CAN CONSUMERS' RIGHTS EFFECTIVELY BE VINDICATED IN THE POST-AT&T MOBILITY WORLD?

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I. INTRODUCTION

The United States Supreme Court in its decision in *AT&T Mobility v. Concepcion*[1] ("*Concepcion"*) overturned the widely-accepted *Discover Bank* rule established by the California Supreme Court in *Discover Bank v. Superior Court.*[2] *Discover Bank* had established a rigid rule that class arbitration waivers are unconscionable and cannot be enforced, thus permitting class wide arbitration where the parties had agreed to only individual arbitrations. In overturning *Discover Bank*, the Court held that the Federal Arbitration Act (FAA) preempted the *Discover Bank* rule and that the terms of an arbitration agreement could not be declared unconscionable simply because they contain a class action waiver. The Court noted that:

> Class-wide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that

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[1] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1750-51 (2011).

[2] Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

> class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA....

The Court concluded that "[a]rbitration is poorly suited to the higher stakes of class litigation,"[3] and struck down the *Discover Bank* rule as hostile to the use of individual arbitration to resolve consumer disputes.

Notwithstanding the pronouncement of the Court in *Concepcion,* some state courts continued to apply special rules to pre-dispute arbitration agreements entered into between individuals and entities that have greater bargaining power. One year following the Court's decision in *Concepcion*, *Marmet Health Care Center, Inc. v. Brown* came before the Court, and in a terse per curiam Order the case was remanded to the West Virginia Supreme Court of Appeals.[4] The Court stated, "State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.,* with respect to all arbitration agreements covered by that statute. Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle. The state court held unenforceable all pre-dispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes." Continuing the Court noted: "(T)his Court reaffirmed last Term, '[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.[5] That rule resolves these cases.'"[6]

In the years since *Concepcion* was decided, arbitration agreements have proliferated in a variety of consumer purchase and employment agreements and lower courts throughout the country have had ample opportunity to interpret the scope of the *Concepcion* decision.[7] While the decisions are varied, they have

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[3] *See AT&T Mobility*, 131 S. Ct. at 1752.

[4] Marmet Health Care Center v. Brown *et al.*, 565 U.S. 530, 530–31 (2012) (*per curiam*).

[5] *See AT&T Mobility*, 131 S. Ct. at 1747.

[6] *See Marmet Health Care Center*, 565 U.S. at 533.

[7] A myriad number of lower courts have interpreted *Concepcion* in a variety of contexts with varied results; compare *University Toyota & University Chevrolet Buick GMC v. Hardeman*, No. 1151204, 2017 WL

generally upheld arbitration agreements with class arbitration waivers. However, it is not the purpose of this article to distill black letter legal principles from these lower court cases. However, the cases frequently raise two potentially conflicting policy questions: (1) Is arbitration an appropriate means of resolving consumer claims? (2) Is the risk that many small-dollar claims will go unresolved due to the costs associated with pursing individual consumer claims a sufficient reason to either preclude arbitration of those claims or allow consumer class claims in an arbitration process?

One difficulty in attempting to resolve these policy issues is that there is little empirical evidence to support a definitive response to either question. Often, commentators on these questions proceed by way of supporting a particular bias either favoring or opposing class actions as a means of vindicating consumer rights without regard to the forum that is used in vindicating those rights. This paper will identify some of the ways in which the courts are approaching resolution of these questions and examine some of the available empirical data regarding consumer claims advanced in an arbitration setting.

382651 (Ala. Jan. 27, 2017) (fully embracing Supreme Court FAA precedent) with *Nappa Construction Management, LLC v. Flynn,* 152 A.3d 1128 (R.I. 2017) (not referencing the FFA in its determination). However, the U.S. Supreme Court continues to firmly advance its overarching FAA thesis. For example, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012), relied on its adherence to the "liberal federal policy favoring arbitration agreements" set forth in *Concepcion* to hold that the statutory phrase "[y]ou have a right to sue a credit repair organization" in the Credit Repair Organizations Act ("CROA") did not bar arbitration of disputes brought under the CROA. The Court specifically stated, "We think it clear, however, that this mere 'contemplation' of suit in any competent court does not *guarantee* suit in all competent courts, disabling the parties from adopting a reasonable forum selection clause…Had Congress meant to prohibit these very common [arbitration] provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest…Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."

II. The Supreme Court Consumer Arbitration Trilogy

The Supreme Court's decision in *AT&T Mobility v. Concepcion*[8] did not occur unexpectedly to those who followed the Supreme Court's development of the FAA's reach into the class action arena and the aggregation of claims into class arbitrations.[9] In 2010, the U.S. Supreme Court held in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp* that arbitrators do not have the power to infer parties' consent to class arbitration where the parties' arbitration agreement is silent on the issue of class arbitration.[10] *Stolt-Nielsen* began as class action antitrust litigation by customers of Stolt-Nielsen, an ocean carrier company.[11] The action was terminated when the Second Circuit held that the parties had an enforceable arbitration agreement.[12] AnimalFeeds International Corp. then filed for class arbitration of the antitrust claims, and the threshold question of whether such a demand was permitted under the parties' arbitration agreement was submitted to the arbitrators.[13] The arbitrators, relying on *Green Tree Financial Corp. v. Bazzle*,[14] found that the parties' arbitration clause allowed for class arbitration. Stolt-Nielsen petitioned for court review, and the District Court vacated the award.[15] AnimalFeeds appealed to the Second Circuit Court of Appeals, which reversed.[16]

The Supreme Court reversed the Court of Appeals, holding that implicit agreements to authorize class arbitrations cannot be inferred from an arbitration agreement that is silent on the matter. In so holding, the Court explained that *Bazzle*, the case on which the arbitrators depended to determine that class arbitration was permissible, did *not* establish a rule to determine whether an arbitration clause permits class arbitration.[17] Rather, the decision in

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

[9] Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer Arbitration In Light of Stolt-Nielsen*, 23 Loy. Consumer L. Rev. 265 (2011) (Supreme Court's development of the FAA's reach into class action).

[10] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 676 (2010).

[11] *Id.* at 667.

[12] *Id.*

[13] *Id.* at 668.

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

[15] *Stolt-Nielsen S.A.*, 559 U.S. at 669.

[16] *Id.* at 670.

[17] *Id.* at 679.

Bazzle left that question open. The Court reviewed the history and purpose of the FAA, highlighting that consent is the cornerstone of arbitration. Following that cornerstone principle, the Court held that a party cannot be compelled to submit to class arbitration where its arbitration agreement is silent on the issue.[18]

AT&T Mobility v. Concepcion

One year later, the Court in *AT&T Mobility v. Concepcion* considered whether state law could render the waiver of class arbitration unconscionable on its face and therefore unenforceable. *Concepcion* was a consumer dispute brought by a couple, the Concepcions, who purchased AT&T telephone service, which had been advertised as including free phones.[19] The Concepcions were charged sales tax for the free phones, as required by California law. Subsequently, they filed a complaint in the District Court against AT&T, later consolidated into a class action lawsuit.[20] AT&T moved to compel arbitration because the terms of its contract with the Concepcions included an arbitration provision prohibiting class proceedings.[21] The Concepcions opposed the motion arguing the arbitration agreement was "unconscionable and unlawfully exculpatory under California law because it disallowed class-wide procedures."[22] The District Court, relying on the California Supreme Court's decision in *Discover Bank*, found that the arbitration agreement was unconscionable.[23] In *Discover Bank*, the California Supreme Court held that class action waivers in consumer arbitration agreements are unconscionable when the waiver acts

[18] *Id.* at 682-85. In commenting on its prior holding in Green Tree, the Stolt-Nielsen Court said, "An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."

[19] AT&T Mobility v. Concepcion, 563 U.S. 333, 336-37 (2011).

[20] *Id.* at 337.

[21] *Id.*

[22] *Id.* at 337-38.

[23] *Id.*

as a defacto means of preventing the consumer from bringing a claim.[24] The Ninth Circuit affirmed the District Court's holding.[25] In addition, the Ninth Circuit held the *Discover Bank* rule was not preempted by the FAA because it was a refinement of the unconscionability doctrine applicable to all contracts in California, and not a flat-out prohibition on collective action waivers in an arbitration context.[26] Thus, the Savings Clause found in Section 2 of the FAA was, in the Ninth Circuit's view, sufficiently broad to shelter the Discover Bank Rule.[27] The U.S. Supreme Court reversed the Ninth Circuit's decision, holding that the *Discover Bank* rule was inconsistent with the FAA, and therefore preempted by the federal statute.

The Court's reason for holding the *Discover Bank* rule inconsistent with the FAA was three-fold. First, the Court pointed out that the FAA was intended to promote arbitration, and that the "switch from bilateral to class arbitration sacrifices the principle advantage of arbitration," which is that it lacks the formalities of litigation that make dispute resolution slower, more costly, and more procedurally difficult.[28] Thus, the *Discover Bank* rule, which allowed Californians to demand class arbitration notwithstanding an agreement to the contrary, was inconsistent with the FAA. Second, the Court pointed out that class arbitration requires a level of formality inconsistent with arbitration noting that the American Arbitration Association's rules governing class arbitrations are similar to those of the Civil Rules of Federal Procedure for class litigation.[29] Third, the Court noted that class arbitration increases risks to the defendant because a defendant in a collective action faces a great number of claims and significant damages, and in arbitration, serious errors made by the arbitration panel could evade review.[30]

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[24] Discover Bank v. Superior Court, 113 P.3d 1100, 1109 (Cal. 2005).

[25] *AT&T Mobility*, 131 S. Ct. at 1745.

[26] *Id.*

[27] 9 U.S.C.A. § 2 (West 1947) (providing that a written arbitration contract "…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[28] *AT&T Mobility*, 131 S. Ct. at 1751.

[29] *Id.*

[30] *Id.* at 1752.

American Express Co. v. Italian Colors Restaurant

In *American Express v. Italian Colors*, the Court considered the enforceability of an arbitration agreement that included a class arbitration waiver clause.[31] Despite the existence of an arbitration agreement between the parties, Italian Colors Restaurant filed a class action lawsuit against American Express to recover treble damages for alleged antitrust violations.[32] American Express moved to compel arbitration.[33] Italian Colors resisted the motion by submitting the statement of an economist who concluded the cost of hiring an expert to prove the antitrust claims would far exceed the maximum recovery of any individual plaintiff.[34] The District Court granted American Express' motion to compel arbitration and the Second Circuit reversed, holding the class waiver unenforceable because Italian Colors had established they "would incur prohibitive costs if compelled to arbitrate under the class action waiver."[35]

In a short and to the point opinion, the Supreme Court held the parties' class arbitration waiver was enforceable. In reaching its decision, the Court considered two exceptions to the overarching rule that arbitration agreements should be enforced: 1) whether there was a contrary congressional command that would require rejection of the class arbitration waiver; and 2) whether the effective vindication exception applied in this case. As to the first issue, the Court found no contrary congressional command that would compel the rejection of the parties' class arbitration waiver. Italian Colors argued that compelling individual arbitration would contravene the policies of antitrust laws because hiring the experts needed to establish each petitioner's claims would make pursuit of such claims cost prohibitive. In finding the effective vindication argument, which "prohibits the prospective waiver of a party's right to pursue statutory remedies" inapplicable, the Court drew a distinction between pursuing and proving such rights.[36] The Court reasoned that antitrust laws do not guarantee an affordable path

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[31] American Express v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308 (2013).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 2310 (citing Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

to the pursuit of every claim, and there is no federal law that outright entitles a plaintiff to vindicate a statutory right through class action proceedings.[37] Bolstering its determination not to apply the doctrine in this case, the Court stated that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[38]

III. THE SUPREME COURT REAFFIRMS THE CONSUMER ARBITRATION TRILOGY

In its most recent consideration of class arbitration waivers in the consumer context, the Supreme Court held that the FAA preempted an arbitration provision that provided the entire arbitration agreement was unenforceable if the law of the consumer's state made class arbitration waivers unenforceable.[39] In *DirecTV, Inc. v. Imburgia*, a consumer filed a class action against DirecTV for false advertising and unfair competition. The parties' arbitration agreement stated "if the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable."[40] DirecTV moved to compel arbitration. Although the Supreme Court had already invalidated in *Concepcion* California law prohibiting waivers of class arbitration, the California Appellate Court relied on the *Discover Bank* rule to invalidate the parties' arbitration agreement.[41] The court reasoned that the words "state law" in the contract referred to the local law of California, including the *Discover Bank* rule, notwithstanding the fact the Supreme Court had invalidated that ruling.[42] The Supreme Court held that the California decision did not leave arbitration agreements on equal footing with all other contracts, as it must, and that the phrase "law of your state" included in the contract could not encompass laws invalidated by the Supreme Court.[43] Accordingly, the California court's decision was preempted and the arbitration agreement was enforced.

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[37] *Id.* at 2306-07.
[38] *Id.* at 2311.
[39] DirecTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).
[40] *Id.* at 466.
[41] *Id.* at 467.
[42] *Id.*
[43] *Id.* at 472.

More recently, in *Kindred Nursing Ctrs. L.P. v. Clark* representatives of the estates of two individuals that held powers of attorney for the decedents entered into agreements with Kindred Nursing Centers that provided "[a]ny and all claims or controversies arising out of or in any way relating to . . . the Resident's stay at the Facility" would be resolved through "binding arbitration" rather than a lawsuit."[44]

Following the deaths of the residents, their representatives brought suit against Kindred in Kentucky state court alleging that Kindred had provided substandard care to the decedents. Kindred moved to dismiss the cases, arguing that the arbitration agreements the representatives had signed prohibited bringing the disputes to court. The trial court denied Kindred's motions, and the Kentucky Court of Appeals affirmed.[45]

The Kentucky Supreme Court construed the scope of the powers of attorney and held that they were invalid because a power of attorney would not entitle a representative to enter into an arbitration agreement without *specifically* saying so.[46] The Kentucky Constitution, the court explained, protects the rights of access to the courts and trial by jury; indeed, the jury guarantee is the sole right of the Constitution declared "sacred" and "inviolate."[47]

In a decision authored by Justice Kagan, the Supreme Court vacated a decision of the Kentucky Supreme Court holding:

> "The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements. In *Concepcion*, for example, we described a hypothetical state law declaring unenforceable any contract that "disallow[ed] an ultimate disposition [of a dispute] by a jury." Id., at 342. Such a law might avoid referring to arbitration by name; but still, we explained, it would "rely on the uniqueness of an agreement to arbitrate as [its] basis"—and thereby violate the FAA. *Id.*, at 341 (quoting *Perry* v. *Thomas*, 482 U. S. 483, 493, n. 9 (1987))."

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[44] Kindred Nursing Ctrs., Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1425 (2017).

[45] *Id.*

[46] *Id.* at 1426.

[47] *Id.*

Justice Kagan continued:

> By its terms, then, the Act cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"—that is, about what it takes to enter into them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made. Precedent confirms that point. In *Concepcion*, we noted the impermissibility of applying a contract defense like duress "in a fashion that disfavors arbitration." 563 U. S., at 341. But the doctrine of duress, as we have elsewhere explained, involves "unfair dealing at the contract formation stage." *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U. S. 527, 547 (2008). Our discussion of duress would have made no sense if the FAA, as the respondents contend, had nothing to say about contract formation.[48]

The opinion is noteworthy for several reasons. First, it was a nearly unanimous decision in an area of the law that has proved deeply divisive in prior cases. Second, the opinion represents a strongly worded warning to the states—and especially state judiciaries—that formalistic attempts to invalidate arbitration agreements will not be tolerated. Third, the fact that the warning was delivered by Justice Kagan (one of the dissenters in *Concepcion*) and was joined by all of the *Concepcion* dissenters, should give serious pause to courts and counsel who would be tempted to employ a similar tactic. The legal principal that consumers can be compelled to arbitrate their claims and that the arbitration process can preclude class or collective action is firmly established and will remain a sturdy legal principal for the foreseeable future.

IV. THE EMPIRICAL DATA

If consumers are compelled to arbitrate and those arbitration agreements can preclude class action as well as class-wide arbitrations of consumer claims, can individual consumer claims be fairly handled in arbitration? This question has been explored in recent years by scholars conducting empirical studies on consumer

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[48] *Id.* at 1428.

arbitration outcomes. Several of the more recent in-depth empirical studies are briefly summarized below. Because arbitration is intended to be faster, less expensive, and less formal than litigation, the studies focus on gathering hard data to analyze these markers and help paint a more complete picture of how individual consumer claims fare in arbitration.[49]

1. Searle Civil Justice Institute 2009[50]

In 2009, the Searle Civil Justice Institute undertook a study of 301 consumer arbitrations conducted before the American Arbitration Association ("AAA"). The study was limited to cases that led to an award between April and December of 2007. Where possible, the study was supplemented with data from the 3,220 cases of the AAA consumer dataset.

Of the 301 arbitrations in the sample, consumers won relief in 53.3% of the cases they filed, with an average award of $19,255. Business claimants, on the other hand, won relief 83.6% of the time with an average award of $20,648.[51] Win rates for both types of claimants were lower when the claimants appeared pro se.[52] In

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[49] Note that these studies pre-date the full development of the Supreme Court jurisprudence concerning consumer class arbitration but the focus of the studies is on the outcome of individual consumer cases and as such are useful in determining how the individual consumer has fared. *See*, Searle Civ. Just. Inst., Consumer Arbitration: *Before the American Arbitration Association* (2009); Consumer Fin. Prot. Bureau, Arbitration Study (2015); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Geo. L.J. 57 (2015).

[50] Searle Civ. Just. Inst., Consumer Arbitration: *Before the American Arbitration Association* (2009).

[51] Searle Civ. Just. Inst., *supra* note 50, at 13 (noting the disparity in win-loss rates between consumer and business claimants could be due to the fact that many business claimants bring debt collection actions in which there is a high likelihood of success).

[52] Searle Civ. Just. Inst., *supra* note 50, at 75 (noting pro se consumer claimants prevailed 44.9% of the time, while pro se business claimants prevailed in only 7% of the cases studied. The study also looked at the effect of "repeat players," defined as a business who had appeared more than once in the AAA consumer dataset used to conduct the study, as well as businesses contained on the AAA's list of "acceptable businesses," meaning those having told the AAA how to serve them with demands, therefore suggesting they had an existing relationship with the AAA. A study of the

cases involving business claimants, 227, or 49.9%, were resolved by an award, and 228, or 50.1%, were either withdrawn, settled, or administratively closed. For cases involving consumer claimants, 887 or 32.1% resulted in an award, while 1,878, or 67.9%, were otherwise closed. The average amount awarded to consumers claiming $75,000 or less was $8,871, while the average award in cases where the amount claimed was more than $75,000 was $111,847.

In 58 of 61 cases filed by business claimants, or 95.5%, the claim demanded was $75,000 or less. In 91.5% of the cases filed, or 215 out of 235, consumer claimants demanded $75,000 or less. The average claim demanded by business claimants was $22,037, while the average demand for consumer claimants was $46,131. In cases with consumer claimants, the consumer was responsible for an average of $129 in AAA administrative fees and $247 in arbitrator fees. For business claimants, those same averages rise to $1,161 and $1,099 respectively.[53] The study found that, on average, the cases lasted 207 days from filing to award. Cases with business claimants were 10 days shorter on average than cases with consumer claimants. A study of the first subset of repeat players did not yield statistically significant outcomes. A study of the second subset showed weakly statistically significant results, with consumer claimants winning relief in 43.4% of cases.

2. Consumer Financial Protection Bureau[54]

In 2015, the Consumer Financial Protection Bureau ("CFPB") released a study on the outcome of 1,060 consumer financial arbitrations filed before the AAA for the period of 2010 through 2012. The study looked specifically at disputes involving credit cards, checking accounts, payday loans, GPR prepaid cards, auto purchase loans, or private student loans. Of the 1,060 sample set, 32.2%, or 341 cases, were resolved on the merits by arbitrators. 246 cases, or 23.2% were settled, and another 362, or 34.2%, *may*

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first subset of repeat players did not yield statistically significant outcomes. A study of the second subset showed weakly statistically significant results, with consumer claimants winning relief in 43.4% of cases).

[53] Searle Civ. Just. Inst., *supra* note 50, at 55-56 (noting these averages drop when cases in which the claim was $10,000 or less are excluded from the sample).

[54] Consumer Fin. Prot. Bureau, Arbitration Study (2015).

have settled. 10.5% of the filings were unlikely to result in settlement based on the type of claim filed.

Out of the 1,060 cases studied, 379 involved disputes where consumers brought affirmative claims without disputing any alleged debts. 92 of these cases were resolved on the merits, and of those, consumers were awarded relief in 25, or 27.2%, of the cases. The average award of such cases was $5,505. The average demand of such cases was $21,194. On average, consumers that were awarded some form of relief received an average of 47 cents for every dollar they claimed.

289 of the 1,060 cases studied involved disputes in which the consumer brought an affirmative claim and disputed an alleged debt. Of these cases, arbitrators reached a decision on the merits 69 times. In the remaining 66 cases, arbitrators awarded relief to consumers on their affirmative claims in seven disputes. In these seven disputes, the average award was $4,972. The average claim for these affirmative disputes was $14,880, and in these seven cases consumers won an average of 90 cents for every dollar claimed. Debt relief was awarded in 22 disputes, or in 33.8% of such cases. Of the 22 disputes in which debt relief was awarded, the average debt forbearance was $8,273.

Overall, the substantive outcome for all affirmative claims across the 668 disputes that involved such claims is as follows: arbitrators awarded relief in 32 of 158 disputes in which consumers brought claims in which the amount awarded was known. In these 32 cases, the average award was $5,389, while the average claim was $19,768.

386 disputes in the sample were cases in which consumers disputed only debts they were alleged to owe, but brought no affirmative claims. Arbitrators reached a decision on the merits in 180 of these cases. Arbitrators provided consumer relief in 24 of those filings, or 13.8%. The average amount of relief in those cases was $3,103, while the average disputed debt amount was $14,919. There were 421 disputes in the study that involved company claims or counterclaims. Of those 421 disputes, arbitrators reached a decision on the merits in 250 cases. In 227 disputes, or 93%, arbitrators awarded companies relief regarding their claims, the average grant of relief for these companies was $12,364. The companies' average claim was $12,616.

The study found that pro se consumers were more likely to have the merits of their claims determined by arbitrators, while those with counsel were more likely to settle. In terms of length, the study found that the average length of disputes resulting in a

decision on the merits of the parties' claims was 179 days. For disputes with claims of $10,000 or less, consumer arbitration fees were capped at $125. For disputes with claims of between $10,000 and $75,000, consumers were responsible for arbitration fees of $375 unless reallocated.

3. Report from Professors David Horton & Andrea Chandrasekher[55]

In 2015, Professors David Horton and Andrea Chandrasekher published a study of 4,839 consumer arbitrations conducted by the AAA that were (1) initiated by the consumer; (2) had a request of $1 or more; and (3) in which the plaintiff's demand exceeded the value of any counterclaim. The study consolidated cases in which there were multiple defendants into one representative case, and dropped cases that were missing a business name or were duplicate records.

Of the 4,839 cases studied, consumers demanded an average of $143,962, with only 24 percent of consumers seeking less than $10,000, and 21% of consumers seeking $75,000 or more. About 35 percent of the sample studied, or 491 consumers to be exact, "won" their case, meaning they were awarded $1 or more. The average award among prevailing consumers was $18,721 with a median award of $5,145. When considering the full sample size, including winning and losing consumers, the average award was $6,533. The study found that on average, consumers spent $1,025 in arbitration fees to pursue their claims.

The average length of an awarded case was 243 days and the median time spent resolving any one case was about 206 days. There was no statistically significance difference in win rates between pro se consumers and those represented by attorneys. Nor was there a significant difference in win rates between consumers who proceeded with documents-only hearings versus those who had full hearings, or between those who conducted phone hearings versus in-person hearings. Finally, the study found that consumers facing high-level "repeat player" defendant-businesses tend to be disadvantaged in terms of award amount when compared to consumers who face less sophisticated businesses.

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[55] David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Geo. L.J. 57 (2015).

V. WHAT DOES THE DATA SUGGEST ABOUT INDIVIDUAL CONSUMER CLAIMS?

The Consumer Arbitration Trilogy has made it more difficult for consumers to bring claims through class action proceedings. This has not led, as some predicted, to a significant increase in the number of small-dollar individual arbitration filings; but rather, has effectively barred small consumer claims from reaching arbitration. The trilogy cases themselves offer anecdotal evidence of this assertion, and the empirical data support this claim. David Horton's and Andrea Chandrasekher's study shows an increase in the median, average, and standard deviation number of consumer arbitrations filed per month in the wake of *Concepcion*.[56] While the increase in these markers after *Concepcion* was due in part to attorneys bringing more claims through arbitration rather than class-action channels, Horton's and Chandrasekher's analysis of the data revealed that despite the slight uptick in arbitration filings post-*Concepcion,* low-dollar claims, like the very claim brought in *Concepcion,* were not included in that filing increase. In fact, without including claims against AT&T Mobility specifically, only 44% of post-*Concepcion* claimants requested $10,000 or less.[57] Moreover, after the *Concepcion* decision, the number of claimants seeking $5,000 or less dropped by a statistically significant percentage from 21% to 13%.[58] Although it is conceivable that more than one explanation could account for the drop in low-dollar claims, Horton and Chandrasekher attribute the decrease in small claim filings to the effect of *Concepcion*. A fair reading of the Consumer Arbitration Trilogy and recent data, is the arbitration process does not adequately vindicate low-dollar claimants because Supreme Court precedent has had the effect of barring consumers with low dollar claims from aggregating multiple claims in class action or class wide arbitration. Indeed, this conclusion was foreordained, albeit in a slightly different legal framework, by the Court in *American Express v. Italian Colors*, where the Court stated that "the fact that it is not worth the expense involved *proving* a statutory remedy

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[56] Horton & Chandrasekher, *supra* note 55, at 93 ("Specifically, the median number of cases filed per month climbed from 50 before Concepcion to 79 after; similarly, the average climbed from 51.14 to 80.76. In addition, the standard deviation of monthly filings, a measure of the trend's average variability, increased from 20.78 to 31.65").

[57] Horton & Chandrasekher, *supra* note 55, at 117.

[58] Horton & Chandrasekher, *supra* note 55, at 117.

does not constitute the elimination of the *right to pursue* that remedy."[59]

Setting aside the effect of *Concepcion* on aggregate claims and determining whether moderate and larger consumer claims are fairly handled in arbitration is a more difficult proposition based on recent studies. This data was not collected or analyzed uniformly across the studies, the CFPB and Horton and Chandrasekher studies did not distinguish between settled and withdrawn cases, and the information gathered about each arbitration proceeding included in the studies' sample pools was not the same. These factors, combined with disparate results from the studies themselves, make it difficult to distill a clear result.

In the Horton and Chandrasekher study, 21% of claimants sought $75,000 or more. About 35 percent of the total sample studied, or 491 consumers to be exact, recovered an award of at least $1. The average award among prevailing consumers was $18,721 with a median award of $5,145. When considering the full sample size, including winning and losing consumers, the average award was $6,533. From the Horton and Chandrasekher study, there is little to be gleaned about the fate of high-dollar consumer complaints. While the study indicates how many consumers claimed $75,000 or more, a moderate to large sum, it does not break down outcomes for that segment of the study pool. Thus, from this study it is impossible to determine whether large claimant consumers are adequately vindicated in arbitration.

The Searle Report analyzed consumer complaints in two buckets: the success of complainants seeking less than $75,000, and the success of complainants seeking more than $75,000. In this study, only 8.5% of claimants requested $75,000 or more. Although only a small number of claimants demanded such an amount, a respectable 60% of those consumers (twelve out of twenty consumers) won relief.[60] The same study found that 215 consumers claimed less than $75,000. Of the group claiming less than $75,000, 52.1% (112 out of 215) of consumers were awarded relief.[61] The average amount awarded to consumers claiming $75,000 or less was $8,871, while the average amount awarded to consumers claiming more than $75,000 was $111,847.[62] Anecdotally, and as common sense

[59] *American Ex. Co.*, 133 S. Ct. at 2311.
[60] *DirecTV, Inc.*, 136 S. Ct. at 468.
[61] *Id.*
[62] *Id.* at 469.

would suggest, the more any claimant is entitled to the greater his or her award will be.

In the CFPB study, consumer arbitration outcomes were categorized and analyzed through four different lenses: claims resolved on the merits; claims that settled; claims that were consistent with settlement; and claims that were inconsistent with settlement.[63] In the study, arbitrators awarded relief in 32 of 158 (20.2%) disputes in which consumers affirmatively asserted claims and the amount awarded was known.[64] In these 32 cases, the average award was $5,389, while the average claim was $19,768.[65] Where consumers disputed only debts they were alleged to owe, and a decision on the merits was reached, consumers won relief in 24 out of 180 filings, or 13.8% of the time. The average amount of relief in those cases was $3,103, while the average disputed debt amount was $14,919.[66] The study then broke down the outcome of disputes by their claim type (i.e. the alleged statutory violation). The CFPB study did not analyze the complaints based on the dollar amount demanded, as did the two studies mentioned below. It is difficult to compare the data and reach definitive conclusions, but the data can support several general observations. Individual consumer claims can be vindicated through the arbitration process at a reasonable cost providing those claims have some economic significance. Horton and Chandrasekher's findings in the 4,839 cases studied concluded that 35% of the sample studied resulted in an average award among prevailing consumers of $18,721 with a median award of $5,145. The study found that on average, consumers spent $1,025 in arbitration fees to pursue their claims. These percentage results are roughly in line with the Searle Civil Justice Institute 2009 study's finding that among consumer claimants, 32.1% of the group studied received and award, while 1,878, or 67.9%, were otherwise closed and the average amount awarded to consumers claiming $75,000 or less was $8,871, while the average award in cases where the amount claimed was more than $75,000 was $111,847.

What these studies really demonstrate is that given the number of variables and factual differences at play in each consumer arbitration, it is immensely difficult to determine how well high-dollar consumer claimants fare in arbitration when compared

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[63] *Supra* note 54.

[64] *Supra* note 54 § 5 at 13.

[65] *Supra* note 54 § 5.6.6 at 41.

[66] *Supra* note 54 § 5.6.6 at 42.

to other means of dispute resolution. At this early stage in which empirical data on the subject is new, the best conclusion to draw is that future studies are needed in order to definitively and objectively state whether high-dollar consumer claims are handled fairly and adequately in arbitration.

VI. CONCLUSION

Beginning with the *Stolt-Nielsen* decision in 2010, the Supreme Court has taken an increasingly firm position that consumer arbitration agreements should be enforced, even when those agreements contain class arbitration waivers. The Supreme Court, placing great weight on the interpretation that the FAA is a "liberal federal policy favoring arbitration"[67] has favored the enforcement of individual arbitration in a number of contexts. *Stolt-Nielsen* makes clear that class arbitration will not be compelled unless the parties' arbitration agreement clearly permits class proceedings. *Concepcion* and *DirecTV* buttressed by *Kindred Nursing* significantly reduce the likelihood that a consumer will defeat a motion to compel individual arbitration based on state contract law, thereby strengthening the general rule favoring enforcement of arbitration agreements. Finally, *American Express* demonstrates that where there is a valid arbitration agreement, individual arbitration will be compelled and a waiver of class wide arbitration will be enforced notwithstanding the "vindication of rights doctrine," at least insofar as the argument was presented in that case. Unless Congress or a federal agency enacts a law or regulation effectively overriding current Supreme Court precedent, individual consumer arbitration agreements will generally be enforced, even when such agreements contain class arbitration waivers, or those agreements interdict some provisions of state contract law. Unquestionably, lower courts will continue to follow Supreme Court precedent but because arbitration is a matter of consent, consumer arbitration agreements will be barred where consent cannot be established.

Consumers are routinely agreeing to accept, purchase, or use services with terms that contain arbitration agreements to the exclusion of other forms of relief. Supreme Court precedent requires lower courts to continue to recognize the validity of arbitration agreements in a consumer context. Moreover, recent empirical

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[67] Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

data on consumer arbitration suggests that individual consumers who bring small-dollar claims will not be able to vindicate their rights through arbitration because bringing such claims individually is not cost effective and bringing them collectively is foreclosed. Large-dollar consumer claimants, on the other hand, do not face the same barriers. While the empirical data show that a significant number of large-dollar consumers successfully resolve their disputes through arbitration, the data is less clear on just how well those consumers fare, particularly in comparison with other forms of dispute resolution. Further research into this evolving field of law is needed to help attorneys and policymakers gain a better view of the arbitration landscape as a means of vindicating consumers rights.