/oral-argument-in-italian-colors.html](http://lawprofessors.typepad.com/laborprof_blog/2013/03/oral-argument-in-italian-colors.html).

113. *In re Am. Express Merchs.’ Litig.*, 667 F.3d at 206; see Rebecca S. Bjork et al., *Supreme Court Argument in American Express Co. v. Italian Colors Restaurant*, SEYFARTH SHAW (Feb. 27, 2013),

Writing for the majority, Justice Scalia explained that the judge-made “effective vindication” doctrine could not provide the *Italian Colors* plaintiffs with relief from individual arbitration with AMEX.<sup>114</sup> The Court noted that *Green Tree* remained a viable defense when “a provision in an arbitration agreement [forbade] the assertion of certain statutory rights” and would “perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>115</sup> However, “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>116</sup>

Thus, the majority drew a distinction between arbitration clauses that prevent the right to pursue a remedy, which courts may invalidate, and arbitration clauses that increase the expense involved in proving a violation, which do not implicate the “effective vindication” doctrine.<sup>117</sup> The *Italian Colors* Court went on to note that *Concepcion* rejected the notion that “class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”<sup>118</sup>

The dissent, led by Justice Kagan, did not mince words when it explained the consequences of the majority’s decision. The CAAW at issue “impose[d] a variety of procedural bars that would make pursuit of the antitrust claim a fool’s errand. . . . [i]f the arbitration clause is enforceable, [AMEX] has insulated itself from antitrust liability—even if it has in fact violated the law.”<sup>119</sup> The “effective vindication” doctrine was created to “prevent arbitration clauses from choking off a plaintiff’s ability to enforce congressionally created rights.”<sup>120</sup>

The dissent continued that if the “effective vindication” rule only prohibits contractual clauses that expressly exculpate a DCP from liability, then “companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless.”<sup>121</sup> The dissent argued that the majority’s rule created a scenario that Congress likely did not envision while passing the FAA: DCPs can use arbitration provisions to foreclose would-be claimants from *both* the courts *and* arbitration.<sup>122</sup>

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<http://www.seyfarth.com/publications/2664> (“Justice Sotomayor recused herself as a member of the Second Circuit Panel who issued the decision below.”)

114. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

115. *Id.*

116. *Id.* at 2311.

117. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1749, 1753 (2011)).

118. *Id.* at 2312.

119. *Id.* at 2313 (Kagan, J., dissenting).

120. *Id.* at 2313 (Kagan, J., dissenting).

121. *Id.* at 2315 (Kagan, J., dissenting).

122. *Id.* at 2317.

## V. POSSIBLE CHALLENGES AND A PROPOSED WAY FORWARD

If the costs associated with pursuing individual arbitration outweigh a claimant's potential recovery, pursuit of even meritorious claims is irrational. Class action lawsuits remedy this inequitable situation in the litigation context by allowing the aggregation of claims to lessen each plaintiff's individual costs.<sup>123</sup> Because CAAWs are disproportionately inserted into contracts by DCPs,<sup>124</sup> individual plaintiffs must find some legal doctrine upon which to challenge the arbitration clause or the CAAW itself. Otherwise, the VCP is left without a viable claim and the DCP reaps a windfall by doing no more than inserting specific language into its standard agreement. After *Concepcion* and *Italian Colors*, few avenues remain realistic. This Part discusses some potential challenges to mandatory arbitration and the likelihood those challenges can be applied to successfully overcome CAAWs.

### A. STATE-LAW PREEMPTION AND FEDERAL-LAW CONFLICT

In *Concepcion*, the Supreme Court outlined the preemption analysis that lower courts must undertake when considering challenges to arbitration clauses involving state and federal law claims. Lower courts considering state law that conflicts with the FAA have routinely rejected state-law challenges to arbitration in light of *Concepcion*. Likewise, recent Supreme Court guidance suggests that federal statutes will rarely override the FAA when in conflict.

#### I. State-Law Challenges

*Concepcion* reiterated that the FAA per se displaces state laws prohibiting outright the arbitration of a particular type of claim.<sup>125</sup> The inquiry becomes more complex "when a doctrine normally thought to be generally applicable . . . is alleged to have been applied in a fashion that disfavors arbitration."<sup>126</sup> In theory, a VCP seeking to overcome a claim-suppressing CAAW could rely on the state legislature or state common law on the narrow grounds *Concepcion* permits. However, lower courts

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123. See *supra* notes 25–27; see also Stephen H. Kupperman & George C. Freeman III, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorney's Fees and Costs*, 65 TUL. L. REV. 1547, 1579 (1990) ("The class action also provides a remedy for those whose claims are too small to justify the expense of individual litigation. In this way it allows an opportunity to vindicate rights, while simultaneously encouraging action that may help effectuate policies underlying substantive statutes.").

124. See *supra* notes 33–34.

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

126. *Id.*

after *Concepcion* generally avoid state-law challenges unless they apply even handedly to other contract disputes as required by *Concepcion*.<sup>127</sup>

Many federal and state courts read *Concepcion* as foreclosing state laws conflicting with the FAA. The Supreme Court in *Marmet Health Care Center, Inc. v. Clayton Brown* reversed a West Virginia Supreme Court of Appeals ruling that the FAA did not preempt the state's public policy against pre-dispute arbitration agreements in personal injury or wrongful death claims against nursing homes.<sup>128</sup>

Similarly, in *Robinson v. Title Lenders, Inc.*, the Missouri Supreme Court explained that “the FAA does not allow state-law policy considerations to be used to invalidate an arbitration agreement.”<sup>129</sup> Other courts have followed this preemption analysis.<sup>130</sup> State-law challenges based on statutes or common law that invalidate or obstruct arbitration provisions are not likely to survive post-*Concepcion* preemption.

However, state-law doctrines that apply to contracts generally still remain a viable means to invalidate arbitration provisions or CAAWs. In *Chavarria v. Ralphs*, the Ninth Circuit relied on an “unconscionability” analysis to invalidate the CAAW embedded in Ralph's Grocery's employment application.<sup>131</sup> The *Chavarria* court noted that *Concepcion* foreclosed the “unconscionability” doctrine when it applied disproportionately to arbitration provisions.<sup>132</sup>

The court went on to note the egregious procedural and substantive “unconscionability” of Ralph's arbitration provision and specifically concluded that the high up-front costs made access to the forum impracticable—the exact situation that the *Italian Colors* majority explained might permit invalidation.<sup>133</sup> The court found that the FAA did not preempt its “unconscionability” analysis because the law “is not

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127. See, e.g., *Lau v. Mercedes-Benz USA, LLC*, No. 11-1940, 2012 WL 370557 (N.D. Cal. Jan. 31, 2012) (finding an arbitration's costs and appeal provision unconscionable).

128. *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012).

129. *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 516 (Mo. 2012) (en banc).

130. See *Kilgore v. Keybank*, Nat'l Ass'n, 673 F.3d 947, 960 (9th Cir. 2012) (finding that the FAA preempts the *Broughton-Cruz* rule, which prohibited outright the arbitration claims where the plaintiff is functioning as a private attorney general on behalf of the general public, after *Concepcion*), *vacated, rev'd, remanded en banc*, *Kilgore v. Keybank*, Nat'l Ass'n, 718 F.3d 1052 (9th Cir. 2013); see also *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 938 (9th Cir. 2013) (“The FAA preempts California's *Broughton-Cruz* rule that claims for public injunctive relief cannot be arbitrated.”); *Schnuerle v. Insight Commc'ns, Co.*, 376 S.W.3d 561, 564–65 (Ky. 2012) (concluding that *Concepcion* preempted a state policy invalidating contractual waivers of class action participation where it was based on *de minimis* claims which are unlikely to be individually litigated). In addition, in light of *Concepcion* the California Supreme Court was forced to reconsider their decision holding that a state-law rule finding arbitration clauses that contain Berman Waivers (providing speedy and informal method to resolve wage claims) unconscionable was not preempted. *Sonic-Calabasas A, Inc. v. Moreno* (Frank B.) No. S174475, 2012 Cal. LEXIS 871 (Cal. Jan. 11, 2012).

131. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013).

132. *Id.* at 921.

133. *Id.* at 927.

unfavorable towards arbitration, but instead reflects a generally applicable policy against abuses of bargaining power.”<sup>134</sup> At least in the Ninth Circuit, then, state-law challenges can avoid preemption if courts can rationalize that they apply to all contracts generally.<sup>135</sup> However, state-law challenges must be narrowly tailored and are now generally disfavored by courts hearing such arguments.

## 2. Federal-Law Challenges

When a federal statute conflicts with permitting the arbitration of certain types of claims, the analysis is more complex. The Supreme Court previously highlighted the importance of enforcing arbitration agreements by their terms “unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>136</sup> Therefore, if a VCP has a federal statutory claim that requires adjudication in the courts, she may be able to overcome a CAAW because arbitration in general is disallowed.

In *CompuCredit v. Greenwood*, the Supreme Court outlined the analysis to apply when a federal statutory claim seemingly prevents arbitration of a dispute, in conflict with the FAA.<sup>137</sup> The Court explained that when a federal statutory claim is silent as to whether the claim may be arbitrated, if an arbitration agreement governs the dispute, the claim must be submitted to arbitration per the FAA.<sup>138</sup> Thus, the *CompuCredit* Court established the FAA as the default, requiring other federal statutory claims to expressly preclude arbitration in its text. Only a few statutes expressly disallow pre-dispute agreements to arbitrate their corresponding claims.<sup>139</sup>

In the employment context, lower courts have unanimously agreed that the National Labor Relations Act (“NLRA”),<sup>140</sup> a federal statute designed to protect the rights of employees in the private sector, does not preclude the use of CAAWs.<sup>141</sup> In *In re D.R. Horton, Inc.*, an employee

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134. *Id.*

135. See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 188 (Cal. 2013) (holding that the “unconscionability” doctrine may continue to invalidate arbitration agreements after *Italian Colors* and *Concepcion* that are unreasonably one-sided).

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

137. *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012).

138. *Id.* at 673.

139. See Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 289 (2012) (noting that both the Department of Defense Appropriations Act Dodd-Frank Wall Street Reform and Consumer Protection Act prohibit pre-dispute agreements to arbitrate specific types of claims); see also Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2012).

140. 29 U.S.C. §§ 151–69 (2012).

141. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 364 (5th Cir. 2013); see *Richards v. Ernst & Young LLP*, 734 F.3d 871, 874 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (holding that arbitration

of D.R. Horton alleged that the CAAW previously agreed to violated his § 7 NLRA right to engage in concerted legal action addressing wage, hours, or other working conditions.<sup>142</sup> The National Labor Relations Board agreed, holding that employers cannot compel employees to “waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral or judicial.”<sup>143</sup> On appeal, the Fifth Circuit explained that *CompuCredit* required explicit language of congressional intent to override the FAA.<sup>144</sup> The court noted it was “loath to create a circuit split,” and concluded that the rights of collective action under the NLRA did not evince a congressional intent to preclude application of the FAA.<sup>145</sup>

Unless the plaintiff’s federal statutory claim explicitly requires court access, courts must enforce the arbitration agreement under the FAA.<sup>146</sup> Despite the contention that *Concepcion* only stands for the preemption of state statutes that conflict with the FAA, the *CompuCredit* Court raised the bar slightly higher when asserting federal claims and objecting to individual arbitration in opposition to the FAA.<sup>147</sup> Neither state nor federal law is a safe bet in opposing an arbitration provision and avoiding the preclusive effects of a CAAW.

## B. FEDERAL LEGISLATION

After *Concepcion* and *Italian Colors*, a workable and equitable solution must be found to provide a remedy in situations in which CAAWs work an obvious injustice. Congressional action is the best option to avoid the inequitable, claim-suppressing effect of CAAWs. Congress should establish a workable rule for courts to follow, limiting whatever impact these decisions have on CAAWs. Despite current congressional gridlock on most issues, the protection of VCPs in agreements containing arbitration clauses should be a policy Congress as a whole can endorse. If the FAA is to continue its purpose of placing

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agreements containing class waivers are enforceable in claims brought under the FLSA); *see also* Jeffrey T. Johnson, *Ninth Circuit Joins Growing Trend: Declines to Follow D.R. Horton and Upholds Arbitration Agreement Prohibiting Class Claims*, EMPLOYERS’ LAWYERS BLOG (Aug. 26, 2013), <http://www.employerslawyersblog.com/2013/08/ninth-circuit-declines-follow-drhorton-upholding-arbitration-agreement-prohibiting-class-claims-flsa-class-waiver.html>.

142. *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at \*2, 2012–2013 NLRB Dec. ¶ 15546 (Jan. 3, 2012); section 7 of the National Labor Relations Act (the “NLRA”), in pertinent part, requires that employees have the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2012).

143. *In re D.R. Horton, Inc.*, 357 N.L.R.B. at \*12 (“So long as the employer leaves open a judicial forum for class and collective claims, employees’ NLRA rights are preserved without requiring the availability of classwide arbitration.”).

144. *D.R. Horton, Inc.*, 737 F.3d at 360.

145. *Id.*

146. *Id.* at 361.

147. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672–73 (2012).

arbitration on the same footing as the courts, actual access to justice within that system is necessary.

I. *The Arbitration Fairness Act*

In a press release immediately following the *Concepcion* decision, Senators Al Franken, Richard Blumenthal, and Representative Hank Johnson announced they were going to reintroduce the Arbitration Fairness Act (“AFA”).<sup>148</sup> They decried *Concepcion* as “another example of the Supreme Court favoring corporations over consumers.”<sup>149</sup> The AFA, according to its sponsors, rectifies *Concepcion*’s detrimental effect by “eliminat[ing] forced arbitration clauses in employment, consumer, and civil rights cases” and “allow[ing] consumers and workers to choose arbitration after a dispute occurred.”<sup>150</sup> However, the Act has languished in the Committee on the Judiciary since 2011 and has little hope of ever reaching a full vote.<sup>151</sup>

The AFA is a flawed response to CAAWs because it is overbroad. The AFA would invalidate the claimant-friendly arbitration provisions such as the AT&T provision present in *Concepcion*. The *Concepcion* Court noted that the district court concluded that the plaintiffs were in fact better off under the arbitration agreement than they would have been in a class action lawsuit because the claimants were essentially guaranteed to be made whole.<sup>152</sup> If enacted, the AFA would prevent what Myriam Gilles calls “consumer friendly arbitration clauses”—clauses specifically designed to “provide courts with comfort that the elimination of aggregate procedures will not serve to prevent the vindication of rights.”<sup>153</sup>

The companies that adopt “consumer friendly” provisions give the claimant the ability to vindicate her rights, and in theory provide a race to the top in terms of VCP-beneficial arbitration provisions instead of an outright ban on rights vindication.<sup>154</sup> CAAWs can still benefit the individual because, in order to stave off court challenges, companies will rationally choose to make their individual arbitration procedures more beneficial to claimants and eliminate the argument that binding arbitration

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148. Press Release, Sen. Franken, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts Against Corporations (Apr. 27, 2011), available at [http://www.franken.senate.gov/?p=press\\_release&id=1466](http://www.franken.senate.gov/?p=press_release&id=1466).

149. *Id.*

150. *Id.*

151. H.R. 1873, 112th Cong. (2011); see Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG (Sept. 13, 2011, 11:46 AM), <http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act>.

152. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

153. Gilles, *supra* note 77, at 829, 844.

154. *Id.* at 865.

is unjust. This does not prevent vindication of rights, and keeps intact all of the benefits of arbitration discussed earlier.<sup>155</sup>

Any federal legislation should be narrowed to specifically invalidate CAAWs that act as a Hobson's choice for claimants: abandon meritorious claims or face overwhelming, unrecoverable costs to obtain any relief.

## 2. *FAA Amendment or Similar Federal Legislation*

In order to avoid the pitfalls that would follow from an outright ban on arbitration in consumer and employment contexts, Congress instead should either amend the FAA or introduce new legislation aimed directly at CAAWs that prevent the claimant from actually utilizing the arbitral forum. The distinction drawn by the *Italian Colors* Court between the *right* to pursue a claim and the costs involved with *proving* a claim is irrelevant to VCPs because the result will always end up the same: the contractual language immunizes the drafter from liability. Consumers do not care that they can still theoretically assert their rights. If it makes no economic sense to do so, then they will not even consider asserting a claim and the DCP escapes without incurring any cost.

The statutory language should provide that any arbitration provision barring collective or class action is unenforceable upon a factual showing by the claimant. The claimant should demonstrate by a preponderance of the evidence that individual arbitration would require said claimant to incur substantial, unrecoverable costs greatly outweighing the potential recovery and rendering arbitration impractical.<sup>156</sup> This could easily be inserted in the FAA's savings clause, adding to the grounds upon which an agreement can be invalidated.<sup>157</sup>

Significant discretion should be left to the trial court judge to determine whether the plaintiff has met her burden. Such an inquiry will not invade the province of the arbitrator. This legislation will give the judge the same level of discretion authorized under the FAA when a judge is tasked with considering state-law defenses such as fraud, duress, or unconscionability.<sup>158</sup>

District courts have made this exact same cost-based inquiry many times before, and past experience shows that the threshold will remain

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155. *See supra* notes 18–20.

156. Such a situation will arise when the plaintiffs are faced with substantial upfront expenditures to prosecute their claims, meaning the only economically feasible means of doing so is through a class procedure. *In re Am. Express Merchs.' Litig.*, 681 F.3d 139, 141 (2012). This can be distinguished from the situation in both *Coneff* and *Concepcion* because, while “the individual damages awards available to any single plaintiff were small . . . the fee-shifting provisions insured that a damaged plaintiff could be made whole. The reason that a plaintiff may not bring a suit was not because he would not be likely to recoup his costs, but rather because the small amount of damages was not worth his trouble.” *Id.*

157. *See* 9 U.S.C. § 2 (2012).

158. *Id.*

high.<sup>159</sup> This legislation will allow lower courts to compel arbitration according to “consumer-friendly” arbitration clauses<sup>160</sup> while striking cost-prohibitive CAAWs and allowing plaintiffs to proceed in the only economically rational manner: a court-certified class action lawsuit.

One argument raised by opponents of the vindication of statutory rights doctrine is that plaintiffs will attempt evade CAAWs by manufacturing an affidavit or choosing pricey attorneys to increase their upfront costs.<sup>161</sup> This argument carries little weight because a cost-prohibitive situation will arise only in certain types of claims, such as antitrust claims,<sup>162</sup> and the courts are “perfectly capable of doing the analysis necessary to determine if the plaintiffs have made the necessary showing.”<sup>163</sup> If lower courts are tasked with determining the scope of the class under Federal Rule of Civil Procedure 23, a quite complex initial task, they should be able to handle this similar inquiry.

This proposed legislation would have the dual effect of pushing contract drafting to a more claimant-friendly end product while providing certainty to a DCP that if they draft arbitration agreements that prevent individual redress, that agreement will be invalidated and the DCP will face a class action lawsuit. In the end, this should restore some faith in the arbitration system that consumers now credibly view as merely a corporate means of self-immunization.

#### CONCLUSION

Arbitration remains an effective means of quick and inexpensive dispute resolution, but it cannot and should not be used to thwart a VCP from asserting claims. *Italian Colors* sent shockwaves through the consumer-advocate community.<sup>164</sup> The American Association of Justice went so far as to write that “[t]he Supreme Court rule[d] that corporations can use the fine print of contracts to grant themselves a license to steal and

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159. See *supra* notes 62–64.

160. Gilles, *supra* note 77, at 844.

161. *In re Am. Express Merchs.’ Litig.*, 681 F.3d at 142.

162. One possible suggestion for the specific claim limit here can be lifted from Thomas E. Carbonneau’s proposed amendment to the FAA. He suggested “[c]ases involving the enforcement of fundamental statutory rights” be deemed nonarbitrable, including “those arising from antitrust statutes, the securities legislation, RICO, labor statutes, and other regulatory legislative frameworks deemed essential by Congress.” Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 273 (1990).

163. *In re Am. Express Merchs.’ Litig.*, 681 F.3d at 142. If the courts are capable of determining class action status under Federal Rule of Civil Procedure 23 and engaging in other types of initial analysis, a cost-based analysis should provide the type of hurdle expected by detractors. Specific claims under which the inquiry should be made can be fleshed out by the courts in due time.

164. See, e.g., Binyamin Appelbaum, *Justices Support Corporate Arbitration*, N.Y. TIMES, June 20, 2013, at B3; Paul Bland, *Worst Supreme Court Arbitration Decision Ever*, PUB. JUSTICE (June 20, 2013), <http://publicjustice.net/blog/worst-supreme-court-arbitration-decision-ever>.

violate the law.”<sup>165</sup> Following *Concepcion*, some of the most well-known companies in the world such as Microsoft,<sup>166</sup> Instagram,<sup>167</sup> and others<sup>168</sup> inserted arbitration clauses with CAAWs in their standard agreements. After *Italian Colors*, there may be little preventing any corporation from including a CAAW in contracts with consumers.

Congress passed the FAA with the intention that arbitration would help facilitate claim adjudication. Now, with the proliferation of CAAWs and repeated Supreme Court approval, DCPs can draft contracts that prevent claims from ever seeing the light of day. Federal legislation would override the detrimental impact of *Concepcion* and *Italian Colors* and bring stability back to the arbitration system. Long gone are the days when contracts of adhesion were considered by the courts to be unconscionable and unenforceable, but by passing appropriate legislation, Congress can signal that the little guy will be at least given the opportunity to have his or her grievances heard.

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165. Press Release, Am. Assoc. for Justice, AAJ Statement on SCOTUS Decision in *American Express Co. v. Italian Colors Restaurant* (June 20, 2013), available at <http://www.justice.org/cps/rde/justice/hs.xsl/21293.htm>.

166. Meg Marco, *Microsoft Updates Service Agreement to Make It Easier to Read the New Mandatory Binding Arbitration Clause*, CONSUMERIST (Aug. 31, 2012), <http://consumerist.com/2012/08/31/microsoft-updates-service-agreement-to-make-it-easier-to-read-the-new-mandatory-binding-arbitration-clause>.

167. Jacob Gersham, *Have a Beef with Instagram? Civil Suit May Be Off Limits*, WALL ST. J.L. BLOG (Jan. 2, 2013, 5:06 PM), <http://blogs.wsj.com/law/2013/01/02/have-a-beef-with-instagram-a-civil-suit-might-be-off-limits/?cb=logged0.35796129144728184>.

168. *Forced Arbitration Rogues Gallery*, PUB. CITIZEN, <http://www.citizen.org/forced-arbitration-rogues-gallery> (last visited June 1, 2014).

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