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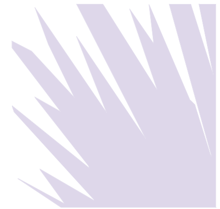

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CONCEPCION AND THE FUTURE OF PRE-DISPUTE ARBITRATION AGREEMENTS

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On April 27, 2011, in *AT&T Mobility v. Concepcion*,[1] a 5 to 4 majority of the U.S. Supreme Court "overturned the entire landscape" of consumer class action.[2] Until *Concepcion*, courts in California and elsewhere routinely found class action waivers in the arbitration clauses of consumer agreements categorically unconscionable.[3] Left to pursue individual claims, as Justice Breyer noted in his dissent in *Concepcion*, "only a lunatic or a fanatic sues for $30."[4] Nevertheless, the majority of the Supreme Court held that the refusal to enforce arbitration clauses with class action waivers "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in Section 2 of the Federal Arbitration Act (FAA),[5] which makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6]

As we explore below, *Concepcion* threatens to slam the courthouse doors not only on the consumer false advertising class action at issue in that case, but a vast swath of litigation. The majority opinion in *Concepcion* leaves little room to avoid arbitration of consumer claims. The opinion explicitly endorses arbitration clauses that not only bar class claims, but also restrict discovery and require that the proceedings be confidential. While the decision involved false advertising claims, nothing in it would prevent its application to product liability claims involving personal injury and even death.

I. THE *CONCEPCION* STORY

The case had humble beginnings. AT&T offered free cell phones for new wireless customers. Vincent and Liza Concepcion signed a two-year contract and received their two phones. They were surprised, however, when they got their first bill. While there was no charge for the phones themselves, AT&T had charged them $30.22 in sales tax on their "free" phones. The Concepcions felt cheated and, believing that other new AT&T wireless customers felt the same way, they sued on behalf of all AT&T customers who were charged sales tax on their "free" phones. When the Concepcions got to court, however, AT&T surprised them again. Buried somewhere in the terms and conditions of the cell phone contract, AT&T's lawyers had inserted a clause requiring arbitration of any dispute and requiring that the arbitration be in an "individual capacity, and not as a plaintiff or class

1 131 S. Ct. 1740 (2011)
2 *Grabowski v. C.H. Robinson Co.*, Case No. 10cv1658 (S.D. Cal. Sept. 19, 2011)
3 California's "Discover Bank Rule" was set forth in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005).
4 131 S. Ct. at 1761 *quoting Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).
5 9 U.S.C. §§1-16.
6 131 S. Ct. at 1744 quoting 9 U.S.C. § 2.

member in any purported class or representative proceeding." AT&T moved to compel an *individual* arbitration. The Concepcions argued that the class action waiver was unconscionable – both procedurally because it was part of a contract of adhesion, and substantively because the costs of an individual arbitration effectively prevented them from pursuing their claims. The trial court rejected the Concepcions' argument, but the Ninth Circuit reversed. Applying California law, it held that the class action waiver was unconscionable.[7] The U.S. Supreme Court granted review to consider whether state law rules prohibiting enforcement of class action waivers in arbitration clauses conflicted with the Federal Arbitration Act.

The majority opinion, authored by Justice Scalia, explained that "the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms."[8] It would conflict with the FAA for a state to prohibit arbitrations outright or even to have rules that "disfavored" arbitration. The first example given of such a discriminatory rule was a prohibition on contracts that did not allow for judicially supervised discovery. Restrictions on discovery are a fundamental part of why parties choose arbitration: to reduce cost and increase the speed of dispute resolution. Finding a contract unconscionable because it restricts discovery conflicts with one of the principal purposes of arbitration. Similarly, keeping arbitrations confidential facilitates an efficient, streamlined procedure. Finding a contract unconscionable because it requires confidentiality conflicts with the FAA's policy favoring arbitration.

The majority was unimpressed with the fact that the Concepcions had no opportunity to negotiate the terms of the contract: "the times in which consumer contracts were anything other than adhesive are long past."[9] For support, the opinion cites *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997), where the terms and conditions were stuffed into the box with the Hill's new computer. The terms provided that the customer could reject the terms by returning the computer within 30 days. After that, the terms were binding. That was good enough for the Seventh Circuit and good enough for Justice Scalia and his four conservative brethren on the Court.

The majority also brushed aside the argument that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[10] Nevertheless, the Court went on to say that the claim in *Concepcion* "was most unlikely to go unresolved."[11] AT&T had agreed that if it lost the arbitration, the arbitrator could award the winning consumer his or her costs and attorneys' fees *and*, if the arbitrator awarded more than AT&T's last written offer, AT&T would pay a minimum recovery of $7,500 plus double the consumer's attorneys' fees. Of course, AT&T expected to make written offers for the $30 sales tax to the Concepcions long before an arbitrator was even selected.

The Court concluded that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[12]

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7 In light of *Concepcion*, the Ninth Circuit recently held that a similar Washington state judicial rule (*Scott v. Cingular Wireless*, 161 P. 3d 1100 (2007) was preempted by the FAA and remanded for more individualized analyses of procedural unconscionability. *Coneff v. AT&T Corp.*, No. 09-35563 (9th Cir. March 16, 2012).
8 131 S.Ct. at 1748 (internal quotes omitted).
9 131 S. Ct. at 1750.
10 131 S.Ct. at 1753.
11 131 S.Ct. at 1753.
12 131 S. Ct. at 1748.

II. JUDICIAL ACTIONS IN THE WAKE OF *CONCEPCION*

In the short time since it decided *Concepcion*, the Supreme Court has twice overturned state supreme court decisions upholding arbitration clauses as preempted by the FAA, in contexts well beyond those considered in *Concepcion.* In *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (Feb. 21, 2012), the Court held that states could not prevent arbitration merely because the claims involved personal injury or wrongful death. The West Virginia Supreme Court held that arbitration agreements in nursing home contracts were unconscionable as a matter of public policy and Congress did not intend the FAA to apply "to personal injury or wrongful death suits."[13] The U.S. Supreme Court resoundingly rejected the ruling, calling it "contrary to the terms and coverage of the FAA."[14]

In *Sonic-Calabasas A, Inc. v. Moreno,*[15] the U.S. Supreme Court held that the FAA can preempt efforts to limit arbitration in the employment context. The California Supreme Court had decided that an arbitration clause may not require an employee to waive California's optional wage and hour administrative hearing procedures, which are "statutory advantages accorded to employees designed to make that process fairer and more efficient."[16] The U.S. Supreme Court instructed the California Supreme Court to reconsider the matter in light of *Concepcion*.

Many lower courts have dutifully applied *Concepcion*, sending to individual arbitration numerous claims that had been filed as class actions.[17] The Third, Eight, Ninth and Eleventh Circuits have applied *Concepcion* to class actions against banks, health insurance companies and employers, and the Ninth Circuit recently invalidated a California judicial rule barring the arbitration of claims for broad public injunctive relief.[18]

A handful of courts have sought to avoid *Concepcion*'s broad scope. The most promising are cases involving federal claims where the FAA's "mandate has been overridden by a contrary congressional command."[19] For example, the Fair Labor Standards Act ("FLSA") expressly permits representative actions.[20] Accordingly, Judge Sweet of the Southern District of New York held that "a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law," because "an otherwise enforceable arbitration agreement should not become the vehicle to invalidate the particular Congressional

13 *Brown v. Genesis Healthcare Corp.*, (W. Va. June 29, 2011).
14 *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (Feb. 21, 2012).
15 132 S. Ct. 496 (2011)
16 51 Cal. 4th 659, 686 (2011).
17 *See e.g. Coneff v. AT&T Corp.*, No. 09-35563, 2012 BL 61851 (9th Cir. Mar. 16, 2012) (FAA preempts Washington common law on substantive unconscionability of class action waiver, but permits further proceedings as to whether contract formation was procedurally unconscionable); *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, No. 11-1393, 2012 BL 62060 (3d Cir. Mar. 14, 2012), (FAA preempts Pennsylvania law the held that class action waiver was unconscionable where it "is the only effective remedy" given the high cost of arbitration and the minimal value of individual claim); *Kilgore v. KeyBank, N.A.*, No. Nos. 09-16703, 10-15934, 2012 BL 53654 (9th Cir. Mar. 07, 2012) (FAA preempts California rule against arbitration of public injunctive relief claims (Consumer Legal Remedies Act)); *In re Checking Account Overdraft Litigation*, No. 11-14317, 2012 BL 51577 (11th Cir. Mar. 05, 2012) (FAA preempts Georgia law that found arbitration clause was unconscionable because bank had unilateral right to recover its expenses from arbitration); *Antkowiak v. TaxMasters*, No. 11-1882, 2011 BL 324525 (3d Cir. Dec. 22, 2011), Court Opinion (remands to consider whether FAA preempts Pennsylvania law from finding arbitration provision substantively unconscionable where customer must be all costs of arbitration and whether that provision can be severed); *Green v. SuperShuttle Intl., Inc.*, 653 F.3d 766 (8th Cir. 2011), Court Opinion (FAA preempts Minnesota law challenge to enforceability of class action waiver in shuttle driver's contract); *Litman v. Cellco Partn.*, 655 F.3d 225 (3d Cir. 2011) (FAA preempted New Jersey law that made class action waivers unconscionable, even though waiver applied if the case was litigated rather than arbitrated); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011) (FAA preempts Florida law that class action waiver could be unconscionable despite evidence that plaintiffs could not cost-effectively pursue individual claims in arbitration)
18 *Kilgore v. KeyBank, Nat'l. Assoc.*, Case No. 09-16703 (9th Cir. March 7, 2012) (invalidating the rule of *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (1999) as FAA preempted for the same reasons as the *Discover Bank* rule).
19 *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2011) citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).
20 The FLSA is the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

purposes of the collective action provision and the policies on which that provision is based."[21] An appeal based in part on *Concepcion* is pending.[22] Many other courts have disagreed, finding waivers of FLSA collective actions enforceable.[23]

Another New York district judge ruled that class action waivers were unenforceable in a federal employment civil rights case under Title VII because the Second Circuit had previously held that cases alleging a pattern or practice of discrimination may only be brought as class actions. A class action waiver would "prevent the plaintiff from vindicating her statutory cause of action."[24] The defendant has appealed to the Second Circuit.[25]

Separately, the Second Circuit has held that arbitration class action waivers may not be enforced where "the practical effect of enforcement would be to preclude [the] ability to vindicate [] federal statutory rights."[26] Relying on testimony from plaintiffs' economic expert that it was not economically rational to pursue an individual action, the Second Circuit concluded that "forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute."[27] This contrasts with the facts of *Concepcion*, where the Supreme Court observed in dicta that AT&T's arbitration policy likely would have provided the Concepcions a full recovery.[28]

However, when the Ninth Circuit held that the Credit Repair Organizations Act ("CROA")[29] prohibited arbitration of claims made under the statute, the Supreme Court reversed, finding that CROA was "silent" about arbitration, so it could not override the FAA's policy in favor of arbitration.[30]

A different *Concepcion* "work around" involves California's private attorney general actions ("PAGA") to enforce certain employment laws. A California Court of Appeal described a PAGA as a "law enforcement action" distinct from class actions[31] and found *Concepcion* inapplicable.[32] Other courts have disagreed, ruling that *Concepcion* and the FAA compel enforcement of arbitration agreements even when the agreements bar representative PAGA claims.[33]

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21 *Raniere v. Citigroup, Inc.*, CV11-2448 (S.D.N.Y. Nov 22, 2011)
22 Second Circuit Case Number 11-5213.
23 Citigroup's appellate brief lists: *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002), *Vilches v. Travelers Cos.*, 413 F. App'x. 487 (3d Cir. 2011); *Horenstein v. Mortgage Mkt., Inc.*, 9 Fed. App'x. 618 (9th Cir. 2001); *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294 (5th Cir. 2004); and *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359.
24 *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 406-410 (S.D.N.Y. Apr. 28, 2011) and 1:10-cv-06940 Dkt. 59 (S.D.N.Y. July 7, 2011) (order holding that *Concepcion* does not alter the court's prior ruling). The court noted that "plaintiffs ability to vindicate her statutory rights appears even more threatened in this case than was the ability of the plaintiffs in the American Express cases, for whom the class action waiver had the 'practical effect' of ensuring they would not bring claims against the defendant. Given the case law in this district indicating the plaintiff may not bring a pattern or practice claim as an individual, she would have absolutely no recourse for proving her claim." 785 F. Supp. 2d 410 n.7.
25 Second Circuit Case No. 11-5229.
26 *In re American Express Merchants' Litigation* (2d. Cir. Feb. 1, 2012) citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985) for the proposition that "Arbitration is also recognized as an effective vehicle for vindicating statutory rights but only so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum."
27 *In re American Express Merchants' Litigation* n. 5 (2d. Cir. Feb. 1, 2012).
28 *See* 131 S.Ct. at 1753 (noting that the claim "was most unlikely to go unresolved.")
29 CROA is the Credit Repair Organizations Act, 15 U.S.C. § 1679 et seq.
30 *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2011).
31 Under California's PAGA (Cal. Labor Code § 2698 et seq.), 75% of penalties collected go to the state and only 25% to the aggrieved employees.
32 197 Cal. App. 4th 489, 500 (2011); *see also Plows v. Rockwell Collins, Inc.*, 2011 U.S. Dist. LEXIS 88781 (C.D. Cal. Aug. 9, 2011 (denying motion to compel arbitration of PAGA claims based on *Brown*).
33 *E.g. Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122 (C.D. Cal. 2011); *Grabowski v. C.H. Robinson Co.*, No. 10cv1658 (S.D. Cal. Sept. 19, 2011).

We can expect that pro-consumer and pro-employee judges will continue to look for exceptions to *Concepcion*. We can expect that pro-business judges, including a majority of the U.S. Supreme Court, will continue to stretch the logic of *Concepcion* as far as it can go.

IV. OTHER REACTIONS TO *CONCEPCION*

Shortly after *Concepcion* came down, Senators Al Franken (D-MN), Richard Blumenthal (D-CT) and Representative Hank Johnson (D-GA) introduced the Arbitration Fairness Act of 2011, which would make pre-dispute arbitration agreements unenforceable in employment, consumer and civil rights cases.[34] Similar legislation has been introduced unsuccessfully in the past and the present bill is not expected to advance.[35] Senator Blumenthal also introduced the Consumer Mobile Fairness Act,[36] which would invalidate pre-dispute arbitration agreements in cell phone contracts. Enactment of this legislation is also not expected.

On the regulatory front, FINRA,[37] an agency charged with regulating securities markets and broker dealers, recently informed Charles Schwab & Co. that it would seek disciplinary sanctions for Schwab's post-*Concepcion* insertion of class action waivers in its customer agreements.[38] FINRA has interpreted an existing rule as barring class action waivers despite *Concepcion*.[39] Schwab sought injunctive relief in District Court but the court dismissed its complaint for failure to exhaust administrative remedies through FINRA and the SEC.[40]

The Consumer Financial Protection Bureau, recently formed as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, has an express mandate to "prohibit or impose conditions or limitations on the use of an agreement . . . for a consumer financial product or service providing for arbitration of any future dispute if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."[41] Thus far, no steps have been taken to promulgate regulations on the issue.

State legislatures would appear to have some ability to limit *Concepcion*, although to date none of them has taken advantage of that ability. In *Concepcion*, the Supreme Court recognized that "states remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action waiver provisions in adhesive arbitration agreements to be highlighted."[42] Thus, states may seek to protect consumers and employees by developing stricter standards for the enforceability of arbitration agreements so long as they do not "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."[43] The contours of what a majority of the Supreme Court believes "does not conflict with the FAA" remain to be defined and, in the wake of Concepcion, courts have turned to an individualized analysis of

34 Senate Bill 987 and House Resolution 1873.
35 Arbitration Fairness Acts were introduced in Congress in 2007 and 2009.
36 Senate Bill 1652.
37 Financial Industry Regulatory Authority, Inc.
38 Complaint for Declaratory and Injunctive Relief in *Charles Schwab & Co., Inc. v. Financial Industry Regulatory Authority, Inc.*, Case No. CV12-0518 (N.D. Cal. Feb. 1, 2012).
39 National Association of Securities Dealers Rule 3110(f)(4)(C).
40 Complaint for Declaratory and Injunctive Relief in *Charles Schwab & Co., Inc. v. Financial Industry Regulatory Authority, Inc.*, Case No. 3:12-cv-00518-EDL (N.D. Cal. Feb. 1, 2012) (Dkt. 1) and Order of Dismissal (May 11, 2012) (Dkt. 38).
41 Dodd-Frank Act, Pub. Law 11-203 § 1028.
42 131 S. Ct. at 1750 n. 6.
43 *Id.*

unconscionability for each disputed arbitration clause. If states were to pass legislation banning pre-dispute arbitration agreements in consumer or employment contracts outright, along the lines of the pending federal legislation, or seek to ban pre-dispute class action waivers, as was attempted in Maryland,[44] it is unlikely that such laws would survive a FAA preemption challenge.

In another approach, states may also attempt to respond to *Concepcion* by expanding private attorney general actions. Given the severe budget crises many states face, such an approach may be doubly attractive by saving money the state would have spent on its attorney general's office while protecting its citizens. It is still unclear, however, whether PAGAs will be preempted by the FAA.

Concepcion does not preclude states from adopting changes in arbitration procedures that may make the arbitrations themselves more consumer friendly. The most obvious concern is that arbitrators will favor parties from whom they hope to get future work. That will almost always be the business in a consumer-business dispute. State could require that consumer representatives be included in the pool of potential arbitrators. The final selection of arbitrators may be left to chance, permitting the parties only challenges for cause.

On the flip side, *Concepcion* could open a door for entrepreneurial states to attempt to attract business by developing laws narrowing unconscionability and expanding the enforceability of pre-dispute arbitration agreements. Much as South Dakota and Delaware attracted credit card business by passing lender-friendly legislation, states could pass arbitration-friendly legislation, prompting businesses to select that state's choice of law to govern their consumer agreements. For the choice of law provisions to be enforceable, business would have to establish a presence in the arbitration friendly state, generating jobs in that state.

IV. POST-*CONCEPCION* OPPORTUNITIES FOR BUSINESSES

Concepcion opens up enormous opportunities for businesses to expand the use of arbitrations for resolution of disputes. It also allows businesses to shape those arbitrations further to their advantage and to the disadvantage of consumers and employees.

There is a wide array of reasons that businesses prefer arbitration for consumer and employment disputes. Arbitration can be more efficient, resulting in faster and lower cost resolution of disputes, particularly when discovery is limited and motion practice is almost non-existent. Businesses want to avoid the uncertainty of an unknown judge or jurors by having a hand in selecting the arbitrator. And arbitrators are less likely than juries to be driven by passion to make substantial awards for minimal injuries or to impose punitive damages.

Concepcion allows businesses to shape arbitrations even further to their liking. The majority directly addressed using individual arbitrations to avoid class actions. They also endorsed other restrictions on arbitration, restrictions that will tend to favor businesses. Most importantly, the Court found that restrictions on discovery were a fundamental characteristic of arbitration. State law efforts to overcome restrictions in the parties'

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44 A recent Maryland House of Delegates Bill (#729) was sweeping, stating that "a written agreement made before a dispute arises may not waive or have the practical effect of waiving the rights of a party to the agreement to resolve the dispute by obtaining relief as a representative of or as a member of a class of similarly situated persons." It was defeated in the Maryland Senate.

agreement would be preempted by the FAA. Will courts and arbitrators enforce arbitration agreements that prohibited all discovery?

In *Concepcion*, the Court also found that confidentiality was a central feature of arbitration. The Court will almost certainly strike down any efforts by states to require that arbitrations be open to the public. Thus, businesses will have the advantage of using the information that they develop in multiple arbitrations while consumers or employees have to reinvent the wheel for every case.

Being too creative with an agreement may lead to costly, protracted and public litigation on the enforceability of the arbitration clause. This could leave the business with the same uncertainty, delay and cost that it hoped to avoid through arbitration.

The FAA preempts state laws that interfere with arbitration, but that same protection does not extend to other parts of an agreement containing an arbitration clause. Businesses must be careful not to overreach in other parts of their agreements with consumers and employees. An agreement that caps compensatory damages, waives punitive damages or only gives the business the right to appeal, may be deemed substantively unconscionable. Such efforts to gain advantage in other portions of the agreement could result in a finding of unconscionability that would invalidate the agreement entirely, including the right to compel individual arbitration.

To avoid charges of procedural unconscionability, businesses should keep their consumer agreements clear and concise. In the online context, websites should be configured to make an unambiguous record of the customers' consent. Courts distinguish between "click-wrap" agreements, which are enforceable, and "browse wrap" agreements, which often are not.[45] A browse-wrap agreement only has the terms available on the site, but does not require affirmative action to accept them. A click-wrap requires the consumer to click on a separate button explicitly accepting the terms and conditions. To further document consent, customers should not be allowed to complete a purchase without first scrolling through the terms and conditions and clicking on a separate screen or pop-up box to explicitly indicate acceptance.

When returning customers are able to skip the page accepting the terms and conditions, they should be alerted to substantive changes since they last purchased and be given the opportunity to review the new terms.

Getting consent to terms and conditions from consumers should not be a problem for businesses that have a direct relationship with their ultimate customers, such as car dealers, banks, insurance companies, doctors and hospitals. The challenge is: How do manufacturers that rely upon a retail distribution network create enforceable arbitration agreements with their consumers? This is particularly an issue for manufacturers who frequently face product liability claims and would like to move those claims into confidential, individual arbitrations with limited discovery. Increasingly, manufacturers are creating direct relationships with their ultimate customers through loyalty programs, which offer customers incentives to purchase the manufacturer's product or provide advance notice of new products. The loyalty program agreement could include an arbitration clause covering disputes of any kind that involve the manufacturer's products.

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45 *See U.S. v. Drew, 259 F.R.D. 449, 462 n.22* (C.D. Cal. 2009) (collecting cases and stating that click wrap agreements are routinely upheld whereas the enforceability of browse wrap agreements will depend on whether a website user has actual or constructive knowledge of a site's terms and conditions)

Business could also attempt to turn to intermediaries to procure the arbitration agreements. For example, branded drug companies currently pay rebates to health insurers for including the manufacturer's products on the insurer's formulary. Drug companies could provide an additional rebate to insurance companies that require their insureds to arbitrate all claims arising from goods or services purchased with the insurance, however the burden would be on the drug company to establish that it is an intended third party beneficiary to the insurance agreement.[46]

Credit card companies could earn similar rebates from manufacturers if they make their customers agree to arbitrate any disputes arising from products purchased with that credit card. Presumably, the credit card company would make such arbitration agreements enforceable only by manufacturers who pay a rebate to the credit card company. Not only will it earn money for the credit card company, it will also create the mutuality needed for an enforceable agreement.

Relying upon intermediaries may create confusion over what claims are covered by the arbitration agreement. Toyota sought to invoke arbitration clauses in its dealer's contracts with Toyota customers in its unintended acceleration multi-district litigation.[47] The court refused to impose the arbitration provision on the customers, finding that the dealer agreements dealt with "the mundane details of purchasing or leasing a new or used motor vehicle . . . [and the agreements] are utterly devoid of any guarantees or representations regarding the performance, operation, or maintenance of the vehicles.[48]

Another possible means of manufacturers binding customers with whom they have no direct relationship is to adopt a variation of the shrink-wrap licenses used by software manufacturers. The packaging conspicuously discloses to consumers that opening the package means that the consumer has adopted the manufacturer's terms. The terms could be made available online at a web address disclosed on the box. Or the terms could be inside the packaging and the consumer could reject the terms by returning the product. Such a "stuff wrap" agreement was upheld in *Hill v. Gateway,*[49] the case cited by Justice Scalia when dismissing the notion that California's policy against class action waivers should be upheld because it relates to adhesion contracts.[50]

Even with assent established, procedural unconscionability remains a problem if the arbitration clause is not sufficiently prominent. Courts tend to scrutinize arbitration provisions in adhesive contracts more closely – a practice which itself may be suspect as conflicting with the FAA.[5] Courts may find procedural unconscionability when the clauses are buried in lengthy agreement terms, printed in a small font, printed on the back of a physical agreement or at the end of an online agreement or not otherwise made sufficiently distinctive.[52] While standards vary somewhat by jurisdiction, California has defined

46 *See e.g. Jones v. Jacobson*, 125 Cal. Rptr. 3d 522, 534 (4th Dist. 2011); *City of Hope v. Bryan Cave, L.L.P*, 102 Cal. App. 4th 1356, 1371 (2d Dist.).
47 Central District of California Case No. 8:10ML 02151 JVS, Dkt. #2312 at p. 49. Equitable estoppel is "designed to ensure fairness by forcing a party who reaps the benefits of an agreement to accept the agreement's accompanying burdens."
48 *Id.* at pp. 52-53.
49 105 F.3d 1147 (7th Cir. 1997).
50 131 S. Ct. at 1750.
51 The following question is currently pending before the California Supreme Court: Does the FAA as interpreted in Concepcion "preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable." California Supreme Court Case No. S199119 granting review of *Sanchez v. Valencia Holding Co.*, 201 Cal. App. 4th 90-93 (2d Dist. 2011).
52 See discussion and collection of cases in *Sanchez v. Valencia Holding Co.*, 201 Cal. App. 4th 90-93 (2d Dist. 2011) (post *Concepcion* case finding an automotive sales contract procedurally unconscionable where the arbitration clause was located at the bottom of the back page of the sale contract and plaintiff averred that he was not afforded time to read the agreement). The case was recently appealed to the California Supreme Court (Case No. S199119).

'conspicuousness' for the purpose of waiver of warranties as including (1) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (2) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.[53] The *Concepcion* court suggested highlighting.[54] If contract terms must be lengthy, there should be a table of contents that describes each paragraph, as well as upfront language indicating that the agreement contains an arbitration clause.

V. CONCLUSION

With *Concepcion*, businesses that want to move their litigation out of court and into arbitration, avoiding class actions, reducing the burden of discovery and improving the confidentiality of their disputes, will have a favorable environment for some time. No one can guarantee, however, that the pendulum will not swing back, whether through legislative or regulatory action or by the appointment of new justices with views more in line with the dissenters in *Concepcion.*

53 California Commercial Code § 1201(b)(1). *See also Harustak v. Wilkins*, 84 Cal. App. 4th 208, 215 (5th Dist. 2000).
54 131 S. Ct. at 1750 n. 6.