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The Consumer Financial Protection Bureau and Class Action Waivers after AT&T v. Concepcion

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I. INTRODUCTION

A man may not barter away his life or his freedom, or his substantial rights. In a civil case any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.1

While some view arbitration as an adequate forum for the vindication of rights, others argue that social and “public policy concerns provide a reason to withhold certain claims from the arbitration system.”2 In particular, both scholars and legislators suggest that all mandatory arbitration agreements between consumers and businesses are “unjust” because of the unequal bargaining power present in these agreements.3 In a 5-to-4 decision, however, in April of 2011 the United States Supreme Court made it easier for businesses to require consumers to sign binding pre-dispute arbitration agreements that prohibit them from joining class actions.4 Yet it may be the Consumer Financial Protection Bureau (CFPB) that has the last word. The CFPB was created in Title X of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (Dodd-Frank)...

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3. See Kate Davidson, Supreme Court Gives Banks a Win on Arbitration, But Will CFPB Trump It?, FIN. PLAN., 2011 WLNR 8241900 (Apr. 28, 2011) (noting that mandatory arbitration has been a top consumer complaint for years); Hanft, supra note 2, at 2801 (noting that supporters of this view point contend that arbitration was intended to be used only by businesses with unequal bargaining power).
and assumed its powers as an independent bureau within the Federal Reserve System on July 21, 2011. While the CFPB’s authority may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a business after a dispute has arisen, Dodd-Frank requires the CFPB to conduct a study and prepare a report to Congress concerning the use of mandatory pre-dispute arbitration agreements in connection with consumer financial products or services. If consistent with the study, Dodd-Frank further permits the CFPB to restrict or prohibit these mandatory pre-dispute arbitration agreements in the future. This Note evaluates the Supreme Court ruling in AT&T v. Concepcion and discusses the potential role of the CFPB in regulating class action waivers in mandatory pre-dispute arbitration agreements.

The CFPB aims to “make markets for consumer financial products and services work for Americans.” Under Dodd-Frank, the CFPB is charged with “facilitating the collection and monitoring of and response to consumer complaints regarding certain financial products and services.” One challenge of the CFPB will be carving out abuses within the financial system, without over regulating to the point where consumer access to financial services becomes too limited. In addition to exploring the role of the CFPB in wake of AT&T v. Concepcion, this Note will examine the impact of class action waivers on the rights of businesses and consumers. This Note contends that class actions, while providing only a limited benefit to the individual consumer, may serve as a socially productive deterrent to consumer abuses by businesses. Therefore, this Note further offers suggestions on how the CFPB should develop substantive regulations to protect consumer interests without having too heavy a hand.

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6. Id.; see also Davidson, supra note 3 (“[T]he Dodd-Frank Act requires the CFPB to study and provide a report to [C]ongress concerning the use of mandatory arbitration agreements in connection with consumer financial products.”).
7. 12 U.S.C. § 5491; see also Davidson, supra note 3 (discussing the duties given to the CFPB under Dodd-Frank).
10. See Davidson, supra note 3 (arguing that the CFPB should balance the concerns of both businesses and consumers).
Part II will give a short overview of federal arbitration law, the mandatory arbitration debate, and class action waivers. Part III will dissect the Supreme Court decision in AT&T v. Concepcion and predict the future application of the ruling. Part IV will discuss the potential role of the CFPB in the wake of Concepcion.

II. FEDERAL ARBITRATION LAW AND THE MANDATORY ARBITRATION DEBATE

A. Federal Arbitration Law

Arbitration is a form of dispute resolution whereby parties agree among themselves to hire a private judge to adjudicate their dispute.\textsuperscript{11} Though arbitration began as a tool for resolving disputes between merchants, today arbitration is also commonly used in disputes between businesses and consumers.\textsuperscript{12} In general, state contract law governs the process of forming contracts, including arbitration contracts.\textsuperscript{13} However, the Supreme Court has repeatedly held that the Federal Arbitration Act preempts any state law that may be inconsistent with the Act's provision or purposes.\textsuperscript{14}

In 1925, Congress passed the United States Arbitration Act that made written agreements for arbitration of disputes arising out of contracts, maritime transactions, or interstate commerce valid and enforceable.\textsuperscript{15} This statute was reenacted and codified in 1947 as the Federal Arbitration Act (FAA) amidst some resistance about the benefits of using arbitration in a wide-range of disputes.\textsuperscript{16} Under the FAA, arbitration agreements may be enforced in two ways: (1) federal

\textsuperscript{11} Christopher R. Drahozal, Commercial Arbitration: Cases and Problems I (2d ed. 2006).
\textsuperscript{12} Id.
\textsuperscript{13} See id. ("Arbitration is matter of contract between the parties.").
\textsuperscript{16} Federal Arbitration Act, Pub. L. No. 282, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1-14 (2006)); see also Hanft, supra note 2, at 2779-80 ("While . . . this Act was generally lauded in the legal community, some were hesitant about the benefits of using arbitration in a broader array of disputes.").
courts may issue a stay of proceedings if any suit is brought in court upon any issue referable to arbitration under an agreement in writing for such arbitration;\(^{17}\) and (2) federal courts may compel arbitration in accordance with the terms of the arbitration agreement upon being satisfied that the legitimacy of the agreement to arbitrate is not an issue.\(^{18}\) For example, provided that there was no defense to the enforcement of the arbitration clause in a valid arbitration agreement, parties that agree in writing to arbitrate disputes and waive their rights to class action proceedings may be denied the right to participate in class actions and compelled to arbitrate their disputes in accordance with the terms of the agreement.\(^{19}\)

B. Mandatory Arbitration Debate

1. The Development of Mandatory Arbitration Agreements

From when the FAA was enacted in 1925 to the 1970s and 1980s, the scope of Congress’s power to regulate interstate commerce increased dramatically which in turn increased the number of contracts to which the FAA applied.\(^{20}\) In addition, arbitration clauses and procedures, particularly between businesses and consumers, have become more complex.\(^{21}\) Consequently, both courts and legislatures struggle over whether and how much to regulate contracts between these parties.\(^{22}\) Part of the controversy stems from the fact that in the United States, historically, consumers and businesses did not enter into arbitration agreements with one another, and it is unlikely that Congress considered such arbitrations in 1925 when it passed the United States Arbitration Act.\(^{23}\)

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18. Id. § 4.
19. Id. §§ 3-4.
22. Drahozal, supra note 11, at 50.
The debate surrounding these types of arbitration agreements is particularly heated in the context of mandatory arbitration.\textsuperscript{24} In mandatory arbitration agreements, consumers are required to sign standard form contracts containing pre-dispute arbitration clauses.\textsuperscript{25} The prevalence of such agreements increased after the Supreme Court's decision in \textit{Gilmer v. Interstate/Johnson Lane Corp.}\textsuperscript{26} In that decision, the Court compelled arbitration of a claim under the Age Discrimination in Employment Act (ADEA)\textsuperscript{27} where the plaintiff signed an agreement that contained a provision requiring arbitration of all future employment related claims.\textsuperscript{28} In reaching its decision, the Court explained that arbitration adequately protects statutory rights under the ADEA.\textsuperscript{29}

2. The Advantages and Disadvantages of Mandatory Arbitration

For many reasons, applying a scheme of dispute resolution that incorporates arbitration makes a lot of sense in business transactions.\textsuperscript{30}

\textsuperscript{24} See Brunet \textit{et al.}, \textit{supra} note 23, at 140 (stating that while critics feel comfortable with the label mandatory arbitration, defenders suggests that this nomenclature is unfair since consumers have the option to refuse services or products connected to binding arbitration).

\textsuperscript{25} See id. at 143-44 (identifying reasons why mandatory arbitration can be unfair to consumers).


\textsuperscript{28} \textit{Gilmer}, 500 U.S. at 26.

\textsuperscript{29} See id. at 28 (stating that statute serves its "remedial and deterrent functions" provided litigants are able to assert their statutory claims in arbitration); Sevilla, \textit{supra} note 26, at 332-33 (noting the increased acceptance of alternative dispute resolutions in both the public and private sectors).

\textsuperscript{30} See Michael A. Satz, \textit{Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform}, 44 \textit{Idaho L. Rev.} 19, 25-26 (2007) ("Business actors are seen as being more sophisticated, repeat players in the conduct of their affairs, or at the very least, they are seen as having access to more sophisticated resources in the form of lawyers and advisors. This sophisticated, business-to-business, repeat player model is a critical component for the theoretical argument in favor of arbitration in general: the actors in a typical business transaction will know the business and industry norms; they will likely have an institutional knowledge of the transaction and transaction-type at issue; they will have the resources to effectively advocate their position in an arbitration; and they will be more likely to 'self-police' when, where, and how they press their claims because they deal with far fewer
In general, arbitration is designed to reduce the costs and length of judicial proceedings. As such, some contend that mandatory arbitration is better for claimants than litigation. The argument is that "litigation is simply not affordable by or accessible to most consumers, and therefore arbitration provides much better access." For example, arbitration typically has less discovery than litigation, which reduces the time and cost of proceedings. In addition to the lower costs and relative speed of arbitration procedures, arbitration can also provide parties with customized procedural rules and expertise in the decision making process. It is also likely that businesses' reduction in dispute resolution costs results in savings for their customers that are realized in the form of lower prices. Defenders of mandatory arbitration thereby contend that over-regulation of mandatory arbitration could lead to higher prices for consumers of certain products and services.

However, critics suggest that mandatory arbitration agreements erode the already limited bargaining power of the weaker party. Critics further assert that mandatory "arbitration agreements have taken on a more coercive, non-negotiable, and less voluntary form." For example, businesses can require potential consumers to choose between agreeing to the unilateral provisions of the contract and foregoing desired products or services.

Opponents also argue that these agreements are detrimental to individual consumers and the public interest. For one, many "consumers do not read or understand arbitration clauses." Even

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32. Brunet et al., *supra* note 23, at 149.
33. Id.
36. See Brunet et al., *supra* note 23, at 149.
37. See id.
39. Id. at 334.
40. See id. (discussing the disadvantages of mandatory arbitration agreements in employment contracts).
41. Brunet et al., *supra* note 23, at 143-47.
42. Id. at 143.
consumers who read and understand these clauses may be unable to properly recognize the advantages and disadvantages of accepting an arbitration provision. Furthermore, many arbitration opinions are unpublished and have limited reviewability. This private resolution may prevent other consumers and members of the public from benefiting from the public account that often occurs in litigation. In addition, the lack of judicial review combined with arbitrators' malpractice immunity may deprive consumers of protection from arbitrators' mistakes.

3. General Overview of Class Actions

In recent years, businesses have taken to even "further insulating themselves from liability by contractually restricting potential plaintiffs' use of a powerful and legitimate procedural tool in arbitration—the class action." American Jurisprudence defines a class action as "a nontraditional litigation procedure permitting a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of similarly situated persons when a question is one of common or general interest to persons so numerous as to make it impracticable to bring them all before court." One goal of class actions is to protect consumers through the deterrence of business practices that affect large numbers of consumers but where individual damage awards are too small to support a private lawsuit. In such cases, the class action may be deemed necessary to prevent the "actor from retaining the benefits of its wrongful conduct simply

43. Id.
44. Goldich, supra note 31, at 1681.
46. Goldich, supra note 31, at 1681.
49. See Stan Karas, The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services, 90 CALIF. L. REV. 959, 965 (2002) (discussing how class actions protect consumers); Linder v. Thrifty Oil Co., 2 P.3d 27, 31 (Cal. 2000) (suggesting that deterrence should be considered by the courts when deciding whether to certify a class); Vasquez v. Superior Court, 484 P.2d 964, 968 (Cal. 1971) ("A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices . . .").
because no potential plaintiff would ever bring a lawsuit." Therefore, the possibility of a recovery through a class action must factor into a corporation's cost-benefit analysis of its conduct and practices with respect to consumers.51

However, some argue that class action lawsuits are nothing more than "conglomerations of weak or nonexistent claims in an attempt to 'win a potentially big payday' from... a large corporation."52 Class actions also present numerous disadvantages for the consumer including: (1) possible delay in obtaining individual relief; (2) greater litigation expenses in the event of an unsuccessful class action; and (3) an increased likelihood that the plaintiff's choice of forum will not be upheld.53

4. The Development of Class Action Waivers in Arbitration Agreements

Since World War II, as businesses have become larger and class action waivers have become more widely used in contracts of adhesion,54 it has become more difficult for individuals "to stand up for their rights in the face of corporate neglect or wrongdoing."55 An arbitration clause acts as a class action waiver because it prohibits parties to the arbitration agreement from proceeding in court on a class basis.56 Corporations once primarily used the class action waiver to insulate themselves from class actions in judicial proceedings, as class wide arbitration procedures are a relatively recent development.57 After

50. See Karas, supra note 49, at 965 (discussing Daar v. Yellow Cab Co., 433 P.2d 732, 746 (Cal. 1967), where a class action was allowed to proceed against a Los Angeles taxicab company accused of systematically overcharging its customers).


52. Rice, supra note 47, at 223.


54. See Edna Sussman, Comments to the Consumer Financial Protection Bureau in Connection with Its Review of Arbitration for Consumer Financial Products or Services, 12 CARDOZO J. CONFLICT RESOL. 491, 501 (2011) (describing contracts of adhesion as standard form agreements between businesses and consumers whose terms are not subject to negotiation).


57. See Sussman, supra note 54, at 509-10 (noting that class actions in arbitration were
the 2003 Supreme Court decision in *Green Tree v. Bazzle*, which was read as "sanctioning class wide arbitration procedures, the American Arbitration Association (AAA) began to administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Association’s rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." Since a silent clause could then be seen as permitting class arbitration proceedings, it is no surprise that businesses desiring to avoid class wide arbitration, would seek to include a class action waiver provision in their arbitration agreements. Yet in the 2010 *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* decision, the Supreme Court revisited the issue of class wide arbitration, and held that class wide arbitration could only proceed if the contract clearly indicated an agreement between the parties to allow it.

Nonetheless, once it became clear that it was possible to have a class action in arbitration, many corporations began adding separate clauses within the arbitration agreement expressly prohibiting the aggregation of claims in a class action. Therefore, "when an arbitration clause and a class arbitration waiver are present together in an arbitration agreement class relief may be altogether unavailable."
5. Class Action Waivers Pre-Concepcion

Since the development of class action waivers in mandatory arbitration agreements, courts around the country have been split on whether these waivers could be enforced. The Supreme Court first considered whether the FAA applied to state court proceedings in 1984 in Southland Corp. v. Keating. In Southland Corp., the Court held that in enacting section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." However, consistent with section 2 of the FAA, the Court noted that state contract defenses such as fraud, duress, or unconscionability may still be applied to invalidate arbitration agreements. For instance, California courts have often found class action waivers unenforceable as unconscionable or contrary to public policy. Though some courts deemed class actions or arbitrations as merely a procedural right, in Discover Bank v. Superior Court, the California Supreme Court held that the inclusion of class action waivers in mandatory consumer arbitration agreements was unconscionable in cases where a party with superior bargaining power was alleged to have "cheated a large number
of consumers out of individually small sums of money." Several states have adhered to California’s approach of finding class action waivers unconscionable when the party with superior bargaining power is insulated from liability. Now that the Supreme Court has weighed in on the issue in AT&T v. Concepcion, it is unclear how these arbitration agreements containing class action waivers will affect consumers in the long run.

III. AT&T v. Concepcion and Future Application

A. AT&T v. Concepcion

1. General Overview

In AT&T v. Concepcion, the Supreme Court found that the FAA preempted the Discover Bank rule. In this case, the Concepcions purchased mobile cellular service from AT&T based on an advertisement for free cell phones. At the time of purchase, the Concepcions signed an arbitration agreement that required claims to be brought in their individual capacity and not as a plaintiff or class member in any purported class or proceeding. Though AT&T provided the phones for free, they charged the Concepcions $30.22 in sales tax based on the phones’ retail value. Upset with the $30.22 charge, the Concepcions filed a lawsuit in United States District Court.

71. See Discover Bank, 36 Cal. 4th at 161 ("Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because... damages in consumer cases are often small and because company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit the class action is often the only effective way to halt and redress such exploitation. Moreover, such class action or arbitration waivers are indisputably one-sided. Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits. Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable."); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742 (2011).
72. Sussman, supra note 54, at 509.
73. See Concepcion, 131 S. Ct. at 1742; Discover Bank, 36 Cal. 4th at 16 (holding that class action waivers in contracts of adhesion are unconscionable when they operate to shield a party from liability that would normally be imposed under state law).
74. Concepcion, 131 S. Ct. at 1744.
75. Id. at 1742.
76. Id. at 1744.
for Southern California, which was consolidated with a putative class action alleging that AT&T had engaged in false advertising.\(^7\) AT&T subsequently moved to compel arbitration under section 4 of the FAA.\(^8\) However, the California Federal District Court found that the Concepcions were entitled to join in a class action claim, despite the binding arbitration agreement in their contract.\(^9\) Based on the Discover Bank rule,\(^8\) the District Court determined that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects\(^8\) of class actions.\(^8\) The Ninth Circuit affirmed the District Court’s decision, holding that the provision was unconscionable under California law and not preempted by the FAA.\(^8\) The United States Supreme Court granted certiorari to determine “whether the FAA prohibits states from conditioning enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures.”\(^8\)

2. The 5-to-4 Supreme Court Decision\(^8\)

Justice Scalia delivered the opinion of the Court,\(^8\) which held that California’s Discover Bank rule\(^8\) is preempted by the FAA because it “stands as an obstacle to the accomplishment and execution of the full

\(^7\) Id. at 1745.
\(^8\) Id.
\(^9\) Id.
\(^8\) See generally Jason Sherman, Injury or Deterrence: The End of Class action Litigation and Its Benefit to Consumers, 1 HARV. BUS. L. REV. ONLINE 50 (2011), http://www.hblr.org/?p=978 (suggesting that deterring businesses from wrong-doing may be the primary benefit of class actions, since consumers individually benefit more from the one-on-one non-aggregated arbitration).
\(^8\) Concepcion, 131 S. Ct. at 1742.
\(^8\) Id.; see also 9 U.S.C. § 2 ("[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").
\(^8\) Concepcion, 131 S. Ct. at 1744.
\(^8\) The opinion of the Court was delivered by Justice Scalia, in which Roberts, Kennedy, Thomas, and Alito joined. Thomas filed a concurring opinion. Breyer filed a dissenting opinion in which Ginsburg, Sotomayor, and Kagan joined. Id. at 1740.
\(^8\) Id.
\(^8\) See id. at 1742 (noting that under the Discover Bank rule, class action waivers designed to insulate parties with superior bargaining power from liability were unconscionable in consumer contracts of adhesion).
purposes and objectives of Congress." According to Justice Thomas, the text of the FAA demands that an agreement to arbitrate be enforced unless a party successfully contests the formation of the arbitration agreement. Therefore, he wrote that the decision of the Ninth Circuit should be reversed not due to preemption; but instead, because the Concepcions failed to fully develop the challenge to the class action waiver based on defects in the making of the agreement.

On the other hand, the dissent argued that the Discover Bank rule is consistent with the FAA’s objective to place agreements to litigate and arbitrate on the same footing. Not only does the rule apply equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers, it also falls squarely within the scope of the Act’s exception permitting courts to refuse to enforce arbitration agreements on grounds that exist “for the revocation of any contract.” The dissent further suggests that the opinion of the

88. See id. at 1753 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
89. Id. at 1744.
91. Id. at 1751-52.
92. See id. at 1740 (Thomas, J., concurring).
93. Id. at 1753; see, e.g., Kamens & Taylor, supra note 64.
94. Id. at 1753 (citing 9 U.S.C. §§ 2, 4 (2006)).
95. See id. at 1753-54 (noting that although he adheres to his views on the objectives of preemption, the test outlined by the majority in this case leads to the same outcome as his textual interpretation).
96. See id. at 1756 (5-4 decision) (Breyer, J., dissenting).
97. Kamens & Taylor, supra note 64.
99. Id. at 1757 (quoting 9 U.S.C. § 2 (2006)).
Court is not supported by the Court’s precedent, and does not embody the federalist ideal of respecting the legitimacy of a State’s action in an individual case.

3. Evaluating the Opinion

The decision outlined in AT&T v. Concepcion is perhaps one of the more ideological 5-to-4 decisions that the Court has had in the last year or two, with the irony being that the majority and minority "reversed their usual roles and usual rhetoric." For example, the dissent written by Justice Breyer suggests that federalism requires the Court to defer to the state rule, which is usually the position of the conservative majority. Given that this majority is normally extremely respectful of federalism and its values, this decision is likely the reflection of the majority’s extreme distaste for class actions.

Another interesting point in this decision is the suggestion by the Court that this interpretation was required in order to “accomplish and execute the full purposes and objectives of Congress." The idea that the FAA passed in the 1925 legislature was meant to cover arbitration agreements between businesses and consumers is unlikely since at that time consumers and businesses did not enter into arbitration agreements with one another in the United States. It is, therefore, argued that the legislative intent of the FAA is being misused in “order to insulate corporations from liability for wrongdoing.”

100. See id. at 1761 (noting that the FAA has not generally been used to strike down state statutes that place arbitration on a similar footing as judicial and administrative proceedings).
101. Id. at 1762 (arguing that the principles of federalism supports upholding California’s law).
102. Kamens & Taylor, supra note 64 (quoting Professor John C. Coffee Jr., who teaches at the Columbia Law School).
103. See Concepcion, 131 S. Ct. at 1762.
104. Kamens & Taylor, supra note 64 (citing comments from Professor John C. Coffee Jr., who teaches at the Columbia Law School).
105. Id.
106. See Concepcion, 131 S. Ct. at 1756 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
107. See Brunet et al., supra note 23, at 127; Jessie. K. Kamens, Supreme Court: Lealhy Concerned Supreme Court Rulings Have Tilted Too Much Toward Corporations, Corp. L. Daily (BNA), June 30, 2011 (noting comments from Senator Al Franken (D-Minn.) that suggest the FAA was intended to apply only in contract between businesses).
108. Kamens, supra note 107 (quoting Professor Melissa Hart, associate professor at the
As such, *Concepcion* was indeed a significant change in the law on arbitration.\(^{109}\) Prior to this ruling, California precedent uniformly held that arbitration provisions “purporting to waive class action rights were invalid” on the basis on unconscionability.\(^{110}\) However, some believe that the battles over class action waivers are far from over.\(^{111}\)

**B. Potential Impact of Concepcion on Class Action Waivers in Mandatory Arbitration Agreements: Who Wins and Who Loses?**

Some argue that that mandatory arbitration is an area in which consumers have gotten the “short end of the stick,” as mandatory arbitration tends to favor businesses and not the consumer.\(^{112}\) Since many businesses now believe that class action waivers in mandatory arbitration agreements will generally be upheld in court challenges,\(^{113}\) opponents of the decision argue that the Supreme Court ruling will make it harder for people instituting consumer claims that stem from corporate wrongdoing to join together to obtain their rightful compensation.\(^{114}\)

However, predictions that all business will begin using mandatory arbitration agreements to avoid class actions are unsupported.\(^{115}\) In addition, others feel that *Concepcion* is not “a victory for businesses over consumers, but rather a reaffirmation that arbitration is the preferred method for resolving disputes under our legal

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110. R. Christian Bruce, *Judge Upholds Bank's Decision to Wait for U.S. Supreme Court’s Arbitration Ruling*, 96 BANKING REP. (BNA), No. 1208, June 28, 2011.

111. R. Christian Bruce, *Is there Wiggle Room on Arbitration? ABA Meeting Maps Next Likely Cases*, BANKING DAILY (BNA), Aug. 9, 2011 (noting that *Concepcion* was “too broad and was fought largely in the abstract”) [hereinafter Bruce, *Wiggle Room*].

112. R. Christian Bruce, *Recent Court Actions Shed More Light on Use of Class Waivers in Arbitration*, 94 BANKING REP. (BNA) No. 1096, June 1, 2010 [hereinafter Bruce, *Court Actions*].

113. Bruce, *Wiggle Room*, supra note 111.

114. Kamens & Taylor, supra note 64 (quoting Deepak Gupta, a staff attorney at Public Citizen Litigation Group in Washington, D.C.).

115. See Drahozal & Rutledge, *Arbitration & Consumer supra* note 63, at 5 (noting that the significance of other factors in explaining the use of arbitration clauses provides a limit on the increase of arbitration clause post *Concepcion*).
system."\textsuperscript{116} For instance, the informality, efficiency, cost-effectiveness, and procedural flexibility\textsuperscript{117} of bilateral arbitration may make it a “better alternative for resolving disputes”\textsuperscript{118} for both consumer and businesses.\textsuperscript{119} Furthermore, business may be relieved by this ruling since class actions exert enormous pressure on banks to settle because of the risk of litigating the case.\textsuperscript{120}

While Scalia’s opinion suggests that states cannot require procedures that are inconsistent with the FAA,\textsuperscript{121} it is unlikely that this case will be the last word on class action waivers in mandatory arbitration agreements.\textsuperscript{122} For one, the Supreme Court has historically only enforced arbitration agreements so long as parties were able to vindicate their rights,\textsuperscript{123} and thus this decision would not likely permit unfair arbitration agreements that would saddle consumers with exorbitant fees or limit their ability to initiate arbitration.\textsuperscript{124} In addition, \textit{Concepcion} does not directly address the relationship between the FAA and rights under other federal statutes, and thus it is likely that this will be the basis for the next case the Supreme Court takes on this issue.\textsuperscript{125} In \textit{Green Tree Financial Corporation-Alabama v. Randolph}, Green Tree moved to compel arbitration pursuant to a contract between the parties, but the plaintiff sought to invalidate the arbitration provision on the ground that the “arbitration agreement’s silence with respect to costs and fees creates a risk that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and

\begin{itemize}
  \item Davidson, \textit{supra} note 3.
  \item See \textit{AT&T Mobility LLC v. Concepcion}, 131 S. Ct. 1740, 1751 (2011) (discussing the benefits of bilateral arbitration).
  \item See \textit{Kamens & Taylor, supra} note 64 (noting comments from Alan Kaplinsky, a partner at Ballard Spahr, L.L.P., suggesting that bilateral arbitration is an adequate forum for dispute resolution).
  \item \textit{Concepcion}, 131 S. Ct. at 1762; \textit{see also} \textit{Kamens & Taylor, supra} note 64 (quoting Alan Kaplinsky, a partner at Ballard Spahr, L.L.P.).
  \item Bruce, \textit{Court Actions, supra} note 112.
  \item \textit{See Concepcion}, 131 S. Ct. at 1757 (noting that the FAA preempts state laws that prevents the execution of the purposes and objectives of the Act).
  \item See generally Bruce, \textit{Wiggle Room, supra} note 111 (discussing what types of cases may potentially revisit this issue).
  \item \textit{Id.} (quoting Attorney F. Paul Bland of the Public Justice law firm).
  \item Davidson, \textit{supra} note 3. \textit{But see} Paul H. Haagan, \textit{New Wineskins for New Wine: The Need To Encourage Fairness in Mandatory Arbitration}, 40 \textit{ARIZ. L. REV.} 1039, 1068 (1998) (suggesting that the burden of demonstrating that the arbitration is inadequate to vindicate one’s rights is almost impossible to meet).
  \item Bruce, \textit{Wiggle Room, supra} note 111 (quoting Attorney Alan S. Kaplinsky, a partner at Ballard Spahr, L.L.P.).
\end{itemize}
thereby forces her to forgo any claims she may have against Green Tree.\textsuperscript{126} Though the Supreme Court ruled that the plaintiff’s concern about the expense of arbitrating was “too speculative to justify the invalidation of an arbitration,” the Court stated that “[i]t 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.”\textsuperscript{127} The Second Circuit applied \textit{Green Tree} to invalidate a class action waiver in an arbitration agreement in \textit{In re American Express Merchants’ Litigation} and concluded 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.”\textsuperscript{128} Therefore, the Second Circuit refused to enforce the class action waiver since the class action was the plaintiffs’ “only economically feasible means for enforcing their statutory rights.”\textsuperscript{129} Post-\textit{Concepcion}, courts in the Second Circuit have used a case-by-case analysis to determine the enforceability of a class action waiver based on the “totality of the circumstances including, but not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff’s potential recovery, the ability to recover attorneys’ fees and other costs and thus obtain legal representation to prosecute the underlying claim.”\textsuperscript{130} In \textit{Chen-Oster v. Goldman, Sachs & Co.}, a Second Circuit District Court held that a class action waiver would prevent the plaintiff from vindicating federal statutory rights pursuant to Title VII, since a plaintiff could only bring such a “pattern or practice” discrimination claim in a collective action.\textsuperscript{131} However, in another post-\textit{Concepcion} case, the United States District Court for Northern California noted that if “\textit{Green Tree} has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the

\begin{footnotes}
\item[127] \textit{Id.} at 90-91.
\item[128] \textit{In re American Express Merchs.’ Litig.}, 634 F.3d 187, 197-99 (2d Cir. 2011).
\end{footnotes}
arbitration process, such as filing fees and arbitrator’s fees, prevent her from vindicating her claims.”  

Even still, mandatory arbitration agreements may be deemed invalid based on the text of the FAA. The FAA provides that arbitration clauses shall be “valid, irrevocable, and enforceable save upon such grounds as exists at law or in equity for the revocation of any contract,” such as fraud, duress, or contract formation issues. In *NAACP of Camden County East v. Foulke Management*, the state court relied on contract formation doctrines to invalidate an arbitration agreement that lacked mutual assent to the arbitration provisions. Though several federal courts have refused to distinguish and limit the scope of *Concepcion*, other courts’ efforts to limit *Concepcion*’s reach indicate that there may still be more to come.  

IV. THE ROLE OF THE CFPB

The balance between efficiency and economy and the need to protect vulnerable consumers is delicate. This is particularly true in the consumer context where the coexistence of mandatory arbitration clauses and class action waivers cause problems. In this context, these clauses tend to be used effectively as an exculpatory measure. This is where the CFPB, established in response to the United States’ financial crisis, could play a vital role:

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139. *Id.*
140. *Building the CFPB*, supra note 8, at 8-9.
Beginning in 2007, the United States faced the most severe financial crisis since the Great Depression. Millions of Americans saw their home values drop, their savings shrink, their jobs eliminated, and their small businesses lose financing. Credit dried up, and countless consumer loans – many improperly made to begin with – went into default.\textsuperscript{141}

Concern about the unfair, deceptive, and abusive financial practices that led to this financial crisis prompted the enactment of Dodd-Frank.\textsuperscript{142} Congress created the CFPB through Dodd-Frank. One provision of Dodd-Frank requires the CFPB to study and provide a report to Congress concerning the use of mandatory pre-dispute arbitration agreements in the limited context of contracts for consumer financial products or services.\textsuperscript{143} Based on the results of this study, the CFPB may prohibit or impose conditions on the use of mandatory pre-dispute arbitration agreements in contracts for consumer financial products or services.\textsuperscript{144} Though a CFPB rule prohibiting class action waivers would probably not be applicable in the phone purchase contract at issue in the \textit{Concepcion} case,\textsuperscript{145} the CFPB does have specific legislative authority to promulgate a rule that could limit class action waivers in contracts for consumer financial products or services which could in turn override the \textit{Concepcion} case in the consumer financial products or services area.\textsuperscript{146} However, it is important to note that the CFPB itself “is subject to substantial oversight and limitations on its activities and authorities.”\textsuperscript{147} Not only are the CFPB’s activities subject to judicial review, but CFPB’s rules can also be overruled by a council made up of other federal financial regulatory agencies.\textsuperscript{148}

Therefore, how should the CFPB respond to \textit{Concepcion} as it

\begin{itemize}
\item \textsuperscript{141} \textit{Id.} at 8.
\item \textsuperscript{142} \textit{E.g., id.; see also Hanft, supra} note 2, at 2788.
\item \textsuperscript{143} \textit{See} 12 U.S.C. §§ 5491, 5518 (Supp. IV 2010).
\item \textsuperscript{144} \textit{See id.} § 5518.
\item \textsuperscript{145} \textit{Id.} (noting that the CFPB’s authority is limited to the consumer financial products, and it may not impose conditions on voluntary post-dispute consumer arbitration agreements).
\item \textsuperscript{146} \textit{See id.} (giving the CFPB the authority to restrict or prohibit pre-dispute mandatory arbitration clauses in the contracts for consumer financial products or services).
\item \textsuperscript{147} \textit{Building the CFPB, supra} note 8, at 32.
\item \textsuperscript{148} \textit{Id.}
\end{itemize}
relates to class action waivers in mandatory pre-dispute arbitration agreements in connection with consumer financial products or services? Many can agree that the outright elimination of arbitration in consumer contracts is not the most appropriate response. Some suggest that instead the CFPB should focus on establishing an arbitration process that is fair for the consumer as well as the company. However, while many agree that class action waivers are particularly advantageous for businesses, what is best for the consumer may be less obvious.

The CFPB should resist the temptation to over regulate the class action waiver process in mandatory pre-dispute arbitration agreements. Though the courts have been split for years on this issue, and an array of legislative approaches are possible, Congress has not been eager to regulate or prohibit such agreements. One possible explanation is the concern that the over-regulation of mandatory arbitration would “return us to the era of ‘judicial hostility toward arbitration agreements’ that the FAA sought to end.” In addition, over regulation could limit consumer access to financial services. An empirical study on the use of arbitration clauses in credit card agreements, found that credit card issuers are more likely to use arbitration clauses when they (1) specialize in making credit card loans; (2) make riskier credit card loans; and (3) have a larger credit card portfolio. This suggests that increased regulation of consumer arbitration could encourage credit card issuers to reduce their volume of outstanding credit card loans or avoid lending to high-risk consumers, which could have a negative impact on the availability of credit for lower-income borrowers.

149. Rice, supra note 47, at 253.
150. Davidson, supra note 3.
151. Bruce, Court Actions, supra note 112.
152. See supra Part II.B.3. (“Class actions also present numerous disadvantages for the consumer including: possible delay in obtaining individual relief; greater litigation expenses in the event of an unsuccessful class action; and an increased likelihood that the plaintiff’s choice of forum will not be upheld.”).
153. Kamens & Taylor, supra note 64 (quoting Alan Kaplinsky, a partner at Ballard Spahr, L.L.P.).
155. See Drahozal & Rutledge, Contract, supra note 21, at 1168 (noting the effects of the courts holding class action waivers unconscionable).
156. See Drahozal & Rutledge, Arbitration & Consumer supra note 63, at 4-5 (noting that the increased regulation of arbitration clauses could reduce the supply of credit to consumers, particularly high-risk borrowers).
157. Id.
158. Id.
Therefore, the CFPB’s comprehensive study of class action waivers in pre-dispute mandatory arbitration agreements should include an analysis of data related to: (1) consumer perceptions; (2) outcome comparisons; and (3) corporate behavior. Since the CFPB has been charged with responding to the needs of consumers, any study on this issue should reflect consumer perceptions of their experience in both bilateral and class arbitration proceedings. This information would not only assist the CFPB in understanding the advantages and disadvantages of mandatory arbitration from the consumer perspective, but also help to guide the CFPB’s future arbitration policy. The study should also include an analysis of consumer outcomes. Since the courts have been split for years on the issue of class action waivers in mandatory arbitration agreements, the CFPB could conduct a retrospective study and comparison of consumer outcomes in jurisdictions where class action waivers were allowed versus those jurisdictions that banned such waiver provisions. In particular, it would be important to compare not only the awards and associated costs, but to also track whether consumers continued to proceed with pursuing their claims in arbitration when the class action was not available to them or instead opted to drop their claims altogether. Such a study would help the CFPB determine whether class action waivers have prevented consumers from effectively vindicating their rights. Perhaps the most important aspect of this study would include a comparison and analysis of data on corporate behavior in jurisdictions with competing views on these class action waiver provisions. If class actions are indeed an effective deterrent from corporate wrongdoing, you would expect to see less corporate abuse in jurisdictions that banned class

159. See 12 U.S.C. § 5518 (Supp. IV 2010) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for 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. The findings in such rule shall be consistent with the study conducted under subsection (a).").


161. Kamens & Taylor, supra note 64 (quoting Alan Kaplinsky, a partner at Ballard Spahr, L.L.P.).

162. See Sachs-Michaels, supra note 51, at 671 (noting that class actions may be a productive deterrent from corporate wrongdoing).
action waivers than in similarly situated jurisdictions that allowed class action waiver provisions. This information could prove to be instrumental in determining the impact of class actions on deterrence from corporate wrongdoing. By formulating a study that includes consumer perceptions, consumer outcomes, and an analysis of corporate behavior the CFPB would gain additional insight on ways to protect the consumer without over-regulating an arbitration process that benefits all parties.

However, such a study may take years. Therefore, it is important to consider what the CFPB should be doing now to protect consumers who may be adversely affected by the ruling. One suggestion is that the CFPB should simply ban class action waivers in mandatory pre-dispute arbitration agreements. Yet it is unlikely that the CFPB could even take such an action as an interim measure, since Dodd-Frank specifically requires a study of this issue prior to any prohibition or restriction on mandatory pre-dispute arbitration agreements. Furthermore, even if permitted under the Act, the current political climate may prevent the CFPB from taking such a measure in the absence of empirical data.

It is this Note’s contention that the most significant benefit of class actions is deterrence of corporate wrongdoing. With the Concepcion ruling in place and the unlikelihood of additional legislative intervention, there is some concern that businesses may not be held

163. Cf Drahozal & Rutledge, Arbitration & Consumer supra note 63, at 4 (finding that credit card issuers were less likely to use arbitration clauses in states where class action waivers were deemed unenforceable).

164. Cf Meili, supra note 160, at 75-76 (2011) ("Study’s findings suggest at least one reform to improve the class action process: creating a standardized formula for compensating named plaintiffs for the time and money they spend fulfilling that role... Calculating those awards according to a standardized formula, such as a percentage of the total payout to class members, would provide the named plaintiff with a better idea of what to expect should she be successful.").

165. BRUNET ET AL., supra note 23, at 149.

166. See Meili, supra note 160, at 78 (noting that interviews for this study began in 2008 and continued through 2009).

167. See Davidson, supra note 3 (citing comments from Deepak Gupta, a Public Citizen lawyer, that suggests that the CFPB has the power to trump the Supreme Court decision).


169. See Kamens, supra note 107 (citing comments from Sen. Patrick Leahy (D-Vt.) that suggests that it will be difficult to overturn the Supreme Court’s decision due to the current make-up of the House and Senate).

170. Sachs-Michaels, supra note 51, at 671; see Meili, supra note 160, at 76 (asserting that class actions are the best way to stop widespread corporate abuse).
An alternative approach to the prohibition of class action waivers in mandatory arbitration agreements could come through the utilization of the CFPB’s consumer complaint and inquiry system. The CFPB has already planned to implement a phased rollout of complaints and consumers' inquiries in order to identify areas of concern and aid in its supervision and other responsibilities. However, the CFPB could begin immediately to collect information from consumers via an integrated web and phone system for small claims that were forced into mandatory bilateral arbitration. In turn, the CFPB could utilize the information obtained from its consumer complaint and inquiry system to conduct its own investigations of these companies. There is some skepticism about whether such an approach would be an effective deterrent. One article suggests that "corporate officers and directors agonize less over the Securities Exchange Commission than over potential securities fraud class actions; pharmaceutical companies worry less about the Federal Drug Administration’s post-approval monitoring than about products liability class actions; and the Federal Trade Commission is less threatening to companies apt to ignore fair credit reporting requirements than the class action bar."

However, unlike these and other federal agencies, the CFPB has the unprecedented power to study, monitor, and to promulgate rules that could significantly influence pre-dispute mandatory arbitration clauses. Therefore, if the consumer complaint and inquiry system failed to be an effective tool for deterrence, the CFPB, based on these findings, could impose restrictions that would greatly affect businesses’ ability to enter into such agreements with consumers. This fear of increased regulation and restriction combined with the threat of investigations would also likely have some

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171. See Kamens, supra note 107.
172. Building the CFPB, supra note 8, at 18.
173. Though the CFPB says that it will phase in different areas of consumer complaints, it gives no timeline for how soon they will begin to address complaints regarding mandatory arbitration agreements. Id.
177. See id. (discussing the CFPB’s authority).
deterrent effect of corporate wrongdoing.\textsuperscript{178}

One of the principal roles of consumer protection regulation is to make it easy for consumers to see what they are getting and to compare one product with another. For instance, consumers might demand products without class action waivers if it were easy to figure out if such waivers are included in the contract and the consequences of such inclusion. It is, therefore, important that the CFPB also focus on consumer education.\textsuperscript{179} In doing so, the CFPB could follow the lead of The Health Insurance Portability and Accountability Act of 1996 (HIPAA).\textsuperscript{180} This would include the CFPB’s development of a concise document that defines mandatory arbitration and class action waivers and identifies the potential benefits and risks associated with these provisions. All businesses that choose to employ such agreements would be required to give a copy of this document to consumers and have them acknowledge their receipt of this information prior to entering any mandatory arbitration agreement.\textsuperscript{181} Finally, consistent with Dodd-Frank’s mandate, the CFPB should also serve as resource for consumers who are looking to better understand their rights as they relate to mandatory arbitration by providing access to tools and information that can help consumers make informed decisions.\textsuperscript{182} The outlined suggestions could bring the CFPB closer to its mission of making “markets for consumer financial products and services work for Americans”\textsuperscript{183} without disturbing the Supreme Court decision or over-regulating a process that has potential benefits to all parties.

\textsuperscript{178} Since “the main effect of this rulemaking power will be that existing laws will be more stringently enforced,” this Note suggests that corporate entities may choose to interact with consumers fairly versus risk increased oversight and enforcement. See Hawkins, supra note 175, at 24.

\textsuperscript{179} Building the CFPB, supra note 8, at 18-19 (suggesting that informed consumers will be better able to make workable financial decisions).


\textsuperscript{181} See generally id. (outlining the HIPAA regulations). But see Doctor’s Assocs. v. Casarotto, 517 U.S. 681, 688 (1996) (holding that the FAA preempted a Montana notice statute that conditioned the enforceability of arbitration agreements on compliance with a special notice requirement that was not applicable to contracts generally).

\textsuperscript{182} See 12 U.S.C. § 5493 (Supp IV 2010) (mandating the office of financial education to serve as a resource for consumers seeking to better understand financial decision making).

\textsuperscript{183} Building the CFPB, supra note 8, at 18.
V. CONCLUSION

The concern that consumers could be bartering away substantial rights in pre-dispute mandatory arbitration agreements is not unfounded. This is especially true when such agreements erode the bargaining power of the weaker party. Concepcion has undoubtedly presented consumers with an additional limitation on its power to bargain with businesses. However, government regulation is not always the answer. This Note provides the CFPB with four alternative ways to address consumers' needs: (1) conducting studies of class action waivers in mandatory arbitration agreements; (2) collecting data and investigating potential corporate wrongdoing; (3) developing and requiring businesses to distribute a consumer education document related to such agreements and waivers; and (4) serving as resource to consumers who are looking to better understand class action waivers in the context of mandatory arbitration agreements. By employing these suggestions, the CFPB may be armed with the tools it needs to ensure that consumer rights are protected without having too heavy a hand.

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184. Sevilla, supra note 26, at 333.

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