# More Than Class Action Killers: The Impact of *Concepcion* and *American Express* on Employment Arbitration

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## INTRODUCTION

The Supreme Court recently issued two important decisions involving the enforceability of class waivers in arbitration agreements, *AT&T Mobility LLC v. Concepcion* ("*Concepcion*")[1] and *American Express Co. v. Italian Colors Restaurant* ("*Amex*").[2] Observers can easily contextualize these decisions as part of a broader trend of Supreme Court cases limiting the availability of class actions.[3] Indeed, Justice Kagan wrote a spirited dissent in *Amex* criticizing the majority as being obsessed with eliminating class actions: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled."[4] In the wake of these Supreme Court decisions, several courts have in effect ended class or collective actions by compelling the named plaintiff to submit his or her claim to individual arbitration.[5] Armed with these decisions, companies can use arbitration agreements to immunize themselves from class action liability.

*Concepcion* and *Amex* can significantly impact the availability of class actions, and the decreasing availability of class actions is problematic. However, the reach of these decisions goes far beyond the class action context. These Supreme Court rulings can also undermine the fairness of *individual* arbitration proceedings. As explained in this Article, *Concepcion* and *Amex* threaten to have a destabilizing effect on the legal framework supporting individual arbitration proceedings in the United States, an impact observable in the context of employment disputes.

Through judicial review of arbitration agreements, courts in the past could generally invalidate skewed, one-sided, unfair arbitration clauses drafted by employers and imposed on employees, but some courts have

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1. 131 S. Ct. 1740 (2011).

2. 133 S. Ct. 2304 (2013).

3. *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (rigorously enforcing Rule 23(b)(3)'s predominance requirement); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (rigorously enforcing Rule 23(a)(2)'s commonality requirement).

4. *Amex*, 133 S. Ct. at 2320.

5. *See, e.g.*, Arroyo v. Riverside Auto Holdings, Inc., No. E056256, 2013 WL 4997488 (Cal. Ct. App. Sept. 13, 2013) (holding that plaintiff who filed a class action regarding wage and hour claims must submit his individual claim to arbitration); Ryan v. JPMorgan Chase & Co., 924 F. Supp. 2d 559 (S.D.N.Y. 2013) (relying on *Concepcion* and *Amex* to enforce class waiver and compel employee to submit her individual claim to arbitration); Jasso v. Money Mart Express, Inc., 879 F. Supp. 2d 1038 (N.D. Cal. 2012) (enforcing class waiver and compelling employee to submit her individual claim to arbitration); Torres v. United Healthcare Servs., Inc., 920 F. Supp. 2d 368 (E.D.N.Y. 2013) (compelling employees to arbitrate on an individual basis); Rivera v. Hilton Worldwide, Inc., No. G047644, 2013 WL 6230604 (Cal. Ct. App. Nov. 26, 2013) (ordering employee to arbitrate his individual claim); Fimby-Christensen v. 24 Hour Fitness USA, Inc., No. 5:13-cv-01007-EJD, 2013 WL 6158040 (N.D. Cal. Nov. 22, 2013); Smith v. BT Conferencing, Inc., No. 3:13-cv-160, 2013 WL 5937313 (S.D. Ohio Nov. 5, 2013).

begun to construe *Concepcion* and *Amex* as narrowing the scope of judicial review of arbitration agreements.[6] If the judiciary is giving less scrutiny to arbitration agreements because of *Concepcion* and *Amex*, such limited judicial review can open the door for employers to tilt the scales more in their favor by drafting arbitration clauses with questionable procedures. One-sided arbitration clauses with burdensome procedures or a lack of procedural protections can in turn undermine the enforcement of critical legislation protecting employees, such as wage and hour and civil rights statutes.

The judicial review of employment arbitration agreements for fairness is particularly important because of grievous errors made by the Supreme Court. The Supreme Court, completely ignoring the rich history behind the Federal Arbitration Act ("FAA"), has held that the FAA covers employment disputes.[7] However, the history of the FAA's enactment establishes that the FAA was never intended to force employees into arbitration.[8] The judicial fairness review of employment arbitration agreements helps counterbalance some of the unjustness of the Supreme Court's flawed decision to apply the FAA in the employment context, but judicial review is shrinking because of *Concepcion* and *Amex*.

Moreover, the Supreme Court has made other fundamental errors when interpreting the FAA over the years. For example, through flawed Supreme Court interpretations, the FAA now binds state courts and broadly preempts many state laws.[9] However, the FAA was never intended to apply in state court.[10] Additionally, the Court pushed the boundaries of the FAA in a way that makes it more challenging for parties to invalidate arbitration agreements in court. For example, in *Rent-A-Center, West, Inc. v. Jackson*, which involved an employment dispute, the Supreme Court found that an arbitration agreement can delegate a dispute about the enforceability of the arbitration agreement to an arbitrator, and such delegation clauses are generally enforceable unless a party specifically challenges the delegation clause.[11] In effect, because of the delegation clause, a court can be easily stripped of the ability to review an arbitration agreement for fairness. Grouped together, *Rent-A-Center*, *Concepcion*, and *Amex* arguably narrowed the scope of judicial review of individual arbitration agreements, and now courts can enforce arbitration agreements in an increasingly

6. *See infra* Part II.B.

7. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

8. *See infra* notes 174-76 and accompanying text.

9. *See generally* Southland Corp. v. Keating, 465 U.S. 1 (1984).

10. *See generally* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992).

11. 130 S. Ct. 2772 (2010); *see also In re* Checking Account Overdraft Litigation, No. 09-MD-02036-JLK (S.D. Fla. Aug. 27, 2013) (enforcing delegation clause and sending to arbitration all arguments regarding arbitration clause's enforceability).

rubberstamp-like manner. Through the Supreme Court's expansion of the FAA, the FAA is becoming a virtually all-powerful, docket-clearing tool for the judiciary.[12]

This Article highlights how the Supreme Court's *Concepcion* and *Amex* decisions, although involving class actions, can impact individual employment arbitration proceedings and destabilize the broader legal framework supporting arbitration in the United States. The shrinking scope of judicial review of arbitration agreements should prompt a broader debate about the relationship between the courts and a system of arbitration. If employment arbitration is to have any legitimacy, judicial review of arbitration agreements should be increasing in scope rather than decreasing, to ensure that employees knowingly and voluntarily entered into arbitration agreements.

Part I of this Article provides an overview of the Supreme Court's *Concepcion* and *Amex* decisions. Part II of this Article explores how courts construe these decisions as changing the scope of judicial review of individual arbitration agreements, with a particular emphasis on cases involving employment disputes. Part III then discusses the implications of this changing nature of judicial review, how parties and courts can address these implications, and how the legislature can alleviate some of the problems arising from *Concepcion* and *Amex* by adding a definition of arbitration to the FAA.

## I.
## THE SUPREME COURT'S *CONCEPCION* AND *AMEX* DECISIONS

In both *Concepcion* and *Amex*, the arbitration agreements at issue contained class waivers requiring claims to be brought in an individual capacity and not as part of a class or representative proceeding.[13] The plaintiffs in *Concepcion* were consumers who had entered into cell phone agreements with AT&T,[14] and the plaintiffs in *Amex* were merchants who had entered into agreements with American Express.[15] In both cases, the

12. The Supreme Court's arbitration cases are also part of a larger trend of Supreme Court cases limiting the availability of litigation. *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1109 (2006) (arguing that the Rehnquist Court "acted aggressively and explicitly to limit the scope or availability of litigation [in the areas of] remedies and rights of action, qualified immunity and attorney's fees, the enforceability of mandatory arbitration agreements, and limitations on the permissible scope of punitive damage awards"). The Roberts Court has continued this trend of limiting the availability or scope of litigation, especially through the Court's controversial heightening of pleading standards. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

13. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011); Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308 (2013).

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

15. *Amex*, 133 S. Ct. at 2308.

plaintiffs filed class actions in court against the companies, AT&T and American Express respectively. The underlying claims of the consumers in *Concepcion* involved allegations that AT&T engaged in fraud and unfair business practices by charging sales taxes on phones that were advertised as free.[16] In *Amex*, the merchants alleged that American Express violated antitrust laws by using its monopoly power to force merchants to accept credit cards subject to significantly higher fees than the fees associated with competing credit cards.[17] In both of these class action lawsuits, the corporate defendants moved to compel individual arbitration pursuant to the FAA.[18]

### *A.* Concepcion

The district court in *Concepcion* denied AT&T's motion to compel arbitration because the court found the class waiver to be unconscionable under California law.[19] The California Supreme Court had previously articulated an unconscionability test which classified most class waivers as unconscionable.[20] Under this test, referred to as the "*Discover Bank* rule," class waivers are unlawfully exculpatory and unconscionable if they are found in a consumer adhesion contract and the party with the superior bargaining power allegedly engaged in a scheme to defraud large numbers of consumers out of small sums of money.[21] The district court found that under California's *Discover Bank* rule, the class waiver at issue was not enforceable, and the Ninth Circuit affirmed.[22]

The Supreme Court framed the issue in *Concepcion* as "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."[23] Justice Scalia, joined by Justices Kennedy, Thomas,[24] Alito and Chief Justice Roberts, explained that under section 2 of the FAA, courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[25] Thus, while generally applicable contract defenses, such as unconscionability, could invalidate an arbitration agreement, according to the Court the FAA does not permit

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

17. *Amex*, 133 S. Ct. at 2308.

18. *Concepcion*, 131 S. Ct. at 1744-45; *Amex*, 133 S. Ct. at 2308.

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

20. *Id.* at 1746 (citing Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005)).

21. *Id.*

22. *Id.* at 1745.

23. *Id.* at 1744.

24. Justice Thomas joined the majority's opinion in *Concepcion*, and he also wrote a separate concurring opinion setting forth a textual argument why the FAA's savings clause should not permit courts to consider the *Discover Bank* rule. *Id.* at 1753-56 (Thomas, J., concurring).

25. *Id.* at 1746 (majority opinion).

"defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[26]

The *Concepcion* Court next determined whether California's *Discover Bank* rule was a generally-applicable contract defense, which would be a valid defense under the FAA, or a defense targeting arbitration, which the FAA would preempt.[27] Justice Scalia, writing for the majority, explained that the FAA preempts state laws that expressly prohibit the arbitration of a claim.[28] However, the FAA can also preempt other laws or court rulings that, although appearing to be generally-applicable on their face, "have been applied in a fashion that disfavors arbitration."[29] Additionally, the majority determined that the FAA can preempt rules having a "disproportionate impact on arbitration," and that a court could not "rely on the uniqueness of an agreement to arbitrate" as a ground for refusing to compel arbitration.[30] For example, the FAA would preempt a court's finding of unconscionability if the court based its decision on the agreement's failure to allow full discovery, failure to incorporate the Federal Rules of Evidence, or failure to provide for a jury of "twelve lay arbitrators."[31] Such findings of unconscionability by a court would rely on the uniqueness of arbitration and improperly attack arbitration for not conforming to litigation procedures.

The majority in *Concepcion* explained that the FAA does not permit "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[32] The majority found that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[33] The majority pointed out that the differences between class and bilateral arbitration are "fundamental," and it is unlikely that Congress intended an arbitrator to apply class procedures protective of class members.[34] Under this reasoning, the majority held that the FAA preempted California's *Discover Bank* rule.[35] Therefore, the class waiver in *Concepcion* was enforceable, and the parties had to submit their disputes to individual, not class, arbitration.

Justice Breyer wrote a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.[36] Justice Breyer found that because California's

26. *Id.*
27. *Id.*
28. *Id.* at 1747.
29. *See id.*
30. *Id.* (citation omitted).
31. *See id.*
32. *Id.* at 1748.
33. *Id.*
34. *Id.* at 1750-51.
35. *Id.* at 1753.
36. *Id.* at 1756-62 (Breyer, J., dissenting).

*Discover Bank* rule applied equally to class waivers in "*any* contract," the savings clause in section 2 of the FAA permitted application of the rule.[37] Breyer also emphasized the *Discover Bank* rule did not establish a "blanket policy" against class waivers, noting that some California courts had enforced class waivers when such agreements satisfied the unconscionability doctrine.[38]

Breyer's opinion also criticized the majority for characterizing individual arbitration, as opposed to class arbitration, as a "fundamental attribute" of arbitration under the FAA.[39] Breyer explained that the majority focused too much on the potential disadvantages of class arbitration while ignoring countervailing advantages. Instead, Breyer believed that California should be entitled to make its own decision in weighing the pros and cons of class proceedings.[40] Breyer stressed that under the FAA, courts must treat arbitration agreements on the same footing as other agreements, and the *Discover Bank* rule did not offend this principle since it applied equally to class waivers in any contract.[41] Under the dissent's reasoning, the savings clause of section 2 of the FAA would permit courts to apply the *Discover Bank* rule and invalidate class waivers.

### *B.* Amex

The plaintiff merchants in *Amex* resisted the motion to compel arbitration by asserting that individual claims would be prohibitively costly.[42] Relying on an economist's declaration, the plaintiffs reported that the cost of obtaining an expert analysis to prove the antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," but that each merchant would only recover between about $12,000 and $38,000.[43] Therefore, it was impractical for each merchant to bring individual proceedings. Despite this declaration, the district court granted the motion to compel arbitration and dismissed the lawsuit.[44] However, the Second Circuit reversed, finding that the class waiver was not enforceable because the merchants had demonstrated they would "incur prohibitive costs" if forced into individual arbitration.[45]

The Supreme Court framed the issue in *Amex* as "whether a contractual waiver of class arbitration is enforceable under the [FAA] when the

37. *Id.* at 1757.
38. *Id.*
39. *Id.* at 1759.
40. *Id.* at 1759-61.
41. *Id.* at 1761-62.
42. Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308 (2013).
43. *Id.*
44. *Id.*
45. *Id.*

plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."[46] Justice Scalia, again writing for the majority, which again consisted of Justices Kennedy, Thomas,[47] Alito, and Chief Justice Roberts, explained that under the FAA, courts must rigorously enforce the terms of an arbitration agreement, even with respect to statutory claims unless a "contrary congressional command" overrides the FAA.[48] Turning to the antitrust laws, the majority found that nothing in these laws required the Court to override the FAA and reject the waiver of class proceedings.[49] The majority also reasoned that the antitrust laws cannot preclude class waivers because they were enacted before the advent of modern class actions, and thus individual proceedings should be considered acceptable for resolving antitrust claims.[50]

The merchants argued that an arbitration agreement cannot be enforced if the agreement prevents the "effective vindication" of a federal statutory right.[51] The merchants contended that enforcing the class waivers in this case would prevent the effective vindication of their rights since they would have no economic incentive to pursue their antitrust claims in individual arbitration.[52] However, the majority rejected these arguments and dismissed the "effective vindication" doctrine as mere dictum from prior Supreme Court cases.[53] The Court explained that this doctrine was intended "to prevent prospective waiver of a party's right to pursue statutory remedies."[54] Properly understood, the effective vindication doctrine would thus apply if arbitration agreements expressly forbid the assertion of certain statutory rights. The majority opined that the doctrine "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[55] However, the majority reasoned that the high cost in proving a statutory claim is distinct from the "elimination of the right to pursue that remedy."[56] The majority reasoned that under *Concepcion*, the "FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."[57]

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46. *Id.* at 2307.

47. Justice Thomas also wrote a concurring opinion relying on a textual analysis of the FAA to show why the merchants' arguments should be rejected. *Id.* at 2312 (Thomas, J., concurring).

48. *Amex*, 133 S. Ct. at 2309 (majority opinion) (citations omitted).

49. *Id.*

50. *Id.*

51. *Id.* at 2310.

52. *Id.*

53. *Id.* at 2310.

54. *Id.* (emphasis omitted) (citation omitted) (internal quotation marks omitted).

55. *Id.* at 2310-11.

56. *Id.* at 2311 (emphasis omitted) (citation omitted).

57. *Id.* at 2312 n.5.

Justice Kagan wrote a dissenting opinion in *Amex*, joined by Justices Ginsburg and Breyer.[58] The dissenters explained that the majority gave an overly-cramped, narrow reading to the effective vindication doctrine, which, according to the majority, applied only in a few, discrete situations.[59] The dissenters, however, argued that the effective vindication doctrine was much broader.[60] According to the dissenting Justices, the doctrine barred the enforcement of an arbitration clause whenever the clause would operate to confer immunity from federal claims, regardless of the procedural devices used to confer that immunity.[61] The dissent reasoned that an exculpatory clause explicitly insulating a company from antitrust liability would not be enforceable.[62] Similarly, an arbitration clause could have the same unlawful effect pursuant to a wide variety of procedural devices. For example, a clause could be exculpatory if it established excessive filing or administrative fees, removed the arbitrator's authority to grant relief, or prohibited certain testimony.[63] Under the arbitration clause at issue, which prohibited class proceedings and imposed confidentiality provisions preventing the merchants from sharing information or producing a common expert report, the merchants would have to spend ten times more in proving their claims than the claims were worth.[64] The dissenters reasoned that because such costs are prohibitive and trigger the effective vindication doctrine, the arbitration agreement should not be enforced.[65]

## II.
## *CONCEPCION* AND *AMEX* ARE CHANGING JUDICIAL REVIEW OF INDIVIDUAL ARBITRATION AGREEMENTS

After *Concepcion* and *Amex*, a party subject to an arbitration clause with a class waiver may have to pursue claims in individual arbitration, or otherwise forego them. It will become more difficult to pursue class proceedings because these cases make it more challenging for parties to invalidate class waivers in arbitration agreements.[66] Lower courts can no longer refuse to enforce class waivers as a matter of public policy.

58. *Id.* at 2313-20 (Kagan, J., dissenting). Justice Sotomayor did not participate in the decision.
59. *Id.* at 2317.
60. *Id.* at 2317-18.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 2316.
65. *Id.* at 2316-17.
66. *See supra* note 5.

Because class actions have played a major role in American society,[67] and because they can be controversial,[68] it is easy to focus on how *Concepcion* and *Amex* can in effect limit the availability of class proceedings. However, the doctrines and analyses set forth in these decisions may potentially reach far beyond the class action context. As demonstrated below, these decisions impact the judicial review and enforceability of individual arbitration agreements. The next two Parts provide an overview of how some courts, particularly in the employment context, have engaged in a fairness review of individual arbitration agreements both before and after the Supreme Court's decisions in *Concepcion* and *Amex*.

### *A. Judicial Review of Employment Arbitration Agreements Before* Concepcion *and* Amex

Prior to *Concepcion* and *Amex*, a line of authority in the employment context permitted courts to engage in a fairness review of the arbitral procedures set forth in an arbitration agreement before compelling an employee to submit his or her dispute with an employer to arbitration. This line of authority, which ultimately derived from the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[69] primarily took root in California, though courts in other jurisdictions also engaged in this type of review. Under this review, courts would sometimes strike down and carve out unfair, one-sided arbitration procedures before compelling arbitration of employee's disputes.[70] In some situations, courts would invalidate the entire arbitration agreement.[71] This judicial fairness review of bilateral arbitration agreements helped ensure a fair arbitration proceeding, and through this review, courts played an important role in helping to police arbitration procedures in the employment context. This Part provides an overview of the judicial fairness review that occurred

67. *See, e.g.*, Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After* Wal-Mart v. Dukes, 62 DEPAUL L. REV. 659, 660 (2013) (explaining that class actions "have been the basis for the most important civil rights cases [in American history], addressing school desegregation, prisoners' rights, and employment discrimination, among other issues," and pointing out that the Supreme Court's landmark case *Brown v. Board of Education*, 347 U.S. 483 (1954), was a class action).

68. *See, e.g.*, Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against Class Defendants*, 66 SMU L. REV. 1, 2 (2013) ("Class actions are a politically charged and controversial topic because their judgments dispose of the rights of a large number of people who are not present in the litigation.").

69. 500 U.S. 20 (1991).

70. *See, e.g.*, Abrahim v. ESIS, Inc., No. C-07-04014-JCS, 2008 WL 220104, at *6 (N.D. Cal. Jan. 25, 2008) (holding that plaintiff must comply with defendant's arbitration policy but striking down portion of policy requiring payment of a fee to defendant to initiate arbitration).

71. *See, e.g.*, Lelouis v. W. Directory Co., 230 F. Supp. 2d 1214 (D. Ore. 2001).

before *Concepcion* and *Amex*, illuminating the important ways in which *Concepcion* and *Amex* altered the playing field.

In *Gilmer*, the Supreme Court addressed whether an employee's statutory claims under the Age Discrimination in Employment Act ("ADEA") could be subject to compulsory arbitration under the FAA.[72] The Supreme Court ultimately found that such claims are subject to arbitration because "[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."[73] The Supreme Court found that Congress did not intend to preclude arbitration of ADEA claims.[74] The Court reasoned that as long as "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," arbitration is appropriate, and arbitration would not undermine a statute's remedial and deterrent functions.[75]

The plaintiff employee in *Gilmer* raised several challenges to the adequacy of the arbitration procedures at issue.[76] The employee argued that arbitration would be deficient because of the potential bias of the arbitrators, limited discovery, the lack of written opinions, and limited relief.[77] However, the Court rejected all of these challenges.[78] It found that both the applicable arbitration rules and the FAA provided protection against biased decision-makers.[79] According to the Court, the plaintiff failed to show how the limited discovery allowed by the arbitration rules would undermine a fair opportunity to present a claim.[80] Furthermore, the arbitration rules at issue required written awards, and the arbitrators could award equitable relief.[81]

In the employment arbitration case *Cole v. Burns International Security Services*, the United States Court of Appeals for the District of Columbia Circuit used four of the employee's challenges in *Gilmer* and developed a list of fairness factors to help courts analyze the enforceability of an employment arbitration agreement under the FAA.[82] In finding that

72. *Gilmer*, 500 U.S. at 23.

73. *Id.* at 26 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

74. *Id.* at 26-29.

75. *Id.* at 28 (citation omitted).

76. *Id.* at 30-32.

77. *Id.*

78. *Id.*

79. *Id.* at 30-31.

80. *Id.* at 31.

81. *Id.* at 31-32.

82. 105 F.3d 1465, 1481-83 (D.C. Cir. 1997). In developing these fairness factors, the court also relied in part on due process protocols drafted by a task force representing arbitration service providers, employees, and employers. *See generally* Richard A. Bales, *The Employment Due Process Protocols at*

the arbitration agreement at issue satisfied "minimal standards of procedural fairness" and allowed employees to effectively vindicate statutory rights, the Court of Appeals observed that the arbitration agreement at issue satisfied the following factors: (1) it provided for neutral arbitrators, (2) it provided for more than minimal discovery, (3) it required a written award, (4) it provided for all relief that would otherwise be available in court, and (5) it did not require employees to pay unreasonable costs, fees, or expenses as a condition of accessing the arbitration forum.[83] The *Cole* court noted in connection with this last factor that an employee could not be forced to arbitrate "public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses."[84]

Other courts have adopted these *Cole* factors to assess the fairness of an employment arbitration agreement. For example, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court applied the *Cole* factors when it addressed the arbitrability of antidiscrimination claims under the California Fair Employment and Housing Act.[85] The California Supreme Court held that such claims are arbitrable provided that the arbitration agreement permits the employee to vindicate his or her rights.[86] In order to help police the fairness of an employment arbitration agreement, the California Supreme Court in *Armendariz* borrowed the five fairness factors from the *Cole* decision and explained that an employee could vindicate his or her statutory rights only if the arbitration agreement satisfied these minimum fairness factors.[87]

Many lower courts, particularly those in California, have applied these *Armendariz* fairness factors when reviewing the enforceability of an arbitration agreement in the employment context. The *Armendariz* court did not discuss these fairness factors as linked to the FAA's savings clause; instead, the *Armendariz* court viewed these factors as arising from the effective vindication doctrine.[88] However, some lower courts have treated these fairness factors as part of general contract law or have applied an unconscionability analysis, as permitted by the savings clause of the FAA.[89]

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*Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. DISP. RESOL. 165 (2005).

83. *Cole*, 105 F.3d at 1482-83.

84. *Id.* at 1485.

85. 6 P.3d 669, 682 (Cal. 2000).

86. *Id.* at 674, 680-82.

87. *Id.* at 682 n.8.

88. See *infra* notes 113-14 and accompanying text.

89. *See, e.g.*, Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 94 (Cal. Ct. App. 2004) ("The *Armendariz* requirements are an application of general state law contract principles regarding the unwaivability of public rights in the arbitration context.").

Several pre-*Concepcion* court decisions invalidated employment arbitration agreements with one-sided or unfair arbitration procedures because the agreements failed to satisfy the *Armendariz* fairness factor analysis and/or a general unconscionability analysis. For example, in *Fitz v. NCR Corp.*, an employee filed a wrongful termination lawsuit in court against her employer, and the employer responded by asking the court to enforce an arbitration agreement in the employer's dispute resolution policy.[90] The arbitration agreement limited discovery "to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing."[91] Additionally, the agreement required the parties to exchange exhibits and a list of witnesses to be used during arbitration at least two weeks prior to the hearing, while no other discovery was permissible unless the arbitrator determined there was a compelling need for additional discovery.[92]

The *Fitz* court, recognizing that "arbitration agreements must ensure minimum standards of fairness,"[93] engaged in a fairness review of the procedures set forth in the arbitration agreement. As a result of this review the court ultimately found that the agreement was void in its entirety on the grounds of unconscionability.[94] During the course of its fairness review, the *Fitz* court observed that the discovery limits were not mutual because the employer was likely to be in possession of the vast majority of the evidence, and that allowing only two depositions would not be fair to the employee.[95] According to the court, the discovery limits were also overly harsh considering the "complexity of employment disputes, the outcomes of which are often determined by the testimony of multiple percipient witnesses, as well as written information about the disputed employment practice."[96] The court also found that the arbitrator's discretion to allow for additional discovery was an insufficient safeguard against unfairness because the party seeking additional discovery would have to satisfy a high burden and demonstrate a compelling need to justify additional discovery.[97] As a result of these findings, the *Fitz* court held that the arbitration agreement was not enforceable because the discovery procedures failed to satisfy "minimum standards of fairness."[98]

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90. *Id.* at 90.
91. *Id.* at 97.
92. *Id.*
93. *Id.* (citation omitted) (internal quotation marks omitted).
94. *Id.* at 101-07.
95. *Id.* at 97-98.
96. *Id.* at 98.
97. *Id.*
98. *Id.* at 99-100 (citation omitted).

In *Ontiveros v. DHL Express (USA), Inc.*, an employment case similar to *Fitz*, a California appellate court refused to enforce an arbitration clause after engaging in a fairness review of the arbitration agreement.[99] The agreement permitted a party to make a request for production of documents and to depose one individual and any expert witnesses.[100] The agreement also provided that an arbitrator could permit additional discovery "upon a showing of substantial need."[101] The court found that the one deposition limit was inadequate to allow the plaintiff to prove her claims, given that the alleged misconduct involved two different worksites and numerous employees over the course of four years.[102] The *Ontiveros* court reasoned that the discovery limits made the arbitration agreement substantively unconscionable.[103]

In its review of the arbitration agreement, the *Ontiveros* court also found that the arbitration agreement's cost-sharing provisions—which required the employee to pay for half of the costs of the arbitrator—made the arbitration agreement unconscionable.[104] The court reasoned that the payment of such expenses, which were unique to arbitration and imposed by the employer, would deter employees from pursuing important statutory claims.[105] As a result of the problematic discovery and cost provisions, the *Ontiveros* court refused to enforce the arbitration agreement.[106]

Like the *Fitz* and *Ontiveros* courts, several other courts have found particular arbitration procedures to be inappropriate or insufficient, and such courts either refused to compel arbitration or invalidated the problematic procedures on the grounds of the *Armendariz* fairness factors and/or a general unconscionability analysis.[107]

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99. 79 Cal. Rptr. 3d 471 (Ct. App. 2008).

100. *Id.* at 476.

101. *Id.*

102. *Id.* at 487.

103. *Id.* at 487-88.

104. *Id.* at 484-86.

105. *Id.* at 485.

106. *Id.* at 489.

107. *See, e.g.*, Abrahim v. ESIS, Inc., No. C-07-04014-JCS, 2008 WL 220104, at *5-6 (N.D. Cal. Jan. 25, 2008) (relying on *Armendariz* to invalidate an arbitration agreement's requirement that the employee pay a fee to an employer in order to initiate arbitration); McManigal v. Medicis Pharm. Corp., No. C07–4874-TEH, 2008 WL 618909 (N.D. Cal. Mar. 3, 2008) (holding that fee provisions violated *Armendariz*); Lelouis v. W. Directory Co., 230 F. Supp. 2d 1214 (D. Ore. 2001) (citing *Armendariz* with approval and invalidating arbitration agreement because the arbitration agreement, inter alia, made the employee bear half the costs of arbitration); Jackson v. S.A.W. Entm't Ltd., 629 F. Supp. 2d 1018 (N.D. Cal. 2009) (finding arbitration agreement problematic under *Armendariz* because the agreement did not provide that employer to pay the costs associated with arbitration); Hulett v. Capitol Auto Group, Inc., No. 07-6151-AA, 2007 WL 3232283 (D. Or. Oct. 29, 2007) (citing *Cole* and finding discovery limits to be substantively unconscionable); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538 (E.D. Pa. 2006) (citing *Gilmer* and finding that provision limiting depositions solely to expert witnesses was substantively unconscionable); Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998) (severe discovery limits, inter alia, made the arbitration agreement unconscionable); Walker v. Ryan's

### B. *Judicial Review of Employment Arbitration Agreements After* Concepcion *and* Amex

As discussed above, many court opinions pre-*Concepcion* and pre-*Amex* reviewed the fairness of arbitration procedures in the employment context and invalidated procedures or the entire arbitration agreement on the basis of the *Armendariz* factors, a general unconscionability analysis, or both.[108] Courts are still navigating how *Concepcion* and *Amex* are changing the landscape of arbitration law. However, some courts construe *Concepcion* and *Amex* as undermining earlier authority and requiring a more circumscribed scope of judicial review of arbitration agreements.

Although *Concepcion* involved the validity of a class waiver, the Supreme Court interpreted the FAA as embodying a very broad, and arguably vague, preemptive power. According to the Court, the FAA would preempt "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" or that "interfere[] with fundamental attributes of arbitration."[109] After the Court's ruling, courts are not permitted to "rely on the uniqueness of an agreement to arbitrate" when invalidating an arbitration agreement on the grounds of unconscionability,[110] and the FAA can preempt a state rule of general applicability that has a "disproportionate impact" on arbitration or "disfavors" arbitration.[111]

Some courts construe *Concepcion*'s broad preemption analysis to undermine the *Armendariz* fairness factors and even to invalidate a more general unconscionability analysis used before *Concepcion*. For example, in *James v. Conceptus, Inc.*, a whistleblower-retaliation lawsuit against a former employer, a federal district court in Texas found that the *Armendariz* fairness factor analysis was "in serious doubt following *Concepcion*."[112] To help understand the district court's reasoning, it is helpful to recall that the *Armendariz* fairness factors arose from the effective vindication doctrine and the non-waivable nature of important statutory claims that further fundamental public interests; they did not arise from the FAA or general

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Family Steak Houses, Inc., 400 F.3d 370, 387 (6th Cir. 2005) (refusing to enforce arbitration agreement because of, inter alia, limited discovery provisions which "could significantly prejudice employees"); Hamrick v. Aqua Glass, Inc., No. 07-3089-CL, 2008 WL 2853992 (D. Or. Feb. 20, 2008) (citing *Gilmer* and finding discovery limits to be unconscionable); Miller v. Aqua Glass, Inc., No. 07-3088-CL, 2008 WL 2854126 (D. Or. Feb. 20, 2008) (citing *Gilmer* and finding discovery limits to be unconscionable); Hoffman v. Cargill, Inc., 968 F. Supp. 465, 475 (N.D. Iowa 1997) (citing *Gilmer* and finding discovery limits raise "grave concern about the fundamental fairness of the arbitration proceeding").

108. *See supra* Part II.A.

109. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

110. *Id.* at 1747 (citation omitted).

111. *Id.*

112. 851 F. Supp. 2d 1020, 1033 (S.D. Tex. 2012).

contract law.[113] The California Supreme Court in *Armendariz* distinguished between the fairness factor analysis and the separate doctrine of unconscionability:

> In the previous section of this opinion [discussing the fairness factors], we focused on the minimum requirements for the arbitration of unwaivable statutory claims. In this section, we will consider objections to arbitration that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the type of claim being arbitrated. These objections fall under the rubric of "unconscionability."[114]

Thus, based on the *Armendariz* court's introduction to the unconscionability analysis, it seems that the California Supreme Court viewed the five fairness factors from *Cole* as a distinct public policy requirement, separate from the general unconscionability analysis applicable to any contract. As the *Conceptus* court explained, these *Armendariz* fairness factors therefore cannot be considered grounds that "exist at law or in equity for the revocation of any contract, 9 U.S.C. § 2, because they 'apply only to arbitration [and] derive their meaning from the fact that an agreement to arbitrate is at issue.'"[115] The *Conceptus* court reasoned that the *Armendariz* fairness factors are "categorical, *per se* requirements specific to arbitration clauses," not generally applicable contract law.[116] Consequently, the *Conceptus* court ruled that under *Concepcion*, the FAA would preempt the *Armendariz* fairness factor analysis, and these fairness factors can no longer automatically invalidate an otherwise valid agreement to arbitrate.[117]

The *Conceptus* court then analyzed the arbitration agreement at issue, particularly its cost-splitting provisions. The court found that under the old, and now preempted, *Armendariz* fairness factor analysis, the agreement's cost-splitting provisions would have been automatically "unconscionable on a per se basis . . . without further inquiry."[118] As noted above, pre-*Concepcion* court decisions relied on the *Armendariz* fairness factors to strike down arbitration provisions requiring employees to bear the costs of arbitration.[119] However, the *Conceptus* court recognized that post-

113. Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 682 (Cal. 2000).

114. *Id.* at 689.

115. *Conceptus*, 851 F. Supp. 2d at 1033 (citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *See supra* notes 104-07 and accompanying text.

*Concepcion*, it could not apply *Armendariz* to strike down fee provisions as a categorical rule.[120]

In *Mercado v. Doctors Medical Center of Modesto, Inc.*, a California appellate court also recognized that *Concepcion* and *Amex* "cast doubt on the continued validity of *Armendariz*."[121] The *Mercado* court explained that under *Concepcion*, a court cannot "rely on the uniqueness of an agreement to arbitrate" to invalidate an agreement as unconscionable.[122] The *Mercado* court, which described *Armendariz* as setting forth special minimum requirements for an arbitration agreement, concluded that such special requirements "appear[] to be the type of state rule *Concepcion* condemned."[123] Moreover, as recognized by the *Mercado* court, the Supreme Court's *Amex* decision also casts serious doubt on the continued validity of *Armendariz*.[124] In *Amex*, the Supreme Court explained that the effective vindication doctrine was mere dictum, and the *Armendariz* fairness factors arose out of this effective vindication doctrine.[125] Thus, *Amex* undermines the foundation of *Armendariz*.[126]

Previously, under *Armendariz*, a court could invalidate an arbitration provision requiring an employee to pay any part of an arbitrator's fees.[127] However, courts are construing *Amex* as "mak[ing] it more difficult for Plaintiffs to show that [an arbitration agreement] is unenforceable due to high fees associated with arbitration."[128] As explained by one court:

> After [*Amex*], if there is any situation in which provisions in an arbitration agreement increasing the cost of arbitration are unenforceable, it appears that the increased costs must do more than merely create a situation in which "it is not worth the expense involved in proving a statutory remedy," because "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." Rather, it appears that the increased costs must be "so high as to make access to the forum impracticable," such

120. *Conceptus*, 851 F. Supp. 2d at 1034 ("To the extent *Armendariz* invalidates all cost-splitting provisions in arbitration agreements as a categorical rule, it likely is abrogated by *Concepcion*.").

121. No. F064478, 2013 WL 3892990, at *7 (Cal. Ct. App. July 26, 2013).

122. *Id.* at *6.

123. *Id. See also* Ruhe v. Masimo Corp., No. SACV-11-00734-CJC(JCGx), 2011 WL 4442790, at *2 (C.D. Cal. Sept. 16, 2011) (reasoning *Armendariz* fairness factors "appear to be preempted by the FAA under the Supreme Court's reasoning in *Concepcion*"); Baeza v. Superior Court, 135 Cal. Rptr. 3d 557, 568 (Ct. App. Dec. 14, 2011) (describing *Armendariz* as "abrogated in part" by *Concepcion*).

124. *Mercado*, 2013 WL 3892990, at *6.

125. *Id.*

126. *Mercado*, 2013 WL 3892990, at *7.

127. *See supra* notes 104-07 and accompanying text.

128. Byrd v. SunTrust Bank, No. 2:12-cv-02314-JPM-cgc, 2013 WL 3816714, at *18 (W.D. Tenn. July 22, 2013).

> that the costs effectively "constitute the elimination of the right to pursue that remedy."[129]

Thus, *Amex*'s limiting of the effective vindication doctrine and *Concepcion*'s broad preemption doctrine seriously undermine *Armendariz*.

While some courts have focused on *Concepcion*'s preemption of the *Armendariz* fairness factors, the impact of *Concepcion* goes beyond these *Armendariz* factors. Some courts are treating *Concepcion* as changing and limiting the scope of a general unconscionability analysis. For example, in *Lucas v. Hertz Corp.*, a federal district court in California addressed an unconscionability challenge to an arbitration agreement that did not permit discovery.[130] The court described how pre-*Concepcion* courts used to invalidate limited discovery provisions in arbitration agreements:

> Prior to the Supreme Court's ruling in *Concepcion*, numerous courts, at both the state and federal level, found arbitration agreements substantively unconscionable where the rules of the arbitral forum allowed for only minimal discovery or where the affect [sic] of the discovery rules operated solely to one side's benefit.[131]

The *Lucas* court then stated that under *Concepcion*'s broad preemption analysis, "limitations on arbitral discovery no longer support a finding of substantive unconscionability."[132] Under this court's application of *Concepcion*, an unconscionability analysis that relies on the "uniqueness of an agreement to arbitrate" is inappropriate and preempted.[133] A pre-*Concepcion* court may have found the discovery limits at issue in the *Lucas* case to be unconscionable.[134] However, the *Lucas* court found that *Concepcion* foreclosed such a conclusion.[135] The *Lucas* court held that "in this post-*Concepcion* landscape, the arbitration agreement [at issue with its limited discovery provisions] is not substantively unconscionable."[136]

State-specific standards developed specifically for arbitration agreements—like the *Discover Bank* rule in *Concepcion* and the *Armendariz* fairness factors for employment arbitration—seem doomed under *Concepcion*'s broad preemption analysis. Furthermore, cases like *Lucas* show that in addition to preempting arbitration-specific rules,

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129. *Id.* (emphases omitted) (citations omitted) (quoting Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2307, 2310-11 (2013)).

130. 875 F. Supp. 2d. 991, 1008 (N.D. Cal. 2012).

131. *Id.* at 1007.

132. *Id.*

133. *Id.*

134. *See supra* Part II.A.

135. *Lucas*, 875 F. Supp. 2d at 1007.

136. *Id.* at 1009.

*Concepcion* can even threaten generally applicable state law defenses such as unconscionability if applied in a way that results in a "disproportionate impact" on arbitration or that "interfere[s] with fundamental attributes of arbitration."[137] Additionally, the *Amex* case, by limiting the effective vindication doctrine, threatens to undermine the foundation supporting the *Armendariz* factors. In sum, many courts are construing *Amex* and *Concepcion* as circumscribing the prior, more expansive scope of judicial review of arbitration agreements.

## III.
## LOOKING FORWARD: THE POTENTIAL CONSEQUENCES OF THE CHANGING NATURE OF JUDICIAL REVIEW OF ARBITRATION AGREEMENTS AND HOW TO RESPOND TO THESE CHANGES

The changing scope of judicial review of arbitration agreements in the wake of *Concepcion* and *Amex* can have significant consequences for employment arbitration. The next two Parts of this Article discuss these consequences and suggest some ways to respond to the changing nature of judicial review.

### *A. The Potential Consequences of the Changing Nature of Judicial Review of Arbitration Agreements*

The potential implications of this changing nature of judicial review of arbitration agreements are far-reaching. An employee may now lose the benefit of the *Armendariz* fairness factors, which provided at least a minimum guarantee of procedural protections for employment arbitration. Additionally, employees may have difficulty relying on unconscionability defenses if such arguments have a "disproportionate impact" on arbitration.[138] Furthermore, a more circumscribed scope of judicial review opens the door for unscrupulous employers to engage in greater overreaching when drafting arbitration agreements. For example, if an employer adds language to an arbitration agreement severely limiting or banning discovery, employees may have a harder time challenging such limits, previously challengeable under *Armendariz*. Even under a general unconscionability analysis, the discovery limits may be unassailable because some courts construe *Concepcion* as preempting an

137. Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1159 (9th Cir. 2013) ("We take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA."); *see also* Dean v. Draughons Jr. Coll., Inc., 917 F. Supp. 2d 751, 762 (M.D. Tenn. 2013) (holding that *Concepcion* preempts a Kentucky cost-prohibitiveness defense, even if the defense were based on general unconscionability principles, because such a defense is arbitration-specific and would frustrate the FAA's objectives).

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

unconscionability analysis that disfavors arbitration.[139] Moreover, if an employer adds a broad delegation clause, which was endorsed by the Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*,[140] judicial review of an arbitration agreement would be closer to an almost automatic rubberstamping of orders compelling arbitration.[141] The more limited nature of judicial review of arbitration agreements endorsed by these cases may lead to employer overreaching and more one-sided arbitration agreements.

Without the procedural protections of *Armendariz*, with a more circumscribed unconscionability analysis, and with a weakened effective vindication doctrine, employees can be forced to arbitrate in a proceeding with very limited procedural rights. This in turn may undermine the enforcement of critical statutory rights embodied in civil rights and wage and hour legislation. The rights and obligations created by such legislation are meaningless if employees can no longer access the judicial system and are relegated to a private system of arbitration governed by increasingly one-sided arbitration provisions.

Cases like *Concepcion*, *Amex*, and *Rent-A-Center* are destabilizing the relationship between courts and the system of arbitration supported by the FAA. The FAA is not solely about resolving disputes between two parties. Rather, it was enacted, at least in part, to assist the judiciary by alleviating overcrowded dockets.[142] At the time of the FAA's enactment, the judicial system was overwhelmed with congested dockets and overly technical, confusing procedural court rules slowing down the resolution of cases.[143] The FAA provided a safety valve to alleviate the burdens of the judiciary, but the FAA simultaneously provided a special, continuing role for the judiciary in connection with the enforcement of arbitration agreements and review of arbitration awards.[144] Thus, the FAA sets forth and defines a relationship between the government and its people. Changing the scope of judicial review therefore not only impacts the two parties to a dispute; it also changes the relationship between the judiciary and the privately-run system of dispute resolution. By shrinking the scope of judicial review of arbitration agreements, the Supreme Court is further closing the courthouse

139. *See, e.g.*, *Lucas*, 875 F. Supp. 2d. at 1007-09.

140. 130 S. Ct. 2772 (2010).

141. *See, e.g.*, *In re* Checking Account Overdraft Litigation, No. 09-MD-02036-JLK (S.D. Fla. Aug. 27, 2013) (order enforcing delegation clause and sending to arbitration all arguments regarding arbitration clause's enforceability).

142. IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 16, 24-25, 27, 34-36, 44, 45, 47, 52, 58, 62, 63, 68, 79, 138, 166-73, 188-89 (2013).

143. *Id.*

144. *See generally* 9 U.S.C. §§ 1-16 (2012).

door and providing for less oversight regarding arbitration.[145] Moreover, if courts are moving closer to rubberstamping one-sided arbitration agreements, such minimized judicial review threatens to undermine the public's confidence in the judicial system. And in the employment setting, where there is typically a large disparity in bargaining power between employers and employees, a decreasing level of judicial review can undermine the legitimacy of arbitration proceedings involving key public laws like civil rights and wage legislation.

### *B. How to Respond to the Changing Nature of Judicial Review of Arbitration Agreements*

The next two sub-Parts discuss possible responses to the changing scope of judicial review. Employees who are currently litigating and challenging the enforceability of an arbitration agreement can seek to limit a court's application of *Concepcion* and *Amex* through various arguments described below, and in the longer run, there are some possible legislative solutions.

#### *1. Limiting the Reach of* Concepcion *and* Amex *in Litigation*

The changing nature of judicial review of arbitration agreements should prompt a broader debate about the proper role of the judiciary, the level of judicial review that should occur in connection with arbitration, and the types of claims that should be subject to arbitration. These are fundamental questions related to accessing justice through the court system. Ideally, such fundamental choices should be debated and made through Congress or through the rulemaking process of an administrative agency, but not through a unilateral decision by five Justices of the Supreme Court. However until legislative action or rulemaking takes place, how should an employee who files a lawsuit respond when an employer seeks to compel arbitration and rely on *Concepcion* and *Amex* to reject an employee's challenges to an individual arbitration agreement? One possibility is for employees in litigation to distinguish *Concepcion* and *Amex* and to argue for a limited application of these two cases.

An employee can distinguish *Concepcion* as not applicable to employment arbitration agreements in several ways. First, *Concepcion* focused on the enforceability of a class waiver in a consumer setting,[146] not an employment setting. Additionally, the plaintiff consumers in *Concepcion* knew the core, relatively simple facts of their case: they were

145. The Supreme Court's recent arbitration cases are part of a larger trend of Supreme Court decisions limiting the scope and availability of litigation. *See supra* note 12.

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

charged $30 for a phone that was advertised as free.[147] Employees, on the other hand, may often lack key evidence which is in the hands of an employer, and broad discovery rights can help employees uncover such evidence.[148] Furthermore, there is arguably more at stake in the employment setting when compared to a consumer setting. In the employment setting, an arbitration agreement can affect one's entire livelihood and almost every conceivable dispute that could arise at the workplace over a long time span with a particular employer. A significant part of one's daily affairs can be beyond the reach of the judiciary as a result of employment arbitration agreements, and low-wage earners may have little choice but to accept an arbitration agreement in order to remain employed. However, in the consumer setting, an arbitration agreement may have a small scope or reach and may only cover the purchase of a non-essential item. The *Concepcion* decision did not address the employment setting, where greater supervision of arbitration is arguably more justified. Similarly, the arbitration agreement at issue in *Amex* involved relatively sophisticated parties, merchants and the American Express Company.[149] *Amex* did not consider the employment context.

Moreover, an employee trying to distinguish *Concepcion* and *Amex* can seek to limit application of these two cases by arguing that they involve the enforceability of class waivers, not other provisions, such as discovery, in arbitration.[150] Although *Concepcion* discussed special provisions in arbitration, such as judicially-monitored discovery or the required use of the Federal Rules of Evidence,[151] such statements in the opinion are mere dicta because these arbitration provisions were not before the Supreme Court in *Concepcion*. Moreover, the dicta involved extreme fact patterns, such as an arbitration clause requiring full discovery permitted in courts or application of the Federal Rules of Evidence.[152] For these extreme fact patterns where an arbitration clause required court-like proceedings, the Court opined in dicta that the FAA would preempt such rules.[153] However, clauses involving the opposite of these extremes, such as those providing for little to no discovery, are more likely to appear in arbitration agreements. Similarly, many statements in *Amex* about the effective vindication doctrine

147. *Id.* at 1744.

148. *See, e.g.*, Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 98 (Ct. App. 2004) (relying on *Armendariz* and finding that discovery limitations in an arbitration agreement were inappropriate in light of the "complexity of employment disputes, the outcomes of which are often determined by the testimony of multiple percipient witnesses, as well as written information about the disputed employment practice").

149. Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2306 (2013).

150. *See, e.g.*, Hill v. Garda CL Nw., Inc., 308 P.3d 635, 639 (Wash. 2013) (en banc) (limiting *Concepcion* to class waivers, not other types of arbitration provisions).

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

152. *Id.*

153. *Id.* at 1747-48.

are mere dicta. For example, the Court briefly noted that "perhaps" the effective vindication doctrine would cover high administrative or filing fees.[154] However, the Court in *Amex* did not explore the detailed contours of the effective vindication doctrine because it was not necessary to do so. *Amex*, like *Concepcion*, involved the enforceability of class waivers. Neither *Amex* nor *Concepcion* involved other severe procedural restrictions.

Furthermore, the dispute resolution agreement at issue in *Concepcion* was unusual because its provisions were consumer friendly. For example, the Court found that under the agreement, any "aggrieved customers who filed claims would be essentially guaranteed to be made whole."[155] Also, consumers would be guaranteed at least $7,500 and twice their attorney's fees if they obtained an arbitration award greater than AT&T's last settlement offer.[156] Thus, *Concepcion* did not involve a heavily one-sided arbitration agreement with harmful procedures.

Employees can also argue that a general unconscionability defense can still invalidate an arbitration agreement pursuant to the savings clause of section 2 of the FAA. Although some courts, such as the *Lucas* court,[157] use *Concepcion* to limit the scope of an unconscionability defense, other courts reject such a broad interpretation of *Concepcion*. For example, in *Brown v. MHN Government Services, Inc.*, the Washington Supreme Court found that *Concepcion* should be interpreted narrowly.[158] Under this narrow reading, *Concepcion* would only preempt arbitration-specific state rules, like the *Discover Bank* rule at issue in *Concepcion*, but not general unconscionability arguments. The employer in *Brown* argued that under *Concepcion*, an unconscionability defense cannot interfere with fundamental attributes of arbitration.[159] However, the Washington Supreme Court rejected the employer's broad interpretation of *Concepcion* and found that courts could still apply a general unconscionability analysis to examine whether a particular arbitration provision is "overly harsh or one-sided."[160] Thus, while the *Lucas* court believed it could not find a discovery limit unconscionable under its broad reading of *Concepcion*, a court following the Washington Supreme Court's narrower reading of *Concepcion* could consider the discovery limit at issue in the *Lucas* case under a general unconscionability analysis and potentially find the provision "overly harsh."

154. *Amex*, 133 S. Ct. at 2310.
155. *Concepcion*, 131 S. Ct. at 1753.
156. *Id.*
157. *See supra* notes 130-136.
158. 306 P.3d 948 (Wash. 2013).
159. *Id.* at 953.
160. *Id.* at 954.

Similarly, in *Chavarria v. Ralphs Grocery Co.*, the Ninth Circuit limited the broad scope of FAA preemption under *Concepcion*.[161] The *Concepcion* decision contains broad language regarding the FAA's preemptive powers; it suggested that the FAA can preempt state laws having a "disproportionate impact" on arbitration.[162] The agreement in *Chavarria* contained a problematic cost provision, where the arbitrator would apportion significant fees to both the employer and employee at the beginning of the arbitration, regardless of the merits of the underlying dispute.[163] The Ninth Circuit explained that any state law invalidating this provision would clearly have a "disproportionate impact" on arbitration because this provision is arbitration specific.[164] However, the Ninth Circuit reasoned that invalidating this term would not disfavor arbitration; invalidating this term would simply help make arbitration fair.[165] The Ninth Circuit suggested that the broad preemptive language from *Concepcion* cannot be read to invalidate state rules requiring some level of fairness in arbitration.[166] In other words, the FAA cannot preempt a state law that merely has a "disproportionate impact" on arbitration; in order to be preempted, the law must also disfavor arbitration and not seek to make arbitration fairer. In sum, not all courts are construing *Concepcion* as narrowing the scope of unconscionability review, and parties can still rely on unconscionability arguments to invalidate an arbitration agreement.

### 2. *Legislative Solutions*

Trying to argue in litigation that *Concepcion* and *Amex* should not be applied in the employment setting is likely an uphill battle, and even if this strategy may be successful in a few cases, there are likely to be conflicting court decisions on this issue. To offer better and consistent protection for employees, legislation solutions are a better option. As explained below, the current state of arbitration doctrine can undermine the enforcement for several critical laws, and the legislative branch should respond.

When arbitration agreements are voluntarily entered into, arbitration can be fair and mutually beneficial to both parties. However, in the employment context, employees with little bargaining power may have no real choice and may be forced to submit to arbitration. Courts have enforced arbitration agreements even where it appears employees did not knowingly agree to arbitration. In one case, two employees were required to attend a two-hour orientation session where "they were told to sign their

161. 733 F.3d 916 (9th Cir. 2013).

162. AT&T Mobility LLC v. Concepcion, 131 S. Ct. at 1747.

163. *Chavarria*, 733 F.3d at 923.

164. *Id.* at 927.

165. *Id.*

166. *Id.*

names approximately seventy-five times on a variety of documents without anyone explaining the contents of said documents and without an adequate opportunity to read most of them." One of these documents contained an arbitration clause.[167] This mandatory orientation meeting was described as "intimidating, hurried and tense," and the court found that the employees were completely unaware one of the documents contained an arbitration clause.[168] However, the court, relying on a strong federal policy favoring arbitration, enforced the arbitration clause and compelled the employees to submit civil rights claims to arbitration.[169]

Employees are generally subject to the dynamics of employment relationships involving employers with stronger bargaining power, and in such relationships, arbitration can be forced onto the weaker party and used to the disadvantage of employees. For example, employers can draft arbitration clauses that shorten statutes of limitations, limit discovery, or include other provisions making it more challenging for an employee to bring a claim.[170] Such overreaching in the drafting of arbitration clauses can undermine the enforcement of critical laws for which there is a strong public interest, such as wage and hour laws and civil rights laws.

Moreover, *Concepcion* and *Amex* have the potential to exacerbate the above-described problems. They make it more challenging for employees to proceed collectively if an arbitration agreement contains a class waiver. Also, as discussed in prior sections of this Article, some courts are beginning to construe *Concepcion* and *Amex* as limiting the scope of judicial review of arbitration agreements,[171] and a more circumscribed judicial review carries several negative implications for employees.[172] For example, if judicial review of arbitration agreements is becoming more limited, employers can engage in greater overreaching when drafting arbitration agreements with very limited procedural rights.

To provide the greatest protections for employees, Congress should enact the proposed Arbitration Fairness Act of 2013, which, among other things, would ban pre-dispute arbitration agreements in the employment context.[173] All of the policies underlying wage and hour and civil rights legislation, which protect vulnerable workers, also justify the adoption of

167. Maye v. Smith Barney Inc., 897 F. Supp. 100, 106 (S.D.N.Y. 1995).

168. *Id.* at 107.

169. *Id.* at 108, 110.

170. *See, e.g.*, Affholter v. Franklin County Water Dist., No. 1:07-CV-0388, 2008 WL 5385810 (E.D. Cal. Dec. 23, 2008) (enforcing arbitration agreement which provided for only one deposition as a matter of right); Damato v. Time Warner Cable, Inc., No. 13-CV-994, 2013 WL 3968765 (E.D.N.Y. July 31, 2013) (enforcing arbitration agreement where agreement shrinks the statute of limitations, limits damages, and limits appeals).

171. *See supra* Part II.B.

172. *See supra* notes 138-141 and accompanying text.

173. H.R. 1844, 113th Cong. (2013); S. 878, 113th Cong. (2013).

the Arbitration Fairness Act, which would help employees access a public court with broad procedural opportunities, including class procedures, to enforce these critical rights. If Congress passes the Arbitration Fairness Act, an employee with a dispute would still have the option to submit disputes to arbitration, and under such circumstances, there would be less concern about one-sided arbitration provisions. A post-dispute submission by an employee would arguably be fairer because the submission would be voluntary and knowing.

The history of the FAA's enactment supports the Arbitration Fairness Act of 2013. The FAA was *never* intended to apply in the employment context; the FAA was designed for routine contract disputes between two merchants, not complex, public statutory claims between parties of unequal bargaining power.[174] Moreover, reformers who pushed for the FAA generally had a sincere belief in the use of arbitration to resolve disputes; they did not express a desire to use arbitration as a means of hindering the resolution of a dispute or making it more challenging to resolve a dispute.[175] The FAA was never designed for the employment setting or for statutory claims.[176] To provide the greatest procedural protections for employees, Congress should pass the Arbitration Fairness Act of 2013 and restore the FAA to its original meaning.

Unfortunately, several bills that would establish broad bans on pre-dispute employment arbitration agreements have been introduced in

174. SZALAI, *supra* note 142, at 131-36, 142-45, 147-54, 159, 191-98.

175. *Id.* at 91-95; 199-200.

176. Understanding the historical background of the FAA's enactment also helps one understand the rise and development of the effective vindication doctrine and the *Armendariz* fairness factors discussed above. When the Supreme Court expanded the scope of the FAA beyond its original meaning by holding that statutory antitrust claims are arbitrable in *Mitsubishi*, the Court relied on the effective vindication doctrine as a way to counterbalance or justify the expansion of the FAA to cover statutory claims. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). The effective vindication doctrine would help ensure that arbitration is used as a sincere, effective method of dispute resolution, and not as a way to thwart or hinder the resolution of statutory disputes. Similarly, when the Supreme Court expanded the FAA to cover statutory claims under the Age Discrimination in Employment Act in *Gilmer*, it was also important for the Court to address the effective vindication doctrine and various factors relevant to the fairness of arbitrating employment disputes. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The Supreme Court's analysis in *Gilmer* provided the foundation for the *Armendariz* fairness factors. *See supra* notes 72-87 and accompanying text. One can understand the development of the effective vindication doctrine and the *Armendariz* fairness factors as a judicial attempt to counterbalance or alleviate concerns with the flawed judicial expansion of the FAA to cover statutory claims and employment disputes, which was never the original intent behind the FAA. If Congress is not politically able to ban pre-dispute arbitration agreements in the employment context, to provide some legitimacy, courts should be increasing, not decreasing, judicial review of employment arbitration agreements for fundamental fairness. In light of the history of the FAA and the Supreme Court's transformative expansion of the statute, it is highly inappropriate for courts to cut back on the scope of the effective vindication doctrine, the *Armendariz* fairness factors, or a more general review of arbitration agreements.

Congress over the last few years, and none have been successful.[177] If a complete ban on pre-dispute employment arbitration agreements is not politically possible, legislative solutions should try to preserve a stronger role for the judiciary in policing arbitration agreements for fundamental fairness. A wider adoption of the *Armendariz* fairness factors would be preferable to the circumscribed judicial review of arbitration agreements occurring as a result of *Amex* and *Concepcion*. If the Arbitration Fairness Act is not politically feasible, another possible legislative solution to deal with this more circumscribed judicial review would be to regulate the arbitration process in more detail by codifying the *Armendariz* fairness factors for the employment setting, perhaps by including a definition of employment arbitration under the FAA.

Strikingly, the FAA focuses on arbitration, and yet the statute never defines this key term.[178] This lack of a definition has given rise to problems. *Concepcion*, for example, strikes at the heart of the FAA by raising the fundamental issue of the meaning of arbitration covered by the statute. A majority of Justices in *Concepcion* found that bilateral arbitration, and not classwide arbitration, was a "fundamental attribute" of arbitration under the FAA.[179] However, as pointed out by the dissenting

177. *See, e.g.*, H.R. 815, 107th Cong. (2001) (banning pre-dispute arbitration agreements in the employment context); S. 2435, 107th Cong. (2002) (same); H.R. 3809, 108th Cong. (2004) (same); H.R. 2969, 109th Cong. (2005) (same); H.R. 3010, 110th Cong. (2007) (banning pre-dispute arbitration agreements in the consumer, franchise, and employment contexts); H.R. 991, 111th Cong. (2009) (banning pre-dispute arbitration agreements in consumer contracts); H.R. 1020, 111th Cong. (2009) (banning pre-dispute arbitration agreements in the consumer, franchise, and employment contexts); H.R. 1873, 112th Cong. (2011) (banning pre-dispute arbitration agreements in consumer and employment contracts); S. 987, 112th Cong. (2011) (same).

178. The history behind the FAA's enactment helps explain why the statute never provides a definition of arbitration. The FAA arose in part as a response to a highly technical and broken court system with confusing procedural rules from the early 1900s, and the reformers who wanted a modern arbitration law desired to break free from this extremely complex system. *See supra* notes 142-144 and accompanying text. Understanding that the arbitration reform movement grew out of a procedural nightmare in the court system is a key to understanding why the reformers did not want to get bogged down with a technical, detailed, highly-regulated definition of arbitration. The reformers did not want to create another system that reminded them of the highly technical judicial procedure of the courts of that time. In the process of drafting the FAA, one of the main proponents of the FAA desired a more detailed description of arbitration in the statute, but the main drafter of the FAA rejected this request to get more detailed. SZALAI, *supra* note 142, at 123. Also, progressive values influenced the arbitration reformers, and progressives generally preferred indeterminate, flexible processes to deal with changes in an indeterminate society. *Id.* at 98-99, 173-79, 188, 199-200. Under progressive beliefs, it was important to have an expert decision-maker, freed from any restrictions, to cope with a fluid society instead of trying to define the decision-making process or provide detailed standards for a decision-maker. *Id.* The lack of a clear definition of arbitration in the FAA can be understood as reflecting this progressive belief in the power of an expert-decisionmaker operating with flexibility and unhindered by detailed procedural rules. Furthermore, the FAA was designed for simple contract disputes between merchants, not complex statutory claims of a public nature between parties of unequal bargaining power. *Id.* at 192-98. For such simple contract disputes between co-equals, it was probably not necessary for the statute to contain detailed regulations about the arbitration process.

179. AT&T Mobility LLC v. Concepcion, 131 S. Ct. at 1748-53.

Justices in *Concepcion*, "[w]here does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribute' of arbitration? The majority does not explain."[180] The FAA is simply silent as to the meaning of arbitration. Thus, one can view *Concepcion* as a case struggling with the definition of arbitration, and the case invites lower courts to speculate as to the "fundamental attributes" of arbitration when considering preemption arguments.[181]

If enactment of the Arbitration Fairness Act is not possible, another possible legislative solution to help alleviate concerns regarding the fairness of employment arbitration would be to adopt a statutory definition of arbitration for employment disputes. A definition of employment arbitration could codify, for example, the *Armendariz* fairness factors or some version thereof,[182] and a court could not enforce an employment arbitration agreement under the FAA unless the agreement satisfied this definition. Arbitration could be defined as a bundle of certain core procedures that must exist in the employment context in order for an employment arbitration agreement to be covered by the FAA. A legislative codification of the *Armendariz* fairness factors would provide at least some procedural protections for employees. Also, an amendment to the FAA could require courts to engage in an *Armendariz* fairness factor analysis before compelling arbitration or confirming an arbitration award. In other words, the amendment could prohibit delegating this analysis to arbitrators. Requiring judicial decisions would help foster the development of case law on the subject, which could help ensure uniform application of these fairness factors and provide guidance for future parties in drafting agreements and for courts in analyzing agreements.

## CONCLUSION

The original drafters of the FAA would not recognize the statute as it is construed today. Flawed Supreme Court decisions changed the meaning of the statute, and the FAA appears to be in a continuing state of flux following the Supreme Court's *Concepcion* and *Amex* decisions. These

180. *Id.* at 1759.

181. The FAA's lack of a definition of arbitration causes other problems as well. There are conflicting court decisions concerning whether the FAA covers hybrid mediation-arbitration agreements. *Compare* Advanced Bodycare Solutions, Inc. v. Thione Int'l, 524 F.3d 1235 (11th Cir. 2008) (FAA does not cover mediation clauses), *with* Fisher v. GE Med. Sys., 276 F. Supp. 2d 891 (M.D. Tenn. 2003) (FAA covers mediation clauses).

182. In 2007, and again in 2011, Senator Jefferson Sessions of Alabama introduced bills called the Fair Arbitration Act. These bills guaranteed certain procedural rights in arbitration, and these rights generally tracked the *Armendariz* fairness factors. *See* S. 1135, 110th Cong. (2007); S. 1186, 112th Cong. (2011). These bills died in committee. If a complete ban on forced employment arbitration is not politically feasible, new bills similar to the Fair Arbitration Act could alleviate some concerns arising from the more circumscribed judicial review resulting from *Concepcion* and *Amex*.

decisions appear to be swinging the pendulum closer towards a judicial rubberstamping of arbitration agreements. These decisions could lead to overreaching by employers and threaten to undermine the enforcement of important statutory rights of employees. Stronger judicial review of employment arbitration agreements should resume, either by judicial limitation of *Concepcion* and *Amex*, or through legislative action.