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Class Action Waivers and the Arbitrability of Antitrust Claims—Charting the Likely Ramifications of *AMEX III*

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Published in The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California

I. Introduction

There has been much debate concerning the scope of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, and the enforcement of collective arbitration waivers—also called "class action waivers"—in antitrust cases.[1] Class action waivers are contractual provisions that require the parties to submit all potential claims to individual arbitration while simultaneously forbidding them from seeking any form of class-wide relief. The ability of corporate defendants to enforce such waivers in the consumer antitrust context has potentially wide-ranging implications. Yet the exact contours of *Concepcion's* holding remain ambiguous. While the Court was clear that "state-law rules" invalidating class action waivers are pre-empted by the Federal Arbitration Act ("FAA"), it left open the possibility that they could be found unenforceable under federal common law, or what is sometimes referred to as the "federal substantive law of arbitrability."[2]

In an apparent effort to clear up this ambiguity, the Supreme Court granted *certiorari* in *American Express Company v. Italian Colors Restaurant*, to consider whether the FAA "permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a *federal- law claim*."[3] This article provides a background of the recent jurisprudence on this issue, discusses the circuit court landscape, evaluates the likely outcome of *Amex III*, and assesses the viability of alternative strategies for challenging class action waivers that are likely to exist post-*Amex III*.[4]

II. Background

A. The Federal Substantive Law of Arbitrability and the Effective Vindication of Federal Statutory Rights Doctrine

In *Concepcion*, the Court's preemption analysis focused on how courts should respond when the application of state law rule or doctrine acts as an obstacle to the enforcement of the FAA.[5] The analysis is necessarily different when a claimant challenges the enforceability of an arbitration clause under a federal doctrine because preemption is, by definition, not an issue. Traditionally, the Court has analyzed such cases under the federal substantive law of arbitrability, a "body of law" that has

developed under the FAA's "savings clause," which states that agreements to arbitrate are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[6] One important application of this doctrine is that arbitration agreements can be found unenforceable as against public policy if the party challenging them demonstrates that enforcing them would prevent them from vindicating federal statutory rights.[7] This is particularly apt in the antitrust context, where there is a widely-recognized public policy supporting private enforcement of the federal antitrust laws.[8]

The Supreme Court's opinions in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*[9] in 1985, *Gilmer v. Interstate/Johnson Lane Corporation*[10] in 1991, and *Green Tree Financial Corporation-Alabama v. Randolph*[11] in 2000 shed light on the Court's likely approach to the issue in *Amex III*. In each of these cases, the Court applied the effective vindication of federal statutory rights doctrine—also called the "effective-vindication doctrine"—but nonetheless ordered mandatory arbitration based on its finding that the party challenging the arbitration provision had failed to satisfy his, her or its burden. This suggests that when the Court issues its opinion in *Amex III*, it is likely to clarify the scope of the effective-vindication doctrine when applied to class action waivers, but is unlikely to abandon the doctrine altogether even if it reverses the Second Circuit. To do so would be to ignore decades of its own jurisprudence on arbitrability.

1. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*

This case involved a claim brought by Mitsubishi against Soler, one of its dealers, for breach of contract.[12] Soler brought a counterclaim under the Sherman Act for alleged antitrust violations.[13] The district court granted Mitsubishi's motion to compel arbitration pursuant to a mandatory arbitration provision contained in the Distributor Agreement.[14] The First Circuit reversed, holding that antitrust claims were *per se* nonarbitrable under the Second Circuit's *American Safety* doctrine.[15]

The Supreme Court reversed the First Circuit, and held that while the circuit courts had "uniformly" followed *American Safety*, this doctrine did not apply to international transactions.[16] The Court noted its "skepticism" with the doctrine and stated that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted."[17] The Court further explained that notwithstanding the importance of private antitrust enforcement, an arbitration clause was not *per se* unenforceable just because it deprived the claimants their day in court.[18]

However, in an apparent refinement of the *American Safety* doctrine, the Court noted in *dicta* that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[19] Under this "prospective waiver" rule, a party could challenge the enforcement of an arbitration provision by establishing that (a) "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at

issue," and (b) proceeding in the arbitral forum will be "so gravely difficult and inconvenient" that "for all practical purposes [the claimant would] be deprived of his day in court."[20] This did not affect the Court's holding, however, because Soler, the claimant in that case, had not even attempted to make such a showing.[21] Finally, in *dicta*, the Court stated that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[22]

2. *Gilmer v. Interstate/Johnson Lane Corporation*

In *Gilmer*, a registered securities representative brought a suit against his former employer for improper termination in alleged violation of the Age Discrimination in Employment Act ("ADEA"), a federal labor statute.[23] The employer moved to compel arbitration pursuant to a mandatory arbitration provision that was part of the plaintiff 's registration application to the New York Stock Exchange, which he had submitted as a required term of his employment.[24] The district court denied the motion because it found that the arbitration provision effectively stripped the plaintiff of his rights to seek relief for his ADEA claims, and that "Congress intended to protect ADEA claimants from the waiver of a judicial forum."[25] The Fourth Circuit reversed, concluding that "nothing in the text, legislative history, or underlying purposes of the ADEA indicat[ed] a congressional intent to preclude enforcement of arbitration agreements."[26] The Supreme Court granted *certiorari* to "resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims."[27]

The Supreme Court affirmed the Fourth Circuit, and held that the ADEA claim was subject to mandatory arbitration.[28] The Court concluded, just as it had done in *Mitsubishi*, that statutory claims are generally arbitrable, and that a claimant does not necessarily forgo his statutory rights just by agreeing to arbitration.[29] The Court recognized that, while some statutory claims are "not appropriate for arbitration," the side challenging the arbitration provision "should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[30] Further describing this test, the Court stated that parties challenging such arbitration provisions could establish this intention by citing "the text of the ADEA, its legislative history, or [by identifying] an inherent conflict between arbitration and the ADEA's underlying purposes."[31] The Court found that Gilmer, like Soler, failed to meet this burden.[32]

The Court stated in *dicta* that claims under statutes "designed to advance important public policies," such as the Securities Act of 1933, the Securities Exchange Act of 1934, RICO, and the Sherman Act, were appropriate for arbitration "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum."[33] These statements suggest that the effective-vindication doctrine announced in *Mitsubishi*, while *dicta*, remains a viable method of challenging the enforcement of mandatory arbitration provisions.[34]

3. *Green Tree Financial Corporation-Alabama v. Randolph*

Randolph involved a class action brought by a mobile home purchaser against his lender for alleged violations of the Truth in Lending Act ("TILA") and the Equal Credit Opportunity Act ("ECOA").[35] The defendant moved to compel arbitration based on an arbitration provision in the lending agreement that the plaintiff had signed.[36] The district court granted the motion.[37] The Eleventh Circuit reversed, holding that it had jurisdiction to hear the appeal and that the arbitration clause at issue was unenforceable.[38] The Court of Appeals found that the '"steep' arbitration costs" rendered the clause unenforceable because they "posed a risk" that the plaintiff would be prevented from vindicating her federal statutory rights under TILA.[39] The Supreme Court affirmed the first holding and reversed the second.[40]

Just as it had done in *Mitsubishi* and *Gilmer*, the Court applied the effective vindication doctrine, but again found the arbitration provision enforceable because the party challenging the provision did not satisfy her burden.[41] While declining to elaborate on how "detailed" a showing a party challenging an arbitration provision under this doctrine must make, the Court held that Randolph had merely established a "risk" that arbitration costs would be prohibitively expensive, and that this risk was "too speculative to justify the invalidation of an arbitration agreement."[42] The Supreme Court explained that "federal statutory claims can be appropriately resolved through arbitration," and "rejected generalized attacks on arbitration that rest on suspicion" that arbitration weakens private enforcement of these statutes.[43]

B. Recent Supreme Court Jurisprudence Concerning the Enforcement of Class Action Waivers

The Supreme Court has issued two recent opinions that have bearing on the enforcement of class action waivers when federal claims are involved. In *AT&T Mobility LLC v. Concepcion,*[44] the Court held that California's *Discover Bank* rule, which invalidates class action waivers as unconscionable when certain conditions are met, was preempted by Section 2 of the FAA.[45] In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,*[46] which was decided one year prior to *Concepcion,* the Court held that parties could not be compelled to participate in class-wide arbitration absent an express contractual agreement to do so. Neither case directly addresses whether the effective-vindication doctrine remains a viable means of challenging class action waivers in cases involving federal claims. Both cases do, however, offer valuable guidance as to how the Court may decide the issue in *Amex III*.

1. *AT&T Mobility LLC v. Concepcion*

In *Concepcion*, consumers brought a class action against Cingular Wireless, AT&T's predecessor, for allegedly charging them sales tax on "free" or heavily discounted cell phones in violation of California's consumer protection statutes.[47] The plaintiffs did not assert any federal claims.[48] AT&T moved to compel individual arbitration.[49] The district court denied the motion and held that the class action waiver

was void under the *Discover Bank* rule.[50] The court found that under *Discover Bank*, class action waivers are "voidable" when certain conditions (contracts of adhesion, claims for small amounts of damages, and allegations of deliberate cheating) are met, and that those conditions were met by the record evidence before it.[51] The preemption issue was not raised by the district court.[52]

The Ninth Circuit affirmed, and held that the three-part test announced in *Discover Bank* for determining the unconscionability under California law was satisfied.[53] The Court of Appeals also found that the *Discover Bank* rule was neither explicitly nor implicitly preempted by the FAA.[54] On the explicit preemption issue, the Ninth Circuit held that the plaintiffs' unconscionability challenge was based on a '"generally applicable contract defense,'" and could '"be applied to invalidate an arbitration agreement without contravening § 2 of the FAA.'"[55] The court stated that the *Discover Bank* rule was '"simply a refinement of the unconscionability analysis applicable to contracts generally in California,'" and was therefore not in tension with Section 2 of the FAA.[56] The court also found that the *Discover Bank* rule did not "stand[] as an obstacle" to furthering the purposes of the FAA (*i.e.*, reversing judicial hostility to arbitration agreements, and promoting the efficient and expeditious resolution of claims), because it placed class action waivers in arbitration agreements "on the same footing" as such waivers in contracts written outside the arbitration context.[57]

The Supreme Court reversed, and held that California's *Discover Bank* rule was "preempted" by the FAA, and, as such, could not be used to invalidate the class action waiver at issue.[58] The Court explained: "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[59] In such cases, "the FAA's preemptive effect might extend even to grounds traditionally thought to exist at law or in equity for the revocation of any contract."[60] The Court concluded that while the *Discover Bank* rule "does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*."[61] In the Court's view, the rule's requirements were so "toothless and malleable" that its application essentially mandated class-wide arbitration or litigation whether or not the parties had agreed to such procedures, and thereby interfered with the purposes of the FAA.[62]

Several circuit courts facing similar issues post-*Concepcion* have determined that its holding is limited to the preemption of state law rules, and that it left as an open question what analysis should be applied to plaintiffs' attempts to invalidate class action waivers under federal common law rules of unconscionability that conflict with the FAA. *See infra,* Section III.

2. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*

Stolt-Nielsen involved a class action brought against shipping companies by their customers for price-fixing under the Sherman Act.[63] Plaintiff served a demand on defendants for class-wide arbitration on behalf of all direct purchasers pursuant to an arbitration clause in their "standard contract[s]."[64] At the arbitration hearing, the parties

stipulated that the arbitration clause was "silent" on the issue of class-wide arbitration and that the parties could not agree on the issue.[65] The arbitration panel found that class arbitration was permitted under the standards articulated in *Green Tree Financial Corp. v. Bazzle*,[66] which, according to the panel, "construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration."[67] The district court vacated the award and held that the panel's decision was made in "manifest disregard of the law" because the arbitrators "failed to conduct a choice-of-law analysis."[68] The Second Circuit reversed and held that because the defendants "cited no authority applying a federal maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of federal maritime law."[69]

The Supreme Court granted *certiorari* and reversed the Second Circuit, holding that the parties could not be compelled to participate in class-wide arbitration when the arbitration clause was "silent" on the issue.[70] The Court found that forcing classwide arbitration in such situations would violate the "basic precept" of the FAA that "arbitration 'is a matter of consent, not coercion.'"[71] The Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," and that "[t]he panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[72]

C. The Amex Trilogy

The application of the effective-vindication doctrine to class action waivers has received the most comprehensive treatment in a series of opinions issued by the Second Circuit in the *American Express Merchants' Litigation*. In each of its three successive opinions, the Second Circuit held that parties could use the effective-vindication doctrine to challenge class action waivers in cases involving federal antitrust claims. A review of each of these opinions follows.

1. *Amex I*

In re American Express Merchants' Litigation involves a class action brought on behalf of merchants who accepted American Express cards.[73] Plaintiffs brought an antitrust claim under Section 1 of the Sherman Act, alleging that American Express engaged in anticompetitive tying and charged them "supra-competitive 3% merchant discount fee[s]" on transactions involving American Express credit cards.[74] American Express moved to compel arbitration based on a class action waiver in the cardholder agreements, which the district court granted.[75]

The Second Circuit reversed, and held that the waiver was "void as a matter of public policy," and, therefore, unenforceable because it created "more than a speculative risk" that the members of the proposed merchant class would be deprived of their "substantive rights under the federal antitrust statutes."[76] In other words, "the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex *de facto* immunity from antitrust liability by removing the

plaintiffs' only reasonably feasible means of recovery."[77] The court found that the issue was governed by the "federal substantive law of arbitrability," and that the controlling authority on the application of that doctrine was the Supreme Court's decision in *Randolph*.[78] Finally, in contrast to what it had done years before in *American Safety*, the court explained that it was not adopting a *"per se"* rule that class action waivers are always unconscionable in the antitrust context.[79] Rather, "*each* case…must be considered on its own merits, governed with a healthy regard for the fact that the FAA is a congressional declaration of a liberal policy favoring arbitration agreements."[80]

The court held that under *Randolph*, the party seeking to invalidate the arbitration agreement "bears the burden" of demonstrating that arbitration would be "prohibitively expensive."[81] While there had been a series of cases between *Randolph* and *Amex I* upholding class action waivers, the court noted that in each of these cases the claimants had failed to offer affirmative evidence that satisfied this burden.[82] In contrast, the merchants in *Amex I* submitted a declaration from an expert economist, which, in the court's view, affirmatively demonstrated that it would not be '"economically rational'" for any of the merchants to pursue their claims individually through arbitration.[83] The court concluded that American Express "brought no serious challenge" to the merchants' evidence, and that the plaintiffs had effectively demonstrated that enforcement of the CAA's waiver "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws."[84]

The Supreme Court granted *certiorari* and remanded *Amex I* with instructions to consider the implications of its decision in *Stolt-Nielsen*.

2. *Amex II*

In *Amex II*, the Second Circuit held that its prior ruling was "unaffected" by *Stolt-Nielsen*, and that parties retained the ability to invalidate class action waivers by showing that bringing their federal antitrust claims in an arbitral forum would be "prohibitively expensive."[85] The court concluded that the analysis presented in *Mitsubishi* and *Randolph*, and not *Stolt-Nielsen*, was the controlling authority on the issue of whether a given class action waiver is enforceable when federal statutory rights were at stake.[86] The court agreed with plaintiffs that "to infer from *Stolt-Nielsen's* narrow ruling on contractual construction that the Supreme Court meant to imply that an arbitration [clause] is valid and enforceable where, as a demonstrated factual matter, it prevents the effective vindication of federal rights would be to presume that the *Stolt-Nielsen* court meant to overrule or drastically limit its prior precedent."[87]

The court further explained that, while its reasoning was based on "dicta" from these cases, "it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy."[88] The court concluded that, unlike the challenges in those three cases which failed because the claimants established, at best, only "hypothetical" risks that their federal statutory rights would be eviscerated, the merchant plaintiffs had put forward unchallenged expert testimony that individual arbitration would be prohibitively

expensive and would "effectively depriv[e] plaintiffs of the statutory protections of the antitrust laws."[89] Finally, the court repeated its "caveat" that it was not holding that class action waivers were "*per se*" unenforceable in the class action context, but, rather that the waivers presented in each case should be evaluated on their own merits with a "healthy regard" for the strong congressional policy favoring arbitration agreements.[90]

The Second Circuit "placed a hold on the mandate in *Amex II*" to permit American Express to file a petition for *certiorari*, and during the holding period, the Supreme Court issued its opinion in *Concepcion*.[91] The Second Circuit then permitted supplemental briefing on the implications, if any, that *Concepcion* had on *Amex II*.

3. *Amex III*

In *Amex III*, the Second Circuit held, without oral argument, that "*Concepcion* does not alter our analysis."[92] Consistent with its opinion in *Amex II*, the court found that when enforcing a class action waiver may prevent claimants from vindicating their federal statutory rights, the controlling case authority is *Randolph*, not *Concepcion* or *Stolt-Nielsen*.[93] The court explained that "*Concepcion* plainly offers a path for analyzing whether a state contract law is preempted by the FAA," whereas *Amex I* "rests squarely on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability."[94] The court found that "[s]ince there is no indication in *Stolt-Nielsen* or *Concepcion* that the Supreme Court intended to overturn either *Randolph* or *Mitsubishi*, both cases retain their binding authority."[95]

The court once again noted that in each of these prior opinions the claimants' challenges had been rejected because they had failed to effectively demonstrate that being forced to arbitrate would deprive them of their federal statutory rights.[96] The court concluded that "[t]heir failures speak to the quality of the evidence presented, not the viability of the legal theory."[97] In contrast, the court again found that "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration."[98] The Supreme Court then granted *certiorari* for a second time in the case, and will soon decide whether parties may challenge class action waivers based on the federal substantive law of arbitrability when a federal claim is at issue.[99]

III. The Circuit Court Landscape Post-Concepcion

Following *Concepcion*, circuit courts have addressed the arbitrability of federal claims in at least two contexts. The issue comes up both in regard to the enforcement of class action waivers and as to mandatory arbitration provisions. While not determinative, a court's stance on the enforcement of mandatory arbitration provisions can shed some light on how it is likely to treat class action waivers. The central issues are essentially the same in each instance: Can a claimant's federal statutory rights be vindicated in the arbitral forum, and, if the answer is no, does the FAA nonetheless trump the lost statutory rights? While there are some differences among the circuits on this issue, two trends have emerged. First, the circuits have uniformly limited *Concepcion's* preemption analysis to

challenges based on state law doctrines, and determined that the effective-vindication doctrine may be used to challenge class action waivers when the underlying causes of action include federal statutory claims. Second, regardless of whether or not they ultimately compel arbitration, these courts' holdings preserve the possibility that certain types of challenges—*i.e.*, those not based on public policy—are unaffected by *Concepcion*, and are therefore still viable.[100]

A. First Circuit

The most significant First Circuit case on this issue is *Kristian v. Comcast Corp.*,[101] which was decided well before *Concepcion*. *Kristian* involved a class action brought against Comcast by consumers for violations of federal and state antitrust laws, and set the ground rules for arbitrability analysis in the First Circuit.[102] Comcast moved to compel individual arbitration pursuant to a class action waiver contained in a "Policies & Practices" contract that had been mailed to the plaintiffs.[103] The arbitration provisions also contained additional limitations barring the recovery of attorneys' fees and availability of treble damages.[104] The district court denied the motion and concluded that the facts that gave rise to the dispute arose prior to the existence of the agreements.[105] The First Circuit reversed on two grounds.[106] First, the court found that the provisions were retroactive, but that there were several issues of arbitrability that the district court left unaddressed.[107] The court then found that the prohibitions of class actions, the recovery of attorneys' fees, and treble damages each failed the vindication of federal statutory rights analysis.[108] The court held, however, that these provisions were severable from the arbitration agreements and that once severed, the remaining provisions were enforceable.[109]

On the issue of the class action waiver, the *Kristian* court distinguished *Gilmer* and *Johnson v. West Suburban Bank*.[110] The court explained: "When Congress enacts a statute that provides for both private and administrative enforcement actions, Congress envisions a role for both types of enforcement."[111] The court distinguished *Johnson* and other cases which permitted class action waivers over TILA claims by pointing to the much higher expense and greater risk associated with antitrust claims.[112] The court also noted that the plaintiffs submitted uncontested expert affidavits that demonstrated "that without some form of class mechanism—be it class action or class arbitration—a consumer antitrust plaintiff will not sue at all."[113] These affidavits demonstrated, among other things, that likely individual recoveries would range from a few hundred to a few thousand dollars "at most," whereas expert fees would be $300,000 to $600,000.[114] Mandating individual arbitration under these circumstances would, in the court's view, make hiring the necessary experts cost-prohibitive and '"individual consumer/subscriber's cases would be extremely compromised, and effectively precluded.'"[115]

A more recent First Circuit case, *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*,[116] involved a class action brought by a female employee against Ritz-Carlton under Title VII and the American with Disabilities Act ("ADA") for alleged employment discrimination.[117] The defendant moved to compel arbitration pursuant to a

mandatory arbitration clause contained in an employment agreement, which the plaintiff signed.[118] The district court granted the motion and the plaintiff appealed. The plaintiff argued on appeal that the arbitration provision at issue "deprive[d] her of remedies granted by Title VII and the ADA."[119] The First Circuit affirmed, holding that the challenged arbitration provisions were ambiguous as to the available remedies, and noting that the plaintiff failed to demonstrate, as was her burden, that enforcing the provisions would "interfere with the effective vindication of [her] statutory rights."[120] It appears from this holding that the First Circuit might have ruled differently had the plaintiff come forward with additional evidence as the plaintiffs in *Kristian* had done.

Finally, *Awuah v. Coverall North America, Inc.*[121] involved a class action brought by several "franchisees" against a janitorial services company under Massachusetts' wage and hour laws for allegedly misclassifying them as independent contractors and failing to pay them appropriate wages.[122] The defendant moved to compel arbitration pursuant to a "Consent to Transfer" agreement that included a class action waiver, which at least some of the claimants had signed.[123] The district court denied the motion, and held that the waiver was unenforceable because in the employment context "arbitration clauses cannot be enforced unless there is heightened notice to the party sought to be bound."[124] The First Circuit reversed and held that there was no "heightened notice" requirement under Massachusetts state law, but even if there were, "such a principle would be preempted by the FAA" under *Concepcion*.[125]

Awuah is consistent with the First Circuit's prior cases because it involved claims brought under Massachusetts state law where the claimants challenged the arbitration provisions based on a state unconscionability rule that was preempted by the FAA, as opposed to *Kristian* and *Soto-Fonalledas*, which involved claims brought under federal statutes and the application of the effective-vindication doctrine.

B. Second Circuit

The leading case in the Second Circuit is *Amex III*, which held, as described above, that class action waivers may be found unenforceable under the FAA's own terms when they prevent claimants from vindicating their federal statutory rights. *See infra*, Section II.C.

C. Third Circuit

Antkowiak v. TaxMasters[126] involved a class action brought against a tax resolution services provider by its clients for alleged deceptive sales practices and violations of TILA, the Fair Debt Collection Practices Act, and Pennsylvania state law.[127] The defendant moved to compel individual arbitration pursuant to a class action waiver contained in an "Engagement Agreement" that the named plaintiff had signed.[128] The district court denied the motion based on its finding that the arbitration clause was "unconscionable under Pennsylvania law."[129] The Third Circuit vacated the district court opinion and remanded the case for reconsideration because it found that the analysis presented to the district court was incomplete.[130]

The court found that under *Concepcion*, "generally applicable contract defenses, such as fraud, duress, or unconscionability" could be used to invalidate arbitration clauses, and that Pennsylvania's law of unconscionability fell within this rubric.[131] In an interesting twist, the court found that for a contract to be unconscionable in Pennsylvania, "it must be *both* procedurally and substantively unconscionable," and that the district court had resolved the first part of this test but not the second.[132] As to the first prong, the court held that "[c]ontracts of adhesion are *per se* procedurally unconscionable under Pennsylvania law," and that the plaintiff had put forward specific additional evidence demonstrating procedural unconscionability.[133] For example, TaxMasters' clients were not informed of the arbitration clause during their initial phone consultations, and TaxMasters considered the clients liable for the "full contract price agreed to during the phone consultation" even if they never signed the engagement agreement.[134] As to the second prong, the court held that "the provision is only substantively unconscionable if it prevents Antkowiak from vindicating his rights in the arbitral forum."[135] However, because there were no specific findings on this issue, the Third Circuit remanded the case to the district court with instructions to make further factual determinations as to the projected costs of arbitration and the plaintiff 's ability to pay them.[136]

The Court of Appeals noted that the district court in addressing this issue appeared concerned with the case law that *Concepcion* had overruled, but gave no indication that it felt *Concepcion* preempted the "substantive" prong of Pennsylvania's law on procedural unconscionability.[137] The court otherwise gave no indication that it found Pennsylvania's law on procedural unconscionability in any way inconsistent with, or preempted by, *Concepcion*.[138]

In *Homa v. American Express Company*[139] a group of credit card holders brought a class action against American Express for alleged violations of the New Jersey Fraud Act.[140] The defendant moved to compel individual arbitration pursuant to a class action waiver in the "standard Blue Cash credit card agreement," which the district court granted.[141] Plaintiff argued on appeal that "the uncontradicted evidentiary record in this case establishes that enforcing American Express's arbitration clause would make it impossible for any person … to effectively vindicate his substantive statutory rights."[142] The Third Circuit accepted this characterization of the record, but nonetheless affirmed the district court.[143] This court found, in similar fashion to the First Circuit in *Awuah*, that the plaintiff 's unconscionability challenge was based on state law and involved plaintiff 's alleged inability to vindicate his substantive rights under a New Jersey statute.[144] The court held that plaintiff 's attempt to use this state law rule to invalidate the class action waiver at issue was preempted by the FAA under *Concepcion*.[145] Interestingly, the court found that its opinion was consistent with the Second Circuit's holding in the *Amex* cases because the plaintiff 's challenge to the class action waiver in those cases "was concerned with the assertion of substantive federal statutory rights under the Sherman and Clayton Acts whereas here we are dealing with a substantive claim under the New Jersey Consumer Fraud Act."[146]

D. Fifth Circuit

Carey v. 24 Hour Fitness, USA, Inc.[147] involved a class action brought by a former sales representative against his employer under the Fair Labor Standards Act ("FLSA") for allegedly failing to fully compensate him for overtime work.[148] The defendant moved to compel individual arbitration pursuant to a class action waiver contained in an "Employee Handbook Receipt Acknowledgment" that the plaintiff had signed.[149] The district court denied the motion and the defendant appealed.[150] The Fifth Circuit affirmed and held that the arbitration provision was unenforceable.[151] The court found that under Texas contract law, "an arbitration clause is illusory [and therefore unenforceable] if one party can avoid its promise to arbitrate by amending the provision or terminating it altogether."[152]

E. Eighth Circuit

In *Owen v. Bristol Care, Inc.*,[153] a health care "administrator" brought a class action against her employer under FLSA for allegedly misclassifying her as an "exempt" employee and denying her overtime.[154] The defendant moved to compel individual arbitration pursuant to a class action waiver contained in a "Mandatory Arbitration Agreement" that the plaintiff had signed.[155] The district court denied the motion, concluding that "class waivers are invalid in FLSA cases because the FLSA provides for the right to bring a class action."[156] The district court decided that "when a Plaintiff 's statutory rights are not capable of vindication through arbitration, the federal substantive law of arbitrability, grounded in the FAA, allows federal courts to declare otherwise operative arbitration clauses unenforceable."[157]

The Eighth Circuit reversed and held that "arbitration agreements containing class waivers are enforceable in FLSA cases."[158] The court concluded that the controlling authority in such cases is *Gilmer*, not *D.R. Horton Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), or *Concepcion.*[159] The Court of Appeals found that under *Gilmer*, federal statutory claims are arbitrable unless there is a "contrary congressional command for another statute to override the FAA's mandate."[160] The court concluded that "[i]f such an intention exists, it will be discoverable in the text of the statute, its legislative history, or an 'inherent conflict' between arbitration and the statute's underlying purposes."[161] The court determined that the plaintiff had failed to identify anything in the text of the FLSA or its legislative history that indicated a "congressional intent to bar employees from agreeing to arbitrate" and that there was no "inherent conflict" between the FLSA and the FAA.[162] Based on this, the court concluded that *Gilmer's* holding "forecloses the argument that Supreme Court precedent upholding the enforceability of class waivers is limited to the consumer context."[163]

F. Ninth Circuit

In *Coneff v. AT&T Corp.,*[164], residents of eight states brought a class action against AT&T for violating state consumer protection laws and the Federal Communications Act ("FCA") by allegedly transferring them to more expensive plans

than those to which they had agreed.[165] Defendant moved to compel arbitration based on a class action waiver included in the parties' service agreements.[166] Plaintiffs argued that the provision was both substantively and procedurally unconscionable.[167] Applying Washington law, the district court denied the motion to compel based on its finding that the provision was substantively unconscionable, and did not reach the issue of procedural unconscionability.[168]

The Ninth Circuit reversed, and rejected the plaintiffs' argument that enforcing the arbitration provision would prevent them from vindicating their statutory rights.[169] First, the court found that the arbitration provision at issue was, in many ways, "identical" to the provision in *Concepcion*, and that the Washington law on unconscionability under which the plaintiffs challenged the provision was not "meaningfully different" from California's *Discover Bank* rule.[170] The court also rejected plaintiffs' argument that the Washington law on unconscionability required an "evidence-specific finding of exculpation," finding that "such evidence goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*."[171]

Second, the Court of Appeals explained that it did not view *Concepcion* as being inconsistent with *Randolph*, and that the plaintiffs did not satisfy their burden under *Randolph* because the arbitration provision contained fee-shifting provisions that provided plaintiffs with sufficient "incentive" to bring their claims in arbitration.[172] In the court's view, "the concern is not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so."[173] The court also distinguished *Amex III* on this basis, noting that the Second Circuit "specifically found that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action."[174] Apparently recognizing that the distinction between means and incentives was not actually that helpful, the court stated that "[t]o the extent that the Second Circuit's opinion is not distinguishable, we disagree with it and agree instead with the Eleventh Circuit [in *Cruz v. Cingular Wireless, LLC*]."[175] Finally, on the issue of procedural unconscionability, the court found that *Concepcion* "gives little guidance beyond a recognition of the doctrine's continued vitality."[176] However, the court noted that many state laws require plaintiffs proceeding under this doctrine to demonstrate that the challenged provisions are *both* procedurally and substantively unconscionable.[177] However, unlike the Third Circuit in *Antkowiak* which did not address the issue, the Ninth Circuit concluded that when the state law at issue requires such a showing, the asserted challenge will necessarily fail "because of our holding that the arbitration clause at issue is not substantively unconscionable."[178] This holding cannot be reconciled with the Third Circuit's holding in *Antkowiak.*

G. Eleventh Circuit

In *Cruz v. Cingular Wireless, LLC,*[179] Cingular's customers brought a class action alleging violations of Florida's Deceptive and Unfair Trade Practices Act by charging them for a roadside assistance plan that they never ordered.[180] The defendant moved to compel arbitration pursuant to a contract, which the plaintiffs had signed, that included a

class action waiver.[181] The district court granted the motion, and held that the arbitration provision was enforceable under a Florida law that prohibited waivers only in certain instances.[182] The Eleventh Circuit affirmed, and held that "[i]nsofar as Florida law would invalidate these agreements as contrary to public policy," that law is preempted by Section 2 of the FAA under *Concepcion*.[183] The court concluded that even if the effective vindication doctrine applied to "state as well as federal statutory causes of actions," there was no reason to address the issue because the *Concepcion* Court had determined that this exact arbitration provision "did not produce such a result."[184]

Douglass v. Johnson Real Estate Investors, LLC[185] involved an individual action brought by a former employee against his employer for alleged violations of the ADEA.[186] The defendant moved to compel individual arbitration pursuant to an arbitration provision contained in a "Mandatory Dispute Resolution Agreement" that the plaintiff had signed.[187] The district court denied the motion, and the defendant appealed.[188] The Eleventh Circuit affirmed, and held that the arbitration provision was unenforceable under Massachusetts contract law because the defendant's promise to arbitrate was "illusory."[189] The court found that where one of the parties "retain[s] the right to unilaterally modify part of the integrated contract," the promise to arbitrate is not really a promise, because the requirement to arbitrate can be removed from the contract at any time.[190] While this case did not involve a class action, its holding is still instructive. The arbitration provisions at issue, like most such provisions, were subject to unilateral modification by the party with the greater bargaining power. The party imposing arbitration could just as easily choose to remove the provision and litigate instead. This type of "illusory" contract can be challenged in the class context arguably just as easily.

IV. Conclusions

A. The Effective-Vindication Doctrine Will Likely Survive the Supreme Court's Holding in *Amex III*

While there does not appear to be a clear circuit court split on the issue of *whether* to apply the effective-vindication doctrine in cases involving federal claims, there is a wide variance in the doctrine's *application* among the circuits.[191] Therefore, given the Supreme Court's generally pro-arbitration leanings, one likely scenario is that it may hold in *Amex III* that the Second Circuit identified the correct test, but applied it incorrectly.[192] The Court may find, for example, that the Second Circuit made insufficient findings that Congress, in passing the Sherman Act, "evinced an intention" to preclude antitrust claims from arbitration. On that basis, the Court could reverse and remand with instructions for reconsideration of whether the text and legislative history of the Sherman Act "evinces an intention" to preclude arbitration.

Similarly, the Court could also conclude, just as it did in *Gilmer*, *Mitsubishi*, and *Randolph*, that the cardholders failed to present sufficient evidence that enforcing the class action waiver would create "prohibitive arbitration costs" that would prevent them from effectively vindicating their federal statutory rights.[193] However, given the amount of evidence the *Amex III* claimants did put in on this issue, such a holding would create

an extremely high, possibly insurmountable, barrier for any party seeking to challenge a class action waiver on these grounds in an antitrust case. As noted earlier, the merchant plaintiffs in *Amex III* put forward an uncontested expert report demonstrating that the only economically feasible means for challenging American Express's alleged anticompetitive practices was through a class action.

Regardless of whether the Supreme Court affirms or reverses the Second Circuit's *Amex III* opinion, it seems likely that the effective-vindication doctrine will remain largely intact. Every circuit court to address this issue post-*Concepcion* has determined that class action waivers may be challenged on this basis, and that the controlling opinions are *Mitsubishi*, *Gilmer*, and *Randolph*, and not *Concepcion*.[194]

B. Alternative Strategies for Challenging Class Action Waivers Likely Will Survive the Court's Ruling in *Amex III*

If the Supreme Court reverses *Amex III* or issues a holding that makes challenges under the effective-vindication doctrine all but impossible, there still may be viable alternative strategies to challenging class action waivers. Under the Third Circuit's *Antkowiak* case, for example, it will remain possible to challenge class action waivers on procedural unconscionability grounds, even when the relevant state rule requires a showing of both procedural and substantive unconscionability. Similarly, under the Fifth Circuit's *Carey* opinion and the Eleventh Circuit's *Douglass* opinion, parties challenging class action waivers may be able to lodge challenges under state common law contract doctrines, and attack such provisions as being illusory or lacking in consideration.

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The opinions expressed are those of the author and do not necessarily reflect the views of Zelle Hofmann or its clients. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

[2] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 626 (1985).

[3] *American Express Co. v. Italian Colors Restaurant*, 667 F.3d 204 (2d Cir.) ("*Amex III*"), *reh'g en banc denied*, 681 F.3d 139 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (Nov. 9, 2012); and http://www.supremecourt.gov/qp/12-00133qp.pdf (last visited March 26, 2013) (emphasis added).

[4] On February 27, 2013, the Supreme Court heard oral arguments on this issue, and will issue its opinion later this term. The transcript of oral argument can be found at

http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf ("*Amex III* Transcript").

[5] *Concepcion*, 131 S. Ct. at 1742.

[6] 9 U.S.C. § 2; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

[7] *Mitsubishi*, 473 U.S. at 637 n.19 (noting that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.").

[8] *See* Brief for the United States as *Amicus Curiae* Supporting Respondents, filed Jan. 29, 2013 in *Amex III*, at 33 (stating that "the effective-vindication principle ensures that arbitration permits private enforcement of numerous federal statutes" and "[p]rivate actions are a vital supplement to government enforcement not only under the antitrust laws, but also under a wide range of other statutes."); Brief of the State of Ohio and 21 Other States as *Amicus Curiae* in Support of Respondents, filed Jan. 29, 2013 in *Amex III*, at 19-20 ("Congress's dual purpose in creating the private right of action under the federal antitrust laws was to provide private redress to injured parties and to protect the public interest."). Both briefs can be found at www.supremecourtpreview.org (last visited March 26, 2013).

[9] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985).

[10] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[11] *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

[12] *Mitsubishi*, 473 U.S. at 616.

[13] *Id*.

[14] *Id*. at 616-17.

[15] *Id*. at 623; *see also Am. Safety Equip. Corp. v. J. P. Maguire & Co., Inc.*, 391 F.2d 821, 827 (2d Cir. 1968) ("[w]e do not believe that Congress intended such claims to be resolved elsewhere than in the courts.").

[16] *Mitsubishi*, 473 U.S. at 621, 640.

[17] *Id*. at 632 and 629 ("[w]e find it unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transactions….[W]e conclude [however] that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context").

[18] *Id*.

[19] *Id*. at 637 n.19.

[20] *Id*. at 628, 632.

[21] *Id*. at 632-33.

[22] *Id*. at 637.

[23] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23-24 (1991).

[24] *Id*. at 24.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*. at 27.

[29] *Id*. at 26.

[30] *Id*.

[31] *Id*. (internal quotation marks omitted).

[32] *Id*. at 35.

[33] *Id*. at 28, citing *Mitsubishi*, 473 U.S. at 637.

[34] *Gilmer*, 500 U.S. at 33, citing FAA § 2. It is interesting to note that Justice Stevens stated in his dissent that the Court's holding "skirts the antecedent question whether the coverage of the [FAA] even extends to arbitration clauses contained in employment contracts." *Id*. at 36. While there has been no explicit holding to this effect, a number of circuit courts have found the FAA applicable to employment contracts. *See, e.g., Townsend v. Pinnacle Entertainment, Inc.*, 457 Fed. Appx. 205, 207 (3d Cir. 2012)

("Employment contracts, except those regarding the employment of transportation workers, are within the ambit of the FAA"); *Owen v. Bristol Care, Inc*., 702 F.3d 1050, 1054 (8th Cir. 2013) ("[O]ur conclusion is consistent with all of the other courts of appeals that have considered this issue and concluded that arbitration agreements containing class waivers are enforceable in FLSA cases.").

[35] *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 82-83 (2000).

[36] *Id*. at 83.

[37] *Id*.

[38] *Id*. at 84.

[39] *Id*.

[40] *Id*.

[41] *Id*. at 90, citing *Gilmer*, 500 U.S. at 28, and *Mitsubishi*, 473 U.S. at 637.

[42] *Id*. at 81, 91.

[43] *Id*. at 89-90.

[44] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

[45] *Id.* at 1747, 1756.

[46] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

[47] First Amended Complaint filed May 2, 2006 in *Concepcion v. Cingular Wireless LLC* (No. 06-cv-00675-DMS-NLS, S.D. Cal., Doc. No. 4) at ¶ 2.

[48] *See id.* at ¶¶ 55-57 (Unjust Enrichment); 20-26 (Consumer Legal Remedies Act, California Civil Code §§ 1770, *et seq*.); 27-42 (Unfair Competition Law, California Business and Professions Code §§ 17200, *et seq*.), 43-47 (False Advertising Statute, California Business and Professions Code §§ 17500, *et seq*.); and 48-54 (Fraudulent Concealment, California Civil Code §§ 1709, 1710).

[49] *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *5 (S.D. Cal. Aug. 11, 2008).

[50] *Id*. at *9.

[51] *Id.* at *8-9; *see Discover Bank v. Superior Court of Los Angeles*, 36 Cal. 4th 148, 162-63 (2005) (holding that class action waivers are unconscionable where they are "[1]

found in a consumer contract of adhesion[, 2] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [3] when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money").

[52] *Laster,* 2008 WL 5216255, at *7.

[53] *Laster v. AT&T Mobility LLC,* 584 F.3d 849, 853-59 (9th Cir. 2009

[54] *Id.* at 857-59.

[55] *Id.* at 857, quoting *Shroyer v. New Cingular Wireless Services, Inc*., 498 F.3d 976, 988 (9th Cir. 2007).

[56] *Laster*, 584 F.3d at 857, quoting *Shroyer*, 498 F.3d at 987.

[57] *Laster*, 584 F.3d at 857-58, citing *Shroyer*, 498 F.3d at 988-89.

[58] *Concepcion,* 131 S. Ct. at 1747, 1756.

[59] *Id*. at 1748.

[60] *Id.*

[61] *Id.* at 1750, 1753 (emphasis in original).

[62] *Id.* at 1750.

[63] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1764-65 (2010); *see* Complaint filed September 4, 2003 in *AnimalFeeds Int'l Corp. v. Stolt-Nielsen S.A.* (No. 03-cv-05002-CMR, E.D. Pa., Doc. No. 1), at ¶ 2.

[64] *Stolt-Nielsen*, 130 S. Ct. at 1764-65.

[65] *Id.* at 1766.

[66] *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003).

[67] *Stolt-Nielsen*, 130 S. Ct. at 1766 (internal quotation marks omitted).

[68] *Id.* (internal quotation marks omitted)

[69] *Id.* (emphasis in original).

[70] *Id.* at 1764.

[71] *Id.* at 1773, quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*., 489 U. S. 468, 479 (1989); *see also Stolt-Nielsen*, 130 S. Ct. at 1777 (Justices Ginsburg, Breyer, and Stevens dissenting).

[72] *Stolt-Nielsen*, 130 S. Ct. at 1774-75 (emphasis in original).

[73] *In re American Express Merchants' Litigation*, No. 03 CV 9592(GBD), 2006 WL 662341, at *1 (S.D.N.Y. March 16, 2006).

[74] *Id.*

[75] *In re American Express Merchants' Litigation*, 554 F.3d 300, 304-07 (2d Cir. 2009) ("*Amex I*").

[76] *Id.* at 312, 316, 319.

[77] *Id*. at 320. The same concern, albeit in the context of California's consumer protection statutes, was expressed in *Discover Bank*, 36 Cal. 4th at 160 ("This is not only substantively unconscionable, it violates public policy by granting Discover a 'get out of jail free' card while compromising important consumer rights.").

[78] *Amex I*, 554 F.3d at 312, 315; *see also Kristian v. Comcast Corporation*, 446 F.3d 25, 63 (1st Cir. 2006); *Gay v. CreditInform*, 511 F.3d 369, 394-95 (3d Cir. 2007); and *Randolph*, 531 U.S. 79.

[79] *Amex I*, 554 F.3d at 304, 321

[80] *Id.* at 321 (emphasis in original; internal quotation marks omitted).

[81] *Id.* at 315.

[82] *Id.*, citing and quoting *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir. 2007) ("This kind of uninformed speculation about cost falls far short of satisfying the plaintiffs' burden of proving that the costs of proceeding individually against the defendants would be prohibitive and thus would prevent them from effectively vindicating their statutory rights."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) ("In the present case, the Livingstons have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs."); and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("Adkins makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff.").

[83] *Amex I*, 554 F.3d at 316 (quoting plaintiffs' economist).

[84] *See id.* at 319 (internal quotations omitted).

[85] *In re American Express Merchants' Litigation*, 634 F.3d 187, 189, 197-98 (2d Cir. 2011) ("*Amex II*").

[86] *Id.* at 194-97.

[87] *Id.* at 199 (internal quotations omitted).

[88] *Id.* at 197.

[89] *Id.* at 197-98. *Compare Amex I*, 554 F.3d at 315-16, with *Amex II*, 634 F.3d at 196-98; *see also Randolph*, 531 U.S. at 90-91 (stating that "[t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement").

[90] *Amex II*, 634 F.3d at 199.

[91] *See American Express Co. v. Italian Colors Restaurant*, 667 F.3d 204, 206 (2d Cir. 2012) ("*Amex III"*).

[92] *Id.*

[93] *Id*. at 216.

[94] *Id*. at 213, quoting *Amex I*, 554 F.3d at 320.

[95] *Id*. at 217.

[96] *Id*.

[97] *Id*.

[98] *Id*. at 218 (internal quotations omitted).

[99] 133 S. Ct. 594.

[100] Justice Thomas' concurring opinion in *Concepcion* also discussed the possibility of challenging class action waivers on grounds that "relate to defects in the making [or formation] of an agreement" as opposed to public policy. *Concepcion*, 131 S. Ct. at 1753. Justice Thomas observed, for example, that arbitration provisions should be enforced "unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake." *Id.* at 1755, citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 403-04 (1967); *see also Rent-A-Ctr.*,

W., Inc. v. Jackson, 130 S. Ct. 2772, 2786 (2010) (stating that "[a] claim of procedural unconscionability aims to undermine the formation of the arbitration agreement").

[101] *Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006).

[102] *Id*.

[103] *Id*. at 30-31.

[104] *Id*. at 29-31.

[105] *Id*. at 30.

[106] *Id*.

[107] *Id*.

[108] *Id*.

[109] *Id*.

[110] *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

[111] *Kristian*, 446 F.3d at 59.

[112] *Id*. at 57-58.

[113] *Id*. at 58.

[114] *Id*. at 58-59.

[115] *Id*. at 58 (quoting plaintiffs' expert).

[116] *Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471 (1st Cir. 2011).

[117] *Id*. at 473.

[118] *Id*.

[119] *Id*. at 474.

[120] *Id*. at 476-77 and n.3.

[121] *Awuah v. Coverall North America, Inc.*, 703 F.3d 36 (1st Cir. 2012).

[122] *Id.* at 38.

[123] *Id*.

[124] *Id*. at 44.

[125] *See id*. at 45.

[126] *Antkowiak v. TaxMasters*, 455 Fed. Appx. 156 (3d Cir. 2011).

[127] *Id.* at 158-59.

[128] *Id*. at 159.

[129] *Id*..

[130] *See id*. at 160, citing *Randolph*, 531 U.S. at 90-91.

[131] *Antkowiak*, 455 Fed. Appx. at 159 (internal quotations omitted).

[132] *Id*. at 159-61 (emphasis in original).

[133] *Id*. at 159-60.

[134] *Id*. at 160.

[135] *Id*.

[136] *Id*. at 160-61, citing *Randolph*, 531 U.S. at 90-91.

[137] *Antkowiak*, 455 Fed. Appx. at 160.

[138] *Id.* The Third Circuit also addressed whether plaintiff had a valid challenge to the Engagement Agreement on the grounds that it was a modification of the contract formed by the phone consultation, and that it lacked consideration. *Id.* at 161-62. The court found that the Engagement Agreement imposed many additional requirements on the defendant that were not present based on the phone consultation alone, and, therefore, did have sufficient consideration. *Id*. This holding does, however, seem to leave open the possibility that modifications to contracts that insert previously non-existent arbitration clauses, while providing no additional consideration, could be found unenforceable on this basis.

[139] *Homa v. American Express Co.*, No. 11-3600, 2012 WL 3594231 (3d Cir. Aug. 22, 2012).

[140] *Id* at *1.

[141] *Id*.

[142] *Id*. at *2 (internal quotations omitted; ellipsis in original).

[143] *Id*.

[144] *Id*. at *3-4.

[145] *Id*. at *4-5.

[146] *Id*. at *6 n.2.

[147] *Carey v. 24 Hour Fitness, USA, Inc*, 669 F.3d 202, 204 (5th Cir. 2012).

[148] *Id.* at 204.

[149] *Id*.

[150] *Id*.

[151] *Id*. at 204, 208-09.

[152] *Id*. at 205, 209 (internal quotation marks omitted).

[153] *Owen v. Bristol Care, Inc*., 702 F.3d 1050 (8th Cir. 2013).

[154] *Id.* at 1051.

[155] *Id*.

[156] *Id.* at 1052.

[157] *Owen v. Bristol Care, Inc*., No. 11–04258–CV–FJG, 2012 WL 1192005, at *4 (W.D. Mo. Feb. 28, 2012).

[158] *Owen*, 702 F.3d at 1054.

[159] *Id*. at 1054-55.

[160] *Id*. at 1052 (internal quotation marks omitted).

[161] *Id*., citing *Gilmer*, 500 U.S. at 26.

[162] *Owen*, 702 F.3d at 1052.

[163] Id. at 1054-55.

[164] *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012).

[165] *Id.* at 1157.

[166] *Id*.

[167] *Id*.

[168] *Id*.

[169] *Id*.

[170] *Id*. at 1159-60.

[171] *Id*. at 1160 (internal quotation marks omitted).

[172] *Id*. at 1158-59 & n.2.

[173] *Id*. at 1159 (emphasis in original).

[174] *Id*. at 1159 n.3 (internal quotation marks omitted).

[175] *Id*.

[176] *Id*. at 1161.

[177] *Id*. at 1161-62. As discussed *supra* regarding *Antkowiak,* Pennsylvania is an example of such a state.

[178] *Id*. at 1162 & n.5. The Ninth Circuit remanded to the lower court to apply Washington choice-of-law rules to the procedural unconscionability contentions. *Id.* at 1161-62.

[179] *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011).

[180] *Id.* at 1207-08.

[181] *Id*. at 1206.

[182] *Id*. 1208-10.

[183] *Id*. at 1207.

[184] *Id*. at 1215.

[185] *Douglass v. Johnson Real Estate Investors, LLC*, 470 Fed. Appx. 823 (11th Cir. 2012).

[186] *Id*. at 823-24.

[187] *Id*. at 824.

[188] *Id*. at 823-24.

[189] *Id*. at 826.

[190] *Id*.

[191] The First and Second Circuit are at one end of the spectrum, the Ninth and Eleventh Circuit are at the other end, and the Third and Fifth are somewhere in between. *See generally*, *supra*, Section III.

[192] *See, e.g.*, *Owen*, 702 F.3d at 1054 (stating that the line of cases finding arbitration agreements enforceable in FLSA cases is "consistent with more than two decades of pro-arbitration Supreme Court precedent").

[193] *See Randolph*, 531 U.S. at 91.

[194] This conclusion is further buttressed by the comments and questions by the Justices during the *Amex III* oral argument. Justice Scalia was the sole voice suggesting that plaintiff's financial inability to bring a Sherman Act claim has no bearing on the enforceability of class action waivers under the FAA. *See Amex III* Transcript at 20, 24-25, 33, 38, and 46. Comments from a majority of the Justices reflect continuing concerns about how to evaluate the costs and judicial efficiency of pursuing complex antitrust claims through individual arbitrations as compared with litigating a single class action in federal court. *Id*. at 3-5, 11, and 57 (Justice Ginsburg); 6-10, 15-17, 46, and 58-59 (Justice Kagan); 15-16, 26-31, 37-38, 48-49, and 55 (Justice Breyer); 20-22, 36, 41-43 (Chief Justice Roberts); 12-13 and 17 (Justice Alito); 14, 34-35 and 54 (Justice Kennedy). Justice Thomas asked no questions and Justice Sotomayor was recused. A fair reading of the tea leaves is that the Second Circuit will be reversed with a majority consisting of at least the Chief Justice and Justices Scalia, Breyer, Kennedy and Thomas. Chief Justice Roberts and Justice Kennedy questioned whether antitrust claims are too expensive to be brought in arbitration: The Chief observed that a trade association could fund one economic analysis used by all claimants (*id.* at 20-21) and that offensive collateral estoppel might apply to subsequent arbitrations (*id*. at 22); and Justice Kennedy posited an arbitration where expert costs were eliminated by having "as an arbitrator an antitrust expert." *Id.* at 14.