

NOTES

THE SAVIOR OF AGGREGATE LITIGATION: THE GIVING *GREEN TREE*

*Matthew Maggiasco**

INTRODUCTION

Arbitration is one of the most widely used forms of Alternative Dispute Resolution (“ADR”) employed today by a vast number of industries to resolve legal claims. As federal arbitration law has progressed since its creation under the Federal Arbitration Act (“FAA”), both business entities and individuals have sought to utilize arbitration in an increasing number of their contractual relationships to reduce both litigation costs and legal liability. In *AT&T Mobility LLC v. Concepcion*,¹ the Supreme Court approved the use of arbitration agreements that contain mandatory arbitration and collective action waivers, which serve to deter class action liability, drastically changing the landscape of arbitration under the FAA. However, the Second Circuit in *In re American Express Merchants Litigation* (“*Amex series*”)² found that mandatory arbitration clauses and collective action waivers, in some situations, prevent individuals from vindicating their statutorily protected rights and should therefore be deemed unenforceable. Meanwhile, the Ninth Circuit in *Coneff v. AT&T*³ has expressly disagreed with the Second Circuit’s approach in *Amex* and opted to enforce an

* Senior Articles Editor, *Cardozo Journal of Conflict Resolution*; J.D. Candidate, 2013, Benjamin N. Cardozo School of Law; B.S., *magna cum laude*, 2010, Binghamton University School of Management, State University of New York. I would like to thank Professors Myriam Gilles and Arthur J. Jacobson for their comments and guidance in the drafting of this Note. A special thanks to my family and Danielle E. Gorman for their love and support.

¹ 131 S. Ct. 1740 (2011).

² *In re American Express Merchants Litigation* has been before the Second Circuit four times, with each action returning a judgment in favor of the plaintiffs: 1) *In re Am. Express Merchants’ Litig.*, 554 F.3d 300 (2d Cir. 2009) (Current Supreme Court Justice Sonia Sotomayor served as a Circuit Judge for the Second Circuit in this case.), 2) *In re Am. Express Merchants’ Litig.*, 634 F.3d 187 (2d Cir. 2011), 3) *In re Am. Exp. Merchants’ Litig.*, 667 F.3d 204 (2d Cir. 2012), 4) *In re Am. Exp. Merchants’ Litig.*, 681 F.3d 139 (2d Cir. 2012). The author shall refer to each opinion as *Amex I*, *Amex II*, *Amex III*, and *Amex IV*, respectively, or collectively as the “*Amex series*.” It is useful to note that *Amex I* and *Amex II* were decided pre-*Concepcion*, while *Amex III* and *Amex IV* were decided post-*Concepcion*.

³ 673 F.3d 1155 (9th Cir. 2012).

arbitration agreement containing a class-action waiver in a case covering federal claims similar to those in the *Amex* series.

The Supreme Court granted certiorari to the *Amex* series to resolve this apparent circuit split. This Note argues that the Supreme Court should affirm the Second Circuit's holding in the *Amex* series because the lower court correctly applied existing precedent that was left undisturbed by the most recent developments in federal arbitration law—including the *Concepcion* decision.

Section I of this Note summarizes the general background and fundamental aspects of present-day federal arbitration law. Section II highlights the recent developments in federal arbitration law, the rise of mandatory arbitration clauses, collective or class action waivers, and the Supreme Court's decision in *Concepcion*. Section III addresses the current confusion in the law, analyzing both the holdings of the Second and Ninth Circuits. Section IV provides guidance to the Supreme Court on how courts should handle claims in federal arbitration law's changing environment to ensure the validation of individuals' rights and predicts how the federal arbitration landscape will look after the Supreme Court renders an opinion in the *Amex* series.

I. PRESENT-DAY FEDERAL ARBITRATION LAW

A. *History of the FAA*

The use of ADR, including arbitration, has mirrored its English roots in its progression in the United States.⁴ At first, the use of arbitration and ADR were useful tools when dealing with simple conflicts between parties.⁵ As society progressed, disputes—and, correspondingly, their resolutions—became more sophisticated and complex. During the nineteenth century, conflicting parties in America began to look to the courts to enforce private promises to arbitrate.⁶ Rather than enforce these contractual commitments to utilize arbitration, the courts created various doctrines—such as “ouster” and “revocability”—to void these contracts as a means to

⁴ See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 600 (1997).

⁵ *Id.*

⁶ *Id.*

protect the judiciary's jurisdiction.⁷ In the early twentieth century, however, the tables began to slowly turn in favor of the enforcement of agreements to arbitrate conflicts.⁸

After numerous drafts "patterned on the New York [Arbitration Law of 1920],"⁹ the American Bar Association and various business groups persuaded Congress to pass the United States Arbitration Act,¹⁰ now known as the FAA.¹¹ By enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration."¹² Furthermore, the Supreme Court concluded that the FAA created a federal substantive law of arbitration.¹³ Over time, under this "federal substantive law," the Supreme Court vastly expanded the applicability of the FAA to a wide range of contracts.¹⁴

⁷ See Paul D. Carrington & Paul Y. Castle, *Mandatory Arbitration: The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROB. 207, 207 (2004) (citing *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746)) ("In 1746, an English judge explained the ancient doctrine of revocability as based on the petty jealousy of courts fearing ouster of their jurisdiction."); *Campbell v. American Popular Life Ins. Co.*, 1 MacArth. 246, 257 (D.C. 1873) ("[A] mere agreement between parties, that any future differences growing out of their contract shall be decided by arbitrators, or referees, thereafter to be chosen, will not be allowed by the courts . . ."); see also *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984 n.14 (2d Cir. 1942).

⁸ See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (Oxford University Press 1992).

⁹ *Id.* at 84.

¹⁰ *Id.* at 84–91.

¹¹ Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2011)). The legislation has endured through the years, incorporating only a few changes: Chapter 2 was added on July 31, 1970 (84 Stat. 692), Chapter 3 was added on August 15, 1990 (Pub. L. No. 101-369), two new sections were added by congress in October 1988 and subsequently renumbered on December 1, 1990 (Pub. L. Nos. 669 and 702), and section 10 was amended on November 15, 1990.

¹² *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (establishing the applicability of the FAA to contracts created under state law). The majority opinion in *Southland Corp.* was written by then Chief Justice Warren E. Burger, who is known for approving the use of ADR. See Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982); see also Richard M. Calkins, *The ADR Revolution*, 6 RUTGERS CONFLICT RES. L.J. 1, 1–5 (2008) ("Chief Justice Burger is undoubtedly one of the forefathers of modern ADR . . .").

¹³ See *Southland Corp.*, 465 U.S. at 11–16 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) ("[W]e reaffirmed our view that the Arbitration Act 'creates a body of federal substantive law . . .')."

¹⁴ The FAA applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Supreme Court has since defined "involving commerce" as equal to the full extent of Congress' Commerce Clause power. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–75 (1995) (reasoning the correct test when ruling over the applicability of the FAA is whether the relationship involved interstate commerce "even if the parties did not

The primary purpose of the FAA “was to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts.”¹⁵ When the Supreme Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*¹⁶ in 1967, the world first glimpsed the juggernaut that arbitration would become.¹⁷ In *Prima Paint Corp.*, the Supreme Court found¹⁸ that courts should have only the power to address the validity of parties’ agreement to arbitrate, leaving the merits of any claim for arbitrators to adjudicate (assuming the agreement to arbitrate is found valid).¹⁹ *Prima Paint Corp.* made clear that courts should always look to the pro-arbitration objective and intent of Congress when handling these disputes.²⁰ Moreover, courts should do their best to uphold that objective regardless of the underlying state law provisions.²¹ After *Prima Paint Corp.*, the Supreme Court has continued to advance and further craft the law to favor arbitration under the FAA.²²

contemplate an interstate commerce connection”). It is well established that Congress’ Commerce Clause power (or rather the Supreme Court’s interpretation of such power) has expanded drastically over time. *Allied-Bruce Terminix Cos., Inc.* helps to explain how the scope of the FAA is as vast and all encompassing as it is today, compared to its infancy in the twentieth century. See Janet M. Grossnickle, *Allied-Bruce Terminix Cos. v. Dobson: How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom*, 36 B.C. L. REV. 769, 782–92 (1995).

¹⁵ *Gilmer v. Interstate-Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

¹⁶ 388 U.S. 395 (1967).

¹⁷ David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 448 (2011); see also Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 839–40 (2003) (“[*Prima Paint*] has had a profound impact on the law of modern arbitration, effectively initiating the Supreme Court’s extraordinary push to get lower courts to abandon their hostility to agreements to arbitrate, to take the FAA seriously, and ushering in the modern age of judicial support for arbitration and other ADR methods.”).

¹⁸ Adopting the holding in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959).

¹⁹ See THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 104 (2d ed., Thomson West 2009).

²⁰ *Id.*

²¹ *Id.*

²² See generally *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 1; *Southland Corp.*, 465 U.S. at 1; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985).

B. *The Modern FAA*

Today contracting parties can agree, with little judicial interference, to a wide variety of procedural rules and protocols to govern their disputes as they see fit. With respect to bilateral contract formation, in which two parties interact in an arms-length negotiation, arbitration has a multitude of benefits, including greater speed, lower costs, informality, industry expertise, and finality of disputes.²³ However, as an increasing number of contractual relationships revolve around the use of standard form and “adhesion contracts,”²⁴ where the terms of the contract are unilaterally imposed on one party on a take-it-or-leave-it basis, it remains unclear how beneficial or fair arbitration is. The use of arbitration in adhesion contracts has become progressively prevalent in both the consumer²⁵ and employment²⁶ arenas, in which companies and employers use arbitration as a means to establish a favorable forum to resolve disputes. This trend is likely to continue, especially in light of the Supreme Court’s recent pro-FAA jurisprudence.²⁷

II. RECENT DEVELOPMENTS IN FEDERAL ARBITRATION LAW

A. *Mandatory Arbitration Clauses*

No matter where you go in the United States, it is almost impossible to purchase any good or service without running into an

²³ See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010) (“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.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate . . . [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”); see also Edna Sussman, *Why Arbitrate? The Benefits and Savings*, 81 N.Y. ST. B.J., 20, 20–24 (OCT. 2009).

²⁴ See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176–80 (1983) (listing several features that taken together constitute a “model contract of adhesion”); Friedrich Kessler, *Contracts of Adhesion - Some Thoughts About Freedom to Contract*, 43 COLUM. L. REV. 629, 637 (1943).

²⁵ See Steven C. Bennett & Dean Calloway, *A Closer Look at the Raging Consumer Arbitration Debate*, 65 DISP. RESOL. J. 28 (2010).

²⁶ See Iliza Bershada, Note, *Employing Arbitration: FLSA Collective Actions Post-Conception*, 34 CARDOZO L. REV. 359, 369 (2012).

²⁷ See *Concepcion*, 131 S. Ct. at 1740; *Stolt-Nielsen S.A.*, 130 S. Ct. at 1758.

arbitration agreement.²⁸ Most, if not all, of these contracts are subject to the FAA, falling squarely within Section Two of the statute.²⁹ Many of these arbitration agreements call for mandatory arbitration of *all* claims that derive from the newly established relationship between the company and the purchaser of the good or service.³⁰ Moreover, the majority of these consumer contracts are considered contracts of adhesion.³¹ Accordingly, many commentators have called for courts to tread lightly when enforcing arbitration agreements under them.³² Nevertheless, various courts have continued to uphold “in the box arbitration contracts” under the rationale that the terms established, despite the substantially disparate bargaining powers between the parties at formation, are justified by the need of businesses to limit their exposure to liability so

²⁸ Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 95 (2012) (“We know that arbitration is often imposed on us as consumers when we purchase or rent certain products (e.g. computers, items bought through Amazon or Zappos, Starbucks gift cards, or rental equipment), enroll in schools, rent movies, or purchase auto parts.”) (internal citations omitted).

²⁹ See *supra* note 14 and accompanying text.

³⁰ Scholars debate whether such arbitration agreements are indeed “mandatory.” Compare Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 283 (2002) (“[M]andatory, binding arbitration, is the form with most potential for abuse because the parties *must* use arbitration to resolve future disagreements by contractual agreement, and the arbitrator’s decision will be final. The parties have no ability to seek relief in court or other methods of dispute resolution.”), and Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 39 (1999) (labeling similar arbitration agreements as “cram-down” and “forced”), with Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 McGEORGE L. REV. 195, 201 (1998) (“The consumer is free to put the pen down without signing the form. There is no duress in the typical ‘adhesion’ contract. A consumer who contracts in such circumstances does so voluntarily.”), and Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) (reasoning the only true mandatory arbitration is “arbitration that occurs even though the parties have not contracted for it”). As a general proposition, these agreements are indeed “mandatory” in that a consumer does not really have a choice to but to accept the terms of the contract, being that more and more companies are using these types of clauses. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 n.1 (2005) (“Even if a competitor existed that did not mandate arbitration, it likely would not be worth the consumer’s time to conduct the extensive research necessary to identify the competitor.”).

³¹ See *supra* note 24.

³² See, e.g., Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where have you Gone Learned Hand?*, 10 B.U. PUB. INT. L.J. 366, 414–15 (2001); Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer Experience, 67 LAW & CONTEMP. PROBS. 55, 73–74 (2004); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 787–89 (2002).

that they may provide society at large with price reductions.³³ While society “benefits” from the enforcement of mandatory arbitration agreements, these same agreements can have a crippling effect on consumers subject to them.³⁴

To offset the adverse effect of mandatory arbitration agreements, consumer plaintiffs began looking to collective or class arbitration in order to reap the advantages that collective actions provide in the traditional judicial forum.³⁵ At first, the class-action vehicle was available to some plaintiffs because their contractual relationships established only mandatory arbitration yet did not address the particular rules or procedures of the arbitral forum.³⁶ In these cases, companies found themselves in arbitration facing a collective “class” of plaintiffs. This confrontation quickly became troubling for companies, as class-action arbitrations undermined the very reasons such companies chose to utilize arbitration in the first place—namely, to provide a quick, informal, and inexpensive method of resolving disputes.³⁷ While several companies cautiously and successfully utilized mandatory arbitration agreements

³³ Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 172 (2010) (concluding that an outright abolition of mandatory consumer arbitration would likely harm consumers); see also ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. Wis. 1996); Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. Ill. 1997), cert. denied, 522 U.S. 808 (1997).

³⁴ One major aspect of arbitration is the limitation on the availability of discovery, which can drastically impede a plaintiff’s ability to prove their claim. See Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19, 30–32 (2007) (“The result is a double savings [for the company]: the company does not need to go through the expense of discovery, and the ability of the [plaintiff] to discover documents that support [their] claim . . . or relate specifically to [their] case or account, is severely limited, thus weakening her ability to prove her claim.”).

³⁵ See Fed. R. Civ. P. 23(b)(3). Rule 23 authorizes the use of class actions when common questions of law or fact of class predominate over questions affecting individual members and when class action is the superior method for fair and efficient adjudication of controversy. *Id.* See also Jenkins v. Raymark Indus. Inc., 782 F.2d 468, 473 (5th Cir. 1986) (“[A class action] is clearly superior to the alternative of repeating, hundreds of times over . . . days of the same witnesses, exhibits and issues from trial to trial.”).

³⁶ See, e.g., Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co., 210 F.3d 771, 774 (7th Cir. 2000) (Ponser, C.J.) (consolidating multiple plaintiffs in a single arbitration, finding that “[t]he arbitration provision in this case neither clearly permit[] nor clearly forbid[] consolidation”); New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 8 (1st Cir. 1988) (“We cannot say that the district court abused its discretion in concluding that the two arbitrations should be consolidated.”); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. Ct. 1991); Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779, 794 (Ct. App. 1998).

³⁷ See, e.g., Keating v. Superior Court, 645 P.2d 1192, 1215 (Cal. 1982) (“[C]lass procedures would tend to make arbitration inefficient instead of efficient, lengthy instead of expeditious, and procedural instead of informal.”).

and reaped the benefits in the interim,³⁸ most shied away from their use. Mandatory arbitration clauses continued to be relatively uncommon until 2003,³⁹ when the Supreme Court, in *Green Tree Fin. Corp. v. Bazzle*,⁴⁰ first addressed the availability of class-action proceedings in the arbitral forum.

The Court in *Bazzle* held that whether the parties agreed to availability of class-action arbitration was a question for the arbitrator to decide.⁴¹ The Court determined that this question was a procedural issue of the arbitral forum that any arbitrator was well-equipped to handle, and that, therefore, it is not a question for a judge.⁴² The Court also found that the “contract’s sweeping language” in *Bazzle* provided clear and unmistakable evidence that the parties had submitted the adjudication over the availability of class arbitration to the arbitrator.⁴³ Despite the Court’s effort to clear the confusion concerning arbitration, the *Bazzle* holding did anything but.⁴⁴ *Bazzle* subsequently divided the circuit courts on the validity of mandatory arbitration clauses;⁴⁵ some circuits interpreted *Bazzle*’s holding as a general approval of class-action arbi-

³⁸ Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) (addressing the frequency of collusive settlements between companies and lawyers representing class action plaintiffs, resulting in better settlements for companies); John Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222 (1995) (noting how “[corporate] defendants can manipulate [class actions] for their own benefit”); see also Theodore Eisenberg, *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 118 (2008) (reasoning businesses prefer mandatory arbitration clauses because they “ensure that disputes between firms and consumers will not be decided by juries”).

³⁹ See *Stolt-Nielsen S.A.*, 130 S. Ct. at 1768 n.4 (noting that the decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), opened the door to the use of arbitration clauses in consumer contracts).

⁴⁰ 539 U.S. 444 (2003).

⁴¹ *Id.* at 453.

⁴² *Id.* (“Arbitrators are well situated to answer [this] question. Given these considerations, along with the arbitration contracts’ sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.”) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)). Justice Breyer likens the question in *Bazzle* to a “procedural gateway question” seen in *Howsam*, which are left for an arbitrator to decide. See *Howsam*, 537 U.S. at 84 (“Thus procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator.”) (internal quotations omitted) (emphasis in original).

⁴³ See *Bazzle*, 539 U.S. at 451–52 (“Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.”) (citing *First Options v. Kaplan*, 514 U.S. 938 (1995)); see also *supra* note 42.

⁴⁴ See *infra* note 54 and the accompanying text.

⁴⁵ See Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer Arbitration In Light of Stolt-Nielsen*, 23 LOY. CONSUMER L. REV. 265, 272–73 (2011); see also THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 342–45 (3d ed., Juris Publishing 2009).

tration generally,⁴⁶ while others disregarded *Bazzle*, finding its holding of limited precedential value.⁴⁷ In 2009, the Supreme Court finally picked up where *Bazzle* left off, choosing to readress the availability of class proceedings in arbitration by granting certiorari in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*⁴⁸

In *Stolt-Nielsen*, the Supreme Court held that class-action arbitration could not be imposed on parties when the “arbitration clause [is] ‘silent’ on that issue.”⁴⁹ The contract in *Stolt-Nielsen* was “a standardized contract known as a charter party,” originally drafted in 1950.⁵⁰ The agreement included an arbitration clause that required the parties to arbitrate “[a]ny dispute arising from the making, performance or termination” of the contract.⁵¹ The contract was “silent” as to whether class or group proceedings were permitted in arbitration.⁵² Despite this silence, the arbitration panel in *Stolt-Nielsen* determined that they had jurisdiction under *Bazzle* and ruled that class-action arbitration would be appropriate.⁵³ The Supreme Court’s focus in *Stolt-Nielsen* was concentrated on the parties’ mishandling of *Bazzle*.⁵⁴

The majority opinion by Justice Samuel Alito ruled that due to the lack of a provision explicitly or implicitly *providing* for class action proceedings, the parties had not agreed on the availability of

⁴⁶ See *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. Tex. 2003) (“[W]e hold today that, pursuant to [*Bazzle*], arbitrators should decide whether class arbitration is available or forbidden.”); see also *supra* note 42.

⁴⁷ See, e.g., *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 579–82 (7th Cir. 2006) (declining to adopt *Bazzle* because the court “[could not] identify a single rationale endorsed by a majority of the Court”).

⁴⁸ 130 S. Ct. 1758 (2010).

⁴⁹ *Id.* at 1764. This is a sharp contrast to the approach taken in the early cases that allowed for collective arbitration proceedings. See *supra* note 36 and the accompanying text.

⁵⁰ *Stolt-Nielsen S.A.*, 130 S. Ct. at 1765; see also Charles L. Trowbridge, *Admiralty Law Institute: Symposium on Charter Parties: The History, Development, and Characteristics of the Charter Concept*, 49 TULANE L. REV. 743, 753 (1975) (noting that “charter parties” are highly standardized contracts). The high standardization of the contract in *Stolt-Nielsen S.A.* makes the Court’s holding easily applicable to other highly standardized contracts like those seen in the consumer and employment arenas today.

⁵¹ *Stolt-Nielsen S.A.*, 130 S. Ct. at 1765.

⁵² *Id.* at 1764.

⁵³ *Id.* at 1766 (“[The Panel] found persuasive the fact that other arbitrators ruling after *Bazzle* had construed ‘a wide variety of clauses in a wide variety of settings as allowing for class arbitration.’”).

⁵⁴ *Id.* at 1772 (“Unfortunately, however, [] parties . . . seem to have misunderstood *Bazzle* in another respect, namely, that it established the standard to be applied by a decision maker in determining whether a contract may permissibly be interpreted to allow class arbitration . . . As we have explained, however, *Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted. The decision in *Bazzle* left that question open . . .”).

a class action vehicle in the arbitral forum.⁵⁵ Interestingly, the Court could have maintained the availability of class-action proceedings in arbitration if it had so desired.⁵⁶ Yet, the Court declined to do so in *Stolt-Nielsen*, reasoning that “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it.”⁵⁷ Thus, the Court in *Stolt-Nielsen* found that unless it is clearly and unmistakably provided in a contract to the contrary, the default position of parties adhering to arbitration is on an individual basis.⁵⁸

⁵⁵ *Id.* at 1766.

⁵⁶ The Court could have simply imputed the implied consent to availability of class action proceedings to all parties in arbitration, similarly to how the court imputed consideration and assent under the separability doctrine established in *Prima Paint Corp.* See Reuben, *supra* note 17, at 849–50 (“Rather, [*Prima Paint*’s] separability [doctrine] imputes assent and consideration . . . to the ‘separated’ contract for arbitration by virtue of the construction of the FAA, not by the conduct of the parties.”); *Prima Paint Corp.*, 388 U.S. at 408–09 (citing *Robert Lawrence Co.*, 271 F.2d at 402) (“*Prima* simply contended that there was never a meeting of minds The lower courts relying on the Second Circuit’s decision in *Robert Lawrence Co.*, held that as a matter of ‘national substantive law,’ the arbitration clause in the contract is ‘separable’ from the rest of the contract. The Court today affirms this holding”).

⁵⁷ *Stolt-Nielsen S.A.*, 130 S. Ct. at 1766. It is hard to see how the separability doctrine would not have the same significant degree of “change in nature” in regular contract formation. Accordingly, many scholars have called for *Prima Paint*’s reversal. See, e.g., Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 128–32 (1996) (“As *Prima Paint*’s separability doctrine is not compelled by FAA Section Four, the Supreme Court should overrule it. If the Supreme Court does not do so, the FAA should be amended to do so.”); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 100 (1997) (arguing against the holding in *Prima Paint*, asserting that it is “difficult to imagine a factual scenario in which a party would use fraud solely to impose an arbitration clause and not to affect other essential terms of a contract”); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1952–53 (1996) (stating that the Court’s reasoning in *Prima Paint* is “evasive, somewhat tortuous reasoning”).

⁵⁸ *Stolt-Nielsen S.A.*, 130 S. Ct. at 1776 (“Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was no agreement on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.”) (emphasis in original) (internal quotations omitted). The emphasis shown in the original text of *Stolt-Nielsen S.A.* shows the importance of the “freedom of contract” approach to arbitration established by the earlier cases in federal arbitration law, which aims to allow parties to create a forum of adjudicating potential conflicts that works best for each side. See CARBONNEAU, *supra* note 45, at 342–45; *First Options*, 514 U.S. at 938; *AT&T Technologies, Inc. v. Commc’ns Workers of America*, 475 U.S. 643 (1986); *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

B. *The Rise of Class Action Waivers and the Fall of Unconscionability*

Along with the development of mandatory arbitration provisions, businesses sought to further reduce their legal exposure by incorporating class action waiver clauses into their contracts. “In the late 1990s, trade-journal articles first appeared encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations”⁵⁹ in order to maintain the efficiencies in the arbitral forum.⁶⁰ Professor Myriam Gilles distinctly addresses one law journal article⁶¹ that advised that

each franchisee [facing] potential class [arbitration should] pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, and because arbitrators do not issue runaway awards, [the courts’] strict enforcement of an arbitration clause[s] should enable the franchisor to dramatically reduce its aggregate exposure.⁶²

This short excerpt highlights the profound synergy when a mandatory arbitration agreement is combined with a class action waiver clause.⁶³ The two together provide an overall deterrence of litigation against a company or employer, especially for smaller claims.⁶⁴

⁵⁹ Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396 (2005).

⁶⁰ See JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE, § 2:14 (3d ed. 2006) (“As the potential availability of class-wide arbitration threatens to multiply exponentially the exposure on what is facially a single-consumer issue, companies should strongly consider including in their standard arbitration agreements an express provision barring class action litigation or arbitration.”).

⁶¹ Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997).

⁶² See Gilles, *supra* note 59, at 396.

⁶³ See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 437 (2010) (“[The] received wisdom [is] that some businesses’ use of consumer arbitration clauses is motivated, at least in part, by a desire to reduce their exposure to class actions.”); Gilles, *supra* note 59; Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004).

⁶⁴ This idea is distinctly addressed in *AT&T Mobility LLC v. Concepcion* by a dissenting Justice Stephen Breyer. *Concepcion*, 131 S. Ct. at 1761 (“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”); see *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (C.A.7 2004) (“The

Initially, plaintiffs successfully rebuffed class action waivers, utilizing the common law contract doctrine of unconscionability. Using this approach, individuals argued that the inclusion of a class action waiver in standardized adhesion contracts rendered an agreement “unconscionable” due to the one-sidedness of the agreement.⁶⁵ Under the FAA’s saving clause,⁶⁶ a party may avoid arbitration on such “grounds [that] exist at law or in equity for the revocation of any contract,” and more than fifteen years ago, the Supreme Court noted that state-law unconscionability provides such a ground.⁶⁷ Accordingly, many jurisdictions recognized this concept and began to openly invalidate class action waivers.⁶⁸

Notably, the California Supreme Court in *Discover Bank v. Superior Court*⁶⁹ found that class actions provide an essential and necessary way to protect consumers.⁷⁰ Furthermore, *Discover Bank* found that class action waivers in adhesion contracts are “contrary to public policy” and therefore unenforceable.⁷¹ Although courts had found class action waivers in adhesion contracts unconscionable before the “*Discover Bank Rule*”⁷² was crafted,

*realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”); see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (“A critical fact in this litigation is that petitioner’s individual stake in the damages award he seeks is \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic realities dictate that petitioner’s suit proceed as a class action or not at all.”). See *infra* note 217 for a simple hypothetical.*

⁶⁵ Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility V Concepcion*, 79 U. CHI. L. REV. 623, 628 (2012).

⁶⁶ 9 U.S.C. § 2.

⁶⁷ Gilles & Friedman, *supra* note 65, at 628 (citing *Doctor’s Associates, Inc. v Casarotto*, 517 U.S. 681, 687 (1996)). The court in *Doctor’s Associates, Inc.* found that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA].” *Doctor’s Associates, Inc.*, 517 U.S. at 687.

⁶⁸ Gilles & Friedman, *supra* note 65, at 628.

⁶⁹ 113 P.3d 1100 (2005).

⁷⁰ See generally Gilles, *supra* note 59.

⁷¹ *Discover Bank*, 113 P.3d at 1108. This concept was dubbed the “Discover Bank Rule.” However, the *Discover Bank* court did not find all class action waivers are “necessarily unconscionable.” *Id.* at 1109–10. Rather, *Discover Bank* held

when a class action waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and 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, then . . . the waiver becomes . . . unconscionable under California law and should not be enforced.

Id.

⁷² *Id.* at 1108; see also *supra* note 71 and the accompanying text.

many courts subsequently adopted *Discover Bank's* reasoning.⁷³ By 2011, over a dozen states had adopted the *Discover Bank* Rule, finding class action waivers unenforceable on public policy grounds.⁷⁴

The *Discover Bank* Rule allowed plaintiffs, especially those pre-*Stolt-Nielsen*,⁷⁵ to escape mandatory arbitration on an individual basis and to bring their claims collectively in the arbitral forum. “By the time of the *Concepcion* decision, the trend was unmistakable: class action waivers were being defeated in courts around the country.”⁷⁶ However, the use of unconscionability in this fashion came to an end with the Supreme Court’s decision in *Concepcion*, which rendered any “broad state law rule holding unenforceable class action waivers in consumer adhesion contracts preempted by the [FAA].”⁷⁷

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

In *Concepcion*, the plaintiffs brought a class-action suit in federal court, claiming that AT&T Mobility LLC (“AT&T”) engaged in false advertising and fraud by charging sales tax on newly purchased cell phones that were advertised as “free.”⁷⁸ AT&T moved to compel arbitration pursuant to the purchase agreements with the plaintiffs⁷⁹ that contained both a mandatory arbitration agreement and a class action waiver.⁸⁰ Pursuant to the contract, if the parties were unable to settle the dispute, resolution would continue

⁷³ See Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 557–58 (2012).

⁷⁴ Gilles & Friedman, *supra* note 65, at 628; see also Blechschmidt, *supra* note 73, at 557–58.

⁷⁵ See *supra* Part II.A.

⁷⁶ Gilles & Friedman, *supra* note 65, at 628.

⁷⁷ *Id.*

⁷⁸ *Concepcion*, 131 S. Ct. at 1744.

⁷⁹ *Id.*

⁸⁰ Unlike the contracts seen in *Bazze* and *Stolt-Nielsen*, AT&T’s contract distinctly addresses collective proceedings, specifying that “YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.” Brief for Respondents at 3, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 4411292; see Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1092 (2011) (classifying the contract in *Stolt-Nielsen* as the “first-generation” of arbitration agreement and the contract in *Concepcion* as a “third-generation” agreement for it not only “fill[ed] in the silence in first-generation clauses by adding class waivers,” but “attempt[s] to respond in various ways to the lower-court invalidations of [class waivers]”).

in arbitration in only an “individual capacity.”⁸¹ Both the District Court and Ninth Circuit, relying on the *Discover Bank* Rule, found that the class action waiver in AT&T’s contract rendered the arbitration agreement unconscionable.⁸² The Supreme Court reversed the Ninth Circuit, concluding that the *Discover Bank* Rule was preempted by the FAA⁸³ because it stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸⁴

Concepcion reaffirms the primary goal of the FAA, “to place arbitration agreements on the same footing as other contracts,”⁸⁵ but the holding goes one step further by utilizing preemption to reach its conclusion. *Concepcion* establishes that even a generally applicable contract rule would violate the FAA if it impaired essential features of an arbitration agreement⁸⁶—such as a class action waiver—and would be preempted accordingly.⁸⁷ Just as in *Stolt-Neilsen*, the Supreme Court had the opportunity to establish the availability of class actions to those in mandatory arbitration and put an end to class action waivers in adhesion contracts (at least those paired with mandatory arbitration agreements).⁸⁸ Instead, the Supreme Court explicitly approved their use, “requir[ing] enforcement of an agreement to arbitrate unless a party successfully asserts a *defense concerning the formation of the agreement to arbitrate*, such as fraud, duress, or mutual mistake.”⁸⁹ Moreover, the Court dismissed any ambiguity with respect to its endorsement of class action waiver, making it apparent there is no

⁸¹ See *supra* note 80. The agreement also contained a “blow up” clause, which provided that if the class action waiver portion of the arbitration agreement was deemed unenforceable, that the entire arbitration agreement dissolves, “and any class action must be litigated in court.” Brief for Respondents at 3, *supra* note 80.

⁸² See *supra* notes 69–76 and the accompanying text.

⁸³ The Ninth Circuit found that preemption of the *Discover Bank* rule under the FAA was improper because it is “simply a refinement of the unconscionability analysis applicable to contracts generally in California.” *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009) (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)).

⁸⁴ *Concepcion*, 131 S. Ct. at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Justice Scalia writing for the majority reasoned that the “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Id.*

⁸⁵ *Gilmer*, 500 U.S. at 24.

⁸⁶ Donald R. Frederico & Clifford H. Ruprecht, *AT&T Mobility LLC V. Concepcion: Is Feeney Finis?*, 55 B.B.J. 13 (2011).

⁸⁷ See *supra* note 77 and the accompanying text.

⁸⁸ See *supra* note 56 and the accompanying text.

⁸⁹ *Concepcion*, 131 S. Ct. at 1754–55 (emphasis in original).

fixed limitation on the procedures that can be placed in arbitration agreements.⁹⁰

Concepcion dealt a heavy blow to potential claimants who rely on the class-action procedural vehicle to bring their claims. Rather capriciously,⁹¹ the Supreme Court opted to use preemption to perpetuate the FAA, leaving almost nothing in its way to stop arbitration's advancement.⁹² *Concepcion* renders the states practically powerless in stopping the use of class action waivers and mandatory arbitration clauses to protect potential claimants.⁹³ Any type of state legislation rooted in public policy or common law doctrine that would act as an "obstacle" to the FAA would be preempted.⁹⁴ This idea is reinforced by the Supreme Court's recent post-*Concepcion* decision in *Marmet Health Care Ctr., Inc. v. Brown*.⁹⁵ In *Marmet*, the Court found that the FAA preempted West Virginia courts that held that "as a matter of [state] public policy, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforce[able]."⁹⁶

⁹⁰ *Id.* at 1748–49 ("In light of these provisions [of the FAA], we have held that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes.") (citing *Mitsubishi Motors Corp.*, 473 U.S. at 628). *Concepcion* echoes the Supreme Court's endorsement of the "freedom of contract" approach to arbitration, discussed *supra* note 58.

⁹¹ The Court could have its holding fit in existing federal arbitration law, which Justice Clarence Thomas in his concurrence. It is interesting to note that Justice Thomas, in his decision-swinging concurrence, looks back to and heavily cites the text of *Prima Paint Corp.* See *Concepcion*, 131 S. Ct. 1754–55 (Thomas, J., concurring) (citing *Prima Paint Corp.*, 388 U.S. at 403–04).

⁹² See Blechschmidt, *supra* note 73, at 557–58; see also *supra* note 84 and accompanying text.

⁹³ See *supra* note 92 and the accompanying text; see generally Gilles & Friedman, *supra* note 65.

⁹⁴ See *supra* note 84 and accompanying text.

⁹⁵ 132 S. Ct. 1201 (2012).

⁹⁶ *Id.* at 1203. Interestingly, the Supreme Court of Appeals of West Virginia on remand from the United States Supreme Court again found the arbitration clause in the nursing home contract was unconscionable under West Virginia state law. See *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 729 S.E.2d 217, 223 (2012) ("We otherwise find that the Supreme Court's decision does not counsel us to alter our original analysis of West Virginia's common law of contracts.") The United States Supreme Court has not granted review of this decision.

III. FEDERAL ARBITRATION LAW POST-*CONCEPCION*: WHAT'S LEFT?

After *Concepcion*, it is unclear what or who⁹⁷ is left to protect those subject to class action waivers paired with mandatory arbitration agreements in contracts of adhesion. When all seemed to be lost, the Second Circuit in *In re Am. Exp. Merchants' Litig.*⁹⁸ (“*Amex III*”) took a significant step in the post-*Concepcion* development of federal arbitration law.⁹⁹ *Amex III* found that a class action waiver paired with a mandatory arbitration agreement was unenforceable for it “effectively precluded the vindication of a statutory right[].”¹⁰⁰ The “vindication of statutory rights” argument finds its roots in *Green Tree Financial Corp. v. Randolph*¹⁰¹ and likely provides the last hope for maintaining class actions arising out of contractual relationships. Meanwhile, the Ninth Circuit in *Coneff v. AT&T*¹⁰² expressly disagreed with the Second Circuit in the *Amex* series: *Coneff* held that *Green Tree* was not an obstacle to the enforcement of the arbitration agreement containing both a class action waiver and a mandatory arbitration clause, because under the FAA it is irrelevant whether customers “have insufficient incentive to vindicate their rights.”¹⁰³

The Supreme Court’s grant of certiorari to the *Amex* series will certainly address this apparent confusion in the law; the use of class action waivers paired with mandatory arbitration clauses in contracts of adhesion; and in turn, the fate of aggregate litigation as we know it. The Second Circuit correctly adopted the reasoning of *Green Tree* in the *Amex* series and perpetuated *Green Tree*’s holding in the current environment of federal arbitration law. The Supreme Court should affirm the Second Circuit as it correctly applied existing federal arbitration law in reaching its holding, including *Concepcion* and other recent developments in federal arbitration law.

⁹⁷ See generally Sternlight, *supra* note 28; Gilles & Friedman, *supra* note 65.

⁹⁸ *Amex III*, 667 F.3d at 204.

⁹⁹ The Second Circuit reached the same conclusion in both *Amex I* and *Amex II*, yet the Supreme Court reversed and remanded *Amex II*, instructing the Second Circuit to reconsider its holding in light of *Stolt-Nielsen*. Being that *Concepcion* also dealt with the FAA, the Second Circuit saw fit to address *Concepcion*’s effect, or lack thereof, on its ruling in *Amex II* when it issued *Amex III*.

¹⁰⁰ *Amex III*, 667 F.3d at 206.

¹⁰¹ 531 U.S. 79 (2000).

¹⁰² *Coneff*, 673 F.3d at 1155.

¹⁰³ *Id.* at 1159 (citing *Concepcion*, 131 S. Ct. at 1753).

A. *The Savior of Class Action: the Second Circuit and the Giving Green Tree*

1. The Amex Series Begins

In 2003, a number of merchants¹⁰⁴ brought a class-action lawsuit against American Express Travel Related Services Company, Inc. (“Amex”). The plaintiffs alleged that Amex charged considerably higher “merchant discount fees” than the other major credit card companies in the industry.¹⁰⁵ At first, the merchants justified paying Amex’s higher fees because Amex’s business originally centered on the extension of credit to a wealthy demographic, which generally spent larger amounts than average consumers through “charge cards.”¹⁰⁶ A storeowner who accepted Amex’s charge cards as tender for goods or services was able to gain access to a segregated piece of the consumer market that, at least in theory, had more money to spend.

Over time, Amex’s business grew, and the company began to issue “credit cards”¹⁰⁷ to a wide array of consumers. These credit cards also imposed the same allegedly excessive fee on merchants as Amex’s “charge cards.”¹⁰⁸ Moreover, the agreement between the plaintiff merchants and Amex required that any merchant who accepted one of Amex’s products as tender must honor “any card or other account access device issued by [Amex]”¹⁰⁹ Therefore, the merchants were faced with either paying Amex’s substantially higher rates as compared to other credit card providers, or “inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others who are the traditional users of Amex charge cards.”¹¹⁰ The plaintiffs al-

¹⁰⁴ The merchant plaintiffs consist of: “(1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. (“NSA”), ‘a voluntary membership-based trade association that represents the interests of independently owned supermarkets.’” *Amex III*, 667 F.3d at 204.

¹⁰⁵ *Amex I*, 554 F.3d at 301.

¹⁰⁶ “A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle,” and is merely a “method of payment.” *In re Am. Express Merchants Litig.*, No. 03-CV-9592, 2006 WL 662341, at *1 n.6 (S.D.N.Y. Mar. 16, 2006).

¹⁰⁷ “A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges,” constituting a “a means of financing purchases.” *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Amex I*, 554 F.3d at 308.

¹¹⁰ *Id.*

leged that this agreement constituted a “tying arrangement”¹¹¹ in violation of Section 1 of the Sherman Act.¹¹²

While the plaintiffs sought redress in the federal courts, Amex looked to enforce its agreements with the plaintiffs that contained both a mandatory arbitration clause and a class action waiver clause.¹¹³ Soon after the commencement of numerous actions against it in various district courts,¹¹⁴ Amex motioned to compel all parties to submit to arbitration on an individual basis as required by the class action waiver.¹¹⁵ The plaintiffs opposed, claiming that they would be effectively stripped of their ability to validate their claims against Amex because the costs associated with bringing the lawsuit on an individual basis would far outweigh the potential reward to any single plaintiff.¹¹⁶

The District Court in *In re Am. Express Merchants’ Litig.*¹¹⁷ glossed over this concern, finding that the plaintiffs’ argument “ignores the statutory protections provided by the Clayton Act . . . [which] provides that any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”¹¹⁸ The District Court then shifted its focus in the opinion and subsequently

¹¹¹ A tying arrangement has been defined as “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.” *Northern Pacific Ry. Co. v. U.S.*, 356 U.S. 1, 5–6 (1958).

¹¹² “A tying arrangement violates Sherman Act if the seller has ‘appreciable economic power’ in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.” *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992) (quoting *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969)).

¹¹³ *Amex I*, 554 F.3d at 306. The relevant section of the contract contained the following:
 IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM
 FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.

Id.

¹¹⁴ Amex motioned for and was subsequently granted consolidation of the actions by different plaintiffs in different jurisdictions into a single forum, the Southern District of New York. *Id.* at 305.

¹¹⁵ *In re Am. Express Merchants Litig.*, 2006 WL 662341 at *4.

¹¹⁶ *Amex I*, 554 F.3d at 308. “[P]laintiffs argue that each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only \$5000.” *In re Am. Express Merchants Litig.*, 2006 WL 662341 at *4.

¹¹⁷ *In re Am. Express Merchants Litig.*, 2006 WL 662341 at *1 n.6.

¹¹⁸ *Id.* at *5 (internal citation omitted).

resolved the dispute, on strictly jurisdictional grounds, in favor of Amex.¹¹⁹

2. *Amex I*

On appeal, the Second Circuit in *In re Am. Express Merchants' Litig.*¹²⁰ (“*Amex I*”) found that the plaintiffs were “plainly challenging” the agreements’ arbitration clause “insofar as they dispute the enforceability of its class action waiver and, by extension, the validity of the parties’ agreement to arbitrate.”¹²¹ Under *Prima Paint*,¹²² this question is clearly reserved for the courts, not arbitrators.¹²³ Accordingly, the Second Circuit reversed the District Court and moved away from the question of jurisdiction, choosing instead to focus on whether individual arbitration was “‘prohibitively expensive.’”¹²⁴

Amex I held in favor of the plaintiff merchants, finding that they “adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate [their] statutory rights. . . .”¹²⁵ In reaching its holding, the court in *Amex I* relied distinctly on two Supreme Court cases: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹²⁶ and *Green Tree Fin. Corp. v. Randolph*.¹²⁷

Mitsubishi Motors established that statutory claims could be properly adjudicated in arbitration. In *Mitsubishi Motors*, Mitsubishi brought an action against Soler Chrysler under several claims,

¹¹⁹ The court concluded it did not have jurisdiction to address the merits of the plaintiffs’ claims, reasoning that “[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established.” *Id.* at *6.

¹²⁰ *Amex I*, 554 F.3d at 301.

¹²¹ *Id.* at 311.

¹²² See *supra* notes 16–22 and the accompanying text; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (quoting *Prima Paint Corp.*, 388 U.S. at 403–04) (“‘The arbitration clause itself-an issue which goes to the making of the agreement to arbitrate-the federal court may proceed to adjudicate it. But [the FAA] does not permit the federal court to consider claims [which challenge] the contract generally.’”).

¹²³ “This appeal therefore involves ‘a gateway dispute about whether the parties are bound by a given arbitration clause,’ a dispute which ‘raises a question of arbitrability for a court to decide.’” *Amex I*, 554 F.3d at 311 (quoting *Howsam*, 537 U.S. at 84).

¹²⁴ *Amex I*, 554 F.3d at 315 (quoting *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000)).

¹²⁵ *Amex I*, 554 F.3d at 304.

¹²⁶ 473 U.S. 614 (1985).

¹²⁷ 531 U.S. 79 (2000).

including breach of contract.¹²⁸ Soler Chrysler counterclaimed, alleging violations of the Sherman Act.¹²⁹ Mitsubishi moved to compel arbitration of all claims, including the Sherman Act claim, pursuant to the parties' agreement that contained a mandatory arbitration clause.¹³⁰ The Supreme Court reasoned that arbitration agreements were merely forum selection clauses¹³¹ and that mandatory arbitration of statutory right disputes would have no adverse effects on individual rights.¹³² Accordingly, the Supreme Court held that there is no reason to preclude the adjudication of a federal statutory claim in arbitration because "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."¹³³ *Mitsubishi Motors* did recognize that there could be arbitration agreements containing certain provisions that would render the agreement unenforceable because the contract would prevent a prospective litigant from vindicating its statutorily granted rights in an arbitral forum. In dicta, the Court "note[d] 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, [it] would have little hesitation in condemning the agreement as against public policy."¹³⁴

Green Tree builds on the language of *Mitsubishi Motors* in deciding whether to compel arbitration under a mandatory arbitration agreement (following *Mitsubishi Motors*, merely a "choice-of-forum")¹³⁵ that was to "be governed by the [FAA]."¹³⁶ In *Green Tree*, the plaintiff brought a class action suit against Green Tree Financial Corporation for a failure to make adequate disclosure

¹²⁸ *Mitsubishi Motors Corp.*, 473 U.S. at 614.

¹²⁹ *Id.*

¹³⁰ *Id.* at 617 ("All disputes, controversies or differences which may arise between [the parties]" were agreed to be handled in arbitration.)

¹³¹ See *id.* at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.")

¹³² See Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 *FORDHAM URB. L.J.* 803, 821 (2009) (citing *Mitsubishi Motors Corp.*, 473 U.S. at 628).

¹³³ *Id.* at 637.

¹³⁴ *Id.* at 637 n.19. The root of the division between the Circuit Judges in *Amex IV* turns on the interpretation of this dicta. See *infra* notes 164–171 and accompanying text.

¹³⁵ See *supra* note 134 and accompanying text.

¹³⁶ *Green Tree Financial Corp.*, 531 U.S. at 83.

under the Truth in Lending Act (“TILA”).¹³⁷ The District Court held in favor of Green Tree, who sought to compel arbitration of the claim under its agreement with the plaintiff.¹³⁸ In a motion to reconsider, the plaintiff asserted that the arbitration agreement was unenforceable because the “arbitration costs were [too] high”¹³⁹ and he did not have the resources to arbitrate. The District Court was not persuaded by this argument.

On appeal, the Eleventh Circuit agreed with the plaintiff, holding the arbitration agreement unenforceable because it “fail[ed] to provide the minimum guarantees required to ensure that she can vindicate her statutory rights under the TILA.”¹⁴⁰ Upon granting certiorari, the Supreme Court recognized that large costs could preclude a litigant from effectively vindicating his or her federal statutory rights in arbitration.¹⁴¹ But the Supreme Court made it clear that the party who “seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive” bears the burden of demonstrating the likelihood of incurring such costs.¹⁴² Under this standard, the Court reversed the Eleventh Circuit and determined that the plaintiff’s evidentiary submissions were inadequate, falling short of showing the *likelihood* of incurring such costs.¹⁴³

Determining that *Green Tree* was “controlling here to the extent that it holds that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs,” *Amex I* looked to the evidentiary submissions of the merchant plaintiffs in opposition to the en-

¹³⁷ *Randolph v. Green Tree Fin. Corp.-Alabama*, 178 F.3d 1149, 1151 (11th Cir. 1999). “Randolph contends that Green Tree required her to obtain ‘vendor’s single interest’ insurance, which protects a vendor or lienholder against the costs of repossession in the event of default, but did not mention this requirement in its Truth in Lending Act disclosure.” *Id.*

¹³⁸ *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410, 1414 (M.D. Ala. 1997).

¹³⁹ *Green Tree Financial Corp.*, 531 U.S. at 79 n.6.

¹⁴⁰ *Randolph*, 178 F.3d at 1157.

¹⁴¹ *Green Tree Financial Corp.*, 531 U.S. at 79 n.6. *See generally Gilmer*, 500 U.S. at 20. In *Gilmer*, the plaintiff argued that arbitration impeded his ability to effectively pursue and protect his statutory rights. However, the Court in *Gilmer* found that the plaintiff did not make a proper and substantial showing to support this claim. *Gilmer*, 500 U.S. at 32; *see also* Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619, 1628 (1999).

¹⁴² *Green Tree Financial Corp.*, 531 U.S. at 92.

¹⁴³ *Id.* at 79 n.6 (“None of [the] information [provided by the plaintiff] affords a sufficient basis for concluding that [the plaintiff] would in fact have incurred substantial costs in the event her claim went to arbitration.”).

forcement of the arbitration agreement.¹⁴⁴ The court in *Amex I* found that the record “abundantly support[ed] the plaintiffs’ argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver.”¹⁴⁵ With *Amex* “bringing no serious challenge”¹⁴⁶ to the plaintiffs’ argument and evidentiary support, the court agreed with the plaintiffs “that enforcement of the class action waiver . . . flatly ensures that no small merchant may challenge American Express’s tying arrangements under the federal antitrust laws.”¹⁴⁷ *Amex I* then distinctly addressed *Mitsubishi Motors*’ language that noted that the Supreme Court “would [have] little hesitation in condemning [an agreement where 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.”¹⁴⁸

We readily acknowledge that this statement is dicta, but it is nevertheless dicta grounded upon a firm principle of antitrust law to the effect 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.¹⁴⁹

Under the guidance of *Mitsubishi Motors*, *Amex I* held that the class action waiver (choice-of-law) and mandatory arbitration clause (choice-of-forum) in *Amex*’s arbitration agreement could not be enforced under the FAA because “to do so would grant *Amex* de facto immunity from antitrust liability by removing the plaintiffs’ only reasonably feasible means of recovery.”¹⁵⁰

¹⁴⁴ *Amex I*, 554 F.3d at 315.

¹⁴⁵ *Id.* at 315–16. Plaintiffs supported their arguments with a declaration from an expert affidavit addressing the “likely costs and complexity of expert economic study concerning the liability and damages related to this action” to prove plaintiffs’ alleged antitrust violations by *Amex* and the potential recovery of each plaintiff in any action. *Id.* at 316. The declaration concluded in his “expert opinion, it would not be worthwhile for an individual plaintiff [in this case] . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed \$1 million.” *Id.*

¹⁴⁶ *Id.* at 319.

¹⁴⁷ *Id.* (internal quotations omitted).

¹⁴⁸ See *supra* note 134.

¹⁴⁹ *Amex I*, 554 F.3d at 319.

¹⁵⁰ *Id.* at 320; see *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir.2007) (“Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims.”).

3. *Amex II* and *Amex III*

On petition by Amex for writ of certiorari, the Supreme Court vacated *Amex I* and sent it back to the Second Circuit for further consideration in light of the Supreme Court's then-recent ruling in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*¹⁵¹ On remand, the Second Circuit in *Amex II* found that its original analysis in *Amex I* was unaffected by the Supreme Court's ruling in *Stolt-Nielsen*.¹⁵² Shortly after the Second Circuit issued its opinion in *Amex II*, the Supreme Court issued the *Concepcion* opinion. Since *Concepcion* also dealt with the FAA, the Second Circuit opted to address *Concepcion*'s effect, or lack thereof, on its holding in *Amex II*. After soliciting briefing on the impact of *Concepcion* from each party, the Second Circuit issued its third opinion in *Amex III*. Despite *Concepcion*, the Second Circuit yet again concluded that the class action waiver was unenforceable on the ground that the only effective way for the plaintiffs to vindicate their statutory rights was via class action in court.¹⁵³

It is difficult to see how *Stolt-Nielsen* and *Concepcion* would have any effect on the Second Circuit's holdings in the *Amex* series. *Stolt-Nielsen* concluded that unless the parties clearly and unmistakably contract to the contrary, arbitration would be conducted on an individual and bilateral basis.¹⁵⁴ *Concepcion* found that a state's law (i.e., the *Discover Bank* Rule) that pushes parties into class or collective arbitration, absent an explicit provision in the agreement allowing such procedure, would be preempted by the FAA.¹⁵⁵ Taken together, *Stolt-Nielsen* and *Concepcion* simply established that parties can be forced to arbitrate disputes in a class or collective proceeding only if the parties clearly and unmistakably contract for its use.¹⁵⁶ *Amex III* distinguishes both *Stolt-Nielsen* and *Concepcion* in this fashion and further concludes that "[w]hat *Stolt-Nielsen* and *Concepcion* do not

¹⁵¹ See *supra* notes 49–58 and the accompanying text, for an in depth discussion of *Stolt-Nielsen S.A.*.

¹⁵² See *Amex II*, 634 F.3d at 199.

¹⁵³ *Amex III*, 667 F.3d at 218–19.

¹⁵⁴ *Stolt-Nielsen S.A.*, 130 S. Ct. at 1775 (“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.”); see *supra* notes 49–58 and the accompanying text.

¹⁵⁵ *Concepcion*, 131 S.Ct. at 1750–51 (“[C]lass arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with the FAA.”).

¹⁵⁶ *Amex III*, 667 F.3d at 213.

do is require that all class-action waivers be deemed per se enforceable.”¹⁵⁷

Amex III supports this position, clarifying that its prior decisions rested squarely on *Green Tree*’s “vindication of statutory rights” analysis.¹⁵⁸ As opposed to the Supreme Court in *Concepcion*, which engaged solely in a preemption analysis,¹⁵⁹ *Amex III* was confronted with two statutes—the FAA and the Sherman Act—and had to determine how a court should handle them in conjunction. Courts have traditionally recognized that a preemption analysis and the reconciliation of two federal statutes are two very separate and distinct tasks for a court,¹⁶⁰ especially when that court is adjudicating issues arising under arbitration agreements.¹⁶¹

Because *Stolt-Nielsen* and *Concepcion* clearly dealt with substantially different issues than those in *Amex III*, there is no basis for finding that either case affected the Second Circuit’s holding in *Amex II* (or, in turn, *Amex I*). Moreover, neither case purported to overrule *Green Tree* or *Mitsubishi Motors* in any way. To the contrary, *Mitsubishi Motors* was cited approvingly multiple times in the *Concepcion* majority opinion issued by Justice Scalia.¹⁶² Therefore, with no signs indicating otherwise, the Second Circuit, and all other Circuits for that matter, should still be bound to follow the precedent set out in *Green Tree* and *Mitsubishi Motors*.¹⁶³ Accordingly, *Amex III* affirmed its prior holding in *Amex II* and

¹⁵⁷ *Id.* at 214.

¹⁵⁸ *Id.* at 213.

¹⁵⁹ See *supra* notes 89–92.

¹⁶⁰ See *Affordable Housing Found., Inc. v. Silva*, 469 F.3d 219, 237 (2d Cir. 2006) (identifying “an important legal distinction between” preemption analysis, on one hand, and cases where courts seek “to reconcile two federal statutes to ensure that one did not trench on the other, [which is] a task routinely performed by federal courts”); *Tufariello v. Long Island R. Co.*, 458 F.3d 80, 86 (2d Cir. 2006) (“[T]he preemption doctrine flows from the Constitution’s Supremacy Clause, which invalidates state laws that interfere with, or are contrary to, federal law. [This] doctrine is inapplicable to a potential conflict between two federal statutes.”) (internal citations omitted).

¹⁶¹ See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006) (“Although Plaintiffs’ challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration . . .”).

¹⁶² See *Concepcion*, 131 S.Ct. at 1743–61. It is possible that the Court foresaw cases like the *Amex* series would come about, where the FAA runs in conflict with another statute, and cited *Mitsubishi Motors* to simply re-affirm its relevance.

¹⁶³ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (determining that the lower courts should not “conclude our more recent cases have, by implication, overruled an earlier precedent” and must “leav[e] to this Court the prerogative of overruling its own decisions”); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (establishing that “[the Supreme] Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*”).

remanded the case to the District Court for further proceedings. Nevertheless, Amex filed an appeal for an *en banc* hearing of the Second Circuit's decision in *Amex III* that was subsequently denied.

4. *Amex IV*

In denying the appeal for *en banc* review, several judges saw fit to support their reasoning, issuing a fourth opinion in the *Amex* series ("*Amex IV*"). Circuit Judge Pooler, who concurred in the denial of *en banc* review, wrote to reinforce that the *Amex* series is a narrow holding that "rests squarely on a vindication of statutory rights analysis—an issue untouched in *Concepcion*."¹⁶⁴ Judge Pooler also found that the Ninth Circuit's decision in *Coneff v. AT&T*¹⁶⁵ was cut from the same cloth as *Concepcion* and should have no effect on the Second Circuit's holding in the *Amex* series.¹⁶⁶

Writing in dissent to the denial of *en banc* review, Chief Judge Jacobs found the *Amex* series holdings as rather broad ones that could subsequently "be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver."¹⁶⁷ Additionally, Judge Jacobs argued that the *Amex* series "leans on the distortion of dicta from *Green Tree*"¹⁶⁸ and a "misleading . . . quotation of *Mitsubishi [Motors]*."¹⁶⁹ Finally, he asserted that the *Amex* series made a "dubious"¹⁷⁰ distinction of the Supreme Court's holding in *Concepcion* and subsequently created a circuit split with the Ninth Circuit's holding in *Coneff v. AT&T Corp.*¹⁷¹

¹⁶⁴ *Amex IV*, 681 F.3d 139 (2d Cir. 2012).

¹⁶⁵ 673 F.3d 1155 (9th Cir. 2012).

¹⁶⁶ *Amex IV*, 681 F.3d at 141–42.

¹⁶⁷ *Id.* at 143.

¹⁶⁸ *Id.* at 147.

¹⁶⁹ *Id.* Judge Jacobs finds that the Second Circuit's use of the language in *Mitsubishi Motors*, see *supra* note 134 and the accompanying text, is using the Supreme Court's dicta out of context.

¹⁷⁰ *Amex IV*, 681 F.3d at 143. Judge Jacobs argues the *Amex* series treats *Concepcion* "as an obstacle to be surmounted or evaded" in reaching a holding that runs directly against *Concepcion*. *Id.* at 146–47.

¹⁷¹ *Id.* at 145–46.

B. *The Return of the Ninth Circuit: Coneff v. AT&T*

In *Coneff*, soon after a merger between Cingular and AT&T, the plaintiffs¹⁷² alleged that “Cingular deliberately degraded AT&T Wireless’ network in order to induce AT&T Wireless customers to transfer their plans to Cingular”¹⁷³ The plaintiffs asserted that this scheme was designed to strong-arm AT&T customers to “upgrade” to Cingular’s network.¹⁷⁴ Furthermore, the plaintiffs alleged that those customers who opted not to “upgrade” had to choose between “fulfill[ing] their contract term with a degraded AT&T Wireless service, or paying a \$175 early termination fee to cancel service.”¹⁷⁵ In response, AT&T filed a motion to compel arbitration on an individual basis pursuant to the terms of their agreements with the plaintiffs.¹⁷⁶ Not surprisingly, the agreement contained a class action waiver and mandatory arbitration clause.¹⁷⁷

In its pre-*Concepcion* decision, the District Court in *Coneff* denied AT&T’s motion to compel arbitration and held “that the class waiver provisions are substantive[ly] unconscionable”¹⁷⁸ The court justified its holding by finding that “the cost of pursuit significantly outweighs the potential recovery if each of the Plaintiffs was to proceed on an individual basis.”¹⁷⁹ Moreover, the court chose to follow “recent” jurisprudence and refused to enforce the class action waiver, naming five different jurisdictions that concurrently did the same.¹⁸⁰ The District Court rejected AT&T’s claim that “the FAA preempts the substantive unconscionability of Washington State,”¹⁸¹ finding that the Ninth Circuit had “squarely rejected” this argument.¹⁸² AT&T appealed the court’s ruling, pushing *Coneff* up to the Ninth Circuit for review.

After being reversed by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, the Ninth Circuit oddly enough found itself in

¹⁷² The plaintiffs were comprised of active or former AT&T customers. *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1250 (W.D. Wash. 2009).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1251.

¹⁷⁷ *Id.*

¹⁷⁸ *Coneff*, 620 F. Supp. 2d at 1257.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1259 (citing *Amex I*, 554 F.3d at 301).

¹⁸¹ *Id.*

¹⁸² *Id.* (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 989 (9th Cir. 2007)).

the position to take another crack at the adjudication of an arbitration agreement containing a class action waiver and a mandatory arbitration. But the agreement in *Coneff* was not just any old arbitration agreement; instead, it was the same standard form agreement containing exactly the same provisions at issue in *Concepcion*.¹⁸³ On appeal, the Ninth Circuit reversed the District Court in *Coneff*, noting that “[t]he district court understandably followed our precedent [at the time]. But the Supreme Court later reversed our holding[s], in *AT&T Mobility LLC v. Concepcion*.”¹⁸⁴ The Ninth Circuit emphasized that in a post-*Concepcion* world, the fact that a claim may be worth much less than the cost of litigating it does not justify invalidating an agreement to arbitrate, since such public policy concerns are preempted by the FAA.¹⁸⁵ In an effort to distinguish its holding from the *Amex* series, the Ninth Circuit noted that “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.”¹⁸⁶ Furthermore, the court stated that “[t]o the extent that the Second Circuit’s opinion [in *Amex III*] is not distinguishable, we disagree with it.”¹⁸⁷

IV. SUPREME COURT STEPS UNDER THE *GREEN TREE*

After the Second Circuit denied *en banc* review in *Amex IV*, Amex filed a petition for writ of certiorari for Supreme Court review. On November 9, 2012, the Supreme Court granted Amex’s petition. The Supreme Court will certainly pick up where Judge Pooler and Chief Judge Jacobs left off in *Amex IV*. Nevertheless, on inspection of both the *Amex* series and *Coneff*, one can discern no true split among the circuit courts. However, there *is* confusion in the law concerning how and when to harmonize *Concepcion* and *Stolt-Nielsen* with *Green Tree*’s “vindication of statutory rights” analysis, *Mitsubishi Motors*, and the *Amex* series. The Supreme Court should affirm the Second Circuit’s holdings in the *Amex* series for the following reasons: 1) to resolve the confusion in the law as evidenced by both the Ninth Circuit in *Coneff* and the dissenting Judges in *Amex IV*, 2) because the Second Circuit correctly distin-

¹⁸³ *Id.* at 1251; *supra* note 75 and the accompanying text.

¹⁸⁴ *Coneff*, 673 F.3d at 1157.

¹⁸⁵ *Id.* at 1159.

¹⁸⁶ *Id.* at 1159 (emphasis in original).

¹⁸⁷ *Id.* at 1159 n.3.

guished *Concepcion* and properly applied existing federal arbitration law to the facts of the case, and 3) because the *Amex* series' holding is narrow in application and will be available only to a select few plaintiffs moving forward.

A. *No Circuit Spilt? Now I am Confused*

Despite the argument of dissenting Chief Judge Jacobs in *Amex IV*,¹⁸⁸ there is no circuit split between the Ninth and Second Circuits on *how* to apply *Green Tree* and *Mitsubishi Motors* in the post-*Concepcion* world. If anything, *Coneff* shows that the Ninth Circuit is in agreement with the Second Circuit's application of *Green Tree* and *Mitsubishi Motors* in *Amex III*. However, what *Coneff* and *Amex IV* together demonstrate is confusion as to *when* to apply the "vindication of statutory rights" analysis to a set of given facts.

It is true, however, that the court in *Coneff* states that "[t]o the extent that the Second Circuit's opinion [in *Amex III*] is not distinguishable, we disagree with it"¹⁸⁹ This language is deceptively indicative of a rejection of the Second Circuit's approach to *Green Tree* and *Mitsubishi Motors*, to such an extent that it leads dissenting Chief Judge Jacobs to conclude erroneously that the Second Circuit's ruling in *Amex IV* leads to a split among the circuits.¹⁹⁰ Chief Judge Jacobs' dissent falls victim to the very same critique he imposes on all of the *Amex* series opinions in *Amex IV*.¹⁹¹ Chief Judge Jacobs misleadingly cites from *Coneff* in reaching his conclusion that the Ninth Circuit and Second Circuit are at odds. But the facts and issues in *Coneff*, as noted by both the Ninth Circuit in its opinion¹⁹² and a concurring Judge Pooler in *Amex IV*,¹⁹³ are distinguishable from the *Amex* series.

First, the distinction that needs to be made is a fine one—the need to provide a forum for the protection of statutorily granted

¹⁸⁸ *Amex IV*, 681 F.3d at 145–46.

¹⁸⁹ *Id.* at 1159 n.3.

¹⁹⁰ *Id.* at 145–46.

¹⁹¹ *Id.* at 143, 147 (“[T]he dicta on which the majority precariously relies . . . is pulled out of context and distorted Similarly misleading is the panel’s quotation of *Mitsubishi [Motors]*. . . .”) (emphasis added).

¹⁹² *Coneff*, 673 F.3d at 1159, n.3 (“It is on this reasoning that we distinguish this case from a recent decision of the Second Circuit [*Amex III*] on a similar question.”) (emphasis added).

¹⁹³ *Amex IV*, 681 F.3d at 141 (“Unlike *Amex III*, the *Coneff* court was not focused on individual plaintiffs lacking an effective means of enforcing their rights.”).

rights, as compared to the need to compel the filing of claims in a certain forum (i.e., making a claim financially ‘worthwhile’). The Ninth Circuit in *Coneff* expressly recognized this distinction.¹⁹⁴ The issue in *Coneff* was whether the plaintiffs would have an adequate *incentive* to vindicate their rights, given the small damage award available to any claimant in individual arbitration.¹⁹⁵ On the other hand, the focus in the *Amex* series was on individual plaintiffs who lack an *effective means* of vindicating their rights.¹⁹⁶ Also, in *Coneff*, the potential relief sought in damages by any individual claimant was dwarfed by the cost of pursuing their claim.¹⁹⁷ Nevertheless, the agreements in *Coneff* contained contractual provisions¹⁹⁸ that ensured that damaged plaintiffs could be made whole if they were to choose to enforce their claim.¹⁹⁹ In contrast, the plaintiffs in the *Amex* series were faced with substantial upfront costs to pursue their antitrust claim—“costs that were only economically feasible if the plaintiffs prosecuted their claims as a class.”²⁰⁰

Second, in *Coneff*, the Ninth Circuit explicitly stated that it “do[es] not read *Concepcion* to be inconsistent with *Green Tree* and similar cases,”²⁰¹ but simply rejects the plaintiffs’ arguments with respect to a “vindication of statutory rights” analysis on the merits. Concerning this point, the Ninth Circuit found “with *Green Tree* in mind; [that the] [p]laintiffs’ federal claim fail[ed] under *Green Tree*.”²⁰² The very fact that *Coneff* engaged in a “vindication of statutory rights” analysis shows that there is no split between the Second and Ninth Circuits with respect to application of *Green Tree* in the *Amex* series.

While there is no split between the Ninth and Second Circuits regarding the application of the “vindication of statutory rights” analysis in the post-*Concepcion* world, it is clear that there is confusion as to when to undergo such analysis. *Mitsubishi Motors*, *Green Tree*, and other similar decisions under the “vindication of

¹⁹⁴ *Id.* (citing *Coneff*, 673 F.3d at 1158–60, n.3); see *Coneff*, 673 F.3d at 1159 (“That is, 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.”) (emphasis in original).

¹⁹⁵ *Amex IV*, 681 F.3d at 141 (citing *Coneff*, 673 F.3d at 1158–60, n.3).

¹⁹⁶ *Id.* at 141.

¹⁹⁷ *Coneff*, 620 F. Supp. 2d at 1257.

¹⁹⁸ These fee-shifting and incentive provisions are addressed, *infra* Part IV.C.

¹⁹⁹ *Amex IV*, 681 F.3d at 141.

²⁰⁰ *Id.*

²⁰¹ *Coneff*, 673 F.3d at 1158.

²⁰² *Id.* at 1158 n.2.

statutory rights” umbrella are limited to federal statutory right claims. The plaintiffs in the *Amex* series brought solely federal statutory right claims, placing them directly into the gambit of *Green Tree*’s “vindication of statutory rights” analysis. However, in *Coneff*, despite the fact that the plaintiffs “assert[ed] primarily state statutory rights” claims, the Ninth Circuit engaged in a “vindication of statutory rights” analysis,²⁰³ citing little precedent to justify such an approach. Thus, the question of whether the “vindication of statutory rights” analysis under *Mitsubishi Motors* and *Green Tree* is applicable to solely state claims remains open and is likely to remain so even after *Amex IV* is decided.²⁰⁴ While this question does not seem controversial now, its answer will become increasingly relevant as *Green Tree*’s “vindication of statutory rights” analysis is increasingly used.²⁰⁵

B. *The Second Circuit’s Application of Green Tree*

The Second Circuit correctly adopted and perpetuated *Green Tree*’s reasoning and holding in the *Amex* series. The Second Circuit was bound to follow existing Supreme Court precedent laid out by *Mitsubishi Motors*, *Green Tree*, and other “vindication of statutory rights” analysis cases that have not been overruled or overturned. *Concepcion*’s holding, as well as *Coneff*’s, is rooted strictly in preemption; it examined a situation in which the FAA faced off against a state contract law doctrine—unconscionability—that led a court to decline to enforce an arbitration agreement.²⁰⁶ In the *Amex* series, the Second Circuit juggled two federal statutes, the FAA and the Sherman Act, which in combination led to incongruent results. Thus, a preemption analysis and *Concepcion*’s holding were simply inapplicable to the *Amex* series’ facts.²⁰⁷ Since neither *Mitsubishi Motors* nor *Green Tree* were overturned by *Concepcion* or any other decision, the Second Cir-

²⁰³ *Id.*

²⁰⁴ While the Supreme Court could surely opine on the answer to this question, any guidance would be strictly dicta as this question is not at issue in the *Amex* series.

²⁰⁵ For a more in-depth discussion of this issue, see Gilles & Friedman, *supra* note 65, at 647–52.

²⁰⁶ See *supra* notes 78–84 and the accompanying text; *Coneff*, 673 F.3d at 1157–59.

²⁰⁷ The same is true for *Stolt-Nielsen*’s holding, discussed *supra* notes 48–58 and the accompanying text, which is simply outside the scope of the *Amex* series facts.

cuit is still bound to follow the precedent set out in these cases.²⁰⁸ Accordingly, the Second Circuit, following *Green Tree*, in the *Amex* series found that the plaintiffs successfully supported their claim that the arbitral forum was prohibitively expensive such that an order to compel arbitration would preclude them from vindicating their statutory rights.²⁰⁹ Thus, the Second Circuit correctly applied the existing precedent set forth in these cases both pre-*Concepcion* (in *Amex II*) and post-*Concepcion* (in *Amex III* and *Amex IV*).²¹⁰

C. Deforestation—Limitations on *Green Tree*

The Supreme Court should affirm the Second Circuit in the *Amex* series because its holding is rather narrow in application and will only be available to an ever-decreasing number of plaintiffs. Over time, businesses will surely look to incorporate contractual provisions that make arbitration agreements more “pro-plaintiff” to protect against the application of *Green Tree* to potential claims. Companies, at least in the consumer context, are also taking many of these claims in-house, finding that fierce competition in the marketplace has made customer service increasingly important. Nevertheless, in the select situations in which *Green Tree* will come into play, there is no reason to find that the lower courts are incapable of applying the “vindication of statutory rights” analysis without stripping the benefits of arbitration.

Seen to be extremely effective in both *Concepcion* and *Coneff*, companies will follow AT&T’s lead and seek to incorporate fee-shifting and “bounty” provisions to prevent the application of *Green Tree*’s “vindication of statutory rights” analysis by ensuring that the arbitral forum is not “prohibitively expensive.”²¹¹ A basic fee-shifting provision allows the costs of a claim brought in arbitration (likely under a company’s mandatory arbitration agreement) to be recoverable by a prevailing plaintiff.²¹² Under a “bounty

²⁰⁸ See *supra* note 163 and the accompanying text; This idea was explicitly supported by the Ninth Circuit in *Coneff*, finding that “it “do[es] not read *Concepcion* to be inconsistent with *Green Tree* and similar cases.” *Coneff*, 673 F.3d at 1158.

²⁰⁹ See *supra* notes 145–147 and the accompanying text.

²¹⁰ See *supra* Part III.A.

²¹¹ See Gilles & Friedman, *supra* note 65, at 644.

²¹² *Id.* (citing Weil, Gotshal & Manges LLP, Second Circuit Strikes Down Class Arbitration Provisions in *In re American Express Merchants Litigation* *3 (Feb 26, 2009), available at http://www.weil.com/files/upload/WeilBriefing_LitReg_090226.pdf (visited Jan 20, 2013) (“Another

clause,” an individual plaintiff is provided a lump cash sum “if [he or she] receive[s] an arbitration award superior to defendant’s final pre-award offer.”²¹³ Both of these provisions were included in the contracts at issue in *Concepcion* and *Coneff* that touted a “bounty clause” entitling plaintiffs to a lump sum of \$7,500 and double attorney’s fees.²¹⁴ In the face of these two provisions, it would be nearly impossible to argue that arbitration is “prohibitively expensive,” which was a key concern to the Second Circuit as seen in the *Amex* series.²¹⁵ Moreover, companies could (and likely would) apply these clauses to all types of claims, including those that arise under federal statutory rights. Again, with these clauses in play, it would be difficult to argue that the arbitral forum prevents a claimant from vindicating their statutory rights—rendering *Green Tree* inapplicable.²¹⁶ While it is clear that it may not be worth a consumer’s time to actually pursue these claims, these four provisions together ensure that any claimant with a viable claim could be made whole.²¹⁷ While these pro-plaintiff provisions may seem beneficial to plaintiffs, their practical effect is anything but. When paired with class action waiver clauses and mandatory arbitration agreements, these agreements create a four-headed monster that guards a company from legal liability.²¹⁸

option for businesses to consider, to the extent they wish to increase the possibility that their class arbitration waiver provisions will be enforceable under *In re American Express*, is the inclusion of a fee-shifting provision for attorneys’ fees and expert costs.”)).

²¹³ *Id.* at 644–45.

²¹⁴ *Concepcion*, 131 S. Ct. at 1744.

²¹⁵ Gilles & Friedman, *supra* note 65, at 644.

²¹⁶ *See id.*

²¹⁷ For example, imagine an individual with a legitimate claim against their cellular phone provider for illegally charging them a one-dollar “fee” upon activation of their cellular phone. Following the mandatory arbitration clause and the class action waiver, this individual would only be able to bring this claim in individual arbitration with the provider. After reading the provider’s website on how to bring their claim, filling out a form or two, making a few phone calls, and sending some e-mails, the individual takes the required steps to initiate the claim in arbitration. Following the fee shifting provision, the cellular phone provider pays all the fees and expenses that arise in the arbitration. After a proceeding, the arbitrator finds the individual had a valid claim and awards the individual one dollar. While this is an option for the individual, which indeed does make them whole (i.e., they are put in the same position they were before the provider illegally charged them the one dollar “fee”), it is unlikely that it is worth the individuals time to do this. Therefore, the majority of people, including this hypothetical individual, would simply not bring this claim. *See supra* note 64.

²¹⁸ *See supra* notes 61–64 and the accompanying text; Gilles & Friedman, *supra* note 65, at 645–46 (“Bounty and fee-shifting clauses are plainly intended to avoid liability and not to select an alternative forum for the resolution of disputes. Indeed, this is the whole purpose of mandatory arbitration clauses in consumer and employment contracts.”).

Companies are also applying the “killing them with kindness” tactic by taking a more hands-on customer-service approach to nip these claims at the bud, rather than resorting to arbitration. Consumers today often bring these arbitration-eligible claims by simply calling a customer service number and asking for informal relief.²¹⁹ “For example, [AT&T] ‘dispensed over \$1.3 billion in credits [to customer’s accounts] for customer concerns and complaints’ between February 2007 and January 2008.”²²⁰ Following this same concept, credit card companies often engage in “chargebacks,” in which the credit card provider reverses charges made on a customer’s card if a purchased product or service did not meet the consumer’s expectations.²²¹ There are an estimated thirty million “chargebacks” per year in the United States,²²² totaling “conservatively” fifteen billion dollars annually.²²³

Despite companies’ best efforts, there will be cases that fall under the shade of *Green Tree* and require a lower court to engage in a “vindication of statutory rights” analysis when examining an arbitration agreement. The lower courts are well-equipped to handle such a task. However, courts should be cautious to strike the proper balance between the need to provide a forum that allows individuals to vindicate their statutory rights under *Green Tree* and the need to follow the FAA’s overall push in favor of enforcing arbitration agreements.²²⁴ Being privy to the intricacies and facts of each case, a lower court is in the position to achieve such a balance in an effective manner. Meanwhile, affirming the Second Circuit’s holding in the *Amex* series would allow the Supreme Court to set forth a template for the lower courts’ adjudication of these types of claims.

²¹⁹ Sternlight, *supra* note 28, at 102.

²²⁰ *Id.* at 102 n.85 (citing Opening Brief of AT&T Mobility LLC at 10, Laster et al. v. AT&T Mobility LLC, No. 08-56394 (9th Cir. Jan. 5, 2009), 2009 WL 2494186).

²²¹ *Id.* at 102.

²²² *Id.* (citing Neil M. Peretz, *The Single Euro Payment Area: A New Opportunity for Consumer Alternative Dispute Resolution in the European Union*, 16 MICH. ST. J. INTL. L. 573, 585 (2008) (citing Mark Betz, Chargebacks and Consumer Behavior, TRANSACTION WORLD (Oct. 2003), <http://web.archive.org/web/20050323104030/http://www.transactionworld.net/articles/2003/October/coverstory.asp>).

²²³ *Id.* (citing TOM CAIN, RISKY BUSINESS: BEST PRACTICES FOR MANAGING CARDHOLDER DISPUTES AND CHARGEBACK PROCESSING IN CHALLENGING TIMES 2 (2008), available at <http://www.tsys.com/Downloads/upload/TSYS-WP-DisputeChargeback.pdf>).

²²⁴ Courts should look to temper discovery and other procedures that directly affect the cost of litigation.

V. CONCLUSION

Throughout arbitration's history, courts have stayed true to Congress' intent when it first drafted the FAA, striving to place arbitration agreements on an equal footing with other contracts.²²⁵ However, the rise of adhesion contracts and complex arbitration agreements with powerful contractual provisions, including class action waivers, mandatory arbitration and bounty clauses, and fee-shifting provisions, have pushed arbitration agreements into the limelight. Courts must remain diligent in policing the use of arbitration agreements in a wide array of contexts. *Green Tree's* "vindication of statutory rights" analysis is the only arrow left in the quiver for courts to combat a particularly abusive use of arbitration agreements and stands as a true savior of aggregate litigation. With this in mind, the Supreme Court should affirm the Second Circuit's holding in the *Amex* series and usher in a new era of federal arbitration law under *Green Tree*.

²²⁵ See *Gilmer*, 500 U.S. at 24.