

KILLING THEM WITH KINDNESS: EXAMINING
“CONSUMER-FRIENDLY” ARBITRATION
CLAUSES AFTER *AT&T MOBILITY*
V. *CONCEPCION*

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INTRODUCTION

In *AT&T Mobility v. Concepcion*, the Supreme Court struck California’s so-called “*Discover Bank* rule”—a judge-made rule providing that arbitration agreements attended by class action waivers are unenforceable if those agreements are contained in standard form consumer contracts.¹ The *Discover Bank* rule had been informed by a judicial suspicion that class waivers in adhesion contracts often prevent putative claimants from being able to vindicate their rights. But over time, the rule was applied more broadly and ceased to be limited to cases where the ability to vindicate rights was frustrated. The fact that the *Discover Bank* rule might save many claimants from forfeiting the ability to vindicate their rights—from seeing their claims “slip through the legal system”—presented no justification, in the view of the Scalia-led majority, for a prophylactic state rule that would label “unconscionable” all arbitration agreements in standard-form consumer contracts. Even if such an *ex ante* rule were “desirable for unrelated reasons,” the Court held, “States cannot require a procedure that is inconsistent with the FAA.”²

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1 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1748 (2011), *abrogating* *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

2 *Id.* at 1753.

As I and others have argued, *Concepcion* leaves open and unresolved the viability of a state law challenge to a bilateral arbitration clause which is shown, in a particular case, to impose a forfeiture of the claimant's ability to vindicate his state law rights.³ Reasonable people can dispute the implications that *Concepcion* holds for such challenges, whether they are couched in terms of a generally applicable state law doctrine against exculpatory contracts,⁴ or the vaguer and broader concept of "unconscionability." But the *Concepcion* majority certainly did not foreclose such challenges in any explicit fashion—indeed, the *Concepcion* Court expressly granted *certiorari* to consider whether states may condition the enforceability of an arbitration agreement on the availability of class-wide procedures "when those procedures are *not necessary* to ensure that the parties to the arbitration agreement are able to vindicate their claims."⁵

Meanwhile, in the context of federal claims, the Second Circuit in *Amex III*⁶ reaffirmed, in light of *Concepcion*, its earlier holdings that a class action waiver contained in an arbitration agreement is unenforceable if it is proven in the individual case that the arbitration clause at issue would force the claimant to shoulder such costs as would prevent the claimant from effectively vindicating its federal statutory rights.⁷ On both the state and federal levels, then, cost-based vindication of rights challenges remain a significant concern to corporate defendants looking to exculpate themselves from exposure to aggregate litigation.

All of this begs a question: will the robust recognition of cost-based, evidence-backed vindication of rights challenges swallow up the basic ruling of *Concepcion*, rendering unenforceable arbitration agreements and class action waivers that the Supreme Court has held are otherwise to be enforced?

3 See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) (discussing potential state law cases after *Concepcion*).

4 See, e.g., *Picardi v. Eighth Judicial District Court*, 251 P.3d 723, 725 (Nev. 2011) (noting plaintiffs' argument that "the class action waiver was exculpatory because, in cases . . . where the individualized claims are relatively small, it is almost impossible to secure legal representation unless those claims are aggregated with the claims of other similarly situated individuals").

5 Petition for a Writ of Certiorari at i, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 6617833 (emphasis added). In their petition, moreover, the Petitioners expressly distinguished *Amex* as "based on federal law, not state law," and as involving a "finding that the respondents could not vindicate their antitrust claims on an individual basis." *Id.* at 16 n.7.

6 *In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204 (2d Cir. 2012).

7 *Id.* at 206. *Amex's* unique procedural history is recounted *infra*, Part I.B.

Recently, in *Amex IV*,⁸ a divided Second Circuit refused to rehear *Amex III en banc*. In dissenting from the court’s decision, Chief Judge Jacobs flagged this very issue, complaining that the vindication of rights doctrine “can be used to challenge virtually every consumer arbitration agreement that contains a class action waiver”⁹ given the generally low per-plaintiff damages and significant expense of litigating most federal class actions.¹⁰ Such an expansive interpretation would, in Chief Judge Jacobs’s view, imply that class action waivers in cases asserting rights arising under most federal statutes are per se unenforceable, “permit[ing] plaintiffs to evade enforcement of class action . . . waivers simply by manufacturing an affidavit or choosing pricey attorneys.”¹¹ In the end, “every class counsel and every class representative who suffers small damages [could] avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff’s individual loss.”¹²

As this article goes to print, the Supreme Court has granted certiorari to review the *Amex* case.¹³ Nonetheless, Chief Judge Jacobs’s instrumentalist admonition that the vindication-of-rights “exception” will swallow the *Concepcion* “rule” is a useful launching-off point: I see three basic responses, to each of which I have applied labels that I will use throughout this article. First, a “*liberal pragmatist*” would say to Chief Judge Jacobs, “So what? If an arbitration agreement prevents the vindication of rights, it should fall. It makes no difference if the vindication of rights exception applies to save 5% of class filings or 90%.” (That said, one’s view on whether 5% or 90% is more likely will turn on how one treats attorneys’ fees and other recoupable cost items, as discussed below in Part II). What matters to the liberal pragmatist is whether claimants are deterred from vindicating their rights.

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

9 *Id.* at 143 (Jacobs, C.J., dissenting); see also *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048–49 (“If the *Concepcion* majority had intended to allow for the plaintiffs to avoid class-action waivers by offering evidence about particular costs of proof they would face—essentially applying the underlying rationale of *Discover Bank* without relying on *Discover Bank* as a ‘rule’—one would expect it to have drawn attention to such a significant point in response to the dissent.”).

10 See, e.g., Myriam Gilles, *Opting out of Liability*, 104 MICH. L. REV. 373, 407 (2005) (noting that the costs of experts, depositions, neutrals’ fees, and other disbursements in nearly any “complex commercial case, will exceed the value of the recovery [the claimant] is seeking”).

11 *Amex IV*, 681 F.3d at 142 (Pooler, J. concurring); see also *id.* at 143 (Jacobs, C.J., dissenting) (reflecting Chief Judge Jacobs’ view that the vindication-of-rights exception will swallow the *Concepcion* rule).

12 *Id.* at 144.

13 *American Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (Nov. 9, 2012).

A second response, which I will call “*practical formalism*,” would observe that the vindication of rights exception is narrower than meets the eye. Following *Concepcion*, bilateral arbitration clauses themselves are evolving to *permit* vindication of rights, by providing that companies will absorb otherwise non-recoupable costs and fees, and by posting “bounties,” premiums and other features discussed below in Part II.A. Justice Scalia’s majority opinion has ushered in a sort of “race to the top”—a development that should be cheered. The correct legal approach is a case-by-case evidentiary test as to whether the particular clause permits vindication in the particular case.

A third response, which I will call “*FAA absolutism*,” holds that there is no vindication of rights exception. Even where the enforcement of a bilateral arbitration clause can be shown to exculpate the defendant from wrongdoing or prevent the effective vindication of rights in a particular case, the clause is *per se* enforceable under the FAA. On this view, it is no defense to an arbitration clause that it snuffs out substantive claims. The FAA saving clause recognizes only defenses to the making of an arbitration agreement; any defense relating to the ability to vindicate rights is, on this view, a non-cognizable public policy-rooted defense.

And then, of course, there is the “*conservative instrumentalist*” approach that drives Judge Jacobs’s dissent. This view (as I see it) does not dispute the basic rule that arbitration agreements are enforceable only so long as they permit the effective vindication of federal rights. But this instrumentalism is driven by the concern a vindication “exception” will swallow the *Concepcion* “rule.”

The “liberal pragmatist” view is exemplified by my own prior writings and the First Circuit’s decision in *Kristian v. Comcast*, which focused on the real world effects that class action waivers have on lawyers and litigants.¹⁴ The “FAA absolutist” view finds its most perfect expression, I think, in Justice Thomas’s concurring opinion in *Concepcion*, which is quite explicit in its bases for rejecting the vindication of rights doctrine.¹⁵

But the view that I perceive as becoming dominant in the post-*Concepcion* world is “practical formalism,” under which most claimants seeking to make the vindication of rights showing are likely to fail, as consumer-friendly arbitration clauses proliferate across the corporate

14 *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006); *see also* Gilles, *supra* note 10 (exemplifying the “liberal pragmatist” view).

15 *AT&T Mobility v. LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (Thomas, J., concurring) (“As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.”).

landscape.¹⁶ Justice Scalia in *Concepcion* offered up the observation that the claimants in that case *could have* vindicated their rights under the bilateral arbitration clause at issue, principally because “the arbitration agreement provides that AT & T will pay claimants a minimum of \$7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT&T’s last settlement offer.”¹⁷ Since that time, numerous lower courts have rejected challenges to arbitration clauses and class action waivers based upon the observation that the clause at issue would in fact allow the vindication of rights—at least, when measured against the yardstick of *Concepcion*.¹⁸

The goal of this Article is to provide a snapshot of this particular moment in the development of federal arbitration jurisprudence, focusing on cost-based challenges to the explicit or implicit anti-aggregation feature of arbitration provisions in the post-*Concepcion* era. Part I charts the doctrinal bases for these challenges, which are cast in terms of either vindication-of-rights or substantive unconscionability. Part II seeks to verify my hunch that corporate transactional attorneys have taken a cue from the case law, developing bilateral arbitration agreements that appear designed to give judges comfort that the claimant will be able to vindicate its rights, thereby enabling courts to enforce those agreements as written, in conformity with the FAA. Here, I examine thirty-seven current arbitration clauses, confirming that many large and well-known consumer-oriented companies have over time incorporated “friendly” provisions to their arbitration clauses, such as offering to pay filing fees, providing for attorney and expert fee-shifting, and promising “bounty” or premium payments to claimants who achieve a better outcome in arbitration than the company’s last-best offer. This Part, in particular, is in freeze-frame, as I expect that companies will continue to make modifications to their arbitration clauses in response to litigation outcomes. Finally, Part III discusses the four basic post-*Concepcion* approaches to cost-based challenges: FAA absolutism, practical formalism, liberal pragmatism and conservative instrumentalism. As courts around the country take stock of consumer friendly arbitration clauses to determine the extent

16 See, e.g., *American Express v. Italian Colors Restaurant*, Respondents’ Brief in Opposition to Petition for a Writ of Certiorari, at 2 (noting “the ongoing evolution of arbitration agreements, which increasingly include pro-claimant features designed to facilitate the effective vindication of complex statutory claims”) (on file with the author).

17 *Id.* at 1753.

18 See *infra* text accompanying notes 47–62 (discussing post-*Concepcion* cases finding plaintiffs have failed to carry their evidentiary burden of showing the inability to vindicate rights under pro-consumer arbitration clauses).

to which they permit the effective vindication of rights, it is hard to deny that practical formalism has become the dominant strain in the law.

I. COST-BASED CHALLENGES TO INDIVIDUAL ARBITRATION IN THE WAKE OF *CONCEPCION*

Cost-based challenges assert that class action waivers embedded in an arbitration clause prohibit spreading financial outlays across multiple claimants in collective litigation, effectively precluding the individual plaintiff from being able to vindicate her federal statutory rights (under *Amex*) or her state common law or statutory rights (under post-*Concepcion* case law). Specifically, the waiver prevents multiple plaintiffs from sharing the “the costs of experts, depositions, neutrals’ fees, and other disbursements . . . forc[ing] the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims.”¹⁹ And these costs, in any complex federal or state claim, will always exceed the value of the recovery the claimant is seeking. When arbitration “proves too costly to pursue,” courts become amenable to hearing challenges rooted in cost-prohibitiveness.²⁰

A. *Vindication of Federal Statutory Claims*

Up until the 1980s, there was substantial uncertainty regarding the applicability of the FAA to federal statutory claims.²¹ In 1984, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, made clear that the FAA does apply to such claims so long as the arbitration procedure at issue in the particular case allows for the effective vindication of federal statutory rights.²² There, an American manufacturer alleging Sherman Act violations against a Japanese supplier sought to avoid an arbitration clause, arguing it not be forced into international arbitra-

19 Gilles, *supra* note 10, at 407 (citation omitted) (“In the absence of the waiver, the claimant may spread these costs across thousands of coventurers (or have them advanced by lawyers, as happens in practice). In the presence of the waiver, these costs fall on her alone.”).

20 Amalia D. Kessler, Op-Ed., *Stuck in Arbitration*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/07/opinion/stuck-in-arbitration.html>.

21 See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (finding claims brought under the Securities Exchange Act of 1934 fully arbitrable); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .”).

22 473 U.S. 614 (1985).

tion because, it assumed, an international arbitrator would apply the law so as to deny plaintiff its rights under American antitrust claims.²³ The Supreme Court rejected this blanket assumption, explaining that “so long as the prospective litigant effectively may vindicate its statutory cause of action . . . the [FAA] will continue to serve both its remedial and deterrent function.”²⁴ But the Court also warned that if plaintiff’s fears were realized and the arbitrator construed the underlying agreement or applicable law in a way that “operated . . . as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”²⁵

Mitsubishi was followed six years later by *Gilmer v. Interstate/Johnson Lane Corp.*, where the Court upheld an employment contract requiring plaintiff to arbitrate his claim under the Age Discrimination in Employment Act.²⁶ *Gilmer* dealt with one issue only: a broadside allegation that Congress did not intend to authorize arbitration of ADEA claims. In support of his allegation, plaintiff pointed to indicia including the (alleged) unavailability of class procedures and equitable relief in arbitration. But the *Gilmer* case itself was not a class action,²⁷ and the plaintiff did not claim that arbitration actually precluded his ability to vindicate his rights under the ADEA. Rejecting plaintiff’s argument, the Court held that a clear statement of Congressional intent is required to establish that claims under a federal statute are categorically inarbitrable.²⁸

Finally, in *Green Tree Financial Corp. v. Randolph*, the Court considered a consumer’s argument that an arbitration agreement was unenforceable where the cost of arbitration would leave her unable to effectively vindicate her claims under the federal Truth in Lending Act and Equal Credit Opportunity Act.²⁹ Recognizing the viability of

23 *Id.* at 624–25.

24 *Id.* at 637.

25 *Id.* at 637 n.19 (“[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”); *see also* *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (quoting *Mitsubishi* and making clear the Court would have stricken the challenged arbitration clause if the plaintiff had succeeded in showing the arbitral forum and choice of law clauses served to prevent it from vindicating its rights).

26 500 U.S. 20, 23 (1991).

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

28 *Id.* at 29.

29 *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 83 (2000). The specific question granted review was “whether an arbitration agreement that does not mention

plaintiff's argument under *Mitsubishi*, the Court held: "It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."³⁰ The Court then established a simple case-by-case framework for determining challenges to arbitration agreements based upon a prohibitive costs/vindication of rights rationale, the Court held: "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."³¹

From *Mitsubishi*, *Gilmer*, and *Green Tree* sprang numerous lower court decisions considering the vindication-of-statutory-rights defense to arbitration clauses containing class action waivers.³² Lower courts have been uniform in their recognition of the *Green Tree* test. As then-Circuit Judge John Roberts held, a party may "resist[] arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights," but that party "bears the burden of showing the likelihood of such interference," which "cannot be carried by 'mere speculation.'"³³ More often than not, in

arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Id.* at 82.

30 *Id.* at 90. In *Green Tree*, the Court found that the consumer had not carried her burden to prove the costs of arbitration were prohibitive. *Id.* at 90–91 ("[T]he record does not show that [the consumer in this case] will bear such costs if she goes to arbitration. . . . The 'risk' that [the consumer] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.").

31 *Id.* at 92. More recently, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009), the Court recognized that arbitration agreements may not prevent claimants "from effectively vindicating their federal statutory rights in the arbitral forum."

32 For the most part, lower federal courts have understood these cases to rest on the supposition that the arbitral forum adequately protects litigants' ability to resolve their statutory claims. But "[t]his supposition[] falls apart . . . if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights." *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999); *see also* *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld . . ."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (quoting *Gilmer*, 500 U.S. at 26) (internal quotation marks omitted)).

33 *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005); *see also* *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003) (noting that a party seeking to invalidate an arbitration agreement due to prohibitive expense bears the burden of proving that likelihood); *Musnick v. King Motor Co of Fort Lauderdale*, 325 F.3d 1255, 1259–60 (11th Cir. 2003) (holding also that a party seeking to invalidate an arbitration agreement due to prohibitive expense bears the burden of prov-

applying the *Green Tree* test, lower courts have found that the plaintiff has failed to provide sufficient proof of prohibitive costs.³⁴

B. Amex I–IV

Over the years, a number of courts have had occasion to consider the *Green Tree* test in the context of a challenge to a class action waiver,³⁵ where plaintiffs allege that the inability to bring a claim col-

ing); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556–57 (4th Cir. 2001) (holding also that a party seeking to invalidate an arbitration agreement due to prohibitive expense bears the burden of proving); *Delta Funding Corp. v. Harris*, 912 A.2d 104, 112–13 (N.J. 2006) (holding also that a party seeking to invalidate an arbitration agreement due to prohibitive expense bears the burden of proving).

34 See, e.g., *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 780 (10th Cir. 2010) (quoting *Green Tree*'s discussion of the burden to demonstrate prohibitive costs and explaining that the plaintiffs had not met their burden); *Cicle v. Chase Bank USA*, 583 F.3d 549, 556–57 (8th Cir. 2009) (citing the *Green Tree* standard but holding that the record did not support a finding of economically prohibitive costs); *Mazera v. Varsity Ford Mgmt. Servs., LLC*, 565 F.3d 997, 1003 (6th Cir. 2009) (explaining that, to determine whether a cost-splitting provision in an arbitration agreement is enforceable, courts must conduct “a case-by-case inquiry into whether the potential costs of arbitration are great enough to deter potential litigants and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum” (internal quotation marks and alteration omitted)); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (noting that a party that can “demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive” and invalidate the agreement, but that plaintiffs failed to do so); *James v. McDonald's Corp.*, 417 F.3d 672, 679 (7th Cir. 2005) (explaining that it was unclear whether *Green Tree*, which applied to federal statutory claims, extended to common-law or state-law claims, but that even if it did, the party opposing arbitration had not shown that “that the expenses she necessarily and definitely would incur would make arbitration prohibitive”); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (“Tellingly, [plaintiffs'] only ‘evidence’ of prohibitive arbitration costs is an unsubstantiated and vague assertion that discovery in an unrelated arbitration matter disclosed fees of nearly \$2,000 per day.”); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (“[Plaintiff] does not even provide any evidence about the most basic element of this challenge: the size of the allegedly ‘prohibitive’ arbitration fee itself.”); *Bonanno v. Quizno's Franchise Co., LLC*, No. 06-cv-02358-CMA-KLM, 2009 WL 1068744, at *15 (D. Colo. Apr. 20, 2009) (enforcing contract clause barring class actions where plaintiffs failed to demonstrate they would incur excessively high costs in proceeding individually); *Ornelas v. Sonic-Denver T, Inc.*, No. 06-cv-00253-PSF-MJW, 2007 WL 274738, at *6 (D. Colo. Jan. 29, 2007) (refusing to strike class arbitration waiver because the evidence did not demonstrate the costs of pursuing arbitration would effectively “preclude the plaintiff from pursuing his claims”).

35 See, e.g., *Cotton Yarn*, 50 F.3d at 285 (“[W]e have acknowledged that if a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement. . . .”); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223–24 (11th Cir. 2007) (citing *Kristian v. Comcast*

lectively thwarts the vindication of rights. The primary case in this connection is *In re American Express Merchants Litigation*. In *Amex*, class action plaintiffs alleging a complex antitrust violation submitted undisputed evidence that the median pre-trebling value of each plaintiff's claim was \$1,751, while the non-recoupable costs required to vindicate each such claim was at least several hundred thousand dollars.³⁶ Under American Express's arbitration clause, with its embedded class action waiver, plaintiffs argued that they could not "effectively . . . vindicate [their] statutory cause of action in the arbitral forum."³⁷

Finding that American Express had presented "no serious challenge" to the plaintiffs' cost-based evidence, the Second Circuit in *Amex I* found that the merchants had carried their burden of proving that the arbitration agreement's class action waiver, "by removing plaintiffs' only reasonably feasible means of recovery," effectively "grant[ed] Amex de facto immunity from [federal] antitrust liability."³⁸ In striking down the arbitration clause, the court stressed the significant outlay of expert fees—estimated at over \$1 million³⁹—and the fact that such fees are not recoupable by successful litigants under the cost-shifting provisions applicable in either court or arbitration.⁴⁰ The same panel (minus Judge Sotomayor, since elevated to the

Corp., 446 F.3d 25, 54, 58, 61 1st Cir. 2006); *Kristian*, 446 F.3d at 54 (noting that expert and attorney's fees dwarf each putative class member's expected recovery).

36 *In re Am. Express Merchs.' Litig. (Amex I)*, 554 F.3d 300, 317 (2d Cir. 2009) (describing the expert report of economist Dr. Gary French, who concluded that "it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed \$1 million").

37 *Id.* at 319 (internal quotation marks omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

38 *Id.* at 320. *See id.* at 315 ("[W]hen '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.'" (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000))); *see also infra* notes 155–157 and accompanying text (discussing the closely related concepts of vindication of rights and exculpatory contracts as twin defenses to contract enforcement).

39 *Amex I*, 554 F.3d at 316 (quoting Dr. Gary French, plaintiffs' economic expert, as stating that "due to the complexity and analytic intensity of an antitrust study, total expert fees and expenses usually are substantial [A] larger study can easily exceed \$1 million.>").

40 *Id.* at 318 (noting that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b) . . ." which sets expert fees at forty dollars per diem (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987)) (internal quotations omitted)).

Supreme Court) reiterated this view two years later in *Amex II*,⁴¹ writing that “the record evidence before us establishes, as a matter of law, that the cost of plaintiffs’ individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.”⁴²

On February 1, 2012, the Second Circuit issued its third opinion in the case, finding *Concepcion*’s preemption analysis inapplicable to a challenge that the arbitration provision prevented the effective vindication of federal claims.⁴³ In the words of Judge Pooler, concurring in the denial of rehearing en banc in *Amex IV*, the “analysis in *Amex III* rests squarely on a vindication of statutory rights analysis—an issue untouched in *Concepcion*.”⁴⁴ And finally, on May 29, 2012, the defendant’s motion for en banc review was denied by a sharply divided Sec-

41 *In re Am. Express Merchs.’ Litig. (Amex II)*, 634 F.3d 187 (2nd Cir. 2011). After *Amex I* was decided, the Supreme Court decided *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 130 S. Ct. 1758 (2010), holding that where an arbitration clause is silent on the availability of class arbitration, the agreement cannot be construed to provide for aggregate procedures. *Id.* at 1773–75. The Court then granted *certiorari* in *Amex I*, vacating the judgment, and remanding the case to the Second Circuit for further consideration in light of the *Stolt-Nielsen* decision. *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (memorandum opinion).

42 *Amex II*, 634 F.3d at 197–98. Specifically, the court held that *Stolt-Nielsen* did not require a different result: “*Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* enforceable.” *Id.* at 193. Rather, the issue in *Amex I* was “whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations.” *Id.* at 194.

43 *In re Am. Express Merchs.’ Litig. (Amex III)*, 667 F.3d 204 (2d Cir. 2012). The Supreme Court’s decision in *Concepcion* was issued shortly after *Amex II* was published, but before the mandate issued. The Second Circuit panel therefore held the mandate and sua sponte solicited briefing on the impact of *Concepcion* before issuing its third opinion.

44 *In re Am. Express Merchs.’ Litig. (Amex IV)*, 681 F.3d 139, 139 (2d Cir. 2012). In addition, in *Amex III* the Second Circuit addressed the question of whether the Supreme Court’s decision in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) had any application to the *Amex I* and *II*. *Amex III*, 667 F.3d at 213 n.5. In *CompuCredit*, the Supreme Court held that an arbitration agreement could be enforced in a case involving claims under the federal Credit Repair Organizations Act (CROA), because the CROA is silent on whether arbitration is permissible. *Id.* The Second Circuit found that proof of Congressional intent need not be explicit:

Although the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute.

Id.

ond Circuit.⁴⁵ On July 30, 2012, American Express filed a petition for *certiorari* with the United States Supreme Court, and in November 2012, the Court granted review.⁴⁶

C. Lower Court Treatment Of Cost-Based Challenges

Many challenges to arbitration agreements following *Concepcion* have come to focus on the imposition of allegedly prohibitive costs.⁴⁷ Whether those challenges are couched in terms of an *Amex/Green Tree* type of argument, or in terms of substantive unconscionability law,⁴⁸

45 *Amex IV*, 681 F.2d 139. Note that while the Second Circuit is the only Circuit to have directly addressed this issue after *Concepcion*, other Circuits previously had permitted plaintiffs to challenge class action waivers as cost-prohibitive. See, e.g., *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223–24 (11th Cir. 2007) (holding arbitration agreements unenforceable in a putative class action under federal Cable Communications Policy Act); *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 an agreement.” (citing *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502–03 (4th Cir. 2002))); *Kristian v. Comcast Corp.*, 446 F.3d 25, 64 (1st Cir. 2006) (concluding that an arbitration agreement which placed significant limitations on treble damages, attorney’s fees and costs, and aggregate procedures otherwise available under federal law “would prevent the vindication of statutory rights” and thus could not be enforced in an antitrust action against cable company under state and federal law); *Morrison v. Circuit City Stores*, 317 F.3d 646, 663 (6th Cir. 2003) (en banc) (holding “that potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum”).

46 *American Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (Nov. 9, 2012). Arguments are scheduled for Feb. 27, 2013, just as this article goes to print.

47 See, e.g., *Gordon v. Branch Banking and Trust*, 419 F. App’x 920, 926 (11th Cir. 2011) (holding class action waiver unconscionable under Georgia law because of a lack of a contractual fee-shifting feature), *vacated and remanded* 132 S. Ct. 577; *Antonelli v. Finish Line, Inc.*, No. 5:11-cv-03874 EJD, 2012 WL 525538, at *5 (N.D. Cal. Feb. 16, 2012) (finding substantive unconscionability where plaintiff-employees face greater costs by undergoing compelled arbitration than by litigating); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499–500 (Cal. Ct. App. 2012) (“The Agreement also requires plaintiffs to pay any attorneys’ fees incurred by Empire, but imposes no reciprocal obligation on Empire. Again, such a clause contributes to a finding of unconscionability.”).

48 The Supreme Court left the door ajar for unconscionability analysis in *Concepcion*:

Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

most trial courts have found that the claimant’s asserted costs do not in fact prevent the effective vindication of rights, for a variety of reasons. Some courts have carefully weighed the putative expense imposed by the arbitration clause against the claimed damages. For example, in *Ranieri v. Citigroup Inc.*, plaintiffs alleging violations of the Fair Labor Standards Act (FLSA) challenged an arbitration clause in their employment contracts, asserting that the inability to pursue collective litigation would effectively prevent them from pursuing their claims under the statute.⁴⁹ Judge Sweet computed the plaintiffs’ claimed damages over the relevant statutory period and found them significant enough that it would be “neither lunacy nor fanaticism for either plaintiff, or her counsel, to pursue her claim individually.”⁵⁰

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 n.6. (2011); *see also* Marmet Health Care Center v. Brown, 132 S. Ct. 1201, 1204 (2012) (reversing a state court’s public policy-based rationale for striking down arbitration clauses in nursing home agreements as the type of “categorical rule” prohibited by *Concepcion*, but remanded the case for consideration of whether the arbitration clauses at issue are nonetheless “unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA”). Since then, a number of courts have recognized that the unconscionability defense remains available. *See, e.g.*, Kilgore v. Keybank, 673 F.3d 947, 963 (9th Cir. 2012) (“*Concepcion* did not overthrow the common law contract defense of unconscionability whenever an arbitration agreement is involved.”); *In re* DirectTV Early Cancellation Fee Mktg. & Sales Practice Litig., 810 F. Supp. 2d 1060, 1068 (C.D. Cal. 2011) (“As *Concepcion* made clear, the savings clause of the FAA still ‘permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability’” (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011))); Hamby v. Power Toyota Irvine, 798 F. Supp. 2d 1163, 1165 (S.D. Cal. 2011) (concluding that the decision in *Concepcion* “does not stand for the proposition that a party can never oppose arbitration on the ground that the arbitration clause is unconscionable”).

49 827 F.Supp.2d 294 (S.D.N.Y. 2011). Note also that employees cannot release their substantive rights under the FLSA by private agreement. *See* Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 (1945) (“No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act.”); *see also* Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 401 (2d Cir. 1989) (“[P]rivate waiver of claims under the [FLSA] has been precluded by . . . Supreme Court decisions . . .”).

50 *Ranieri*, 827 F. Supp. at 317. Specifically, Judge Sweet estimated plaintiff Boden’s potential recovery at somewhere between \$84,875–\$350,000 and plaintiff Ranieri’s damages at \$149,750 or \$617,500, each potentially doubled, as well as increased, by state the limitations period depending on the method used to calculate damages. *Id.* at 315–16; *see also* Coiro v. Wachovia Bank, N.A., Civ. No. 11–3597, 2012 WL 628514, at *6 (D.N.J. Feb. 27, 2012) (“After considering the evidence presented to it, the Court is not convinced that Plaintiff has met her burden in demonstrating that enforcement of the class-action waiver would effectively preclude any action seeking to vindicate proposed class members’ legal rights.”); Emilio v. Sprint Spectrum L.P., No. 11 Civ. 3041(BSJ), 2012 WL 917535, at *4 (S.D.N.Y. Mar. 16, 2012) (“Peti-

The court applied an objective standard, rejecting as “beside the point” plaintiff’s counsel’s declaration that “he would be unwilling to take these cases on an individual basis.”⁵¹

Other courts have relied upon the availability of a statutory fee- or cost-shifting provision as evidence that plaintiff is fully capable of vindicating her rights because any financial outlays will be recouped upon success. In *LaVoice v. UBS Financial Services, Inc.*, for example, a plaintiff asserting a vindication-of-rights challenge presented evidence that the damages sought on his FLSA claim totaled about \$130,000, while the costs of individually arbitrating this claim would likely be 2–3 times higher.⁵² But because the FLSA awards the prevailing party reasonable attorneys’ fees and costs,⁵³ the court rejected the vindication-of-rights challenge and asserted that the plaintiff could easily arbitrate his claim under the statute and seek to hold the defendant accountable.⁵⁴ In another FLSA case, *D’Antuono v. Service Road Corp.*, the question before the court was “whether it is economically feasible for Plaintiffs to proceed in individual arbitrations, rather than a collective or class action in federal court”⁵⁵ In answering this question, the court focused solely on cost- and fee-shifting: where “each Plaintiff’s potential recovery is at least \$20,000—including double damages under the FLSA—*plus* costs and attorney fees,” the plaintiff

tioner has not demonstrated that any of his statutory rights would be precluded through the Court’s enforcement of the class action preclusion provision”).

51 *Raniere*, 827 F.Supp. at 317 n.18.

52 *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308(BSJ)(JLC), 2012 WL 124590, at *7–8 (S.D.N.Y. Jan. 13, 2012). Specifically, the court found the arbitration agreements at issue permitted plaintiff to recover attorneys’ fees if successful, and that estimated expert costs were speculative because plaintiff conceded he might not employ an expert. *Id.* The *LaVoice* court ultimately found the evidence of costs “too speculative to justify the invalidation of an arbitration agreement.” *Id.* at *8 (citing *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 91 (2000)).

53 29 U.S.C. § 216(b) (2006) (“The court in such action shall . . . allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”).

54 *Lavoice*, 2012 WL at *7 (“[T]he practical effect of enforcement of the waiver’ . . . would not ‘preclude’ *LaVoice* from exercising his rights” (citing *Amex II*, 634 F.3d 187, 199 (2nd Cir. 2011)); see also *Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318, at *2 (W.D. Wisc. Mar. 16, 2012) (“[P]laintiff says that she cannot afford the cost of arbitration, which she estimates at \$14,000. Although she acknowledges that the arbitration agreement allows her to recover these expenses if she prevails, she says she cannot take that risk. Even if I assume that a fee shifting provision might not provide adequate protection in some circumstances, plaintiff’s argument founders because she failed to conduct any comparison of the costs of litigating in federal court.”).

55 789 F. Supp. 2d 308, 342 (D. Conn. 2011).

cannot show that arbitration is cost-prohibitive.⁵⁶ A number of courts have similarly interpreted the statutory fee-shifting provided in the FLSA to undercut any vindication-of-rights challenge.⁵⁷ And other courts have applied similar interpretations to uphold arbitration clauses in numerous contexts in this post-*Concepcion*, post-*Amex* period.⁵⁸

56 *Id.* at 343 (emphasis in original).

57 *See, e.g.*, *Winn v. Tenet Healthcare Corp.*, No. 2:10-cv-02140-JPM-cgc, 2011 WL 294407, at *10 (W.D. Tenn. Jan. 27, 2011) (rejecting vindication-of-rights defense where arbitration provided for “all of the remedies available under the FLSA, including the award of attorney’s fees to the prevailing party,” and making clear that “[p]laintiff is not prevented from obtaining competent legal representation nor disincentivized from pursuing her FLSA claims”).

58 *See, e.g.*, *Gordon v. Branch Banking and Trust*, 419 F. App’x 920, 926 (11th Cir. 2011) (holding class action waiver unconscionable under Georgia law because of a lack of a contractual fee-shifting feature); *Antonelli v. Finish Line, Inc.*, No. 5:11-cv-03874 EJD, 2012 WL 525538, at *5 (N.D. Cal. Feb. 16, 2012) (“The Ninth Circuit has held that an arbitration cost provision which places complaining employees at risk of incurring greater costs than they would bear if they were to litigate their claims in court is substantively unconscionable. Such is the problem here.” (internal citation omitted)); *Khan v. Orkin Exterminating Co.*, No. C 10-02156 SBA, 2011 WL 4853365, at *4 (N.D. Cal. Oct. 13, 2011) (holding that where plaintiff is “seeking to establish that it is too costly for him to pursue consumer protection claims on an individual as opposed to a class basis, the Court notes that post-*Concepcion* decisions have rejected the cost of litigation as a basis for invalidating a class action waiver”); *Tory v. First Premier Bank*, No. 10 C 7326, 2011 WL 4478437, at *4 (N.D. Ill. Sept. 26, 2011) (“*Concepcion* moots any argument on the cost benefits to the plaintiff of a class action versus an individual arbitration.”); *Black v. JP Morgan Chase*, Civil Action No. 10-848, 2011 WL 3940236, at *21 (W.D. Pa. Aug. 25, 2011) (finding that plaintiff’s “ability to recover attorneys’ fees under the Sherman Act ‘help[s] to preserve an individual’s ability to pursue claims, even in those situations where the class forum has been foreclosed’” and that “where, as in this case, the claim involves an alleged violation of federal antitrust laws, the ability to recover treble damages increases the value of the claim, thus making it more attractive and one that is likely to be pursued on an individual basis” (internal citations omitted)); *Saincome v. Truly Nolen of Am., Inc.*, No. 11-CV-825-JM (BGS), 2011 WL 3420604, at *12 (S.D. Cal. Aug. 3, 2011) (explaining FLSA “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 arbitrator’s ability to properly oversee a class arbitration”); *In re Apple and AT&T iPad Unlimited Data Plan Litig.*, No. C-10-02553 RMW, 2011 WL 2886407, at *3 (N.D. Cal. July 19, 2011) (“Plaintiffs contention that their modest claims ‘simply do not provide sufficient motivation for an aggrieved customer to seek redress’ on an individual basis is the very argument that was struck down in *Concepcion*.” (internal citation omitted)); *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (finding that *Concepcion* forecloses argument that an arbitration agreement is void because small claims might be prohibitively expensive to pursue on an individual basis).

Other post-*Concepcion* courts, typified by the Ninth Circuit's decision in *Coneff v. AT&T Corp.*,⁵⁹ have rejected plaintiffs' assertions that the class action waiver embedded in the arbitration clause removes the incentive to bring statutory claims.⁶⁰ To these courts, the question of incentive is beside the point: for consumers with small-value claims, "the concern is not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so."⁶¹ Where, as in *Coneff*, the consumer friendly features of the arbitration clause ensures that the claimant *could* vindicate its rights, the issue is closed. It should be noted that the *Coneff* court took issue with the decision in *Amex III*.⁶²

Still other courts, by contrast, have found that plaintiffs have met their burden of showing cost-prohibitiveness. In *Sutherland v. Ernst & Young LLP*, for example, plaintiff asserting nonpayment of overtime charges argued that the class action waiver in her employment contract would prevent her from maintaining a viable statutory claim.⁶³ Because plaintiff could only expect to recover \$3,800, for which she would need to spend over \$200,000,⁶⁴ Judge Kimba Wood found she had "'substantial[ly] demonstrate[ed] that an inability to prosecute her claims on a class basis 'would be tantamount to an inability to assert [her] claims at all.'"⁶⁵ Most recently, in *In re Electronic Books*

59 673 F.3d 1155 (9th Cir. 2012).

60 *Id.* at 1158–59 ("We do not read *Concepcion* to be inconsistent with *Green Tree* and similar cases. Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that premise." (footnote omitted)).

61 *Id.* at 1159 (noting that this was the point made by Justice Breyer in dissent in *Concepcion* as the primary policy rationale for class actions).

62 The *Coneff* Court stated that "to the extent the Second Circuit's opinion is not distinguishable, we disagree with it . . ." *Id.* at 1159 n.3 (citing *Amex III*, 667 F.3d 204, 218 (2d Cir. 2012)). The panel based its "disagreement" on its reading of an Eleventh Circuit case, *Cruz v. Cingular Wireless*, 648 F.3d 1205 (11th Cir. 2011). *Id.* at 1160. But the *Cruz* Court specifically found that it "need not reach the question of whether *Concepcion* leaves open the possibility that in some cases, an arbitration agreement may be invalidated on public policy grounds where it effectively prevents the claimant from vindicating her statutory causes of action." *Cruz*, 648 F.3d at 1215. Despite this footnote, the *Coneff* panel expressly recognized the vindication-of-rights theory and further held that the theory survives *Concepcion*.

63 768 F.Supp.2d 547 (S.D.N.Y. 2011).

64 *Id.* at 551–52. Specifically, plaintiff presented evidence that the cost of arbitration would exceed \$6,000, that plaintiff's attorney's fees would exceed \$160,000, and that plaintiff's expert witness fees would likely exceed \$33,500.

65 *Id.* at 553 (quoting *Amex I*, 554 F.3d 300, 302–303 (2d Cir. 2009)). Judge Wood also noted that, even if the plaintiff were somehow willing and able to pay \$200,000 to recover a few thousand dollars, she could never get a lawyer to take her case, as no

Antitrust Litig., plaintiffs’ uncontested evidence in support of their vindication-of-rights challenge included:

[D]etailed affidavits demonstrating that, given the complexities of proving this particular antitrust violation, plaintiffs can expect at most a median recovery of \$540 in treble damages, and face several hundred thousand dollars to millions of dollars in expert expenses alone. Plaintiffs have also demonstrated that they are likely to incur significant expenses in securing, organizing, and maintaining documents, deposing witnesses, and in attorneys’ fees, and that they face no guarantee of recovering any or all of these expenses. Plaintiffs have *already* expended \$45,000 in expert expenses evaluating the claims and drafting the complaint. Plaintiffs’ affidavits demonstrate that it would be economically irrational for any plaintiff to pursue his or her claims through an individual arbitration.⁶⁶

This cost-based evidence was sufficient for the district court to find the arbitration agreements invalid, “because the plaintiffs have established that the agreements would prevent them from effectively vindicating their rights under the Sherman Act.”⁶⁷

Another line of post-*Concepcion* cases have applied state unconscionability principles to attack arbitration clauses on cost-prohibitiveness grounds. For example, in *Sanchez v. Valencia Holding Co., LLC*, the arbitration provision contained an appeals clause requiring the party requesting a new hearing to “be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs.”⁶⁸ The court found this appeal clause unconscionable because it forces the “appealing party [to] bear the arbitral expenses for *both* parties in advance.”⁶⁹ Inevitably blurring the thin line between vindication-of-rights and unconscionability defenses, the *Sanchez* court concluded that the possibility the claimant might have to “advance unaffordable expenses . . . discour-

lawyer would “advance the required costs where the [arbitration] Agreement’s fee-shifting provisions present little possibility of being made whole.” *Id.*

66 No. 11 MD 2293(DLC), 2012 WL 2478462, at *3 (S.D.N.Y. June 27, 2012) (noting that “[t]his case falls squarely within the ambit of the Second Circuit’s recent opinion in *Amex III*.”).

67 *Id.*

68 135 Cal. Rptr. 3d 19, 25 (2011) (emphasis removed).

69 *Id.* The court also found that the “reallocation between the parties at the end of the proceeding . . . is inadequate.” *Id.* (citing *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 278 (Cal. Ct. App. 2003) (“[That] possibility . . . provides little comfort to consumers . . . who cannot afford to initiate the [appeal] process in the first place.”)).

ages buyers from pursuing an appeal and enforcing their rights under” the state statute.⁷⁰

In a similar vein, a Missouri plaintiff seeking to void an arbitration clause that required the parties to bear their own costs and allowed the defendant to seek attorneys’ fees if successful presented expert testimony from three consumer lawyers who testified it was unlikely that she could retain counsel to pursue her individual claim in arbitration because it “would not be financially viable for an attorney [due to] the complicated nature of the case and the small damages at issue.”⁷¹ The Supreme Court of Missouri in *Brewer v. Missouri Title Loans* agreed, finding the clause unconscionable because such terms “stand[] as a substantial obstacle . . . to the resolution of any consumer disputes against the title company.”⁷² Many state and federal courts—particularly in California⁷³—have likewise applied case-by-case cost-based analyses to strike down arbitration clauses following *Concepcion*.⁷⁴

70 *Id.*

71 *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 494 (Mo. 2012) (“Even if some attorneys may take some cases because of the potential availability of fees under the merchandising practices act, this does not prove that Brewer would have the benefit of counsel in attempting to obtain a remedy on an individual basis.”). The court found this more compelling than the defendant’s assertion that the availability of attorneys’ fees and punitive damages under the state merchandising act would incentivize lawyers to represent individuals in arbitration. *Id.*; see also *Smith v. Americredit Fin. Servs., Inc.*, No. 09-cv-1076-DMS(BLM), 2012 WL 834784 (S.D. Cal. Mar. 12, 2012) (following the reasoning of the court in *Sanchez* which held that the appeal clause was unconscionable because it forced the appealing party to bear the arbitral expenses for both parties in advance).

72 *Brewer*, 364 S.W.3d at 493.

73 As one California district court noted: “Undoubtedly, *Concepcion* has had some effect [on] class action waivers in other states; however, its most profound effect—or, at least, its most clearly identifiable and immediately anticipated effect—has been on class action waivers in California, as it expressly repudiated California’s *Discover Bank* rule.” *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967, 978 (C.D. Cal. 2012).

74 See, e.g., *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 796–800 (Cal. Ct. App. 2012) (finding “substantial evidence” of unconscionability in an arbitration clause wherein plaintiff was required to bear the “the excessive costs she would incur in arbitrating before a three-judge panel in New York” and face an obligation to pay the defendant’s attorneys’ fees if she lost in arbitration, “without granting her the right to recoup her own attorney fees if she prevails”); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499–502 (Cal. Ct. App. 2012) (holding that an arbitration clause that requires plaintiff to pay any attorneys’ fees incurred by the employer, but imposing no reciprocal obligation, is unconscionable); *Trompeter v. Ally Fin., Inc.*, No. C-12-00391-CW, 2012 WL 1980894, *8 (N.D. Cal. June 1, 2012) (“*Concepcion* does not preclude this Court’s finding that the arbitration agreement in the present case is

At this early juncture, it is hard to make meaningful generalizations about lower courts’ treatment of cost-based challenges following *Concepcion*. To be sure, a subset of courts has held that *Concepcion* flatly forecloses any cost-based challenge.⁷⁵ But most courts have at

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.”); *Smith v. Americredit Fin. Servs. Inc.*, No. 09-cv-1076-DMS(BLM), 2012 WL 834784 (S.D. Cal. Mar. 12, 2012); *Rosendahl v. Bridgepoint Educ., Inc.*, No. 11-cv-61-GH(WVG), 2012 WL 667049, *9 (S.D. Cal. Feb. 28, 2012) (“The parties shall bear their own costs and expenses. The parties also shall bear an equal share of the fees and costs of the arbitration . . . unless the parties otherwise agree”); *Newton v. Am. Debt Servs., Inc.*, No. C-11-3228 EMC, 2012 WL 581318, *15 (N.D. Cal. Feb. 22, 2012) (striking down arbitration provision containing multiple unconscionable elements, which “evinced a systematic attempt by Defendants . . . to gain an unfair advantage over their customers by remitting disputes to an inferior forum”); *Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940 MEJ, 2012 WL 370557 (N.D. Cal. Jan. 31, 2012); *Hamby v. Power Toyota Irvine*, 798 F. Supp. 2d 1163 (S.D. Cal. 2011); *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.*, 128 Cal. Rptr. 3d 330, 339 n.4 (Cal. Ct. App. 2011); *Palmer v. Infosys Techs. Ltd., Inc.*, 832 F. Supp. 2d 1341, 1346–7 (M.D. Ala. 2011) (“While the *Concepcion* Court expressed concern about arbitration morphing into a set of formalized, class-based procedures, this arbitration agreement is unconscionable . . . because of its lack of mutuality as to the availability of arbitration and the types of claims that may proceed to a judicial forum.”); *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices, & Prods. Liab. Litig.*, 828 F. Supp. 2d 1150, 1163 n.7 (C.D. Cal. 2011) (denying a motion to compel arbitration and finding it “uncertain whether *Concepcion* would even apply to this instant action,” as it does not concern “a dispute involving small sums of money, but . . . damages related to expensive cars worth thousands of dollars”).

⁷⁵ See, e.g., *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011) (finding that “[i]nsofar as Florida law would invalidate [class action waivers] as contrary to public policy . . . such a state law would ‘stand[] as an obstacle to the accomplishment and execution’ of the FAA, and thus be preempted” under *Concepcion*) (internal citations omitted); *Simpson v. Pulte Home Corp.*, No. C-115376-SBA, 2012 WL 1604840, *5 (N.D. Cal. May 7, 2012) (“In view of *Concepcion* and its progeny, the Court is not persuaded by Plaintiffs’ contention that the class action waiver is substantively unconscionable.”); *Alvarez v. T-Mobile USA, Inc.*, No. CIV.2:10-2373-WBS-GGH, 2011 WL 6702424, *7 (E.D. Cal. Dec. 21, 2011) (refusing to consider public policy-based arguments against enforcement of class action waiver because “those arguments are not viable post-*Concepcion* [as] state laws advancing those policies are preempted by the FAA”) (internal citations omitted); *In re California Title Ins. Antitrust Litig.*, No. 08-01341-JSW, 2011 WL 2566449, at **2–3 (N.D. Cal. June 27, 2011); *Clemins v. Alliance Data Sys. Corp.*, No. 11-C-36 (E.D. Wisc. Oct. 12, 2011) (applying *Concepcion* and enforcing class action waiver in credit card agreement); *Chavez v. Bank of Am.*, No. C-10-653-JCS, 2011 WL 4712204 (N.D. Cal. Oct. 7, 2011); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048-9 (N.D. Cal. 2011) (declaring that the vindication-of-right doctrine has no viability after *Concepcion*, at least insofar as class action waivers

least engaged the question of whether plaintiffs *could* vindicate their rights under the arbitration clause at issue. Towards those ends, one would expect corporate defendants to generate dispute resolution clauses that are designed to provide courts with comfort that the elimination of aggregate procedures will not serve to prevent the vindication of rights.

II. “CONSUMER-FRIENDLY” ARBITRATION CLAUSES

Given the lavish praise the Supreme Court heaped on AT&T’s consumer-friendly arbitration agreement in the *Concepcion* ruling, one might expect that many companies would scramble to mimic that clause in order to secure the precedential effects of the decision and minimize any chance of class action liability exposure.⁷⁶ The corporate blogosphere offers no shortage of detailed advice to clients and potential clients on how they can bullet-proof their arbitration clauses against cost-based vindication of rights challenges.⁷⁷ Much of this

are concerned); *Villegas v. U.S. Bancorp*, No. C-10-1762, 2011 WL 2679610, (N.D. Cal. June 20, 2011).

76 The AT&T arbitration provision states, in relevant part, that:

If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T’s last written settlement offer made before an arbitrator was selected, then AT&T will:

- pay you the amount of the award or \$10,000 (the “alternative payment”), whichever is greater; and
- pay your attorney, if any, twice the amount of attorneys’ fees, and reimburse any expenses (including expert witness fees and costs), that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration (“the attorney premium”) . . .

Although under some laws AT&T may have a right to an award of attorneys’ fees and expenses if it prevails in an arbitration, AT&T agrees that it will not seek such an award.

AT&T WIRELESS: SUPPORT (2012), *available at* www.att.com/disputeresolution (last visited Oct. 21, 2012).

77 See, e.g., Asa Markel, *California: Time to Revise Your Arbitration Agreements*, MASUDAFUNAI (Mar. 6, 2012), <http://www.masudafunai.com/showarticle.aspx?Show=6945> (warning that because “California’s courts have struck provisions where they believe the parties did not have equal bargaining power,” employers should “review their agreements in light of the changing” legal landscape); Nicole Frush Munro, *Arbitration Remains in the Spotlight—Even Outside the Ninth Circuit*, SPECIAL FIN. INSIDER (May 16, 2012), <http://www.specialfinanceinsider.com/16/548/ARTICLE/Arbitration-Remains-in-the-Spotlight—Even-Outside-of-the-Ninth-Circuit.aspx> (“For the clauses to be valid, companies would do well to draft with a mind towards fairness and respecting the interests of both parties. Consumer contracts are generally contracts of adhesion, so there is necessarily an unequal bargaining position. Thus the onus

advice explicitly urges prospective defendants to follow AT&T’s lead⁷⁸ by providing that all fees and costs of suit are recoverable by a prevailing plaintiff, and by offering cash bounties where claimants receive an arbitration award superior to defendant’s final pre-award offer, among other features.⁷⁹

will always be on companies to use terms that are fair to consumers. Self-regulation is crucial to the continued viability of arbitration clauses.”); Robert J. Nobile, *Human Resources Guide*, § 5.135: ARBITRATION (July 2012) (recommending that “companies that have or plan to implement arbitration agreements should carefully consider the provisions in their agreements to ensure that they do not arguably prevent the claimant from vindicating his or her rights,” including agreeing “to pay all or most of the arbitrator’s fees and expenses and any other costs unique to arbitration,” and “to pay a claimant’s attorney’s fees and costs up to a set amount in the event he or she prevails at arbitration”).

78 See, e.g., Gibson Dunn LLP, *U.S. Supreme Court Finds That Class Action Waivers in Arbitration Agreements Are Enforceable under the Federal Arbitration Act* (Apr. 27, 2011), <http://www.gibsondunn.com/publications/pages/USSupremeCourtFinds-ClassActionWaiversInArbitrationAgreementsAreEnforceableUnderFederalArbitration-Act.aspx> (last visited Oct. 21, 2012) (“The wording of the majority decision in *AT&T Mobility* does not seem to require similar provisions in an arbitration agreement, although the Court did observe that the district court concluded that the guaranteed amounts would put the Concepcions in a better position than if they were participants in a class action.”); THOMAS E. GILBERTSEN & MICHAEL P. BRACKEN, *Judicial Scrutiny of Arbitration Clauses Under Concepcion*, VENABLE LLP (Feb. 2012) (“The *Concepcion* decision itself begins with extended emphasis on all the ways AT&T Mobility’s arbitration provision favored consumers and was fundamentally fair. When it comes to crafting, amending or litigating an arbitration provision in a consumer contract, that comparison is as good a place as any to start.”); Alan Kaplinsky, *Status of Overdraft Fee Litigation*, 1871 PLI/Corp. 209, 2011 (recommending that banks facing class action liability on overdrafts—“only a handful [of which] have arbitration provisions”—draft “the types of consumer-friendly features necessary to ensure enforceability”); see also JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS*, § 2.14 (8th ed. 2011) (“Although *Concepcion* was not predicated on the existence of consumer-friendly provisions, cautious drafting should lead companies to hew closely to the terms of the agreement involved in that case and: [m]ake consumer arbitration low cost or cost-free [and] . . . [c]onsider using premiums: financial incentives for customers or employees to arbitrate and allow arbitrators to award attorney’s fees.”).

79 See, e.g., Weil, Gotshal & Manges LLP, *Second Circuit Strikes Down Class Arbitration Provisions in In re American Express Merchants Litigation*, *3 (Feb. 26, 2009), available at http://www.weil.com/files/upload/WeilBriefing_LitReg_090226.pdf (last visited Oct. 21, 2012) (“Another option for businesses to consider, to the extent they wish to increase the possibility that their class arbitration waiver provisions will be enforceable under *In re American Express*, is the inclusion of a fee-shifting provision for attorneys’ fees and expert costs.”); Markel, *supra* note 77 (noting that “some of California’s courts have struck arbitration clauses providing for the up-front payment of fees” and urging clients to revise such provisions in existing clauses); Hilary B. Miller, *What Payday Lenders Need to Do About Arbitration* (May 2, 2011), <http://myemail.constantcontact.com/What-Payday-Lenders-Need-To-Do-About-Arbitration—Now.html?>

In order to test my supposition that post-*Concepcion* clauses increasingly adopt such measures, I undertook to read and analyze a group of recently-amended arbitration agreements in the contracts of some of the biggest consumer-oriented companies in the country. A few preliminary (and perhaps obvious) points about the assumptions that underlie my analysis in this Part:

First, I assume that would-be defendants are responsive to court decisions on the enforceability of arbitration clauses.⁸⁰ Since 2000, a significant number of companies have inserted arbitration clauses into their contracts with consumers and employees,⁸¹ and presumably,

soid=1101566873044&aid=SGkv356PqJU (last visited Oct. 21, 2012) (“Lenders should give serious consideration to updating their agreements to provide for every one of the consumer protections included in the AT&T arbitration agreement. In other words, at a minimum, the lender-eats-fees provision, venue, preservation of small court claims, opt-out and bump-up provisions of AT&T’s clause should be an element of any class action waiver provision.”).

80 For example, some commentators have suggested that “first-generation” arbitration clauses were especially harsh and burdensome because defendants “felt emboldened by their string of successes in the Supreme Court and thus began to push the envelope by imposing increasingly burdensome and unexpected terms.” Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1457–58 (2008) (citing Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 325 (2003) (suggesting, based on review of nearly 400 court decisions spanning 1998–2001, that some employers’ arbitration agreements are “testing the limits of self-advantage”). The late and much-missed Richard Nagareda was the first to describe the evolutionary path of arbitration clauses in the pages of this law review. Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1106 (describing “first-generation” arbitration clauses which included neither a class action waiver (as would a second-generation clause) nor contractual provisions intended to make the arbitration agreement seem more consumer-friendly (as would a third-generation clause)).

81 See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1167 (2012) (reporting on a study of contracts imposed by financial services and telecommunications firms finding “that 75 percent contained mandatory arbitration clauses, and 80 percent contained class action waivers,” and that “a stunning 93 percent of these companies’ employment agreements mandated arbitration” (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, 882–84 (2008)); see also Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 LAW & CONTEMP. PROBS. 55, 62 n.30 (2004) (finding that approximately 55 percent “of businesses that offer an ongoing product or service” included an arbitration clause in the written contract); Chris Drahozal & Peter Rutledge, *Contract and Choice*, BYU L. REV. (forthcoming 2013) (reporting that 48% of consumer credit card agreements contain arbitration clauses, and that 99% of those clauses contain class action waivers).

they would like those clauses to be enforced if subject to legal challenge. Furthermore, most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop.⁸²

This assumption appears well founded. In 2008, Aaron-Andrew Bruhl demonstrated that, “given the recent successes of unconscionability challenges, the most aggressive arbitration clauses are now being scaled back.”⁸³ In other words, at the height of unconscionability’s success in beating back arbitration clauses, companies responded by redrafting their provisions to make them less vulnerable to that challenge. Moreover, in the four-year period between *Buckeye Check Cashing, Inc. v. Cardegna*⁸⁴ and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁸⁵ some arbitrators were interpreting contracts that were silent on collective dispute resolution to nonetheless provide for class arbitration. As a result, “[b]usinesses moved quickly to block the possibility of collective redress in any forum, judicial or arbitral” by adding severability and no-class-arbitration language to their contracts.⁸⁶ We should expect a similar response to *Concepcion*: some companies may understand that cost-prohibitiveness is a concern for courts reviewing the enforceability of arbitration clauses, and may therefore undertake efforts to alleviate that concern in redrafting and amending their consumer contracts.⁸⁷

82 See Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, 45 Loy. L.A. L. Rev. 435, 440 (2012) (“It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.”).

83 Bruhl, *supra* note 79, at 1457 n.141. Bruhl continues: “Some business advocates provide such an account, admitting that some early arbitration provisions were unduly burdensome but contending that the clauses have now improved to become more attractive to consumers.” *Id.* (citing Brief of AT&T Mobility LLC as *Amicus Curiae* in Support of Neither Party, *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (“[C]onsumer arbitration provisions have been evolving. At first, many provisions plainly favored the business that drafted them. Invoking state unconscionability principles, several courts struck down these clauses . . .”).

84 546 U.S. 440, 449 (2006).

85 130 S. Ct. 1758 (2010).

86 Tracey & McGill, *supra* note 82, at 448.

87 Peter Coffman, *Pendulum Still Swinging on Consumer Arbitration Clauses*, THOMSON REUTERS NEWS & INSIGHTS (July 10, 2012), http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/07_-_July/Pendulum_still_swinging_on_consumer_arbitration_clauses/ (last visited Nov. 27, 2012) (“[A]ssuming that the arbitration clause is prominently displayed and substantively even-handed, it should be fine under *Concepcion*. It should not have to lean heavily in favor of the consumer and cases holding otherwise are likely unsound. . . . But, sound or unsound, such a clause

Second, I assume that the clause at issue in *Concepcion* has become a sort of gold standard to transactional attorneys.⁸⁸ While only a handful of post-*Concepcion* courts have engaged in side-by-side comparisons of a challenged arbitration clause to that of AT&T, these decisions amplify the significance of the “consumer-friendly” nature of those provisions.⁸⁹ In *Brewer v. Missouri Title Loans*, discussed above, the Missouri Supreme Court compared each element of the AT&T agreement to the one at issue before finding the latter unconscionable.⁹⁰ Similarly, in *Feeney v. Dell, Inc.*, the Massachusetts Superior Court found *Concepcion* was inapplicable to the facts of that case because AT&T’s arbitration agreement had “so many pro-consumer incentives that an individual consumer might be better off in arbitration than in class litigation [whereas] [t]he Dell Arbitration Clause provides no incentives and simply requires arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in controversy.”⁹¹ The *Feeney* Court concluded “the differences matter.”⁹² These decisions, as well as other post-*Concepcion* cases that admirably describe the AT&T arbitration clause (albeit in dicta),⁹³ send a signal to putative defendants and their general coun-

may still be a lightning rod to lower courts, and most businesses would rather not be the test case.”).

88 Indeed, a district court judge once described AT&T’s arbitration provision as “perhaps the most fair and consumer-friendly provisions this Court has ever seen.” *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, *3 (C.D. Cal. 2009).

89 *But see* NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011) (“The fact that the arbitration provisions in *AT&T Mobility* may have been more generous to consumers than the provisions here does not affect the force of the Supreme Court’s preemption analysis. The Court’s analysis turned on general doctrinal principles rather than the specific wording of the cellular contracts.” (citation omitted)).

90 364 S.W.3d at 493 (“Unlike in *Concepcion*, in which AT&T shouldered the costs of arbitration and would pay double the customer’s attorney’s fees if the customer recovered more than AT&T had offered prior to arbitration, the agreement here provides that the parties are to bear their own costs.”); *id.* (“In *Concepcion*, the arbitration clause waived AT & T’s right to seek reimbursement for attorney’s fees incurred in defending against a consumer’s claim. In contrast, the title company did not waive its right to seek attorney’s fees and, therefore, could seek to recover attorney’s fees incurred in defending a claim.”); *id.* at 493–4 (“The evidence in this case is also fundamentally different from that in *Concepcion* because Brewer presented expert testimony from three consumer lawyers who testified it was unlikely that a consumer could retain counsel to pursue individual claims. There was no such record in *Concepcion*.”).

91 No. MICV-2003-01158, 2011 WL 5127806, *8 (Mass. Dist. Ct. Oct. 4, 2011).

92 *Id.* at *9.

93 *See, e.g.*, *Winn v. Tenet Healthcare Corp.*, 2011 WL 294407, at *10 (W.D. Tenn. 2011); *Khan v. Orkin Exterminating Co.*, 2011 WL 4853365, at *4 (N.D. Cal. 2011); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *2 (N.D. Cal. 2011).

sels that adding pro-consumer incentives may help bullet-proof an arbitration clause from challenge.

Third, I assume corporate entities are not only responsive to judicial attitudes on the fairness of their arbitration clauses, but also to the views of other policymakers and the public at large. Companies have an interest in not having their dispute resolution procedures appear harsh or unfair to these constituencies. For example, the recently-created Consumer Financial Protection Bureau (“CFPB”) is currently studying the impact of arbitration clauses in consumer contracts.⁹⁴ If, after the completion of its arbitration study, “the agency were to issue regulations prohibiting the use of class action waivers in consumer financial products, the Supreme Court’s ruling in *Concepcion* would be upended, at least for those contracts over which the CFPB has direct authority.”⁹⁵ While advocates on both sides are expecting this is “exactly what the agency will do,”⁹⁶ should the agency’s study reveal that an increasing number of arbitration provisions were actually consumer-friendly in a variety of ways such that claimants could vindicate their rights, this would go a long way in determining what, if any, action the politically-embattled agency might take.

Additionally, Congress continues to consider the Arbitration Fairness Act, which would amend the FAA to invalidate all arbitration clauses in consumer or employment contracts.⁹⁷ While the bill is unlikely to make it out of the current House,⁹⁸ “supporters of the bill

94 Dodd-Frank Wall Street Reform and Consumer Protection Act § 1021, 12 U.S.C. § 5511 (2010). Section 1028 of the Dodd-Frank Act specifically requires the Consumer Financial Protection Bureau to conduct a study of and submit a report to Congress on the use of arbitration in consumer transactions, and “prohibit or impose conditions or limitations on the use of . . . arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.” 12 U.S.C. § 5518.

95 Gilles & Friedman, *supra* note 3, at 656 (citations omitted).

96 *Id.* at 657 (citing Winston & Strawn LLP, *The Bureau of Consumer Financial Protection: Broad Authority to Regulate Arbitration Agreements* 2 (July 2010), available at <http://www.winston.com/siteFiles/Publications/ArbitrationClientBriefing.pdf> (last visited Nov. 27, 2012) (“The Bureau’s consumer protection mandate may suggest that mandatory pre-dispute arbitration clauses may end up on the cutting room floor.”); Daniel Fisher, *After Arbitration Ruling, Watch Warren’s Consumer Bureau*, FORBES (Apr. 27, 2011), <http://www.forbes.com/sites/danielfisher/2011/04/27/after-arbitration-ruling-watch-warrens-consumer-bureau/>.

97 S. 987, 112th Cong., 1st Sess., in 157 CONG. REC. S2929 (May 12, 2011).

98 Earlier versions of this bill were introduced in 2007 and 2009, and both times died in committee. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong., 1st Sess. § 4, 155 CONG. REC. H1517 (Feb 12, 2009) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness

claim that the ground work is being laid for passage down the road.”⁹⁹ As courts citing *Concepcion* enforce close-to-the line arbitration provisions, “public outcry may force Congress to act if the pendulum swings too far in favor of the defense bar.”¹⁰⁰ Corporate entities could endeavor to avoid courting the displeasure of agencies and legislators by promoting better, more pro-consumer arbitration clauses.

A. *Modeling AT&T’s Arbitration Clause*

I conducted a qualitative examination of thirty-seven current arbitration clauses to test whether companies were indeed rewriting their clauses to resemble the AT&T provisions examined by the Supreme Court in *Concepcion*. I examined arbitration clauses in a range of industries—from telecommunications, consumer banking and credit cards, e-commerce, and entertainment—focusing on some of the nation’s largest and most well-known companies.¹⁰¹ My research assistant and I collected these clauses by visiting the companies’ websites, where this information is publicly available. We searched for versions of these agreements current as of May–August 2012, and tracked a number of elements.¹⁰² Importantly, we only included in this sample

Act of 2007, S1782 § 4, 110th Cong, 1st Sess., 153 CONG. REC. S9144 (July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong, 1st Sess., § 4, 153 CONG. REC. H7774 (July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes). In the immediate wake of the Supreme Court’s decision in *Concepcion*, Senators Al Franken and Richard Blumenthal, along with Congressman Hank Johnson, reintroduced a 2011 version of the bill, which would prohibit class waivers in all consumer, employment, and civil-rights-related contracts. This most recent version has also failed to garner much legislative support. See, e.g., Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011, at A26 (noting that the chances of federal legislation overriding *Concepcion* “aren’t great in the current political environment”).

99 James P. Karen et al., *Federal Procedure and Evidence Update*, 58 THE ADVOCATE 7 (2012); see also Gilles & Friedman, *supra* note 3, at 652 (noting that “observers appear uniform in their assessment that this bill stands little chance of passage in the current political environment”).

100 Karen, *supra* note 99, at 7. See also Drahozal and Rutledge, *supra* note 81, at ___, n. 11 (describing a variety of bills that Congress has enacted that would invalidate predispute resolution clauses in specific types of contracts).

101 Following the lead of other scholars who have engaged in empirical studies of arbitration clauses, we identified companies with “significant market share or name recognition in the telecommunications, credit, and financial services industries.” Eisenberg et al., *supra* note 81, at 880 (describing methodology for gathering data on arbitration clauses for empirical analysis).

102 For example, we noted: the location of the arbitration; the payment of filing fees, attorneys’ fees, and other costs; whether there was a bounty offered for success;

binding arbitration clauses, rather than voluntary clauses.¹⁰³ Table 1 reports the companies studied, the source of the information, and the effective date of the most recent arbitration clause examined:

COMPANY	INDUSTRY	SOURCE	EFFECTIVE DATE
AMAZON	E-COMMERCE	http://www.amazon.com/gp/help/customer/display.html/ref=hp_200905880_conditions?nodeId=508088	AUG. 19, 2011
AMERICAN EXPRESS	CREDIT	https://web.aexp-static.com/us/content/pdf/cardmember-agreements/gold/AmericanExpressGoldCard.pdf	MAR. 31, 2012
BARNES & NOBLE	E-COMMERCE	http://www.barnesandnobleinc.com/misc/terms_of_use.html	JAN. 2012
BB&T	BANK & CREDIT	LEAP Account Cardholder Terms & Conditions (on file)	APR. 1, 2012
BEST BUY	E-COMMERCE	http://www.bestbuy.com/site/Computers-3rd-Party/Subscription-Services/pcmcat162100050037.c?id=pcmcat162100050037	JUNE 23, 2011
CABLEVISION	TELECOM	http://www.optimum.net/Terms/OV	OCT. 2011
CHASE	BANK & CREDIT	https://www.chase.com/online/services/document/deposit_account_agreement.pdf	FEB. 2, 2012
CITIBANK	BANK & CREDIT	Checking Plus (Variable Rate) Account Disclosure Agreement (on file)	JUNE 1, 2012
CLEARWIRE	TELECOM	http://www.clearwire.com/legal/terms-of-service	MAY 11, 2012
COMCAST	TELECOM	http://www.comcast.com/corporate/customers/policies/subscriberagreement.html	MAR. 2011
DELL	E-COMMERCE	http://www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&cs=19&l=en&s=dhs&~section=012#ustc	SEPT. 26, 2011
DISCOVER	CREDIT	https://www.discover.com/credit-cards/cardmember-agreement/arbitration.html	APR. 7, 2012

the availability of and payment for appealing arbitral decisions; opt-out clauses and timing; capped damages; limited discovery; and the effective date. Spreadsheet on file with the author.

103 For example Google, Yahoo!, and eBay provide users with a choice between arbitration and litigation in state or federal courts in California. See *Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms/> (last updated Mar. 1, 2012); *Terms of Service*, YAHOO! § 27, <http://info.yahoo.com/legal/us/yahoo/utos/en-us/> (last updated Nov. 24, 2008); *User Agreement*, EBAY, http://pages.ebay.com/help/policies/user-agreement.html?_trksid=m40 (last updated Aug. 21, 2012). Paypal had a similar agreement in place until November 1, 2012, when the company announced a change in its policy to require binding arbitration. See *Amendment to the Paypal Debit Card Cardholder Agreement*, PAYPAL, https://cms.paypal.com/us/cgi-bin/marketingweb?cmd=_render-content&fli=true&content_ID=ua/upcoming_policies_full&locale.x=en_US (last visited Nov. 27, 2012).

E-TRADE	BANKING	https://us.etrade.com/e/t/prospectestation/help?id=1209021000	JULY 2012
ELECTRONIC ARTS	ENTERTAINMENT	http://tos.ea.com/legalapp/WEBTERMS/US/en/PC/	NOV. 28, 2011
GOLD'S GYM	SERVICE	http://www.goldsgym.com/giftcard/terms/	2012
GROUPON	E-COMMERCE	http://www.groupon.com/terms	DEC. 7, 2011
HULU	ENTERTAINMENT	http://www.hulu.com/terms	MAR. 16, 2012
MATCH	SERVICE	http://www.match.com/registration/arbitrationProcedures.aspx	APR. 9, 2012
NASCAR	ENTERTAINMENT	http://www.nascar.com/guides/terms/trackpass/	MAY 2011
NETFLIX	CONTENT	https://account.netflix.com/TermsOfUse#arbitration	MAR. 7, 2012
NORDSTROM	EMPLOYMENT	http://about.nordstrom.com/careers/pdfs/2697_0611_ADR_Agreement.pdf	JUNE 2011
PEP BOYS	SERVICE	http://www.pepboys.com/customer_care/policies/settlements	JAN. 2012
REGIONS BANK	BANK & CREDIT	http://www.regions.com/virtualdocuments/Deposit_Agreement_Admdment_06-21-11.pdf	JULY 21, 2011
SALLIE MAE	CREDIT	https://www1.salliemae.com/salliemae/new/application/displaydocument.aspx?partner=/barstudyloans/sllmaedtrust&type=borr	FEB. 2012
SCHWAB	BANK	http://www.schwab.com/public/file/P-2123214/APP38165-11WB.pdf	MAR. 2012
SOVEREIGN	BANK & CREDIT	http://www.sovereignbank.com/personal/docs/deposit-account-agreement-MA.pdf	JAN. 2012
SONY	ENTERTAINMENT	http://www.sonyentertainmentnetwork.com/terms-of-service/	FEB. 7, 2012
SPRINT	TELECOM	http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml	2012
T-MOBILE	TELECOM	http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true	DEC. 30, 2011
TICKETMASTER	SERVICE	http://www.ticketmaster.com/h/terms.html	JAN. 27, 2012
TIME WARNER	TELECOM	http://www.timewarnercable.com/nynj/about/policies/regulatorynotices/subscriberagreement/	2012
TRACFONE	CELLULAR	http://www.tracfone.com/terms_conditions.jsp	JUNE 24, 2011
U.S. BANK	BANK & CREDIT	https://www4.usbank.com/internetBanking/en_us/transfer/CheckingAcctAdvanceTerms.jsp	2012
VANGUARD	INVESTMENT	https://ontheroad.vanguard.com/getready/documents/30588_51_vai_brochure.pdf	2008

VERIZON WIRELESS	TELECOM	http://www.verizonwireless.com/b2c/support/customer-agreement	FEB. 19, 2012
WELLS FARGO	BANK & CREDIT	https://www.wellsfargo.com/downloads/pdf/credit_cards/agreements/wf_secured_card.pdf	FEB. 2, 2012
XBOX LIVE	ENTERTAINMENT	http://support.xbox.com/en-US/xbox-live/contract-subscription/terms-and-conditions	JUNE 2012

A few conclusions are worth noting at the forefront. First, all the clauses I examined contained class action waivers. While this is not surprising, it represents a clear increase in the popularity of these provisions over the past decade.¹⁰⁴ Second, nearly all the clauses had been amended in the aftermath of *Concepcion*. Indeed, I could find few arbitration clauses that hadn't been amended in 2011–2012, and presumably, many of these changes reflect the addition of pro-consumer provisions.¹⁰⁵ Third, fewer companies than I had expected have copied the more generous aspects of AT&T's clause—*i.e.*, provisions offering automatic cost-shifting, bounties, premiums and doubling of attorneys' fees. Of the thirty-seven arbitration clauses examined, only six companies offered anything close to AT&T's set of incentives, and none were quite as generous.

1. Cost Allocation

The most common consumer-friendly provision that may have been added to arbitration clauses in the post-*Concepcion* wave of amendments is the promise to pick up the tab for all initiation fees,

104 So, for example, a 2004 study of 52 consumer arbitration clauses found only 30.8% contained class action waivers. Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, L. & CONTEMP. PROBS. 55, 65 (2004). A 2009 study by the Searle Institute found 36.5% of arbitration clauses contained a class action waiver. SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION: BEFORE THE AMERICAN ARBITRATION ASSOCIATION 103 (2009) (preliminary report), available at <http://www.adr.org/>.

105 It is impossible to state with certainty that all the amendments reflect pro-consumer additions because we found only one company (T-Mobile) that provides prior iterations of its arbitration clauses on its website, and could locate prior versions of only six other companies' arbitration clauses for direct comparison (DirectTV, Chase, Discover, BB&T, AmEx, and Wells Fargo) [on file with the author]. Furthermore, a number of the clauses we examined did not include arbitration clauses at all prior to *Concepcion* (Sony, Xbox, Regions Bank and Netflix), so these are not amendments to existing clauses but instead reflect the initial adoption of arbitration as a method of dispute resolution. Nevertheless, it seems sensible to presume that, given that so many companies amended their arbitration clauses or added arbitration clauses in the immediate wake of *Concepcion*, a fair number did so in response to that decision and likely added pro-consumer language.

deposits, and costs of the arbitral proceeding. DirectTV, for example, had in 2010 an arbitration clause that required the claimant to “pay an arbitration initiation fee equal to [a] court filing fee, not to exceed \$125” and to pay all costs of arbitration—a fairly typical clause for that period.¹⁰⁶ After *Concepcion*, the company amended its clause, agreeing “to pay the arbitration initiation fee and any additional deposit required by JAMS to initiate your arbitration [as well as] the costs of the arbitration proceeding.”¹⁰⁷ Similar provisions are reflected in the current arbitration clauses of seven companies in our sample: Cablevision,¹⁰⁸ Chase,¹⁰⁹ Clearwire,¹¹⁰ Dell,¹¹¹ Match,¹¹² Sprint,¹¹³ and Ticketmaster.¹¹⁴ Again, while these companies may not have added pro-

106 On file with the author (printed version of older DTV agreement and web capture of new agreement).

107 See, e.g., *Customer Agreement*, DIRECTTV § 9 (May 15, 2012), available at www.directv.com/DTVAPP/content/legal/customer_agreement.

108 See *Terms of Service*, OPTIMUM § 9 (Sept. 17, 2012), available at <http://www.optimum.net/Terms/OV> (last visited July 19, 2012) (“Cablevision will advance all arbitration filing fees and arbitrator’s costs and expenses upon your written request prior to the commencement of the arbitration.”).

109 See *Deposit Account Agreement*, CHASE BANK § 12 (Aug. 10, 2012), available at www.chase.com/online/services/document/deposit_account_agreement.pdf (“We will pay any costs that are required to be paid by us under the arbitration administrator’s rules of procedure. Even if not otherwise required, we will reimburse you up to \$500 for any initial arbitration filing fees you have paid. We will also pay any fees of the arbitrator and arbitration administrator for the first two days of any hearing. If you win the arbitration, we will reimburse you for any fees you paid to the arbitration organization and/or arbitrator.”). Importantly, the 2009 version of Chase’s arbitration clause contains virtually the same language as its 2011 amendment, so there was no pro-consumer addition to the arbitration clause. (2009 version of Chase Account Agreement on file with the author)

110 See *Terms of Service*, CLEARWIRE § 13(c) (May 11, 2012), available at www.clearwire.com/legal/terms-of-service (“Clearwire will pay all filing, administration, and arbitrator fees, unless your claim exceeds \$75,000.”).

111 See *Terms and Conditions*, DELL § 13 (Oct. 25, 2011), available at www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&cs=19&l=en&s=dhs&~section=012#ustc (“Dell will be responsible for paying any individual consumer’s arbitration fees.”).

112 See *Arbitration Procedures*, MATCH.COM, available at <http://www.match.com/registration/arbitrationProcedures.aspx> (last visited Dec. 4, 2012).

113 See *Terms and Conditions*, SPRINT, available at http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml (last visited Dec. 4, 2012) (“We each are responsible for our respective costs relating to counsel, experts, and witnesses However, we will pay for the arbitration administrative or filing fees, including the arbitrator fees.”)

114 See *Terms of Use*, TICKETMASTER § 18 (Jan. 27, 2012), <http://www.ticketmaster.com/h/terms.html> (agreeing to “pay all JAMS filing, administration, and arbitrator fees for any arbitration initiated in accordance with the notice requirements”).

consumer language in these recent amendments to their arbitration clauses, the likelihood is that they did.

Most companies we studied have not gone so far as to offer to pay all upfront costs of arbitration. We found seven arbitration clauses, for example, that instead agreed to *advance* filing fees upon receipt of a written request or statement indicating the claimant’s inability to pay.¹¹⁵ Companies then differ on whether and when the claimant must repay the advance. Time Warner and Discover, for example, require the consumer to reimburse the company any fees advanced if she loses in arbitration.¹¹⁶ American Express, on the other hand, waives the right to seek reimbursement of fees from a losing cardholder.¹¹⁷ Another approach is reflected in U.S. Bank’s arbitration provision, which advances the filing fee and then leaves it to “the arbitrator [to] decide whether we or you will ultimately pay those fees.”¹¹⁸ Under this agreement, consumers must pay fees and proceed with arbitration not knowing whether the arbitrator will ultimately reallocate those fees in the award or cap them under consumer arbitration rules.

An interesting example here is Groupon, whose arbitration clause was amended in late 2011. The arbitration clause specifically provides that “in the event that [the claimant is] able to demonstrate

115 These seven companies are: Discover, BB&T, American Express, U.S. Bank, Groupon, Time Warner and Comcast. *See, e.g., Cardmember Agreement*, DISCOVER (2012), available at https://www.discover.com/assets/Prime_Combined.pdf; *LEAP Account Cardholder Terms and Conditions*, BB&T ¶ 32, available at <http://www.bbt.com/sites/bbtdotcom/banking/cards/docs/leap-account-terms-and-conditions.pdf> (last visited Dec. 4, 2012).

116 For example, Time Warner agrees to “advance” filing fees and arbitration costs upon written request, but also warns that if it wins in arbitration, the customer “will reimburse us for these advances.” *Residential Services Subscriber Agreement*, TIME WARNER, ¶ 15 available at <http://www.timewarnercable.com/nynj/about/policies/regulatorynotices/subscriberagreement/> (last visited Dec. 4, 2012). Discover leaves it to the arbitrator to decide “whether you must reimburse us for money we advanced for you to for the arbitration.” *Arbitration*, DISCOVER, available at <https://www.discover.com/credit-cards/cardmember-agreement/arbitration.html> (last updated Apr. 7, 2012).

117 *See, e.g., Gold Card Cardholder Agreement*, AMERICAN EXPRESS (June 30, 2012), available at <https://web.aexp-static.com/us/content/pdf/cardmember-agreements/gold/AmericanExpressGoldCard.pdf> (“At your written request, we will consider in good faith making a temporary advance of all or part of your share of any arbitration fees. You will not be assessed any arbitration fees in excess of your share if you do not prevail in any arbitration with us.”).

118 *Checking Account Advance*, U.S. BANK, available at https://www4.usbank.com/internetBanking/en_us/transfer/CheckingAcctAdvanceTerms.jsp (last visited Dec. 4, 2012).

that the costs of arbitration will be prohibitive as compared to the costs of litigation, Groupon will pay as much of [the] filing and hearing fees in connection with the arbitration as the arbitrator deems necessary to *prevent the arbitration from being cost-prohibitive*.¹¹⁹ This not-so-subtle signal to claimants and reviewing courts is intended to weaken any vindication-of-rights challenge to Groupon's arbitration clause.

Still other entities require the claimant to advance the filing fee, with a promise to reimburse her upon some triggering event. Netflix, for example, promises to reimburse the claimant as soon as it receives notice that a valid arbitration has been filed.¹²⁰ Citibank, on the other hand, promises to reimburse the claimant her AAA filing fee if she wins in the arbitral forum.¹²¹

Other arbitration clauses offer to pay some amount short of the entire filing fee. We found two companies that agreed to pay half the arbitral filing fee (but no other costs) for consumer-initiated arbitrations.¹²² Others sought to measure arbitral filing fees against the filing fee in small claims court, offering to pay any difference in these amounts.¹²³ But given that both the AAA and JAMS¹²⁴ require a \$250 filing fee to arbitrate any consumer claim worth less than \$10,000—and that small claims courts in most jurisdictions require filing fees significantly lower than \$250—this promise to “pay the overage” is generally misleading.¹²⁵

The best example of increasingly pro-consumer amendments is T-Mobile, whose website contains four different arbitration clauses

119 *Terms*, GROUPON ¶ 16, available at <http://www.groupon.com/terms#arbitration> (last updated Sept. 24, 2012) (emphasis added).

120 *Terms of Use*, NETFLIX (Sept. 14, 2012), available at <https://account.netflix.com/TermsOfUse#arbitration>

121 Citibank Checking Plus (on file with the author).

122 See, e.g., *Account Agreement*, E-TRADE (July 2012), available at <https://us.etrade.com/e/t/prospectestation/help?id=1209021000> (“If you initiate arbitration, the Bank will pay one half of any arbitration filing fee. You will pay the rest of the filing fee and all of the arbitration fees charged by the arbitration forum and the arbitrator through the first day of the arbitration, up to a maximum of eight hours. The Bank and you will split any remaining fees.”); *Deposit Agreement*, REGIONS BANK 22 (2012), available at http://www.regions.com/virtualdocuments/Deposit_Agreement_Oct_10.pdf.

123 See, e.g., *Arbitration Process*, PEP BOYS (Jan. 2012), available at http://www.pepboys.com/customer_care/policies/settlements; *Terms & Conditions*, GOLD'S GYM, available at <http://www.goldsgym.com/giftcard/terms/> (last visited Dec. 4, 2012).

124 These are the most commonly designated arbitral forms listed in all thirty-seven of the contracts we examined.

125 See *Consumer Arbitration*, AM. ARBITRATION ASS'N, available at www.adr.org/aaa/faces/aoe/gc/consumer (last visited Dec. 4, 2012).

depending on when the consumer initiated service, each iteration growing increasing consumer-friendly.¹²⁶ For example, the 2004 clause requires the claimant to pay a small arbitral fee (\$25) for all claims between \$25–\$1000, and commands both parties to pay their own “other fees, costs, and expenses, including those for any attorneys, experts, and witnesses.”¹²⁷ The more recent version incorporates a 30 day opt-out, promises to pay all “filing, administration[,] and arbitrator fees” for claims under \$75,000, allows successful claimants to recover “reasonable attorneys’ fees and costs[,]” and T-Mobile “agrees not to seek an award of attorneys’ fees” in non-frivolous arbitrations.¹²⁸ A number of companies have recently added identical tiered provisions to their arbitration clauses.¹²⁹

2. Bounties, Premium Payments, and “Bump-Ups”

As noted above, few companies have gone as far as AT&T in providing a bounty to claimants who achieve a better result in arbitration than the company’s last-best offer. In my small sample of 37 arbitration clauses, only six companies had such a clause,¹³⁰ with some minor

126 *Terms and Conditions*, T-MOBILE (Dec. 30, 2011), available at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true (“Did you activate (or renew) service prior to December 30, 2011? If yes, please click the date for the applicable version of the Terms and Conditions: July 24, 2011 — July 18, 2010 — June 28, 2008 — December 2004.”).

127 *Terms and Conditions*, T-MOBILE (Dec. 2004), available at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions2004&print=true.

128 *T-Mobile Terms and Conditions*, T-MOBILE (July 24, 2011), available at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditionsJuly2011&print=true.

129 See, e.g., *Terms of Service*, CLEARWIRE § 13 (May 11, 2012), available at www.clearwire.com/legal/terms-of-service.

130 Verizon, Netflix, Electronic Arts, Microsoft Xbox, Sallie Mae, Sovereign Bank; see, e.g., *Customer Agreement Arbitration Clause*, VERIZON WIRELESS ¶ 6 (Sept. 8, 2011), available at <http://www.proandcontracts.com/wp-content/uploads/2011/09/2011.09.08-Verizon-Wireless-Arbitration-Clause.pdf> (“WE MAY MAKE A WRITTEN SETTLEMENT OFFER ANYTIME BEFORE ARBITRATION BEGINS. IF YOU DON’T ACCEPT THE OFFER, OR IF WE DON’T MAKE YOU AN OFFER, AND THE ARBITRATOR AWARDS YOU AN AMOUNT OF MONEY THAT’S MORE THAN OUR OFFER BUT LESS THAN \$5000, THEN WE AGREE TO PAY YOU \$5000 INSTEAD OF THE AMOUNT AWARDED. IN THAT CASE WE ALSO AGREE TO PAY ANY ATTORNEYS’ FEES AND EXPENSES, REGARDLESS OF WHETHER THE LAW REQUIRES IT FOR YOUR CASE. IF THE ARBITRATOR AWARDS YOU MORE THAN \$5000, THEN WE WILL PAY YOU THAT AMOUNT.”); *Terms of Use*, NETFLIX (Sept. 14, 2012), available at <https://account.netflix.com/TermsOfUse#arbitration> (“If the arbitrator issues you an award that is greater than the value of Netflix’s last written settlement offer . . . then Netflix will pay you the amount of the award or US \$1,000, whichever is greater.”).

deviations. For example, Sallie Mae provides that borrowers who successfully arbitrate a claim will be awarded “at least \$7,500 plus any arbitration fees and attorneys’ fees and costs,”¹³¹ but doesn’t offer to double attorneys’ fees. Electronic Arts’ arbitration provision has another slight variation in which the bounty is a capped percentage of the last-best offer rather than a set amount.¹³² Netflix offers a bounty of \$1000 if the claimant gets a higher award in arbitration.¹³³ Verizon, the only direct competitor of AT&T in this group, offers to pay a \$5000 bounty and reasonable fees.¹³⁴ Perhaps the most explicit is Microsoft, whose arbitration provision for the Xbox platform states:

If You reject Microsoft’s last written settlement offer made before the arbitrator was appointed . . . [and] Your dispute goes all the way to an arbitrator’s decision . . . and the arbitrator awards You more than Microsoft’s last written offer, Microsoft will give You three incentives: (i) pay the greater of the award or \$1,000; (ii) pay twice Your reasonable attorney’s fees, if any; and (iii) reimburse any expenses (including expert witness fees and costs) that Your attorney reasonably accrues for investigating, preparing, and pursuing Your claim in arbitration.¹³⁵

These “three incentives” match up neatly with AT&T’s arbitration clause, though the latter pays a higher bounty and doubles attorneys’ fees upon success in the arbitral forum. Notably, we found only one

131 *Bar Study Loan Promissory Note 3BAR1205/3BAI1205*, SALLIE MAE, § T, ¶ 11, available at https://www1.salliemae.com/content/pdf/BarStudy_ApplicationPackage.pdf (last visited Sept. 25, 2012) (containing a “Special Payment” provisions that states that “[if] you refuse to provide the relief I request; and [] an arbitrator subsequently determines that I was entitled to such relief (or greater relief), the arbitrator shall award me at least \$7,500 plus any arbitration fees and attorneys’ fees and costs”). Note that the Bar Study Loan agreement contained the only “Special Payment” provision I was able to find in the many Sallie Mae promissory notes available online.

132 See, e.g., *Terms of Service*, ELECTRONIC ARTS ¶ 20 (Sept. 4, 2012), available at <http://tos.ea.com/legalapp/WEBTERMS/US/en/PC/> (providing that if the arbitrator rules in the claimant’s favor and issues an award “that is greater in monetary value than EA’s last written settlement offer,” then EA will “[p]ay you 150% of your arbitration award, up to \$5,000 over and above your arbitration award” and pay attorneys’ fees and costs).

133 *Terms of Use*, NETFLIX (Sept. 14, 2012), available at <https://account.netflix.com/TermsOfUse#arbitration>

134 *Customer Agreement*, VERIZON WIRELESS (Feb. 19, 2012), available at <http://www.verizonwireless.com/b2c/support/customer-agreement>.

135 *Terms and Conditions for the Xbox Console Bundle/Xbox Live Promotional Offer*, MICROSOFT § 12.6.1 (2012), available at <http://support.xbox.com/en-US/xbox-live/contract-subscription/terms-and-conditions>.

arbitration clause that explicitly offered to pay the prevailing consumer her expert fees.¹³⁶

It is certainly possible that there are other companies out there that pay bounties or premiums, or that companies are adding such provisions presently. As the legal dust settles, it may be reasonable to assume that the rate of pro-consumer addenda will pick up¹³⁷—especially given how easy it is for most entities to effectuate changes in their dispute resolution procedures.¹³⁸

B. “Unfriendly” Clauses

A number of companies have amended their clauses in the past two years, but have failed to add any pro-consumer cost-shifting provisions. For example, customers who are unsuccessful in arbitrating claims against Comcast and Time Warner cable must pay those companies’ costs and attorneys’ fees, as well any costs of appealing the judgment.¹³⁹ Even in the post-*Concepcion* era, courts have held these sorts of provisions unenforceable.¹⁴⁰ Another somewhat ironic example is Sallie Mae’s Bar Study Loan program, which covers living and other expenses of law school graduates during the months they are studying for the bar exam. The 2012 version of the loan agreement contains an arbitration clause requiring borrowers who initiate arbitration to “bear the fees charged by . . . the arbitrator . . . [and] the reasonable and actual expense of [her] attorneys, experts, and wit-

136 See *Personal Deposit Account Agreement*, SOVEREIGN BANK 24, available at <http://www.sovereignbank.com/personal/docs/deposit-account-agreement-MA.pdf> (last visited Sept. 16, 2012) (stating that the company “will pay your reasonable attorneys’ and experts’ fees if and to the extent you prevail” in arbitration).

137 See, e.g., *Amicus Br. of AT&T Mobility*, 2008 WL 534808, at *5 (filed Feb. 25, 2008), in *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (No. 07-976) (pre-*Concepcion* brief describing “the continued evolution of both arbitration clauses” in the marketplace and “the law governing their enforceability,” and urging the denial of certiorari to allow for percolation and development of consumer-friendly clauses such as AT&T’s).

138 Companies can easily include new arbitral rules in software updates, bill-stuffers, and other easy, cheap means of effectuating changes-in-terms. See Eric Andrew Horwitz, *An Analysis of Change-of-Terms Provisions as Used in Consumer Service Contracts of Adhesion*, 15 U. MIAMI BUS. L. REV. 75 (2007).

139 *Comcast Agreement for Residential Services*, COMCAST § 13(h), available at <http://www.comcast.com/corporate/customers/policies/subscriberagreement.html> (last visited Sept. 16, 2012); *Time Warner Cable Residential Services Subscriber Agreement*, TIME WARNER CABLE § 15(d), available at http://help.twcable.com/html/twc_sub_agreement.html (“If TWC wins the arbitration, you will reimburse us for these advances.”).

140 See *supra* notes 47–48 (discussing cases finding a failure to shift costs to be unconscionable).

nesses, regardless of which party prevails in the arbitration”¹⁴¹ But oddly, where Sallie Mae commences arbitration against a borrower, the clause requires the borrower to “pay all such reasonable and actual fees of [Sallie Mae] if [it] prevail[s] in an arbitration”¹⁴² The asymmetry is striking, given the population of newly-minted and eager lawyers signing this agreement who might someday mount a challenge. Among the sample companies, only Tracfone has a similar provision.¹⁴³

Two of the clauses I reviewed simply do not mention costs at all. Hulu has a standard arbitration clause—noting which arbitral bodies can be employed, where the arbitration will be held, that class arbitration and other aggregate and representative forms are prohibited—but makes no mention whatsoever about cost allocation.¹⁴⁴ But such an approach is rare, presumably because silence on payment of costs sets up an argument that the default rule—initiating claimant pays the filing fees and is responsible for her own costs—applies, and this rule in turn makes viable a vindication-of-rights or unconscionability argument.

Finally, four companies in the sample leave all determinations of fees and costs to the arbitrator to decide, referencing the rules and procedures of the AAA or JAMS governing costs.¹⁴⁵ Sony Entertainment, for example, which courted controversy from the gaming community when it added an arbitration clause with a class action waiver

141 *Bar Study Loan Promissory Note 3BAR1205/3BAI1205*, SALLIE MAE § T(6), available at <https://www1.salliemae.com/salliemaenew/application/displaydocument.aspx?partner=/barstudyloans/slmaedtrust&type=borr> (last visited Dec. 4, 2012).

142 *Id.*

143 *See, e.g., TracFone Wireless, Inc. Terms and Conditions of Service*, TRACFONE WIRELESS ¶ 23, available at http://www.tracfone.com/terms_conditions.jsp (last updated June 24, 2011) (“Each party will bear the expenses of its own counsel, experts, witnesses, and preparation and presentation of evidence.”).

144 *See Terms of Use*, HULU ¶ 13 (last visited Mar. 16, 2012), available at <http://www.hulu.com/terms>; *see also NASCAR.COM TrackPass Terms of Use*, NASCAR.COM § 14, available at <http://www.nascar.com/guides/terms/trackpass/> (last visited Sept. 16, 2012) (lacking mention of cost allocation).

145 *See, e.g., Consumer Credit Card Customer Agreement & Disclosure Statement*, WELLS FARGO § 31(d) (2002), available at https://www.wellsfargo.com/downloads/pdf/credit_cards/agreements/wf_secured_card.pdf (noting that the claimant and the company each “shall bear the expense of our own attorney, expert and witness fees, regardless of which of us prevails in the arbitration”); *LEAP Account Cardholder Terms and Conditions*, BB&T ¶ 32, available at <http://www.bbt.com/sites/bbt.com/banking/cards/docs/leap-account-terms-and-conditions.pdf> (last visited Dec. 4, 2012); *Terms of Use*, NETFLIX (last visited Sept. 14, 2012), available at <https://account.netflix.com/TermsOfUse#arbitration> (stating that “the payment of all filing, administration and arbitrator fees will be governed by the AAA Rules”).

to its PlayStation Network Agreement in September 2012,¹⁴⁶ provides that where the consumer successfully arbitrates a claim, Sony will pay reasonable attorneys’ fees and costs “as determined by the arbitrator.”¹⁴⁷ Arguably, these provisions afford arbitrators the latitude to award otherwise non-recoupable expense items, such as the expert fees at issue in *Amex*. But of course, the practical problem with the “winner takes” approach is that it is only triggered upon final judgment; i.e., a winner and a loser must be declared. So, the extent to which such clauses allow for the effective vindication of rights depends, in no small measure, upon the formalism or pragmatism of the beholder. All of which provides a fitting segue into the following section of this Article.

III. A RACE TO THE TOP?

Recall that in his dissent from the refusal to grant *en banc* review of the *Amex* III decision, Chief Judge Jacobs of the Second Circuit worried that cost-based challenges asserting an inability to vindicate statutory rights could subsume the rule of *Concepcion*. The problem, to Jacobs’s mind, is that vindication-of-rights challenges have no clear limitation: they “can be used to challenge virtually every consumer arbitration agreement that contains a class action waiver”¹⁴⁸ given the generally low per-plaintiff damages and the extraordinary expenses of litigating most federal class actions. In other words, in his view, “every class counsel and every class representative who suffers small damages [could] avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff’s individual loss.”¹⁴⁹

Earlier, I presented four possible responses to the concerns underlying Judge Jacobs’ dissent. In this Part, I will elaborate on each of those basic positions and their interplay with the real world contracting practices discussed above.

146 See, e.g., *Sony Adds Mandatory Arbitration Clause to PSN ToS*, GAMEPOLITICS.COM (Sept. 15, 2011), <http://gamepolitics.com/2011/09/15/sony-adds-mandatory-arbitration-clause-psn-tos>; Matt Peckham, *Sony’s ‘No-Sue’ PlayStation Network Use Clause is Anti-Consumer*, PCWORLD (Sept. 19, 2011), http://www.pcworld.com/article/240213/sonys_nosue_playstation_network_use_clause_is_anticonsumer.html (reporting that “in the wake of Sony’s catastrophic PSN security failure last April-May, the company’s legal team seems to think the best way forward involves forcing consumers” to sign a class action waiver).

147 *Terms of Service and User Agreement*, SONY ENTERTAINMENT NETWORK § 17 (Feb. 7, 2012), available at <http://www.sonyentertainmentnetwork.com/terms-of-service/>.

148 *Amex* IV, 681 F.3d 139, 143 (2d Cir. 2012) (Jacobs, C.J., dissenting).

149 *Id.* at 144.

A. *FAA Absolutism*

The FAA absolutist position holds that there is no vindication of rights exception to arbitration agreements. Even where the enforcement of a bilateral arbitration clause can be shown in a particular case to prevent the vindication of rights, the clause is per se enforceable under the FAA. And since the FAA is not dependent upon whether claimants can adequately vindicate their rights in the arbitral forum, there is no warrant for any inquiry into cost-allocation. This view unapologetically disowns the Supreme Court's oft-repeated limitation that arbitration agreements must be enforced as written under the FAA "only so long as" they allow for the effective vindication of federal rights.¹⁵⁰

Of course, any reading of the FAA must deal with the saving clause of Section 2, which provides that arbitration clauses are fully enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁵¹ To avoid recognizing a vindication of rights defense (or any equivalent defense, whether labeled as "exculpatory contract" or otherwise) the FAA absolutist is forced to take the position that such defenses do not constitute "grounds . . . for the revocation of any contract." And this is a difficult argument to make.¹⁵² As Justice Thomas recognized in his concurring opinion in *Concepcion*, the defense of "exculpatory contract"—or the defense that a contract insulates a defendant from effective challenge and prevents the vindication of rights—is a long-established common law ground

150 See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). For those interested in handicapping whether the current Supreme Court would turn its back on this line of case law (presumably by derogating it all as "obiter dicta"), it is worth noting that *Vimar Seguros* was authored by Justice Kennedy and contained an impassioned statement that, if the arbitration clause at issue could be shown to prevent claimants from vindicating their rights under a federal statute, it would be unenforceable under the principles of *Mitsubishi*. *Vimar Seguros y Reaseguros*, 515 U.S. at 540.

151 9 U.S.C. § 2 (2006).

152 Indeed, a number of federal courts have explicitly recognized the exculpatory contract defense in the context of class action waivers in arbitration. See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir. 2007) ("We recognize that there is a policy debate about whether class action waivers essentially act as exculpatory clauses, allowing for violations of laws where individual cases involve low dollar amounts and so will not adequately address or prevent illegality."); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims.").

for the invalidation of contracts.¹⁵³ Justice Thomas, however, would distinguish between grounds for “invalidation” of contract (which would include all common law contract defenses, whether rooted in public policy concerns or otherwise) and “revocation” (which in his view includes only defenses that go to the formation of the agreement, such as duress and fraudulent inducement, and excludes all policy based defenses, such as exculpatory contract).¹⁵⁴

This revocation/invalidation distinction probably strikes most observers as odd and ill-supported. Certainly, no other Justice joined in this view. But the important point here is that the distinction is absolutely necessary to any rejection of a vindication of rights defense to arbitration agreements. Once one recognizes that the vindication of rights defense (or “exculpatory contract” defense) is a traditional “ground at law or equity” for defending against the enforcement of contracts, one is forced to slice the atom along the lines suggested by Justice Thomas in order to read the FAA as precluding a vindication of rights defense.¹⁵⁵ And of course, in this absolutist view, the content of arbitration agreements—including the extent to which they contain consumer-friendly provisions ostensibly permitting the vindication of rights—is utterly immaterial.

B. *Practical Formalism*

A very different view is what I have termed “practical formalism.” This view does not reject as a doctrinal matter the limitation of *Mitsubishi* and other cases that arbitration agreements are enforceable only so long as they allow for the effective vindication of rights. But it construes that limitation in a narrow and literal way. It is not enough for the practical formalist if the arbitration clause at issue would tend to deter litigants and lawyers from seeking to vindicate federal rights. The clause must *prevent* the vindication of rights.

Where an arbitration clause prevents the vindication of rights by forcing a claimant to incur prohibitive costs, this view holds that an

153 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1755 (Thomas, J., concurring). Justice Thomas alone interpreted section 2 of the FAA to bar all public policy-based defenses to arbitration contracts, asserting that “[c]ontract defenses unrelated to the *making* of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.” *Id.* (emphasis added).

154 *Id.* at 1754.

155 *Id.* at 1756 (“Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy. . . . [But r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.” (citing 15 G. GIESEL, *CORBIN ON CONTRACTS* §§ 85.1, 85.17, 85.18 (rev. ed. 2003))).

agreement by the defendant to absorb the otherwise prohibitive costs incurred by a prevailing plaintiff will cure the defect and render the clause enforceable. I call this view “formalist” in the sense that it rejects the liberal pragmatic objection that, even with fee-shifting and cost-shifting, claimants in the real world will be deterred from advancing costs and vindicating their rights. And yet, it remains “practical” insofar as it is rooted in the case-by-case test of *Green Tree*, which asks if the claimant in practice can prove it will be saddled with such costs as to prevent the vindication of rights. In the practical formalist view, chilling effects are beside the point; this view draws a far brighter line based upon whether the plaintiff *could* vindicate its rights.

The prevalence of this view among corporate counsel (whether explicit or intuited) would explain the proliferation of “consumer friendly” provisions in arbitration agreements discussed above in Part II. To establish that plaintiffs could (in the narrow formal sense) vindicate their rights, companies understandably want their agreements to allow prevailing parties to recoup all costs and fees, to make some allowance for the advancement of certain costs, and so forth. (Judging from the agreements we reviewed, the provision of *Concepcion* style bounty or premiums is still regarded as a luxury—an extra insurance policy not necessary to get over the formal “could vindicate” threshold.)

The predictable response from liberal quarters to the advent of these consumer friendly clauses is largely derisive. To the liberal pragmatist, the consumer friendly clauses are a mere fig leaf, designed to support the argument that consumer arbitration clauses allow for the effective vindication of rights.¹⁵⁶ By contrast, the practical formalist approach—which I think is the dominant current in the legal community—has no such cynicism. It takes seriously the efforts of companies to provide a framework that allows for the vindication of rights—at least in the formal sense that the plaintiff *could* vindicate its rights.

To the practical formalist, the question of whether a plaintiff can vindicate her rights will generally turn on whether the arbitration clause would force the plaintiff to shoulder *non-recoupable* costs that exceed the value of the relief sought, as distinct from statutorily

156 See, e.g., Gilles & Friedman, *supra* note 3, at 644 (arguing that “whatever the merits of Justice Scalia’s view that [AT&T’s] bounty clause preserved the *Conceptions*’ ability to vindicate their rights, it is highly likely that this dictum . . . will prove irresistible to lower courts faced with vindication-of-rights challenges in cases that feature a bounty clause”); *id.* at 646 (“Nor should anyone expect that consumers will actually go forward with one-on-one arbitrations, even as consumer arbitration clauses are liberalized to provide ostensible incentives to initiate proceedings in a bid to avoid legal challenges.”).

recoupable costs. If the arbitration clause itself would saddle the plaintiff with, say, \$2,000 in non-recoupable expenses where she is seeking \$1,000 in relief, then the arbitration clause prevents the vindication of rights. It doesn't just chill vindication; it prevents it by establishing a process under which the claimant will be a net loser even if she wins the arbitration. On the other hand—and here is where the practical formalist and the liberal pragmatist are likely to part ways—if the arbitration clause would force the claimant to incur \$2,000 of *fully recoupable* expenses in order obtain the same \$1,000 in relief, the practical formalist might say that the plaintiff *could* vindicate her rights. A pragmatist might reject that assertion (arguing, for example, about the rationality of advancing \$2,000 to win \$1,000), but the practical formalist lays claim to a bright, administrable line.¹⁵⁷

Notably, this practical formalist approach lends itself well to law and economics based arguments that market forces will determine the best equilibrium for contract drafters and adherents. Companies will make economic calculations as to whether it is in their interest, for example, to commit themselves to absorb all non-recoupable costs or whether they are better served by leaving themselves exposed to possible collective litigation in those rare cases where, for example, extraordinary non-recoupable expert fees will be necessary to allow for the effective vindication of rights.¹⁵⁸ But in the majority of cases in this post-*Concepcion* era, “consumer friendly” additions to arbitration clauses will likely suggest that plaintiffs do indeed have the ability to vindicate their rights and so cannot avail themselves of a vindication of rights challenge. And to the practical formalist, these developments are to be cheered as a sort of race to the top, as companies

157 The Second Circuit's decisions in *Amex I–III* lend some force to the practical formalist camp. Recall that the *Amex* court repeatedly laid emphasis on the comparison between the non-recoupable expert costs and the amount the claimant had at stake. *Amex I*, 554 F.3d 300, 317 (2d Cir. 2009) (“[T]he trebling of a small individual damages award is not going to pay for the expert fees [that] . . . will be necessary to make an individual plaintiff's case here . . .”). Further, the judges sensibly held that, even if a single individual arbitration will cost less than a trial in federal district court, “neither an individual arbitration, nor an individual litigation would make any economic sense in light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action.” *Id.* at 319 n.14.

158 In other words, a company may elect not to provide for the shifting of expert witness fees, but where the enforcement of an arbitration clause and the concomitant waiver of aggregate procedures would saddle the plaintiff with expert fees clearly in excess of the recovery sought, the practical formalist will view that the company made its bed, and the application of the vindication of rights defense will be appropriate. But this is unlikely to arise very often.

amend their dispute resolution clauses to permit the effective vindication of rights.

C. *Liberal Pragmatism*

As discussed above, the pragmatic objection to the dominant strain of practical formalism is that it exalts form over substance to give effect to these putatively consumer friendly provisions. On planet Earth, some of us would argue, no plaintiff in the position of the *Concepcions* can be expected to advance thousands of dollars in a one-on-one proceeding for the right to win \$30.22, even if an arbitration victory that exceeds the defendant's last and best offer would produce a \$7,500 bounty and double attorneys' fees, and even if the entire outlay were recoupable.¹⁵⁹ Nor would any lawyer advance those costs, or her time.¹⁶⁰ The claims will simply go unaddressed, as evidence confirms. For example, Professor Judith Resnik points out that between 2003 and 2007—a time period during which AT&T paid \$1.3 billion to settle manifold billing disputes with its 54 million cell phone subscribers¹⁶¹—only 170 consumers saw fit to access AT&T's inexpensive arbitration procedure (and that notwithstanding the unquestioned

159 See, e.g., *Concepcion*, 131 S. Ct. at 1760–61 (Breyer, J., dissenting) (“[A]s the Court of Appeals recognized, AT&T can avoid the [premium] payout (the payout that supposedly makes the [plaintiffs’] arbitration worthwhile) simply by paying the claim’s face value, such that ‘the maximum gain to a customer for the hassle of arbitrating a \$30.22 dispute is still just \$30.22.’”) (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855, 856 (9th Cir. 2009), *rev’d sub nom. AT&T v. Concepcion*, 131 S. Ct. 1740 (2011)).

160 See, e.g., Gilles & Friedman, *supra* note 3, at 646 (“The main problem will be attracting plaintiffs’ counsel: rational lawyers will be deterred by prohibitive disincentives [and t]he availability of attorneys’ fees under fee-shifting statutes is not a realistic inducement in consumer cases.”) (citing *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting)) (“What rational lawyer would have signed on to represent the *Concepciones* in litigation for the possibility of fees stemming from a \$30.22 claim?”) and *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 553 (S.D.N.Y. 2011) (“Even if [plaintiff] were willing to incur approximately \$200,000 to recover a few thousand dollars, she would be unable to retain an attorney to prosecute her individual claim. . . . [Plaintiff’s counsel] will not prosecute her individual claim without charge, and will not advance the required costs where the [arbitration] Agreement’s fee-shifting provisions present little possibility of being made whole.”)).

161 Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 111 (2011) (“[The] district court reported that AT&T paid \$1.3 billion to settle billing problems in 2007 by giving ‘manual credits to resolve customer concerns and complaints.’” (citations omitted)).

enforceability of the class waiver in most states during this period).¹⁶² Indeed, a number of courts have also remarked upon the reality that consumers do not take advantage of dispute resolution procedures, no matter how “consumer friendly,”¹⁶³ because individually risking so much for so little makes no sense.¹⁶⁴

More important than costs are attorneys’ fees. Class actions happen because lawyers advance their time and fees, and they are not going to do that unless they can recover from sufficiently large numbers of people to make it worthwhile. That is the truly pragmatic fact

162 *Id.* at 110 (citing Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents at 20, *Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3934621).

163 *See, e.g.*, *Stern v. AT&T Mobility Corp.*, No. CV 05-8842 CAS (CTx), 2008 WL 4382796, at *12 (C.D. Cal. Aug. 22, 2008) (comparing a version of the class action waiver without the “bump-up” to a version with a “bump-up” and finding that “[t]he likelihood that this new, limited provision would make it worthwhile for customers to pursue individual claims is altogether improbable”); *Stiener v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016, 1030–31 (N.D. Cal. 2008) (explaining that a “bump-up” provision (i) does not make arbitration a “fair substitute for a class action,” (ii) offers “incentives [that] are entirely illusory[,]” and (iii) provides “insufficient inducement for individuals to pursue arbitration”).

164 For example, in *Schnuerle v. Insight Communications Company, L.P.*, only one plaintiff had ever filed an arbitration claim against the defendant based on the allegations in the class complaint. Nos. 2008–SC–000789–DG, 2009–SC–000390–DG, 2010 WL 5129850 (Ky. Dec. 16, 2010) (holding class action waiver unenforceable in case where individual average claim is only \$40 and where arbitration provision lacks any consumer-friendly features). Similarly, in *Scott v. Cingular Wireless*, the court noted that no Washington consumers had taken the defendant to arbitration in the six years prior to its ruling that the class action waiver was unconscionable. 161 P.3d 1000, 1007 (Wash. 2007). And, in *Brewer v. Missouri Title Loans*, the court found that “[t]he cumulative real-world effect of the arbitration provisions in this case is that a consumer’s minimum and maximum recovery from the title company are identical—\$0.00—for no consumer ever has filed an individual claim for arbitration against the title company.” 364 S.W.3d 486, 487–88 (Mo. 2012) (en banc). *See also* Tracey & McGill, *supra* note 82, at 445 n.43 (“Evidence in the record indicates that no arbitrations have been brought under the clause that defendant has included in over 68,000 loan agreements in North Carolina. Based on this evidence and the above analysis, it appears that the combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation. We agree with the trial court that ‘[d]efendant’s arbitration clause contains features which would deter many consumers from seeking to vindicate their rights.’”) (alteration in original) (quoting *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008)).

underpinning the vindication of consumer rights in our legal system.¹⁶⁵

What this really drives home is the difference between chilling and preventing claims. A liberal pragmatist isn't convinced by the formalist argument that rights *could* be vindicated by an individual consumer who might be motivated, for whatever idiosyncratic reason, to wend his way through an individual arbitration. The pragmatic point is that rights *will not in fact* be vindicated if we ban collective action. If we are unmoved by the pragmatic fact that all claimants will be chilled from pursuing claims—if that fact is legally non-cognizable—then the pragmatist objection loses force. And arguably, Justice Scalia's majority opinion in *Concepcion* established that this pragmatic objection is indeed non-cognizable, by striking down the *Discover Bank* rule and dismissing the dissent's objection that "small dollar claims might otherwise slip through the legal system."¹⁶⁶

D. *Conservative Instrumentalism*

The core of the conservative instrumentalist viewpoint here is the concern that a vindication of rights defense will apply so broadly as to invalidate most bilateral arbitration agreements in consumer cases, and therefore—for instrumental reasons—should not be recognized. Where state law claims are concerned, this critique may be dressed up in quasi-constitutional garb by asserting that the allowance of the defense will pose an "obstacle" to the institution of arbitration, and so is preempted under the Supremacy Clause. And indeed, some might argue that this is the basis for the obstacle preemption holding in *Concepcion*.

In any event, the practical formalist come-back to the view espoused by Judge Jacobs and others appears powerful and persuasive. So long as courts take seriously the question of whether consumers could redress their rights under a particular arbitration clause, and so long as they give weight to the consumer-friendly features of those clauses which are proliferating as we go to print, the instrumentalist concern loses its steam. It turns out that the exception will not

165 See *supra* text accompanying notes 51–71 (discussing risk aversion of attorneys, who will be disinclined to take on individual arbitration).

166 *Concepcion*, 131 S. Ct. at 1753; see also *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005) ("The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness. . . . This is not only substantively unconscionable, it violates public policy by granting Discover a 'get out of jail free' card while compromising important consumer rights.") (internal citations omitted).

swallow the rule. It turns out that a traditional vindication of rights defense is not an obstacle to the intent of Congress in passing the FAA. But none of that should cause conservatives to lose much sleep. They are killing us with kindness.

