

## After Class: Aggregate Litigation in the Wake of *AT&T Mobility v Concepcion*

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*Class actions are on the ropes. Courts in recent years have ramped up the standards governing the certification of damages classes and created new standing requirements for consumer class actions. Most recently, in Wal-Mart v Dukes, the Supreme Court articulated a new and highly restrictive interpretation of the commonality requirement of Rule 23(a). But all of this pales in comparison to the Court's April 2011 decision in AT&T Mobility v Concepcion, broadly validating arbitration provisions containing class action waivers. The precise reach of Concepcion warrants close scrutiny. Our analysis suggests that following Concepcion, some plaintiffs will be able to successfully challenge class waivers under certain circumstances. Also, the new Consumer Financial Protection Bureau—if it is not stillborn at the hands of hostile congressional midwives—is likely to eliminate some class action waivers in the financial services field. But most class cases will not survive the impending tsunami of class action waivers. And as this great mass of consumer protection, antitrust, employment, and other cases is swept out to sea, the question arises: What or who can fill the resulting enforcement gap?*

*And here, we would hope to see the “private attorney general” role assumed by class action lawyers over the past several decades give way to a world in which state attorneys general make unprecedented use of their *parens patriae* authority. Insulated from the threats posed by class action waivers and restrictive class action standing doctrine, attorneys general are now uniquely positioned to represent the interests of their citizens in the very consumer, antitrust, wage-and-hour, and other cases that have long provided the staple of private class action practice. And to tackle complex cases, underfunded attorney general offices will make use of the private class action lawyers who have acquired expertise in originating, investigating, and prosecuting class cases. Of course, there are political risks here—given the model’s dependency on contingent fee arrangements—but there are also substantial political benefits, as attorneys general around the country begin to take leadership positions in the sort of complex, big-ticket cases that are likely to contribute meaningfully to state coffers—and redress the injuries of consumers and employees who would otherwise have no recourse in a post-Concepcion world.*

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## INTRODUCTION

There is a deep tradition of private involvement in the enforcement of public laws in America. Most famously, appropriating the English common law *posse comitatus*, we made the “sheriff’s posse” a ubiquitous and signature feature of law enforcement in the postbellum western and southern United States.<sup>1</sup> And it wasn’t a sudden taste for centralized public enforcement that drove the posses out of business; rather, it was private entrepreneurs—principally Allan Pinkerton, whose eponymous private agency rightly inferred from the proliferation of posses that local governments were underfunded and overmatched. Supplanting loosely organized groups of private citizens with tightly controlled private employees, Pinkerton thrived, developing many of the most

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<sup>1</sup> See Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 Yale L & Pol Rev 383, 389, 394 (2003).

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important tools of modern law enforcement, such as undercover work, and spawning the private detective industry.<sup>2</sup>

If less cinematic, the role of private actors in the enforcement of public *civil* laws has been no less robust. Enacted during the Civil War, the False Claims Act<sup>3</sup> (FCA) revived the ancient English practice of *qui tam*, and the use of “bounty,” as a way to enlist whistleblowers and private lawyers to ferret out frauds against the government.<sup>4</sup> A similar concept is at work in the Civil Rights Act of 1964,<sup>5</sup> the citizen-suit provisions of US environmental law,<sup>6</sup> and, for that matter, throughout the entire panoply of federal and state remedial statutes that incent private enforcement with attorney’s fee provisions.<sup>7</sup> Over the past fifty years in particular, we have come to assume, quite correctly, that private actors will be the frontline enforcers in actions redressing broadscale securities fraud, consumer

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<sup>2</sup> See Frank Morn, “*The Eye That Never Sleeps*: A History of the Pinkerton National Detective Agency 151–63 (Indiana 1982).

<sup>3</sup> Act of Mar 2, 1863, 12 Stat 696, codified as amended at 31 USC §§ 3729–33.

<sup>4</sup> See 12 Stat at 698 (noting that where the government has been defrauded a “suit may be brought and carried on by any person, as well for himself as for the United States”). The FCA, which authorizes the government to bring civil actions against anyone who presents a false money claim, contains a *qui tam* enforcement provision, whereby private citizens with independent knowledge of fraud perpetrated against the government may sue to recover the fruits of the fraud. See 31 USC § 3730(b)(1). Under the *qui tam* provisions of the FCA, any person may bring a civil action “for the person and for the United States Government” to recover damages and penalties. See 31 USC § 3730(b)(1).

<sup>5</sup> Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 2000e et seq. In one of the first cases construing the 1964 Act, the Supreme Court held, “A [public accommodations] suit is thus private in form only. . . . If [a plaintiff] obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” *Newman v Piggie Park Enterprises, Inc*, 390 US 400, 401–02 (1968) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.”).

<sup>6</sup> Environmental citizen-suit provisions generally authorize any “citizen,” defined as “a person or persons having an interest which is or may be adversely affected,” to commence suit to enforce statutory requirements against violators, or to require the government to perform a mandatory duty under the statute. See, for example, 33 USC § 1365(g) (defining “citizen” for the purposes of the Clean Water Act). Citizen-suit provisions were first included in the Clean Air Act. See Clean Air Amendments of 1970 § 304, Pub L No 91-604, 84 Stat 1676, 1706, codified at 42 USC § 7604 (authorizing private citizens to sue other persons or the government to enforce the emissions standards established by the Clean Air Act). For a comprehensive listing of environmental citizen-suit provisions, see Cass Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich L Rev 163, 165 n 11 (1992).

<sup>7</sup> See, for example, The Civil Rights Attorney’s Fees Awards Act of 1976, Pub L No 94-559, 90 Stat 2641, codified at 42 USC § 1988. See also Myriam Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 Colum L Rev 1384, 1420–21 (2000).

fraud and deceptive trade practices, antitrust violations (outside the merger context), civil rights violations, and many other areas.<sup>8</sup>

We expect no less. Private involvement in public civil law enforcement is deeply embedded in our politics and culture. State and local enforcement agencies in particular (and many federal ones, too<sup>9</sup>) are funded and organized on the clear, if largely unspoken, understanding that a vigorous and well-stocked private bar sits ready to deploy its ample resources to redress frauds and other harms perpetrated upon the general public.<sup>10</sup> One can imagine a world where public agencies assume primary (or even sole) responsibility for the detection, investigation, and litigation of public frauds, as well as the collection of ill-gotten gains and the distribution of compensation to injured persons. But then, as any state attorney general (AG) will tell you, one would be imagining a very different world—one that provides orders of magnitude more resources to state and local enforcement agencies.

In modern times, the principal means whereby private actors seek to redress public harms is the class action—a device that has become steeped in controversy. The issue is not so much the effectiveness of the class tool; after all, class actions have recovered untold tens of billions of dollars for injured parties, establishing deterrents that critics often complain are *overly* effective.<sup>11</sup> Rather, the *cri de coeur* of the class action critics is “agency costs”—and more specifically, the concern that class practice allows private lawyers to assume the representation of vast sets of absent plaintiffs and to use that power, monitored by no one except overworked judges, as a club with which to extract massive settlements from risk-averse corporations.<sup>12</sup>

Merited or not, the agency cost critique has certainly ushered in a backlash, spurring—among other things—significant restrictions in

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<sup>8</sup> See Pamela H. Bucy, *Private Justice*, 76 S Cal L Rev 1, 12–13 (2002).

<sup>9</sup> See Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 Conn Ins L J 107, 126–27 (2005) (“Because the SEC lacks adequate resources to effectively police the national securities market, supplemental enforcement is essential to achieve an appropriate level of deterrence.”).

<sup>10</sup> See Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 Ga St U L Rev 663, 664 (2008) (“Recognizing the resource limitations of government agencies, many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws. Many of these laws also provide class actions and statutory damages which encourage consumers to act as ‘private attorneys general.’”).

<sup>11</sup> See Myriam Gilles and Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U Pa L Rev 103, 155–59 (2006) (discussing academic critiques of class actions).

<sup>12</sup> See *id.*

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the rules governing the certification of both damages and injunctive classes, as well as the creation of new limitations upon standing, particularly in consumer class actions.<sup>13</sup>

And then there is the *coup de grace* administered to consumer class actions by a 5–4 Supreme Court this past term in *AT&T Mobility LLC v Concepcion*.<sup>14</sup> All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing edict that companies with possible exceptions that warrant close scrutiny may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts with consumers (or employees or others). As we presaged in a 2005 article,<sup>15</sup> the Supreme Court’s ruling suggests that many—indeed, most—of the companies that touch consumers’ day-to-day lives can and will now place themselves beyond the reach of aggregate litigation.<sup>16</sup> These companies include telephone companies, internet service providers, credit card issuers, payday lenders, mortgage lenders, health clubs, nursing homes, retail banks, investment banks, mutual funds, and the sellers of all manner of goods and services. And that is just consumers. Employees, too, will find themselves unable to band together and seek legal redress.<sup>17</sup>

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<sup>13</sup> See John C. Coffee Jr and Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002–2007*, 8 BNA Class Action Litig Rep 787 (Oct 26, 2007) (“[F]or better or worse, it is today clear that the tide has turned against class certification, and new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic.”).

<sup>14</sup> 131 S Ct 1740 (2011).

<sup>15</sup> Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich L Rev 373, 425–27 (2005).

<sup>16</sup> In January 2012, a private equity fund called the Carlyle Group sought to include a class action waiver in its charter in advance of an initial public offering in order to immunize it from future securities class actions. See Carlyle Group LP, *Amendment No 2 to Form S-1 Registration Statement under The Securities Act of 1933* (Securities and Exchange Commission Jan 10, 2012), online at <http://www.sec.gov/Archives/edgar/data/1527166/000095012312000638/w83442a2sv1za.htm#204> (visited May 2, 2012). The fund ultimately withdrew the “controversial” waiver under “pressure from investors and regulators,” but future efforts to embed class action waivers in IPO registration materials may become more commonplace and less controversial. Kevin Roose, *Carlyle Drops Arbitration Clause from I.P.O. Plans*, NY Times DealBook (Feb 3, 2012), online at <http://dealbook.nytimes.com/2012/02/03/carlyle-drops-arbitration-clause-from-i-p-o-plans/> (visited May 2, 2012). See also John C. Coffee Jr, *The Death of Stockholder Litigation?*, Natl LJ (Feb 13, 2012), online at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202541959250&The\\_death\\_of\\_stockholder\\_litigation&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202541959250&The_death_of_stockholder_litigation&slreturn=1) (visited May 2, 2012) (suggesting that other companies are considering adding class action waivers, and “a horde of managements [will] follow the first company to succeed in including such a provision”).

<sup>17</sup> Chris Bourgeacq, a labor and employment attorney for AT&T Services, Inc, advanced this argument shortly after *Concepcion* was decided:

[In a]ffirming the broad preemptive scope of the FAA, the Court’s decision will no doubt reach beyond just consumer disputes. . . . With courts approving arbitration of virtually

So where does this leave civil law enforcement in the United States?

One critically important dimension to this question is the proper scope of the *Concepcion* decision itself. In other words, under what circumstances will the imposition of class action waivers in form agreements be rejected as unenforceable? What *Concepcion* tells us beyond doubt is that a broad state law rule holding unenforceable class action waivers in consumer adhesion contracts is itself preempted by the Federal Arbitration Act<sup>18</sup> (FAA). But *Concepcion* tells us little about what happens when a claimant can prove as a factual matter that an arbitration clause containing a class action waiver precludes her from being able to vindicate rights that she would otherwise be able to vindicate. Here, a too-broad reading of *Concepcion* may collide with Supreme Court jurisprudence that provides agreements to arbitrate federal statutory claims are fully enforceable, but only “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”<sup>19</sup> And as we discuss, a similar precept may apply in many state law cases.

A closely related question is whether any state or federal legislation is likely to restore the pre-*Concepcion* status quo. A federal bill that would bar the use of arbitration clauses in most consumer contracts was introduced immediately after *Concepcion*

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any employment-related dispute, employers should immediately revisit their arbitration policies and agreements to determine whether they wish to carve out arbitration of consolidated and class claims. Doing so could possibly insulate an employer against a class action in any forum.

*FAA Bars States from Restricting Class-Action Waivers in Arbitration Agreements*, CCH Employment Law Daily (Wolters Kluwer Law & Business Apr 28, 2011), online at <http://www.employmentlawdaily.com/index.php/news/faa-bars-states-from-restricting-class-action-waivers-in-arbitration-agreements/> (visited Jan 7, 2012). But see *Equal Employment Opportunity Commission Compliance Manual*, Notice 915.002 (July 10, 1997), reprinted in *Employment Practices Guide* at 6169–77 (CCH 2009) (taking the position that an employee cannot waive the right to file an administrative complaint, nor can agencies be required to waive their right to exercise statutory rights in bringing enforcement actions). See also *D.R. Horton, Inc., and Michael Cuda*, 2012 WL 36274, \*17 (NLRB 2012) (striking down arbitration agreements imposed on employees as a condition of employment that prohibit both class actions in court and class-wide arbitration as a violation of Section 7 of the National Labor relations Act).

<sup>18</sup> Pub L No 68-401, 43 Stat 883, codified as amended at 9 USC § 1 et seq.

<sup>19</sup> *Green Tree Financial Corp-Alabama v Randolph*, 531 US 79, 90–91 (2000), quoting *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20, 28 (1991), quoting *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 637 (1985) (stating that high arbitration costs might render an arbitration agreement unenforceable).

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was decided.<sup>20</sup> But similar bills have died in committee before, and the prospects for this one appear no brighter.<sup>21</sup> In many states, meanwhile, legislation is surely feasible, but effectiveness is another matter. In our view, blunt attempts by states to evade *Concepcion* (for example, by making class action rights unwaivable in consumer contracts) are doomed, while more nuanced legislation mandating case-by-case analysis appears legally and politically viable.

A more sweeping solution (or threat, depending on one's perspective) to *Concepcion* is posed by the new Consumer Finance Protection Bureau (CFPB), which is charged with studying the effects of arbitration clauses in consumer financial contracts and then, if warranted, enacting regulations that would restrict or even prohibit the use of such clauses.<sup>22</sup> If exercised—and if upheld against inevitable legal challenge—CFPB regulations would undercut the use of class waivers by much of the financial services industry. Similar power provided to the SEC may likewise undercut the ability of funds and brokerages to employ class waivers.

So to recap: some federal statutory claims, and arguably some state claims, will likely withstand *Concepcion* by relying on factual case-by-case showings; state legislatures have some room to enact nuanced statutes that will allow some state cases to survive *Concepcion*; and there is some possibility that the new CFPB—if it is not stillborn at the hands of hostile congressional midwives—will eliminate some class action waivers in the financial services field. Collectively, that is not nothing. But most class cases will not survive the impending tsunami of class action waivers. And as this great

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<sup>20</sup> After *Concepcion* was decided, Senators Al Franken and Richard Blumenthal, along with Congressman Hank Johnson, reintroduced the Arbitration Fairness Act, which would prohibit class waivers in all consumer, employment, and civil-rights-related contracts. See Arbitration Fairness Act of 2011, S 987, 112th Cong, 1st Sess, in 157 Cong Rec S 2929 (May 12, 2011).

<sup>21</sup> Similar bills seeking to amend the FAA to provide that “[n]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—(1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power” were introduced in 2007 and 2009. See Arbitration Fairness Act of 2009, HR 1020 § 4, 111th Cong, 1st Sess, 155 Cong Rec H 1517 (daily ed Feb 12, 2009) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, S 1782 § 4, 110th Cong, 1st Sess, 153 Cong Rec S 9144 (daily ed July 12, 2007) (same); Arbitration Fairness Act of 2007, HR 3010 § 4, 110th Cong, 1st Sess, 153 Cong Rec H 7774 (daily ed July 12, 2007) (same). See also Editorial, *Gutting Class Action*, NY Times A26 (May 13, 2011) (noting that the chances of federal legislation overriding *Concepcion* “aren’t great in the current political environment”).

<sup>22</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) § 1028, Pub L No 111-203, 124 Stat 1376, 2003–04 (2010), codified in relevant part at 12 USC § 5518.

mass of consumer protection, antitrust, employment, and other cases is swept out to sea, the question arises: What or who can fill the resulting enforcement gap?

And here, we believe the American tradition of private involvement in the enforcement of public law will supply the answer. Just as the posse gave way to the Pinkertons, we expect that the dominant contemporary modality of private participation in civil law enforcement—the modern class action—will give way to something else.

In our view, the “private attorney general” role assumed by class action lawyers over the past several decades should give way to a world in which state attorneys general make broad use of their *parens patriae* authority—far greater use than they have in the past—to represent the interests of their citizens in the very consumer, antitrust, wage-and-hour, and other cases that have long provided the staple of class action practice.

And to tackle complex cases, we would hope to see underfunded AG offices making use of the lawyers who have acquired expertise in originating, investigating, and prosecuting class actions, as well as financing them. To be sure, AGs will come under fire in some quarters for leveraging the private bar to generate, prosecute, and finance cases; for blurring the lines between class actions and *parens patriae*. But the critique lacks substance. As much as *parens patriae* actions in a post-*Concepcion* world may come to resemble class actions, critics should be significantly mollified by the monitoring function that AGs may bring to bear. It is the lack of effective monitoring—the “agency” problem—that underlies virtually all of the criticisms of class practice. The active presence of a responsible elected official here, as both cocounsel and client, vanquishes the agency critique in our view.

Deployed correctly, the model makes for good policy and good politics. Without AG involvement, consumers and employees injured by an illegal practice will often have no recourse in a post-*Concepcion* world. So there is a compelling rationale for action. Meanwhile, by leveraging the private bar, the state AGs can recoup vast amounts of money for their citizens and reap commensurate political credit.

Of course, there are stiff challenges here. The corporate interests that decimated class actions, and the academics and politicians sympathetic to their positions, will be geared up to launch very similar attacks on *parens patriae* cases. And while current doctrine is largely inhospitable to the expected legal attacks, as we

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show, the political attacks may prove more formidable. Fee arrangements with private counsel present especially rich political targets, making it imperative to institute transparent contracting processes and, probably, some measure of fee caps. Watchful supervisory control over the litigation will be critical. And AGs will have to be vigilant in their fundraising activities to avoid any element of “pay to play” in the donations they accept from law firms or groups of lawyers. Meanwhile, the corporate lobby is free to pool unlimited donations to oppose activist AGs, particularly in the wake of *Citizens United v Federal Election Commission*.<sup>23</sup>

Still, as the class waivers embraced by the *Concepcion* Court drive significant litigation opportunities into AGs offices around the country, we think the stakes are sufficiently high that all of these challenges are likely to be managed. We begin, then, with *Concepcion*.

### I. THE ROAD TO *AT&T MOBILITY V CONCEPCION*

Six years ago, we predicted that class action waivers embedded in arbitration provisions, if not constrained by legal challenges, would threaten the viability of most forms of aggregate litigation.<sup>24</sup> We pointed out that the waiver is capable of reaching all class actions based on any sort of contractual relationship between the plaintiffs and the defendant—a condition that is satisfied in all federal antitrust class actions, where plaintiffs must be “direct purchasers,”<sup>25</sup> the vast majority of consumer cases, employment and Employee Retirement Income Security Act of 1974<sup>26</sup> (ERISA) cases, and indeed just about all class actions other than “fraud on the market” securities fraud actions.<sup>27</sup> We reasoned that, absent broad legal invalidation, it is inevitable that the waiver will find its way from the agreements of “early adopter” credit card, telecom, and e-commerce companies into virtually all contracts that could even remotely form the predicate of a class action someday. After all, the incremental burden of including magic words in dispute resolution boilerplate—or even on point-of-sale purchase receipts or box-stuffer notices—is surely minimal in relation to the benefit of removing oneself from potential exposure to aggregate litigation. Ultimately, if legal challenges to the waiver are sufficiently

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<sup>23</sup> 130 S Ct 876, 913 (2010).

<sup>24</sup> See Gilles, 104 Mich L Rev at 425–27 (cited in note 15).

<sup>25</sup> See *Illinois Brick Co v Illinois*, 431 US 720, 729 (1977).

<sup>26</sup> Pub L No 93-406, 88 Stat 829, codified at 29 USC § 1001 et seq.

<sup>27</sup> See Gilles, 104 Mich L Rev at 413–25 (cited in note 15).

vanquished, we concluded that transactional attorneys will someday face malpractice liability for *not* including the waiver in contracts—as a sort of standard vaccine, like a rabies shot.

All of these dire predictions, of course, were contingent on the failure of legal challenges to the class action waiver. And in 2005, we focused on two principal legal challenges to the waiver—one that had begun to play out in the case law at the time, and a second that we developed and that some courts have embraced in the intervening years.

#### A. First-Wave Challenges: State Law Unconscionability

The “first wave” challenge to class action waivers was grounded in state unconscionability law—that the inclusion of class action waivers in standard adhesion contracts renders the agreements so one-sided as to satisfy the common law contract doctrine prohibiting “unconscionable” agreements.<sup>28</sup> Under the FAA’s saving clause, a party may oppose arbitration on such “grounds as exist at law or in equity for the revocation of any contract,” and fifteen years ago, the Supreme Court observed that state-law unconscionability provides one such ground.<sup>29</sup>

As of 2005, a handful of courts, principally in California, had blown the dust off their largely dormant unconscionability jurisprudence and invalidated class action waivers.<sup>30</sup> Most prominently, the California Supreme Court in *Discover Bank v Superior Court*<sup>31</sup> focused on the “important role of class action remedies in California law” as “the only effective way to halt and redress [consumer] exploitation,” and held that class action waivers in consumer adhesion contracts are unconscionable because they “may operate effectively as exculpatory clauses that are contrary to public policy.”<sup>32</sup>

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<sup>28</sup> See id at 399–404 (discussing first-wave challenges to class action waivers and noting that “[b]asic contract law directs that a contractual provision be deemed unenforceable and unconscionable if it is both procedurally and substantively unconscionable: ‘the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results’”), quoting *Discover Bank v Superior Court*, 113 P3d 1100, 1108 (Cal 2005).

<sup>29</sup> See *Doctor’s Associates, Inc v Casarotto*, 517 US 681, 687 (1996) (holding that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2” of the FAA).

<sup>30</sup> See Gilles, 104 Mich L Rev at 401–02 & nn 140–50 (cited in note 15).

<sup>31</sup> 113 P3d 1100 (Cal 2005).

<sup>32</sup> Id at 1106, 1108.

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*Discover Bank* ushered in a flood of state court decisions invalidating class action waivers on grounds of unconscionability.<sup>33</sup> In state appellate courts around the country, public interest law firms such as Public Justice (in efforts led by the tireless Paul Bland) and Public Citizen lent their expertise to plaintiffs and won a surprising string of victories.<sup>34</sup> Whereas at the time of our 2005 article, most courts to address the issue had rejected the unconscionability argument and only California had fully embraced it,<sup>35</sup> by 2011 at least fourteen states had ruled class action waivers unenforceable on these broad public policy grounds. By the time of the *Concepcion* decision, the trend was unmistakable: class action waivers were being defeated in courts around the country.

#### B. Second-Wave Challenges: Vindication of Federal Statutory Rights

The “second wave” challenge to class waivers asserts that the waiver’s implicit prohibition against spreading the costs of litigation across multiple claimants in collective litigation precludes the individual plaintiff from being able to vindicate her federal statutory rights. Unlike the unconscionability challenge,<sup>36</sup> this argument takes

<sup>33</sup> State and federal courts finding class action waivers unconscionable under state law: *Cooper v QC Financial Services, Inc*, 503 F Supp 2d 1266, 1290 (D Ariz 2007) (Arizona law); *Shroyer v New Cingular Wireless Services, Inc*, 498 F3d 976, 985 (9th Cir 2007) (California law); *Caban v J.P. Morgan Chase & Co*, 606 F Supp 2d 1361, 1372 (SD Fla 2009) (Delaware law); *Dale v Comcast Corp*, 498 F3d 1216, 1224 (11th Cir 2007) (Georgia law); *Kinkel v Cingular Wireless LLC*, 857 NE2d 250, 274 (Ill 2006); *Schnuerle v Insight Communications Company, LP*, 2010 WL 5129850, \*7 (Ky); *Skirchak v Dynamics Research Corp*, 508 F3d 49, 59–60 (1st Cir 2007) (Massachusetts law); *Ruhl v Lee’s Summit Honda*, 322 SW3d 136, 139–40 (Mo 2010); *Fiser v Dell Computer Corporation*, 188 P3d 1215, 1221 (NM 2008); *Muhammad v County Bank of Rehoboth Beach, Delaware*, 912 A2d 88, 100–01 (NJ 2006); *Tillman v Commercial Credit Loans, Inc*, 655 SE2d 362, 373 (NC 2008); *Schwartz v Alltel Corporation*, 2006 WL 2243649, \*6–7 (Ohio App); *Vasquez-Lopez v Beneficial Oregon, Inc*, 152 P3d 940, 953 (Or Ct App 2007); *Thibodeau v Comcast Corporation*, 912 A2d 874, 887 (Pa Super Ct 2006); *Herron v Century BMW*, 693 SE2d 394, 400 (SC 2010); *Scott v Cingular Wireless*, 161 P3d 1000, 1009 (Wash 2007); *Al-Safin v Circuit City Stores, Inc*, 394 F3d 1254, 1261–62 (9th Cir 2005) (Washington law); *Wisconsin Auto Title Loans, Inc v Jones*, 714 NW2d 155, 176 (2006) (Wisconsin law).

<sup>34</sup> See, for example, *Felts v CLK Management, Inc*, 254 P3d 124, 137–39 (NM App 2011); *McKee v AT&T Corp*, 191 P3d 845, 397–98 (Wash 2008); Emma Cheuse, *Alan Morrison Supreme Court Assistance Project Cert. Petitions of Public Interest; April 20, 2007 Conference 28* (Public Citizen Litigation Group Apr 20, 2007), online at <http://www.citizen.org/documents/scapwatch20070420.pdf> (visited Jan 2, 2011).

<sup>35</sup> Gilles, 104 Mich L Rev at 400 n 139 (cited in note 15) (listing decisions that upheld class action waivers against the unconscionability challenge).

<sup>36</sup> *In re American Express Merchants’ Litigation (Amex I)*, 554 F3d 300, 320 (2d Cir 2009) (“We do not follow these cases because they all rely on findings of unconscionability under

as its starting point the Supreme Court's recognition in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*<sup>37</sup> that federal statutory claims are fully arbitrable, but only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."<sup>38</sup> Applying this precept, the Supreme Court in *Green Tree Financial Corp-Alabama v Randolph*<sup>39</sup> recognized that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,"<sup>40</sup> and it established a test: "[W]here . . . 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."<sup>41</sup>

Writing in 2005, we observed that plaintiffs in *In re American Express Merchants' Litigation*<sup>42</sup> (*Amex*) were using this *Mitsubishi-Randolph* line of reasoning to fashion a "second wave" attack on class waivers.<sup>43</sup> The plaintiffs in *Amex*, a complex antitrust case, submitted undisputed evidence that the cost of establishing liability would exceed several hundred thousand dollars—most of it expert economists' fees, which are not recoverable under the Clayton Act's<sup>44</sup>

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state law, while we have relied here on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.").

<sup>37</sup> 473 US 614 (1985).

<sup>38</sup> Id at 637–38. See also *Morrison v Circuit City Stores, Inc*, 317 F3d 646, 658 (6th Cir 2003) (en banc) ("The Supreme Court has made clear that statutory rights . . . may be subject to mandatory arbitration *only if* the arbitral forum permits the effective vindication of those rights.") (emphasis added); *Bradford v Rockwell Semiconductor Systems, Inc*, 238 F3d 549, 556 (4th Cir 2001):

[T]he appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.

<sup>39</sup> 531 US 79 (2000).

<sup>40</sup> Id at 90. See also *Booker v Robert Half International, Inc*, 413 F3d 77, 81 (DC Cir 2005) (construing *Randolph* to allow a party to "resist[ ] arbitration on the ground that the terms of the arbitration agreement interfere with the effective vindication of statutory rights," but that party "bears the burden of showing the likelihood of such interference," which "cannot be carried by 'mere speculation'").

<sup>41</sup> *Randolph*, 531 US at 92. See also Gilles, 104 Mich L Rev at 407 n 175 (cited in note 15) (listing cases following *Randolph* holding that statutory claims may be subjected to arbitration so long as the agreement at issue does not force plaintiffs to assume financial burdens so prohibitive as to "deter the bringing of claims").

<sup>42</sup> 2006 WL 662341, revd 554 F3d 300 (2d Cir 2009), cert granted, judgment vacated, 130 S Ct 2401 (2010), affd on remand, 634 F3d 187 (2d Cir 2011) (*Amex II*), affd, 667 F3d 204 (2d Cir 2012).

<sup>43</sup> See Gilles, 104 Mich L Rev at 407–08.

<sup>44</sup> Pub L No 63-212, 38 Stat 730 (1914), codified as amended at 15 USC §§ 12–27 and 29 USC §§ 52–53.

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fee shifting provisions, or under the rules of any arbitral body—while the median named plaintiff sought damages of roughly \$5,200.<sup>45</sup> Under the arbitration clause at issue in that case, with its class action waiver, plaintiffs thus argued that they could not “effectively vindicate [their] statutory cause of action in the arbitral forum.” As we wrote in the 2005 article:

The simple logic of this second-wave argument is that the collective action waiver—and particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals’ fees, and other disbursements—forces the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims. In the absence of the waiver, the claimant may spread these costs across thousands of coventurers (or have them advanced by lawyers, as happens in practice). In the presence of the waiver, these costs fall on her alone. And these costs, in a complex commercial case, will exceed the value of the recovery she is seeking.<sup>46</sup>

At the district court level, the *Amex* plaintiffs lost, as the court granted defendant’s motion to compel one-on-one arbitration.<sup>47</sup> But then, in 2006, the First Circuit decided *Kristian v Comcast*,<sup>48</sup> in which it endorsed the “second wave” argument, quoting the above excerpt to invalidate Comcast’s class action waiver provisions.<sup>49</sup> Specifically, the *Kristian* court found that the “sheer complexity” of an antitrust case required an intensive factual analysis and prohibitively expensive expert testimony. Because of the costs and legal intricacy involved, the court concluded that plaintiffs could not enforce their rights except on a class-wide basis.<sup>50</sup>

Then, in January 2009, the Second Circuit reversed the district court in *Amex I*.<sup>51</sup> In a decision authored by Judge Rosemary Pooler, the court held that *Randolph* was controlling and that plaintiffs had amply established that “arbitration would be prohibitively

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<sup>45</sup> *Amex I*, 554 F3d at 316–17 (describing expert report of economist Dr. Gary French, who concluded that “it would not be worthwhile for an individual plaintiff . . . 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”).

<sup>46</sup> Gilles, 104 Mich L Rev at 407 (cited in note 15).

<sup>47</sup> 2006 WL 662341, \*10 (SDNY).

<sup>48</sup> 446 F3d 25 (1st Cir 2006).

<sup>49</sup> Id at 55.

<sup>50</sup> See id at 59–61.

<sup>51</sup> 554 F3d 300, 319–20 (2d Cir 2009) (*Amex I*).

expensive”<sup>52</sup> so that “enforcement of the class action bar in the Card Acceptance Agreement ‘flatly ensures that no small merchant may challenge American Express’s tying arrangements under the federal antitrust laws.’”<sup>53</sup>

Secondarily, the court held that the class action waiver operates as a prospective waiver of liability, void as against clear public policy insofar as it “grant[s] Amex de facto immunity from antitrust liability by removing the plaintiffs’ only reasonably feasible means of recovery.”<sup>54</sup>

After *Amex I* was decided, the Supreme Court decided *Stolt-Nielsen SA v AnimalFeeds International Corp.*,<sup>55</sup> holding that where an arbitration clause is silent on the availability of class arbitration, the agreement cannot be construed to provide for aggregate procedures.<sup>56</sup> The Court then granted certiorari in *Amex I*, vacating the judgment and remanding the case to the Second Circuit “for further consideration in light” of the *Stolt-Nielsen* decision.<sup>57</sup> On remand, the Second Circuit in March 2011 reaffirmed its decision, reiterating in *In re American Express Merchants’ Litigation*<sup>58</sup> (*Amex II*) that “the record evidence before us establishes, as a matter of law, that the cost of plaintiffs’ individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.”<sup>59</sup>

### C. The *Concepcion* Decision

In April 2011, a 5–4 Court decided *AT&T Mobility v Concepcion*, reconfiguring in one stroke the law of class action waivers and the landscape of aggregate litigation practice in the United States.

<sup>52</sup> Id at 315, quoting *Randolph*, 531 US at 92.

<sup>53</sup> *Amex I*, 554 F3d at 319, quoting Brief and Special Appendix for Plaintiffs-Appellants, *In re American Express Merchants’ Litigation*, No 06-1871, \*17 (filed Sept 11, 2006) (available on Westlaw at 2006 WL 6198567).

<sup>54</sup> *Amex I*, 554 F3d at 320 (observing that the “public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action” could not be squared with an agreement that conferred de facto immunity from civil liability to American Express), quoting *Lawlor v National Screen Service Corp*, 349 US 322, 329 (1955).

<sup>55</sup> 130 S Ct 1758 (2010).

<sup>56</sup> See id at 1775, 1782 (finding “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” because “arbitration ‘is a matter of consent, not coercion’”), quoting *Volt Information Sciences, Inc v Board of Trustees of Leland Stanford Junior University*, 489 US 468, 479 (1989).

<sup>57</sup> *American Express Co v Italian Colors Restaurant*, 130 S Ct 2401, 2401 (2010) (memorandum opinion).

<sup>58</sup> 634 F3d 187 (2d Cir 2011).

<sup>59</sup> Id at 197–98.

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The facts are germane: In 2002, Vincent and Liza Concepcion responded to an advertisement for a “free” AT&T cell phone with the purchase of a two-year service contract. After learning that they had to pay \$30.22 in sales tax for the putatively free device, the Concepcions initiated a class action lawsuit. AT&T then moved to compel arbitration pursuant to the arbitration clause in its standard service agreement, which contained a class action waiver.<sup>60</sup> Notably, that clause further provided that AT&T will pay claimants a minimum of \$7,500 and twice their attorney’s fees if they obtain an arbitration award that exceeds AT&T’s final settlement offer.<sup>61</sup>

Stating that it was constrained to follow *Discover Bank*, the district court invalidated the class action waiver and directed class-wide arbitration.<sup>62</sup> But the court expressly observed that the arbitration procedures mandated by the contract were quite hospitable to small claimants,<sup>63</sup> and that “the \$7,500 premium functioned as ‘a substantial inducement for the consumer to pursue the claim in arbitration’ if a dispute was not resolved informally.”<sup>64</sup> The Ninth Circuit affirmed.<sup>65</sup>

The Supreme Court then granted certiorari and, in a decision authored by Justice Antonin Scalia, “consider[ed] whether the FAA

<sup>60</sup> *Concepcion*, 131 S Ct at 1744. The Court also explained that “[t]he contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ ‘individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.’” The contract further provided that “the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.” Id at 1744 & n 2.

<sup>61</sup> Id at 1744 (detailing the terms of the service agreement).

<sup>62</sup> *Laster v T-Mobile USA, Inc*, 2008 WL 5216255, \*14 (SD Cal).

<sup>63</sup> Id at \*10-11. The Court in *Concepcion*, considering the same contract, also noted several other elements of the agreement that it perceived to be in the interests of small claimants:

[T]he agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.

*Concepcion*, 131 S Ct at 1744.

<sup>64</sup> *Concepcion*, 131 S Ct at 1745, quoting *Laster*, 2008 WL 5216255 at \*11.

<sup>65</sup> *Laster v AT&T Mobility LLC*, 584 F3d 849, 855-57 (9th Cir 2009) (asserting that the *Discover Bank* ruling was a “refinement of the unconscionability analysis applicable to contracts generally in California,” and therefore did not discriminate against arbitration), quoting *Shroyer*, 498 F3d at 987 (finding that California contract law applies to arbitration, including the general contract defense of unconscionability). See also Cal Civil Code § 1670.5(a) (providing that courts may refuse to enforce any contract found “to have been unconscionable at the time it was made,” or may “limit the application of any unconscionable clause”); Cal Civil Code § 1668 (exculpatory clause).

prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”<sup>66</sup> In arguing against preemption, plaintiffs relied on the FAA’s saving clause, which provides that arbitration agreements shall be enforced as written “save upon such grounds as exist at law or in equity for the revocation of any contract,”<sup>67</sup> and argued that California’s rule holding class action waivers unconscionable applies equally to contracts mandating arbitration or those banning class actions in court.<sup>68</sup>

The majority—with the notable exception of Justice Clarence Thomas<sup>69</sup>—did not dispute that the *Discover Bank* rule is a “ground[ ] . . . for the revocation of any contract” under California law, and so is nominally within the coverage of the saving clause.<sup>70</sup> However, Justice Scalia wrote, “[a]lthough § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>71</sup> And the *Discover Bank* rule “stand[s] as an obstacle,” the Court held, because it categorically allows claimants in any consumer case to demand class-wide arbitration, which the majority views as utterly antithetical to arbitration. Thus, in Justice Scalia’s view, “California’s *Discover Bank* rule [ ] interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. ”<sup>72</sup>

Notably, the *Discover Bank* rule did not require any showing by plaintiffs that class procedures were necessary to effectively

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<sup>66</sup> *Concepcion*, 131 S Ct at 1744 (outlining the fact pattern presented by the case, including the underlying claim and AT&T’s motion to compel arbitration).

<sup>67</sup> 9 USC § 2.

<sup>68</sup> See *Concepcion*, 131 S Ct at 1745–47.

<sup>69</sup> Justice Thomas is of the view that the only viable defenses under FAA § 2 are defenses to the formation of a contract—for example, duress or fraudulent inducement—and that other public-policy-based challenges may well provide legal grounds to challenge the validity of any contract, but they do not count as “grounds . . . for the revocation” of contracts within the meaning of FAA § 2. No other justice shares this view. See *Concepcion*, 131 S Ct at 1753–57 (Thomas concurring).

<sup>70</sup> See id at 1746 (majority).

<sup>71</sup> Id at 1748 (explaining that a savings clause in a statute cannot be interpreted to give a common law right that would contradict the overall purpose of the statute). This is one of a number of recent and controversial preemption decisions by the Supreme Court. See, for example, *Bruesewitz v Wyeth LLC*, 131 S Ct 1068, 1082 (2011) (finding preemption under the Vaccine Act); *Chamber of Commerce of the United States v Whiting*, 31 S Ct 1968, 1981 (2011) (finding no preemption under the Immigration Reform and Control Act); *Williamson v Mazda Motor of America, Inc*, 131 S Ct 1131, 1137 (2011) (finding no preemption under federal motor vehicle safety standards).

<sup>72</sup> *Concepcion*, 131 S Ct at 1750.

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vindicate their rights. Instead, the *Discover Bank* rule was classificatory—that is, it operated categorically, classifying class action waivers in consumer contracts as unconscionable. While the rule was nominally “limited to adhesion contracts” and applicable only to claims that seek “predictably small damages” and “allege a scheme to cheat consumers,” the Court deemed these putative limitations illusory, observing that all consumer contracts nowadays are “adhesive,” that the small damages factor is “toothless and malleable,” and that a requirement of a mere “allegation” of a scheme “has no limiting effect.”<sup>73</sup> To Justice Scalia and brethren, then, the *Discover Bank* rule fatally “interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.”<sup>74</sup>

## II. WHAT’S LEFT OF CLASS ACTION PRACTICE AFTER CONCEPCION

At the outset, it is clear there are many cases that class action waivers simply cannot reach.<sup>75</sup> In some, the nature of the underlying transaction does not allow for the effective communication of the waiver because there is no contractual relationship between the parties—for example, securities fraud cases based on secondary market purchases,<sup>76</sup> many civil rights and environmental cases, and many consumer cases stemming from retail purchases. In other cases, Congress has evinced a clear intent that the class action remedy be available.<sup>77</sup> And then there are outlier cases: for example, under the

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<sup>73</sup> Id (noting that class-wide arbitration inevitably has different procedures and requirements than normal bilateral arbitration and undermines some of the basic reasons to arbitrate, such as confidentiality).

<sup>74</sup> Id at 1748–49 (noting specifically that the benefits of arbitration, such as efficiency, stream-lining dispute resolution, confidentiality and lowered costs, are undermined with the *Discovery Bank* rule).

<sup>75</sup> See Leslie Bailey and Paul Bland, *How Courts Can and Should Limit AT&T Mobility v. Concepcion* (Public Justice 2011), online at <http://www.publicjustice.net/Resources/How-Courts-Can-and-Should-Limit-ATT-v-Concepcion.aspx> (visited Jan 8, 2012) (collecting arguments for minimizing the impact of *Concepcion* on class action waivers such as cases where the arbitration clause expressly adopts state law, or where a prohibition on waivers would not conflict with federal law).

<sup>76</sup> But see note 16.

<sup>77</sup> As the Supreme Court made clear in *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20 (1991), arbitration agreements are unenforceable in the rare case where Congress has clearly evinced an intention that the statutory claim at issue is inarbitrable. See id at 26. We are aware of a handful of federal statutes that appear to fit this bill: 15 USC § 1639c(e)(1) (barring arbitration clauses in residential mortgage loans); 18 USC § 1514A(e) (forbidding predispute contracts requiring arbitration of whistleblower claims under the Sarbanes-Oxley Act not enforceable); 10 USC § 987(e)(3), (f)(4) (voiding arbitration clauses in payday loan or any consumer credit contracts—with the exception of residential mortgages and car loans—with members of the military or their families); 15 USC § 1226(a)(2) (prohibiting automobile

“reverse preemption” doctrine unique to the McCarran-Ferguson Act,<sup>78</sup> *Concepcion* will not affect state laws—and there are about twenty of them<sup>79</sup>—that bar insurance companies from using mandatory arbitration clauses.<sup>80</sup> Likewise, several major credit-card-issuing banks are enjoined from including mandatory arbitration clauses in their cardholder agreements until late 2013.<sup>81</sup>

But beyond these exceptional cases, one must ask: Under what circumstances, going forward, will courts decline to enforce class action waivers? What sorts of rules governing the enforceability of these waivers will pass muster?

#### A. Cases Where the Waiver Precludes Vindication of Federal Statutory Rights

The first question here is whether the federal vindication-of-rights doctrine that finds its fullest expression in the *Amex* cases survives *Concepcion*. In the most recent installment of what is now the *Amex* trilogy, the Second Circuit made clear that its conception of the vindication-of-rights doctrine is unaffected by *Concepcion*.<sup>82</sup> In our view,<sup>83</sup> the court is correct, for two independent reasons.

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manufacturers from imposing predispute arbitration clauses in their franchise agreements with dealers).

<sup>78</sup> Pub L No 79-15, 59 Stat 33 (1945), codified as amended at 15 USC §§ 1011–15.

<sup>79</sup> See *State Laws Regulating Arbitration in Insurance Contracts* (Public Citizen 2010), online at [http://www.citizen.org/congress/article\\_redirect.cfm?ID=6560](http://www.citizen.org/congress/article_redirect.cfm?ID=6560) (visited Jan 4, 2011).

<sup>80</sup> See 15 USC § 1012(b) (“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.”). The Act allows state laws enacted “for the purpose of regulating the business of insurance” to reverse the preemption of congressional acts that do not specifically “relate[] to the business of insurance.” This reflects a policy decision that it is in the public interest for states to have a broad grant of authority over the business of insurance. 15 USC § 1012(b).

<sup>81</sup> See Final Judgment and Order of Dismissal, *In re Currency Conversion Fee Antitrust Litigation*, No 05-cv-7116 (SDNY July 22, 2010) (approving settlement that required defendants Bank of America, Capital One, Chase, and HSBC (1) to remove any arbitration clauses and class action bans from US cardholder contracts; (2) not to restore or otherwise insert any arbitration clause or class action ban into its US cardholder contracts within three and one half years following May 1, 2010; and (3) not to seek to enforce their current or former arbitration clauses or class action bans against any members of the settlement class). See also <http://arbitration.ccfsettlement.com/> (visited Jan 8, 2012).

<sup>82</sup> Subsequent to the decision in *Concepcion*, the Second Circuit ordered the *Amex* parties to brief the question of what effect, if any, the Supreme Court’s decision should have on the rulings in *Amex I* and *Amex II*. On February 1, 2012, the Second Circuit in *Amex III* broadly reaffirmed its prior two decisions. See generally *In re American Express Merchants’ Litigation*, 634 F3d 187 (2d Cir 2011) (*Amex III*). As of this writing, American Express’s application for rehearing en banc is pending and a petition for certiorari will surely follow.

<sup>83</sup> Full disclosure: the authors are hardly unbiased. Mr. Friedman is lead counsel for the plaintiffs in the *Amex* litigation.

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### 1. Preemption analysis versus federal harmonizing principle.

First, the sole basis for the Supreme Court's decision in *Concepcion* was preemption. Once the Court determined that California's *Discover Bank* rule stood as an "obstacle to accomplishment and execution of the full purposes and objectives of Congress," as expressed in the FAA, the Supremacy Clause kicked in and dictated that the FAA preempts the state law rule.<sup>84</sup> By contrast, where the enforcement of an arbitration agreement under the FAA would prevent vindication of a *federal* statutory right, no such preemption doctrine governs.<sup>85</sup> Instead, the governing principle is supplied by the "federal substantive law of arbitration,"<sup>86</sup> under which federal courts harmonize the FAA and federal statutes (such as the Clayton Act) by applying the "vindication of statutory rights analysis" of *Randolph* and related case law.<sup>87</sup>

Under this federal harmonizing analysis, an agreement to arbitrate a federal statutory claim must be enforced as written, unless and until enforcement of the arbitration provision would preclude the claimant from vindicating its federal statutory rights. In a case where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," *Randolph* harmonizes the FAA with substantive federal remedial statutes by mandating that "that party bear[] the burden of showing the likelihood of incurring such costs"<sup>88</sup>—that is, that it would incur costs so steep as to preclude vindication of the federal right.

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<sup>84</sup> *Concepcion*, 131 S Ct at 1753.

<sup>85</sup> See, for example, *Tufariello v Long Island Rail Road Co*, 458 F3d 80, 86 (2d Cir 2006) ("[T]he preemption doctrine flows from the Constitution's Supremacy Clause, U.S. Const. Art. VI, cl. 2, which 'invalidates state laws that interfere with, or are contrary to federal law' . . . The doctrine is inapplicable to a potential conflict between two federal statutes."); *Madeira v Affordable Housing Foundation, Inc*, 469 F3d 219, 237 (2d Cir 2006) (pointing to "an important legal distinction between" preemption analysis, on the one hand, and cases where courts seek "to reconcile two *federal* statutes to ensure that one did not trench on the other, a task routinely performed by federal courts"); *Trollinger v Tyson Foods, Inc*, 370 F3d 602, 608 (6th Cir 2004) ("[P]reemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated powers, intends one to displace the other.").

<sup>86</sup> *Amex II*, 634 F3d at 194, quoting *Kristian*, 446 F3d at 63.

<sup>87</sup> See *Randolph*, 531 US at 92. See also *National Association of Home Builders v Defenders of Wildlife*, 551 US 644, 678–79 (2007) (Stevens dissenting) (arguing that courts "should first try to harmonize" federal statutes, and observing "no statute must yield [to another federal statute] unless it is truly incapable of coexistence").

<sup>88</sup> *Randolph*, 531 US at 90–92:

It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to

2. Categorical rule versus case-by-case test.

Second, the argument underlying the *Amex* cases was based upon a detailed factual showing that, if the arbitration agreement were enforced as written with its class action waiver, plaintiffs would be unable to vindicate their rights in a complex and expensive antitrust case.<sup>89</sup> The *Discover Bank* rule at issue in *Concepcion*, by contrast, did not require a claimant to prove that she was precluded from vindicating her rights under a particular arbitration clause in a particular case.<sup>90</sup> And, in fact, the Court suggested the *Concepcions* could have vindicated their rights under the particular arbitration clause at issue in *Concepcion*.<sup>91</sup>

It would be quite a stretch to argue that *Concepcion* cuts off a claimant's ability to avoid an arbitration clause by making the sort of case-by-case showing prescribed in *Randolph*.<sup>92</sup> And indeed, the *Concepcion* Court expressly granted certiorari to consider whether states may condition the enforceability of an arbitration agreement on the availability of class-wide procedures "when those procedures are *not necessary* to ensure that the parties to the arbitration agreement are able to vindicate their claims."<sup>93</sup> Still, there is certainly

arbitration. . . . The "risk" that *Randolph* will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

See also *In re Cotton Yarn Antitrust Litigation*, 505 F3d 274, 285 (4th Cir 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.").

<sup>89</sup> See *Amex I*, 554 F3d at 308 ("[E]nforcement of the class action waiver would effectively strip [plaintiffs] of the ability to assert their claims because 'each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only \$5000.'"), quoting Brief and Special Appendix for Plaintiffs-Appellants, *In re American Express Merchants' Litigation*, No 06-1871, \*17 (filed Sept 11, 2006) (available on Westlaw at 2006 WL 6198567); *Amex II*, 634 F3d at 197–98.

<sup>90</sup> See text accompanying notes 69–74.

<sup>91</sup> *Concepcion*, 131 S Ct at 1745, 1753 (citing the district court's description of AT&T's arbitration provision as "quick, easy to use," likely to "prompt[ ] full or . . . even excess payment to the customer *without* the need to arbitrate or litigate," and "sufficient to provide incentive for the individual prosecution of meritorious claims" and a "better" option to plaintiffs than class litigation).

<sup>92</sup> Significantly, the *Concepcion* Court never cited *Randolph*. As a consequence, lower courts are not free to determine that the Supreme Court in *Concepcion* implicitly overruled the *Randolph* case-by-case test. See *Agostini v Felton*, 521 US 203, 237 (1997) (stating that lower courts may not "conclude [that the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent" and must "leav[e] to this Court the prerogative of overruling its own decisions"). See also *Shalala v Illinois Council on Long Term Care, Inc*, 529 US 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*").

<sup>93</sup> Petition for Writ of Certiorari, *AT&T Mobility LLC v Concepcion*, No 09-893, \*1 (filed Jan 25, 2010) (available on Westlaw at 2010 WL 6617833) (emphasis added). In their petition, moreover, the Petitioners expressly distinguished *Amex I* as "based on federal law,

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language in Justice Scalia's opinion that gives the appearance that the Court (or at least some members) would shrug off a showing that an arbitration clause in a particular case would render a claim unremediable.<sup>94</sup> And we expect that attempts to capitalize on this language will provide a key battleground as the lower courts hash out the contours of *Concepcion*.

### 3. Implications and scope of the federal vindication-of-rights challenge.

So what does the continued vitality of a federal "vindication of rights" challenge portend for the future of aggregate litigation? Any such assessment necessarily begins with an understanding of just how broadly or narrowly the challenge applies. Commentators and advocates on both sides of the issue are likely to overplay the breadth of the *Amex* exception to the general rule that arbitration agreements are enforceable as written. Business interests will argue that the exception is swallowing the rule and is poised to invalidate class waivers in virtually every federal putative class case, given the generally low per-plaintiff damages and the expense of prosecuting most federal claims. Some plaintiffs will likewise peddle a reductivist reading on which class action waivers are unenforceable in all cases based on violations of federal statutory law.

But as *Concepcion* itself shows, not all claimants will pass the "prohibitive expense test" contemplated in *Amex I* and other cases. In particular, the *Concepcion* majority was clear that the *Concepcions* were not prevented from being able to vindicate their rights, thanks to the relative generosity of what we term a "bounty clause" in their arbitration agreement, which provided that claimants are entitled to a \$7,500 cash bounty—plus double attorneys' fees—if they receive an arbitration award superior to defendant's final pre-award offer.<sup>95</sup>

Moreover, the pool of cases that will pass the prohibitive expense test is set to shrink, post-*Concepcion*. We can expect that corporate counsel seeking to cut off such challenges will use the

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not state law," and as involving a "finding that the respondents could not vindicate their antitrust claims on an individual basis." Id at n 7.

<sup>94</sup> See *Concepcion*, 131 S Ct at 1753. Of course, the opinion did not reject or consider any argument that class proceedings are necessary to prosecute the *Concepcions'* particular small-dollar claim. Nor did Justice Scalia say—in dicta or otherwise—that it would be immaterial if the claimants could show that the instant claim required class treatment.

<sup>95</sup> Id at 1744. Indeed, a district court judge described AT&T's arbitration provision as "perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v AT&T Mobility, LLC*, 2009 WL 1765661, \*3 (CD Cal).

bounty clause in *Concepcion* as a model.<sup>96</sup> And whatever the merits of Justice Scalia's view that the bounty clause preserved the Concepcions' ability to vindicate their rights, it is highly likely that this dictum (for it was certainly not part of the holding in *Concepcion*) will then prove irresistible to lower courts faced with vindication-of-rights challenges in cases that feature a bounty clause—or, at least, a clause that approximates the \$7,500 magnitude of the *Concepcion* clause.<sup>97</sup>

There are other measures that corporate counsel can similarly be expected to take in seeking to remove vindication-of-rights challenges from plaintiffs' arsenals. Foremost among them is providing that all costs of suit are recoverable by a prevailing plaintiff. In finding that the class waiver imposed prohibitive expenses on plaintiffs in the *Amex* cases, the Second Circuit focused on the fact that expert witness fees—the single biggest expense in antitrust cases—would not be recoverable expenses under the relevant statutory cost-shifting provisions.<sup>98</sup> (In a class proceeding, by contrast, those expert costs are recouped from the common fund created by the settlement or judgment.) There is nothing to stop companies from providing that *all* costs of suit shall be paid to a prevailing claimant, whether or not statutorily enumerated.<sup>99</sup> As with bounty clauses, these sorts of provisions are likely to drive many

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<sup>96</sup> See, for example, Gibson, Dunn & Crutcher LLP, *U.S. Supreme Court Finds That Class Action Waivers in Arbitration Agreements Are Enforceable under the Federal Arbitration Act* (Apr. 27, 2011), online at <http://www.gibsondunn.com/publications/pages/USSupremeCourtFinds-ClassActionWaiversInArbitrationAgreementsAreEnforceableUnderFederalArbitrationAct.aspx> (visited Jan 8, 2012).

The wording of the majority decision in *AT&T Mobility* does not seem to require similar provisions in an arbitration agreement, although the Court did observe that the district court concluded that the guaranteed amounts would put the Concepcions in a better position than if they were participants in a class action.

<sup>97</sup> See, for example, *In re Apple and AT&T iPad Unlimited Data Plan Litigation*, 2011 WL 2886407, \*4 (ND Cal) (enforcing an arbitration clause post-*Concepcion* that provided that “if the arbitrator awards [plaintiff] more than [the] last settlement offer, plaintiffs are entitled to double attorney’s fees”).

<sup>98</sup> See *Amex I*, 554 F3d at 315–18; *Amex II*, 634 F3d at 198–99. The Supreme Court has repeatedly held that the “costs” recoverable under 28 USC § 1920 and FRCP 54(d) exclude expert witness fees and that the cost-shifting provisions of the Clayton Act simply do “not permit a shift of expert witness fees.” See *West Virginia University Hospitals, Inc v Casey*, 499 US 83, 94, 99–100 (1991); *Crawford Fitting Co v J.T. Gibbons, Inc*, 482 US 437, 442 (1987).

<sup>99</sup> See Weil, Gotshal & Manges LLP, *Second Circuit Strikes Down Class Arbitration Provisions in In re American Express Merchants Litigation* \*3 (Feb. 26, 2009), online at [http://www.weil.com/files/upload/WeilBriefing\\_LitReg\\_090226.pdf](http://www.weil.com/files/upload/WeilBriefing_LitReg_090226.pdf) (visited Jan 8, 2012) (“Another 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.”).

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courts to conclude that the waiver of the right to proceed collectively does not impose “prohibitive costs” upon a claimant.<sup>100</sup>

One troubling upshot of judicial solicitude for cost-shifting provisions as a means to avoid vindication-of-rights challenges lies in cases where defendants’ offers to shift costs are made post-contract, during the course of litigating a motion to compel arbitration. Some courts have been receptive to post-dispute offers to absorb costs, believing that such offers moot vindication-of-rights arguments.<sup>101</sup> This view, however, appears irreconcilable with the uniform recognition that courts must “look[] to the possible ‘chilling effect’ of the cost-splitting provision on similarly situated potential litigants, as opposed to its effect merely on the actual plaintiff in any given case.”<sup>102</sup> This “chilling effect,” of course, is accomplished when a defendant distributes its contracts and is hardly ameliorated by a post-dispute offer to absorb costs in a particular case.

In any event, as bounty, cost-shifting, and other “consumer-friendly” arbitration clauses proliferate, no one should expect consumer groups to cheer this liberalization of arbitration clauses as some sort of “race to the top.” The race points elsewhere: 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

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<sup>100</sup> See Christopher M. Mason and Benjamin R. Dwyer, *U.S. Supreme Court Upholds Class Action Waivers in Consumer Contracts: AT&T Mobility v. Concepcion*, Class Action Alert \*4 (Nixon Peabody LLP Apr 27, 2011), online at [http://www.nixonpeabody.com/linked\\_media/publications/Class\\_Action\\_Alert\\_04\\_27\\_2011.pdf](http://www.nixonpeabody.com/linked_media/publications/Class_Action_Alert_04_27_2011.pdf) (visited Jan 8, 2012) (advising that “[c]ompanies should consider tailoring their contracts to provide the individual customer reasonable access to a fair and inexpensive dispute resolution process like the contract addressed in *Concepcion*”).

<sup>101</sup> See, for example, *Carter v Countrywide Credit Industries, Inc*, 362 F3d 294, 300 (5th Cir 2004) (noting that while cost allocation features of the “[a]greements would impose prohibitive costs on [plaintiff],” this argument “has been mooted by [defendant’s] representation to the district court that it would pay all arbitration costs”); *Phillips v Associates Home Equity Services, Inc*, 179 F Supp 2d 840, 847 (ND Ill 2001) (finding that an individual could not be compelled to arbitrate if required to bear the prohibitive arbitration costs, but stating that the court would reconsider its ruling if the defendants agreed to pay these costs). See also Kelly Thompson Cochran and Eric J. Mogilnicki, *Current Issues in Consumer Arbitration*, 60 Bus Law 785, 789 (2005) (“The case law is divided on a number of cost issues, particularly at what point in time financial burdens should be assessed, and on whether the analysis should be affected by offers to waive contractual cost provisions.”).

<sup>102</sup> *Morrison v Circuit City Stores, Inc*, 317 F3d 646, 657–58, 663 (6th Cir 2003) (en banc). Courts uniformly recognize plaintiffs’ burden is to “demonstrate that potential costs are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights.” *Spinetti v Service Corp International*, 324 F3d 212, 217 (3d Cir 2003). See also *Kristian*, 446 F3d at 52; *Musnick v King Motor Co of Fort Lauderdale*, 325 F3d 1255, 1259–60 (11th Cir 2003); *Bradford v Rockwell Semiconductor Systems, Inc*, 238 F3d 549, 556 (4th Cir 2001); *Delta Funding Corp v Harris*, 912 A2d 104, 112–13 (NJ 2006).

consumer and employment contracts. As Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin demonstrated in an empirical study of arbitration provisions, among those companies whose consumer agreements provided for mandatory arbitration, “less than 10% of their negotiated nonconsumer, non-employment contracts included arbitration clauses.”<sup>103</sup> As those authors conclude, the absence of arbitration provisions in “the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers . . . [and] casts doubt on the corporations’ asserted beliefs in the superior fairness and efficiency of arbitration clauses.”<sup>104</sup>

Nor should anyone expect that consumers will actually go forward with one-on-one arbitrations, even as consumer arbitration clauses are liberalized to provide ostensible incentives to initiate proceedings in a bid to avoid legal challenges. The main problem will be attracting plaintiffs’ counsel: rational lawyers will be deterred by prohibitive disincentives.<sup>105</sup> The availability of attorneys’ fees under fee-shifting statutes is not a realistic inducement in consumer cases.<sup>106</sup> Take *Concepcion*, for example: we imagine that attorneys for the Concepcions would surely incur well over \$25,000 in legal fees to establish liability in a one-on-one proceeding.<sup>107</sup> And yet, it is almost

<sup>103</sup> Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U Mich J L Ref 871, 876 (2008).

<sup>104</sup> Id. For a countervailing view, and a methodological critique of the Eisenberg, Miller, and Sherwin study, see Christopher R. Drahoszal and Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St J Disp Res 433, 446–74 (2010).

<sup>105</sup> See *Concepcion*, 131 S Ct at 1761 (Breyer dissenting) (“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”); *Sutherland v Ernst & Young LLP*, 768 F Supp 2d 547, 553 (SDNY 2011):

Even if [plaintiff] were willing to incur approximately \$200,000 to recover a few thousand dollars, she would be unable to retain an attorney to prosecute her individual claim. . . . [Plaintiff’s counsel] will not prosecute her individual claim without charge, and will not advance the required costs where the [arbitration] Agreement’s fee-shifting provisions present little possibility of being made whole.

*Picardi v Eighth Judicial District Court*, 251 P3d 723, 725 (Nev 2011) (noting plaintiffs’ argument that “the class action waiver was exculpatory because, in cases . . . where the individualized claims are relatively small, it is almost impossible to secure legal representation unless those claims are aggregated with the claims of other similarly situated individuals”).

<sup>106</sup> See 29 USC § 216(b) (providing for the reimbursement of “reasonable” attorney’s fees).

<sup>107</sup> The Concepcions’ case is not as uncomplicated as it may appear. Plaintiffs pleaded claims under the California Unfair Competition Law, Cal Bus & Prof Code § 17200 et seq; False Advertising Law, Cal Bus & Prof Code § 17500 et seq; and Consumers Legal Remedies Act, Cal Civil Code § 1770 et seq. See *Laster*, 2008 WL 5216255 at \*1. The unfair competition and false advertising claims were initially dismissed with leave to amend. The Consumers Legal

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impossible to imagine a court awarding \$25,000 (or anything remotely close) as a “reasonable fee” for obtaining a settlement of \$30.22.<sup>108</sup>

Thus, we concur with Eisenberg, Miller, and Sherwin that “[l]arge corporations’ assertions that mandatory consumer arbitration is justified because it provides consumers with a superior form of dispute resolution thus appear to be disingenuous.”<sup>109</sup> But merits aside, the point here is that, in the wake of *Concepcion*, courts faced with vindication-of-rights challenges are likely to give great weight to bounty clauses and cost-shifting provisions, and to ignore the shortcomings of statutory attorney fee-shifting remedies. Far from presenting the proverbial hole you could drive a truck through, the *Amex* exception at the end of the day might prove more like the eye of a needle through which claimants must pass to gain refuge from class action waivers.

#### B. State Law Cases Where the Waiver Immunizes the Defendant

Obviously, the first point of distinction in *Amex*—preemption versus harmonization—is not available in cases raising state law claims. But what about cases where a plaintiff can demonstrate, as a factual matter, that the class action waiver confers upon a defendant de facto immunity for violations of a state law? Here, the post-*Concepcion* analysis is trickier.

The savings clause of the FAA provides that arbitration agreements are enforceable “save upon such grounds as exist at law

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Remedies Act claim was dismissed with prejudice because plaintiffs failed to comply with certain statutory notice requirements. See id at \*4. The defendants then moved to dismiss the amended pleading based on a highly technical causation argument and a “safe harbor” provision in California Civil Code § 1656.1. See *Laster*, 2008 WL 5216255 at \*16. As to both defenses, the court declined to dismiss the complaint “[a]t this stage of the proceedings,” clearly signaling that a summary judgment motion would be entertained after a full evidentiary record had been developed. See id. Given these complexities, our estimate of \$25,000 in legal fees is unrealistically low.

<sup>108</sup> The amount of the settlement, moreover, will always be \$30.22, and never \$7,500, as the defendant AT&T will always offer up full value to avoid the bounty. But it is not as though a pro se filing will unearth an automatic \$30.22, as AT&T can make its final offer on the eve of arbitration, or even later.

<sup>109</sup> Theodore Eisenberg, Geoffrey P. Miller, and Emily L. Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts* \*6 (Cornell Law School Legal Studies Research Paper No 08-017, New York University Law & Economics Research Paper No 08-28, Dec 2007), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1076968](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1076968) (visited Jan 8, 2012) (discussing the study of varying use of arbitration clauses across contracts within the same firms). See also notes 103–04 and accompanying text.

or in equity for the revocation of any contract.”<sup>110</sup> *Concepcion* then adds the proviso that, even if a defense is generally applicable to litigation and arbitration alike (as the California unconscionability rule was), it loses the protection of the FAA saving clause if it “stands as an obstacle” to the intent of Congress—which means, at the very least, if it renders arbitration, as traditionally defined, unavailable in some category of cases.<sup>111</sup>

From this, we understand that a challenge to the enforceability of an arbitration agreement after *Concepcion* must satisfy at least the following conditions: (1) it must be based on a recognized defense to contract, which is (2) generally applicable to contracts both in and out of the arbitration context, and (3) it must not have the effect of rendering arbitration, as traditionally defined, unavailable in some category of cases.

It is fair to assume that each of these conditions will become a battleground, as post-*Concepcion* plaintiffs argue that their ability to prosecute claims under state law is impermissibly nullified by arbitration agreements. A careful consideration of these requirements, then, is imperative for determining the contours of a viable challenge to class action waivers in state law cases, following *Concepcion*.

### 1. “Recognized defense.”

Properly framed, the recognized contract defense that is available in state law cases is that the class action waiver operates in a particular case to exculpate or confer de facto immunity upon the defendant, and so implicates a state common law policy against exculpatory contracts. As Justice Thomas observed in his concurring opinion in *Concepcion*, “[e]xculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy.”<sup>112</sup> California Civil Code § 1688 codifies this common law precept: “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of

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<sup>110</sup> 9 USC § 2 (establishing the enforceability of the arbitration provision with the only way to invalidate a provision being under state contract law).

<sup>111</sup> See 131 S Ct at 1753.

<sup>112</sup> Id at 1756 (Thomas concurring). In its decision in *Amex I*, the Second Circuit made a similar point, albeit in the specific context of antitrust claims, where the Supreme Court has long held that, “in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action,” an agreement which confers even ‘a partial immunity from civil liability for future violations’ of the antitrust laws is inconsistent with the public interest.” *Amex I*, 554 F3d at 319, quoting *Lawlor v National Screen Service Corp*, 349 US 322, 329 (1955).

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law, whether willful or negligent, are against the policy of the law.”<sup>113</sup> The Restatement (Second) of Contracts contains similar language.<sup>114</sup> The upshot here is that the “de facto immunity” or “exculpatory contract” defense is, in most jurisdictions at least, a well-established and recognized defense.

## 2. “Generally applicable.”

The FAA saving clause is limited to defenses that apply to “any contract,” as opposed to defenses that single out arbitration. The Supreme Court has applied this principle to nullify state statutes that “mak[e] written, predispute arbitration agreements invalid;”<sup>115</sup> provide that a “contract may not be subject to arbitration” absent notice on the front of the contract;<sup>116</sup> or that exempt any particular type of case (for example, state labor cases) from “any private agreement to arbitrate.”<sup>117</sup> This line of cases “describe[s] the FAA as a kind of equal protection clause that bar[s] state courts from applying contract principles in a manner that discriminate[s] against arbitration.”<sup>118</sup> In all these cases, the Court warned against “rely[ing] on the uniqueness of an agreement to arbitrate as a basis” for nonenforcement, as discriminating against arbitration would take any challenge out of the savings clause.<sup>119</sup>

By contrast, a rule holding unenforceable any agreement that confers de facto immunity on a defendant for violations of state law is surely within the saving clause. In *Concepcion*, the majority did not dispute that the general applicability requirement was met. California’s unconscionability rule applied to “any contract” restricting collective action, in court or arbitration, and California

<sup>113</sup> Cal Civil Code § 1688.

<sup>114</sup> Restatement (Second) of Contracts § 196 (“A term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy.”); Restatement (Second) of Contracts § 195 (adding a proviso regarding negotiated versus nonnegotiated terms). See also F. Paul Bland Jr and Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 Cardozo J Conflict Res 369, 375–76 (2009) (noting that “[m]any states have a well-developed body of statutory or common law that deals explicitly with ‘exculpatory’ agreements”).

<sup>115</sup> *Allied-Bruce Terminix Companies, Inc v Dobson*, 513 US 265, 269 (1995).

<sup>116</sup> *Doctor's Associates, Inc v Casarotto*, 517 US 681, 684, 688 (1996), quoting Mont Code Ann § 27-5-114(4), amended by 1997 Mont Laws ch 19 (SB 135).

<sup>117</sup> *Perry v Thomas*, 482 US 483, 484, 491 (1976) (holding that a state statute that mandates wage disputes must be allowed to be litigated in a judicial forum is counter to the FAA and thus preempted), quoting Cal Lab Code § 229.

<sup>118</sup> David Horton, *Arbitration as Delegation*, 86 NYU L Rev 437, 454 (2011) (arguing that the Court’s reading of the FAA has transformed the statute into a private delegation of legislative power).

<sup>119</sup> *Perry*, 482 US at 493 n 9.

courts had indeed struck down provisions that would ban class actions in cases that did not implicate arbitration at all.<sup>120</sup>

Rather, the lesson of *Concepcion* is that general applicability is not enough: “Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>121</sup> In other words, even if the defense is generally applicable, it will lose the protection of the saving clause if it undermines arbitration—a separate requirement that we discuss immediately below.

### 3. “Obstacle to arbitration.”

*Concepcion* is, at base, about obstacle preemption.<sup>122</sup> In evaluating a case-by-case defense under which plaintiffs must show that the imposition of the class waiver confers de facto immunity, the critical issue following *Concepcion* is whether the defense will be deemed to “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” as expressed in the FAA.<sup>123</sup> This inquiry turns on just what “stands as an obstacle” means.

So what was it about the *Discover Bank* unconscionability defense that made it an impermissible “obstacle,” so as to trigger preemption under the FAA notwithstanding its nondiscriminatory general applicability within the meaning of the savings clause? This much we know: it was not because the successful invocation of that

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<sup>120</sup> See *America Online, Inc v Superior Court*, 108 Cal Rptr 2d 699, 713 (Cal Ct App 2001) (striking as unconscionable dispute resolution clause that would apply Virginia procedural law, which does not allow for class actions); *In re Yahoo! Litigation*, 251 FRD 459, 469 (CD Cal 2008) (striking a class ban applicable in court as unconscionable and exculpatory); *Elhilu v Quizno's Franchising Co, LLC*, No 2:06-cv-07855, Doc 69, \*8 (CD Cal 2008) (same).

<sup>121</sup> *Concepcion*, 131 S Ct at 1748. See also id at 1758 (Breyer dissenting) (“[W]e should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate ‘upon the same footing.’”).

<sup>122</sup> Obstacle preemption exists “where ‘under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Crosby v National Foreign Trade Council*, 530 US 363, 373 (2000), quoting *Hines v Davidowitz*, 312 US 52, 67 (1941). To determine whether obstacle preemption exists, the Supreme Court has instructed the lower federal courts to employ their collective “judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby*, 530 US at 373. See also *Abbot by Abbot v American Cyanamid Co*, 844 F2d 1108, 1113 (4th Cir 1988) (“A decision about [obstacle preemption] requires the court independently to consider national interests and their putative conflict with state interests. . . . [P]reemption under [an obstacle preemption] theory is more an exercise of policy choices by a court than strict statutory construction.”).

<sup>123</sup> *Concepcion*, 131 S Ct at 1753, quoting *Hines v Davidowitz*, 312 US at 67.

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defense in any given case would render an arbitration clause unenforceable as written. Any such objection would be circular: it would mean the defense is an impermissible obstacle because it is a defense. Whenever any common law contract defense is successfully invoked under the FAA saving clause—including fraudulent inducement, duress, or anything else—the arbitration clause may not be enforced as written, or sometimes at all. So unless we are to rescind the savings clause, we must look elsewhere for the meaning of “obstacle.” In our view, the unconscionability defense in *Concepcion* “stood as an obstacle,” for preemption purposes, because it was a categorical rule that applied to all consumer cases. The sin of the *Discover Bank* rule was that it did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis.<sup>124</sup> As the Eleventh Circuit recently held in one of the first cases to interpret *Concepcion*, the “Supreme Court concluded that the triggering conditions of California’s *Discover Bank* rule imposed no effective limit on its application,” and it “implied that although the *Discover Bank* rule was cast as an application of unconscionability doctrine, in effect, it set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases, upon the mere *ex post* demand by any consumer.”<sup>125</sup> For this reason, the Eleventh Circuit recognized, the “Court then held that . . . this state-imposed policy preference ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’”<sup>126</sup>

In essence the standard boils down to this. To support the rejection of an arbitration provision under the savings clause, a defense of exculpatory contract must: (1) be recognized as a ground for the revocation of contracts as a matter of state law; (2) apply to “any contract,” in or out of arbitration; and (3) be supported by a showing that the invocation of the arbitration clause in a specific case would be exculpatory or would confer de facto immunity upon the defendant.

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<sup>124</sup> An illustration will help prove the point: if California had a rule that all class waivers in consumer contracts are presumed, *ex ante*, to have been procured by fraud and duress, the Supreme Court would clearly hold that that rule stands as an obstacle to the FAA. And yet, no one doubts that a case-specific showing that an arbitration agreement was fraudulently induced or obtained by duress would present a viable—indeed paradigmatic—defense under the saving clause. The same is true here. The case-specific invocation of an exculpatory contract defense is no more affected by *Concepcion* than would be the case-specific defense of fraudulent inducement or duress.

<sup>125</sup> *Cruz v Cingular Wireless, LLC*, 648 F3d 1205, 1211 (11th Cir 2011).

<sup>126</sup> *Id* at 1211–12, quoting *Concepcion*, 131 S Ct at 1748.

Of course, exculpatory contract defenses in state law cases additionally face the same hurdles as federal vindication-of-rights challenges discussed above. As in the case law under *Randolph*, plaintiffs will presumably have the burden “to demonstrate that potential costs are great enough to deter them and similarly situated individuals from seeking to vindicate their . . . rights.”<sup>127</sup> In the absence of such a showing, it would be hard to say how the contract confers de facto immunity on a defendant. And in satisfying this burden, claimants will run into the same issues engendered by “consumer-friendly” bounty and cost-shifting clauses and the like.

### C. Legislative Responses to *Concepcion*

To fully take the measure of aggregate litigation in a post-*Concepcion* world, it is also necessary to consider the likelihood, viability, and scope of legislative responses to *Concepcion* and the proliferation of class action waivers in consumer contracts.

#### 1. Possible federal or state legislation.

At the simplest level, of course, Congress could provide that class action waivers shall be unenforceable—at least in standard-form consumer and employment contracts. That is the gist of the proposed Arbitration Fairness Act of 2011,<sup>128</sup> which, after dying in committee both in 2007 and 2009, was reintroduced immediately after *Concepcion*. But observers appear uniform in their assessment that this bill stands little chance of passage in the current political environment.<sup>129</sup> Nor does an amendment to Rule 23 appear in the offing.

The fate of state legislation seeking to override *Concepcion* is equally discouraging. At the outset, state laws making arbitration

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<sup>127</sup> *Spinetti*, 324 F3d at 217, citing *Morrison*, 317 F3d at 663. See also text accompanying notes 98–102.

<sup>128</sup> S 987, 112th Cong, 1st Sess, in 157 Cong Rec S 2929 (daily ed May 12, 2011).

<sup>129</sup> See, for example, Editorial, *Gutting Class Action*, NY Times at A26 (cited in note 21) (noting that the chances of federal legislation overriding *Concepcion* “aren’t great in the current political environment”). There have been numerous attempts to legislate in this area, all of which have failed. See Alan S. Kaplinsky, *The Use of Pre-dispute Arbitration Agreements by Consumer Financial Services Providers*, in Alan S. Kaplinsky, John J. Roddy, and Julia B. Strickland, *16th Annual Consumer Financial Services Institute* 253, 311–12 (Practising Law Institute 2011) (identifying various bills before the House in 2010–11 that sought to restrict or prohibit arbitration, including HR 1020 and 991—which “would bar pre-dispute binding arbitration clauses in certain consumer, employment and franchise contracts”; HR 1237—which “would bar pre-dispute arbitration clauses in nursing home contracts”; HR 1214—which “would bar from a payday loan contract a mandatory arbitration clause that is unfair, unconscionable, or substantially in derogation of the rights of consumers”).

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unavailable in some category of cases are doomed, as the Court showed in *Perry v Thomas*,<sup>130</sup> where it struck down a rule making arbitration unavailable in wage-and-hour claims,<sup>131</sup> and as it reaffirmed in *Concepcion*, where it struck down a rule making arbitration (or at least, one-on-one arbitration, which is now the only kind that matters) unavailable in consumer cases.<sup>132</sup>

It is also not clear that state legislation will be much better received where it specifically provides that class actions shall be available as part of one remedial statute or another. A number of federal courts have rejected similar arguments in the context of claims under the Fair Labor Standards Act of 1938<sup>133</sup> or other statutes where the right to class-wide procedures is hardwired into the remedial statute itself.<sup>134</sup> In essence, these courts reason that the right to proceed collectively, as provided for in the remedial statute, is not “substantive” and is thus fully waivable—even as they conclude that the right to proceed in arbitration, as provided for in the FAA, is a substantive right.<sup>135</sup> Still, this issue is far from settled, and one can imagine that state legislation fully incorporating class action rights into substantive remedial statutes could possibly find some traction.

There exist other possibilities for state legislatures motivated to help their citizens overcome *Concepcion*. One candidate would be legislation providing that any dispute resolution provision in a standard form agreement that has the effect in a particular case of rendering a claimant unable to vindicate her rights under a state remedial statute shall be unenforceable under the state’s clearly recognized policy against exculpatory contracts. Such a statute would pretty clearly satisfy the three requirements described above. Another approach would be that of California Assembly Bill 1062,<sup>136</sup> which provides that denials of motions to compel arbitration are

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<sup>130</sup> 482 US 483 (1987).

<sup>131</sup> Id at 484. See also *Southland Corp v Keating*, 465 US 1, 16 (1984) (“Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).

<sup>132</sup> *Concepcion*, 131 S Ct at 1753.

<sup>133</sup> Pub L No 75-718, 52 Stat 1060, codified as amended at 29 USC § 201 et seq.

<sup>134</sup> See, for example, 29 USC § 216(b) (providing that, under the Fair Labor Standards Act, “[a]n action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated”); 29 USC § 157 (providing that, under the National Labor Relations Act, employees have the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection”).

<sup>135</sup> See *Carter*, 362 F3d at 298.

<sup>136</sup> California Legislature, 2011-12 Regular Session (Feb 18, 2011), online at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1051-1100/ab\\_1062\\_bill\\_20110901\\_amended\\_sen\\_v96.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1051-1100/ab_1062_bill_20110901_amended_sen_v96.pdf) (visited Jan 6, 2012).

unappealable until final judgment is entered.<sup>137</sup> It is less clear that this statute would make the grade; in particular, it is not clear how this law would stand up to an argument that it discriminates against arbitration.

## 2. The Consumer Financial Protection Bureau.

Another legislative option is presented in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>138</sup> of 2010, which established the Consumer Financial Protection Bureau (CFPB). The CFPB is an independent bureau within the Federal Reserve designed to protect consumers in their transactions with banks, credit card companies, mortgage brokers, and other financial institutions.<sup>139</sup> It has broad authority to ensure that existing consumer protection laws are rigorously enforced, and to regulate unfair, deceptive, and abusive practices and consumer products<sup>140</sup>—it will be, in the words of its creator, Elizabeth Warren,<sup>141</sup> a “cop on the beat.”<sup>142</sup>

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<sup>137</sup> See id. The Bill passed the Assembly 42–29 on May 26, 2011 and was referred to committee on June 2, 2011. The sponsors argue that the purpose of the Bill was simply to fix an “anomaly,” as the general rule is that “appeals may only be taken once a final judgment is rendered.” Third Reading of AB 1062 \*4, California State Legislature, Senate Rules Committee, Office of Senate Floor Analyses (June 30, 2011), online at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1051-1100/ab\\_1062\\_cfa\\_20110701\\_095933\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1051-1100/ab_1062_cfa_20110701_095933_sen_floor.html) (visited Jan 8, 2012). But it seems more likely that this is a directed effort to limit appellate review in order to allow the recovery of class remedies, reminiscent of a pre-Rule 23(f) era. See, for example, *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F3d 1293, 1297 (7th Cir 1995) (holding that mandamus appeal from grant of class certification was appropriate because an appeal from the final judgment “will come too late to provide effective relief for these defendants [due to] the sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them”).

<sup>138</sup> Pub L No 111-203, title X, 124 Stat 1955, codified at 12 USC § 5301 et seq.

<sup>139</sup> Dodd-Frank Act § 1021 et seq, 12 USC § 5511 et seq.

<sup>140</sup> See Curtis W. Copeland, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to Be Issued by the Consumer Financial Protection Bureau* \*2 (Congressional Research Service Aug 25, 2010), online at <http://www.fas.org/sgp/crs/misc/R41380.pdf> (visited Jan 8, 2012) (“Section 1022 alone gives the CFPB broad rulemaking powers, authorizing it to prescribe such rules ‘as may be necessary or appropriate’ to enable the Bureau to administer federal consumer financial protection laws.”).

<sup>141</sup> The CFPB was the brainchild of Elizabeth Warren. See Elizabeth Warren, *Unsafe at Any Rate*, 5 Democracy 8, 16–18 (Summer 2007), online at <http://www.democracyjournal.org/pdf/5/Warren.pdf> (visited Jan 8, 2012). Warren, who had earned a reputation as proconsumer during her academic career, was feared by many business types as President Obama’s obvious choice to run the CFPB. She built the agency from scratch, serving as assistant to the President and special advisor to the Treasury. See Jennifer Liberto, *Consumer Bureau to Run—Director or Not*, CNN Money (June 15, 2011), online at [http://money.cnn.com/2011/06/15/news/economy/consumer\\_bureau/index.htm](http://money.cnn.com/2011/06/15/news/economy/consumer_bureau/index.htm) (visited Jan 8, 2012) (reporting that Republicans have “lambasted Warren, and done whatever they can to stop President Obama [from] even thinking about naming her to run the bureau”).

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Furthermore, the agency has a great deal of independence, as its budget is “almost entirely out of the control of Congress.”<sup>143</sup>

Not surprisingly, the CFPB has been enormously controversial, as Republicans in Congress seek to “defund, delay, and defang” the nascent agency.<sup>144</sup> Disputes loom concerning the agency’s independence from congressional and executive oversight;<sup>145</sup> the single-director structure of the agency;<sup>146</sup> and the lack of

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<sup>142</sup> See Andrew Martin and Louise Story, *Banks Brace for Fight over an Agency Meant to Bolster Consumer Protection*, NY Times B1 (June 18, 2009).

<sup>143</sup> Jon Leibowitz, Speech, *Helping Business Bear the New Financial Consumer Protection Regime* \*2, (Jan 20, 2011), online at <http://www.ftc.gov/speeches/leibowitz/110120financialregime.pdf> (visited Jan 9, 2012). See also Dodd-Frank Act § 1017(a), 12 USCA § 5497(a) (providing that the director of the CFPB is entitled to request, and the Federal Reserve is required to transfer, an amount “reasonably necessary” from the earnings of the Federal Reserve, up to a statutory cap of 10 percent of the total operating expenses of the Federal Reserve for 2011, 11 percent in fiscal year 2012, and 12 percent thereafter); Note, *Administrative Law—Agency Design—Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 Harv L Rev 2123, 2126 (2011) (“The degree of independence the Bureau holds is unlike that of a standard independent agency because it is largely insulated from both executive and legislative control, especially due to its independent revenue source.”); Note, 124 Harv L Rev at 2127 (cited in note 143) (“[T]he Dodd-Frank Act takes the rare step of exempting the Bureau from the most powerful tool for congressional control—appropriations.”).

<sup>144</sup> Bernie Becker, et al, *Overnight Money: Defund, Delay, Defang*, The Hill (May 3, 2011), online at <http://thehill.com/blogs/on-the-money/banking-financial-institutions/159097-overnight-money-defund-delay-defang> (visited Jan 9, 2012). In May 2011, forty-four Senate Republicans sent a letter to President Obama declaring they “will not support the consideration of any nominee, regardless of party affiliation,” to direct the bureau until the agency is restructured. Edward Wyatt and Ben Protess, *Foes Revise Plan to Curb New Agency*, NY Times B1 (May 6, 2011), citing 44 U.S. Sens. to Obama: No Accountability, No Confirmation, website of Senator Richard Shelby (May 5, 2011) online at <http://shelby.senate.gov/public/index.cfm/newsreleases?ID=893bc8b0-2e73-4555-8441-d51e0cccd1d17> (visited Dec 20, 2011) (providing the full text of the letter).

<sup>145</sup> See, for example, *Free Enterprise Fund v Public Company Accounting Oversight Board*, 130 S Ct 3138, 3142 (2010) (ruling that a regulatory board created by the Sarbanes-Oxley Act contravened separation of powers by conferring executive power on agency officials without subjecting them to presidential control).

<sup>146</sup> See, for example, Victoria McGrane and Deborah Solomon, *With New Power, GOP Takes On Consumer Agency*, Wall St J A5 (Nov 23, 2010) (reporting that members of the House Financial Services Committee wrote the Federal Reserve and the Treasury Department questioning the legality of the CFPB); William Alden, *GOP Lawmakers: Elizabeth Warren’s Job ‘Undermines’ Constitution*, Huffington Post (Nov 23, 2010), online at [http://www.huffingtonpost.com/2010/11/23/elizabeth-warren-gop\\_n\\_787571.html](http://www.huffingtonpost.com/2010/11/23/elizabeth-warren-gop_n_787571.html) (visited Jan 9, 2012) (describing Representatives Spencer Bachus and Judy Biggert’s opposition to the agency and providing a letter sent by the Representatives to the Treasury and Federal Reserve asserting that Warren’s role as special advisor “circumvented the advice-and-consent process and undermined one of the key checks and balances in our Constitution. While the Act confers upon the Secretary of the Treasury limited interim authority ‘to perform the functions of the Bureau’ (Section 1066(a)), Professor Warren is now exercising that authority”). For the Treasury and Federal Reserve’s response, see Letter from Eric M. Thorson, Inspector General of the Department of the Treasury, and Elizabeth A. Coleman, Inspector General of the Board of Governors of the Federal Reserve System, to Representatives Spencer Bachus and Judy Biggert (Jan 10, 2011), online at <http://www.treasury.gov/about/organizational-structure/letter-from-inspector-general-regarding-elizabeth-warren>.

congressional appropriations authority over the agency's budget.<sup>147</sup> Notwithstanding the charged political atmosphere, the CFPB officially launched on July 21, 2011, and on January 4, 2012, President Obama appointed Richard Cordray, the former attorney general of Ohio, as director of the agency.<sup>148</sup>

Most pertinent here, § 1028 of the Dodd-Frank Act specifically requires the CFPB to conduct a study of and submit a report to Congress on the use of arbitration in consumer transactions, and "prohibit or impose conditions or limitations on the use of... arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."<sup>149</sup> If, after careful study, the agency were to issue regulations prohibiting the use of class action waivers in consumer financial products, the Supreme Court's ruling in *Concepcion* would be upended, at least for those contracts over which the CFPB has direct authority.<sup>150</sup>

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structure/ig/Documents/OIG-CA%2011004%20Committee%20of%20Financial%20Services%20Response%20CFPB.pdf (visited Jan 9, 2011).

<sup>147</sup> See Note, *Administrative Law*, 124 Harv L Rev at 2126 (cited in note 143).

<sup>148</sup> See Deborah Solomon and Maya Jackson Randall, *Bank Challenger Picked to Run Consumer Agency*, Wall St J A2 (July 18, 2011). Cordray is also a controversial pick, as he was a proconsumer state AG who brought a number of important lawsuits against industry. See id; Michael Powell, *The States vs. Wall St.*, NY Times B1 (Oct 12, 2010):

Mr. Cordray in two years in office has demonstrated a willingness to sue early and often, filing lawsuits against global financial houses, rating agencies, subprime lenders and foreclosure scammers. He has wrested about \$2 billion so far, a string of gilded pelts: a \$475 million Merrill Lynch settlement, \$400 million from Marsh & McLennan and \$725 million from the American International Group.... Former Senator Michael DeWine, a Republican who is running against Mr. Cordray, a Democrat, in the November election, has implied that Mr. Cordray wields an antibusiness cudgel.

See Helene Cooper and Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, NY Times A1 (Jan 5, 2012) (reporting that President Obama appointed Richard Cordray to serve as director of the CFPB while the Senate was in recess after Republicans had refused to confirm Cordray since his nomination in July 2011).

<sup>149</sup> Dodd-Frank Act § 1028(b), 12 USC § 5518(b). Notably, Dodd-Frank confers similar authority on the SEC to ban mandatory arbitration in the securities context and flatly prohibits mandatory arbitration in mortgage and home equity loan contracts. Dodd-Frank Act § 1414, 15 USC § 1639c(e). The Act also bans mandatory arbitration that would waive protections for those who blow the whistle on securities fraud and commodities fraud. Dodd-Frank Act § 922, 15 USC § 78u-6; Dodd-Frank Act § 748, 7 USC § 26.

<sup>150</sup> The Dodd-Frank Act expressly lists the "enumerated consumer laws" that are within the agency's jurisdiction. See Dodd-Frank Act § 1002(12), 12 USC § 5481(12). The list includes the following statutes: Alternative Mortgage Transaction Parity Act of 1982, Pub L No 97-320, 96 Stat 1545, codified at 12 USC § 3801 et seq; Consumer Leasing Act of 1976, Pub L No 94-240, 90 Stat 257, codified at 15 USC § 1667 et seq; Electronic Fund Transfer Act, Pub L No 95-630, 92 Stat 3728 (1978), codified at 15 USC § 1693 et seq; Equal Credit Opportunity Act, Pub L No 93-495, 88 Stat 1521 (1974), codified at 15 USC § 1691 et seq; Fair Credit Billing Act, Pub L

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And advocates on both sides are clearly anticipating that this is exactly what the agency will do.<sup>151</sup> While the CFPB has yet to issue any statement on how it plans to conduct the arbitration study,<sup>152</sup> in May 2011, it established an Office of Research to “produce new findings that deepen [the CFPB’s] understanding of the problems that consumers, firms, and markets encounter” by “conduct[ing] rigorous policy evaluations.”<sup>153</sup> Presumably, this research arm will conduct the arbitration study, focusing on class action waivers. It is interesting to note, in this regard, that Deepak Gupta, the consumer-rights attorney who argued the respondents’ position in *Concepcion* before the Supreme Court,<sup>154</sup> joined the General Counsel’s office at CFPB in late May 2011, shortly after the decision in *Concepcion* came down.<sup>155</sup> Gupta has voiced strong views against class action waivers.<sup>156</sup>

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No 93-495, 88 Stat 1511 (1974), codified at 15 USC § 1666 et seq; the Fair Credit Reporting Act, Pub L No 91-508, 84 Stat 1128 (1970), codified at 15 USC § 1681 et seq; Home Owners Protection Act of 1998, Pub L No 105-216, 112 Stat 897, codified at 12 USC § 4901 et seq; Fair Debt Collection Practices Act, Pub L No 95-109, 91 Stat 874 (1977), codified at 15 USC § 1692 et seq.

<sup>151</sup> See, for example, Barkley Clark and Barbara Clark, *Prediction: Likely First Targets of Bureau Rulemaking*, 19-7 Clarks’ Bank Deposits and Payments Monthly \*7 (July 2010) (“We have no doubt that one of the first rules out of the box will restrict or prohibit pre-dispute arbitration clauses coupled with class action waivers in consumer financial services contracts. This issue has been ablaze over the last several years.”); Winston & Strawn LLP, *The Bureau of Consumer Financial Protection: Broad Authority to Regulate Arbitration Agreements* 2 (July 2010), online at <http://www.winston.com/siteFiles/Publications/ArbitrationClientBriefing.pdf> (visited Jan 9, 2012) (“The Bureau’s consumer protection mandate may suggest that mandatory pre-dispute arbitration clauses may end up on the cutting room floor.”); Daniel Fisher, *After Arbitration Ruling, Watch Warren’s Consumer Bureau*, Forbes (Apr 27, 2011), online at <http://www.forbes.com/sites/danielfisher/2011/04/27/after-arbitration-ruling-watch-warrens-consumer-bureau/> (visited Jan 9, 2012).

<sup>152</sup> Dodd-Frank is silent as to whether the CFPB must use an outside consultant to conduct the arbitration study or whether the Bureau itself may perform the necessary review. The legislation is also silent as to the breadth of the study, the manner in which the study is performed, and whether any members of the industry will be asked to contribute to the study.

<sup>153</sup> Raj Date, *Independent Research at the CFPB* (Consumer Financial Protection Bureau May 11, 2011), online at <http://www.consumerfinance.gov/independent-research-at-the-cfpb/> (visited Jan 9, 2012).

<sup>154</sup> Gupta released this statement after the Court issued its decision in *Concepcion*:

Class actions are an essential tool for justice in our society. *Brown v. Board of Education* was a class action. The fate of class actions should not be decided through the fine print of take-it-or-leave-it contracts. . . . Public Citizen is committed to fighting against forced arbitration, which every day is used to deny justice to consumers and employees. We will continue to champion consumers’ rights in every branch of government. We will not give up.

Deepak Gupta, *In AT&T v. Concepcion, U.S. Supreme Court Deals Crushing Blow to Consumers*, Public Citizen (Apr 27, 2011), online at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3326> (visited Jan 9, 2012).

<sup>155</sup> Deepak Gupta, *Moving to CFPB*, BlueMauMau (May 23, 2011), online at [http://www.bluemaumau.org/moving\\_cfpb](http://www.bluemaumau.org/moving_cfpb) (visited Jan 9, 2012) (stating on his blog that he will

Still, even if the CFPB concludes that banning class action waivers in consumer financial contracts is “in the public interest and for the protection of consumers,” any resulting rule will apply, under a grandfather clause, only to contracts entered into more than 180 days after that rule is issued.<sup>157</sup> (One can only imagine the six-month dash to insert waivers that will follow any rulemaking.) This grandfather clause will prove especially impactful in the credit card arena, where consumers enter into “evergreen” contracts that remain in place for many years.

### III. THE ENFORCEMENT GAP

Class actions are on the ropes. And it’s not just because of class action waivers. Whereas courts previously avoided any “preliminary inquiry into the merits” at the class certification stage, recent years have seen the development of a standard under which plaintiffs are required to prove by a preponderance of the evidence—just as they would at trial—any fact necessary to meet the requirements of Rule 23, even if it also goes to the merits.<sup>158</sup> This requirement is at its most

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be joining the CFPB and is “looking forward to the challenge of helping to build a new consumer agency from scratch”).

<sup>156</sup> According to Gupta,

The legal issues before the Supreme Court in *AT&T v. Concepcion* may seem complex, but what’s really at stake is the ability of people to band together and challenge fraud, discrimination and other wrongful practices. . . . Although not without abuses, class actions have become an essential tool for resolving the common legal grievances of large groups of people. . . . The fate of class actions should be decided by our elected representatives, not by private legislation tucked into the fine print of take-it-or-leave-it contracts.

Deepak Gupta, Letter to the Editor, *Class-Action Lawsuits*, NY Times (Dec 3, 2010), online at <http://www.nytimes.com/2010/12/04/opinion/lweb04class.html> (visited Jan 9, 2012). See also Kate Davidson, *High Court Gives Banks a Win, but Will It Last?*, Am Banker 1 (Apr 28, 2011) (quoting Gupta on the question of whether the CFPB has authority to ban certain forms of arbitration: “Congress always has the authority to overturn a decision, but Congress has delegated the authority to ban arbitration in certain contracts in this instance, . . . [s]o there is nothing unusual about an administrative agency exercising authority delegated to it by Congress”).

<sup>157</sup> Dodd-Frank Act § 1028, 12 USC § 5518. There is precedent for this approach to consumer protection by “regulat[ing] contract terms directly, mandating, limiting, or prohibiting terms including prices.” Alan M. White, *Behavior and Contract*, 27 Law & Ineq 135, 177 (2009) (citing the example of the FTC, which has authority to “simply prohibit[] terms that cannot be viewed as benefiting consumers in a vast majority of situations”).

<sup>158</sup> See, for example, *In re Initial Public Offerings Securities Litigation*, 471 F3d 24, 41–42 (2d Cir 2006) (rejecting the “some showing” standard and adopting a requirement that plaintiffs provide “definitive” proof, through “affidavits, documents, or testimony to . . . [establish] that each Rule 23 requirement has been met”); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F3d 305, 316, 320 (3d Cir 2008):

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potent in damages cases under Rule 23(b)(3), where plaintiffs are obligated to establish the predominance of common issues.<sup>159</sup> The Supreme Court's recent decision in *Wal-Mart Stores, Inc v Dukes*,<sup>160</sup> meanwhile, largely carries these heightened requirements over into the injunctive realm, by redefining the hitherto easy-to-satisfy commonality requirement of Rule 23(a)(2).<sup>161</sup>

Further body blows to class action practice have been delivered by the development in recent years of an "implicit requirement" of ascertainability, under which courts in consumer cases have refused to certify classes in the absence of "reliable proof of purchase or a knowable list of injured plaintiffs."<sup>162</sup> This ascertainability requirement, which courts have generally grafted onto the Rule 23(b)(3) manageability requirement,<sup>163</sup> has sounded a death knell for many (if not most) cases arising from small retail purchases. The result has a certain dark irony. On the one hand, purchasers of ordinary products—peanut butter, cough medicine, pineapples, cookware, and aspirin<sup>164</sup>—are likely unconstrained by class action

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An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met... Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence.

See also J. Douglas Richards and Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 Rutgers L J 163, 169 (2009).

<sup>159</sup> See, for example, *Reed v Advocate Health Care*, 268 FRD 573, 596 (ND Ill 2009) (denying certification after weighing plaintiffs' method of proving injury and damages, and competing expert testimony, and concluding that plaintiffs were unable to provide common proof of their claims); *Walsh v Principal Life Insurance Co*, 266 FRD 232, 237 (SD Iowa 2010) (investigating evidentiary submissions before denying class certification due to plaintiffs' inability to satisfy the predominance requirement with evidence of injury common to the class).

<sup>160</sup> 131 S Ct 2541 (2011).

<sup>161</sup> See id at 2556–57 (2011). The Supreme Court clearly ramped up the requirements for establishing "commonality" under Rule 23(a), but no matter how rigorous the showing under *Dukes*, no one can argue that it is more exacting than the Rule 23(b)(3) predominance requirement under the *Initial Public Offering-Hydrogen Peroxide* line of cases. See note 158. Therefore, the impact of *Dukes* on Rule 23(b)(3) damages class actions appears minimal.

<sup>162</sup> Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L Rev 305, 331 (2010).

<sup>163</sup> The manageability notion stems from the view that, in the absence of a known list of injured consumers at the certification stage, "damages cannot reliably be distributed to potential claimants at the subsequent remedial stage of the litigation." Id at 310.

<sup>164</sup> See id at 312–13, citing *In re Conagra Peanut Butter Products Liability Litigation*, 251 FRD 689 (ND Ga 2008) (peanut butter); *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 214 FRD 614 (WD Wash 2003) (ingredient in cough syrup); *In re Fresh Del Monte Pineapples Antitrust Litigation*, 2008 WL 5661873 (SDNY) (pineapples); *In re Teflon Products Liability Litigation*, 254 FRD 354 (SD Iowa 2008) (cookware). See also *In re Bayer Corp Combination Aspirin Products Marketing and Sales Practices Litigation*, 701 F Supp 2d 356 (EDNY 2010) (aspirin).

waivers. On the other hand, they're unlikely to have the proof of purchase necessary to satisfy the ascertainability requirement—and indeed, deceptive trade and antitrust cases based on all these products have been dismissed on just such grounds.<sup>165</sup>

The net result of all this standard tightening, predictably, has been a drop-off in the number of class actions certified.<sup>166</sup> Further depressing class action activity, at least so far as state law claims are concerned, is the Class Action Fairness Act of 2005<sup>167</sup> (CAFA), which allows for the removal of most significant class filings to federal court.<sup>168</sup>

All of this, coupled with the Supreme Court's embrace of class action waivers, radically restricts the continued ability of private actors to vindicate public rights via the class action mechanism. As the private attorney general model recedes, the question naturally emerges: Are there public actors poised to step into the enforcement gap?

#### A. State Attorneys' General *Parens Patriae* Authority

In our view, state attorneys general—alone among public enforcers—have the ability to fill the void left by class actions, primarily through expanded use of the *parens patriae* powers that are currently on the books in most states. *Parens patriae* suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions. And while

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<sup>165</sup> Gilles, 59 DePaul L Rev at 312–13 (cited in note 162).

<sup>166</sup> Although some studies show that the number of class actions filed has remained fairly steady over the past three years, others reveal that, given the increased evidentiary and burden of proof standards that plaintiffs must satisfy, a significant number of these classes are not certified. Compare Fulbright & Jaworski LLP, *7th Annual Litigation Trends Survey Report* (2010), online at <http://www.fulbright.com/litigationtrends> (visited Jan 9, 2012), with Joel S. Feldman, Simone R. Cruickshank, and Gary J. McGinnis, *Evidentiary and Burden of Proof Standards for Class Certification Rulings*, 11 BNA Class Action Litig Rep 536, 541 (June 11, 2010). Securities fraud class actions appear to be the exception. See Jordan Milev, Robert Patton, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review* \*1 (National Economics Research Associates July 26, 2011), online at [http://www.nera.com/nera-files/PUB\\_Mid-Year\\_Trends\\_0711\(3\).pdf](http://www.nera.com/nera-files/PUB_Mid-Year_Trends_0711(3).pdf) (visited Jan 9, 2012) (reporting that securities class action filings remained steady and suggesting that “a wave of new cases alleging breach of fiduciary duty in connection with” mergers and acquisitions is the cause).

<sup>167</sup> Pub L No 109-2, 119 Stat 4, codified in various sections of Title 28.

<sup>168</sup> CAFA § 4(a), 28 USC § 1332(d)(2). See also Emery G. Lee III and Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* \*2 (Federal Judicial Center 2008), online at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Fourth%20Interim%20Report%20Class%20Action.pdf> (visited Jan 9, 2012) (reporting an increase in the number of removals to federal court immediately after CAFA was enacted, followed by a flattening to pre-CAFA levels).

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states may lack the resources and expertise to step into the enforcement gap, they have broad latitude to leverage the substantial resources and expertise of the private bar—and do so in a fashion that ameliorates the most criticized features of class action practice. Whether state AGs will in fact use these tools and seize the mantle of aggregate litigation is another question.

### 1. *Parens patriae authority.*

In parens patriae cases, the state AG is generally acting on behalf of citizens of the state, seeking injunctive relief or damages.<sup>169</sup> In the typical formulation, parens patriae standing is said to exist where the state is not merely a “nominal party” acting on behalf of a private interest, but is rather asserting its “quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”<sup>170</sup> Where the state asserts parens patriae authority as a matter of the common law, courts have wrestled with this “quasi-sovereign interest” requirement. But as Margaret Lemos has explained, “private interests can rise to the level of a quasi-sovereign state interest when sufficiently aggregated” and, as a consequence, “the operative question is whether the injury in question affects a ‘sufficiently substantial segment of [the state’s] population.’”<sup>171</sup> In any event, most assertions of parens patriae authority nowadays are grounded not in the common law, but in statutes that “explicitly authorize the attorney general to sue on behalf of the state’s citizens to redress particular wrongs.”<sup>172</sup> And here, where there is express statutory authorization, standing concerns evaporate.<sup>173</sup>

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<sup>169</sup> See Richard P. Ieyoub and Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 Tulane L Rev 1859, 1863–64 (2000). Parens patriae derives from Latin, meaning “parent of the country.” *Alfred L. Snapp & Son, Inc v Puerto Rico*, 458 US 592, 600 (1982). See also Jack Ratliff, *Parens Patriae: An Overview*, 74 Tulane L Rev 1847, 1847 (2000).

<sup>170</sup> *Snapp*, 458 US at 607.

<sup>171</sup> Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harvard L Rev \*5 (forthcoming 2012) (on file with authors), citing *Snapp*, 458 US at 608. Lemos interprets *Snapp* to support parens patriae authority where the state “acts on behalf of ‘its residents in general,’ rather than ‘particular individuals,’ asserting a ‘general interest’ in the welfare of its citizens of the sort that a state might try to ‘address through its sovereign lawmaking powers.’” Lemos, 126 Harv L Rev \*5 (cited in note 171).

<sup>172</sup> Lemos, 126 Harv L Rev \*5 (cited in note 171).

<sup>173</sup> Lemos has pointed out that, where parens patriae authority is grounded in federal or state statutory law, “every court to consider the question has held [that] state actions under such statutes present a case or controversy that satisfies the irreducible minima of Article III standing in federal court.” Id at \*6 (citations omitted).

In broad strokes, then, state AGs will generally have standing to step into cases that could otherwise be prosecuted as class actions, unless there is some statutory impediment. In state common law cases, *parens patriae* authority should generally lie; after all, if Rule 23(a)(1) numerosity would be satisfied, the “substantial segment of the population” test is likely met.<sup>174</sup> Likewise, the state remedial statutes that are most prominent in class action practice—including deceptive trade, antitrust, and wage-and-hour laws—are generally covered by broad legislative grants of *parens patriae* authority.<sup>175</sup>

Where standing problems most impede *parens patriae* actions is in federal cases based on a statute that expressly or impliedly restricts the ability of state AGs to act. Most prominently, the Clayton Act provides that state AGs have standing to pursue federal antitrust claims on behalf of “natural persons” residing in their states.<sup>176</sup> The problem is that natural persons rarely have standing to bring federal antitrust claims in the first place. Federal antitrust standing is vested exclusively in “direct purchasers” (usually businesses who bought from the defendant) while “indirect purchasers” (usually consumers) generally lack standing under the

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<sup>174</sup> See, for example, *People v Peter & John's Pump House, Inc*, 914 F Supp 809, 812 (NDNY 1996) (noting “[t]here is no numerical talisman to establish *parens patriae* standing,” and, citing *Snapp*, 458 US at 607, that “[a]lthough more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population”).

<sup>175</sup> See also *In re Sclater*, 40 BR 594, 596–97 (Bankr ED Mich 1984) (allowing state to bring claim as *parens patriae* under state consumer protection law that was silent on AG’s authority).

<sup>176</sup> 15 USC § 15c. See also *Hawaii v Standard Oil Co of California*, 405 US 251, 264 (1972) (insisting on a “clear expression of a congressional purpose” that a state may sue as *parens patriae* to “recover damages for injury to its general economy” under the Clayton Act); *California v Frito-Lay, Inc*, 474 F2d 774, 777–78 (9th Cir 1973) (same).

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federal antitrust laws.<sup>177</sup> As a consequence, parens patriae actions are effectively unavailable in most federal antitrust cases.<sup>178</sup>

A handful of other federal statutes, including ERISA and the Racketeering Influenced and Corrupt Organizations Act<sup>179</sup> (RICO), have also been read to preclude parens patriae standing.<sup>180</sup> But as a general matter, courts have allowed states to sue in parens patriae “under federal statutes that create broad private rights of action but are silent” on the capacity of AGs, including Title VII of the Civil Rights Act of 1964,<sup>181</sup> 42 USC § 1983, the Fair Housing Act,<sup>182</sup> and the Americans with Disabilities Act,<sup>183</sup> among others.<sup>184</sup>

In sum, the authority of state AGs proceeding in parens patriae to fill the enforcement gap is dependent on the nature of the claim at issue. While certain statutory claims will pose challenges, AG

<sup>177</sup> See Scott-Rodino Antitrust Improvements Act § 301, Pub L No 94-435, 90 Stat 1383 (1976), codified in relevant part at 15 USC § 15c (granting state AGs the right to bring treble damages suits on behalf of “natural persons,” as opposed to business entities, residing in their states). See also Hart-Scott-Rodino Antitrust Improvements Act of 1976, S 94-803, 94th Cong, 2d Sess (Jan 19, 1976) in 122 Cong Rec S 15974 (daily ed May 28, 1976); Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 Nw J Intl L & Bus 285, 295 (2010) (“[T]he purpose of the grant of statutory *parens patriae* authority to state attorneys general was ‘to overcome obstacles to private class actions through enabling state attorneys general to function more efficiently as consumer advocates.’”) (citations omitted). One year later, the Supreme Court decided *Illinois Brick v Illinois*, 431 US 720 (1977), stripping indirect purchasers of standing under federal antitrust laws and eviscerating Congress’s earlier empowerment of state AGs. See id at 726–29.

<sup>178</sup> Some state antitrust statutes echo this limitation, providing that parens patriae standing is limited to natural persons. See, for example, Cartwright Act, Cal Bus & Prof Code § 16760(a)(1) (providing that an AG “may bring a civil action in the name of the people . . . as *parens patriae* on behalf of natural persons residing in the state . . . to secure monetary relief . . . for injury sustained by those natural persons”). Still, the Cartwright Act and many other state statutes, unlike the federal law, expressly allow claims on behalf of indirect purchasers, leaving a significant role for parens patriae suits in antitrust enforcement. Cartwright Act, Cal Bus & Prof Code § 16760(a)(1).

<sup>179</sup> Pub L No 91-452, 84 Stat 922 (1970), codified as amended at 18 USC §§ 1961–68.

<sup>180</sup> See, for example, *Illinois v Life of Mid-America Insurance Co*, 805 F2d 763, 766 (7th Cir 1986) (“[E]ven if the complaint did sufficiently allege an injury to the state in its quasi-sovereign capacity, it is not clear . . . that Congress, in enacting the RICO statute, intended to permit such a *parens patriae* proceeding.”); *Connecticut v Physicians Health Services of Connecticut, Inc.*, 287 F3d 110, 120–21 (2d Cir 2002) (finding that the state was a “non-enumerated part[y] [which] lack[ed] statutory standing” under ERISA).

<sup>181</sup> Pub L No 88-352, 78 Stat 253, codified at 42 USC § 2000a et seq.

<sup>182</sup> Pub L No 90-284, 82 Stat 81 (1968), codified as amended at 42 USC § 3601 et seq.

<sup>183</sup> Pub L No 101-336, 104 Stat 327 (1990), codified as amended at 42 USC § 12101 et seq.

<sup>184</sup> See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 NYU L Rev 698, 710–11 (2011). See also *EEOC v Federal Express Corp*, 268 F Supp 2d 192, 197–98 (EDNY 2003) (Title VII); *Pennsylvania v Porter*, 659 F2d 306, 318 (3d Cir 1981) (42 USC § 1983); *Support Ministries for Persons with AIDS, Inc v Village of Waterford, New York*, 799 F Supp 272, 277 (NDNY 1992) (Fair Housing Act); *Vacco v Mid Hudson Medical Group, PC*, 877 F Supp 143, 149 (SDNY 1995) (Americans with Disabilities Act and the Rehabilitation Act).

standing is not much in doubt in key areas of current class action practice, including consumer and employment cases. There are questions remaining: To what extent do the challenges that have hobbled class actions pose a threat to parens patriae actions? And, what are the legal and political constraints on the ability of state AGs to lever the resources and expertise of the private bar to pursue parens patriae cases?

## 2. Parens patriae and the challenges to class actions.

As enforceable class action waivers proliferate, we think it is only a matter of time until a defendant makes the argument that a state AG's parens patriae action is barred by the uniform terms of the contracts between the defendant and the AG's constituent consumers and workers. Facing parens patriae claims that might otherwise have been brought by persons that are bound by arbitration clauses and class action waivers, defendants will argue that agency principles apply,<sup>185</sup> under which an agent is deemed bound by the arbitration agreements of the principal.<sup>186</sup>

But the centuries-old doctrinal underpinnings of parens patriae<sup>187</sup> are incompatible with any notion of agency. The whole idea behind parens patriae suits is that the state has its own interest at stake in the litigation. The state's "quasi-sovereign" interest supporting the claim is not derived from an agency relationship with third-party constituents. Instead, the state's *own* interest kicks in once a sufficient number of its constituents have suffered injury. Moreover, the sine qua non of agency is control; there is no agency relationship absent an "understanding of the parties that the principal is to be in control of the undertaking."<sup>188</sup> In a parens patriae case—as in a

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<sup>185</sup> Courts often recite a litany of five grounds upon which a nonsignatory to an arbitration agreement can be deemed bound to arbitrate under that agreement: "(1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference." *Zurich American Insurance Co v Watts Industries, Inc*, 417 F3d 682, 687 (7th Cir 2005). Of these, agency is the only potentially applicable ground for assertions that the state AG is bound to class waivers in underlying agreements.

<sup>186</sup> See *Pritzker v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 7 F3d 1110, 1121 (3d Cir 1993) ("Under traditional agency theory, . . . [b]ecause a principal is bound under the terms of a valid arbitration clause, its agents . . . and representatives are also covered under the terms of such agreements.").

<sup>187</sup> See Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 Georgetown L J 1059, 1068 (2008) ("Parens patriae originated as an English common law doctrine which allowed the Crown to assert the rights of subjects who were incapacitated.").

<sup>188</sup> Restatement (Second) of Agency § 1. See also *Azuna, LLC v Netpia.com, Inc*, 2009 WL 2474634, \*3 (ED Pa):

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criminal prosecution, and quite unlike an ordinary private lawsuit—the injured party is simply not “in control of the undertaking.”<sup>189</sup> And indeed, this precept finds support in *EEOC v Waffle House, Inc.*,<sup>190</sup> where the Supreme Court held that an employee’s arbitration clause did not bar the EEOC from seeking victim-specific damages.<sup>191</sup> So class waivers, in our view, are unlikely to affect *parens patriae* suits.<sup>192</sup>

Absent a radical expansion of current doctrine, *parens patriae* suits are likewise impervious to the increasingly restrictive rules governing class certification, including the ascertainability requirement. It is hard to see why it should matter if an AG has a knowable list of persons affected by an unfair trade practice or environmental nuisance, so long as the AG can ascertain the amount of aggregate damages suffered by his citizenry. A court in a class action may feel obliged to ensure that any relief will ultimately be distributed to the injured parties, and it may conclude that problems identifying those parties render the class device unmanageable within the meaning of Rule 23(b)(3). But state AGs generally have no obligation to distribute damages at all<sup>193</sup>—much less are they obligated to do so

In the absence of an agreement between DAK and Azuna or evidence that DAK had control or supervision over Azuna, the Court cannot conclude that there is an agency relationship binding DAK to an agreement to arbitrate entered into by Azuna. Therefore, DAK is not bound by the arbitration agreement under an agency theory.

<sup>189</sup> As Lemos points out in a related context, “*parens patriae* group members have *no* ability to replace the attorney general as their representative if they are displeased with his work.” Lemos, 126 Harv L Rev at \*14 (cited in note 171).

<sup>190</sup> 534 US 279 (2002).

<sup>191</sup> Id at 295–96. We thank Brian Fitzpatrick for making this important connection.

<sup>192</sup> Still, we can imagine defendants trying to analogize AGs to trade associations. According to the Supreme Court:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v Washington State Apple Advertising Commission*, 432 US 333, 343 (1977).

<sup>193</sup> For example, California’s Cartwright Act provides that

Monetary relief recovered by the Attorney General . . . shall be distributed . . . [i]n any manner as the superior court having jurisdiction over the action in its discretion may authorize to insure, to the extent possible, that each person be afforded a reasonable opportunity to secure his or her appropriate portion of the monetary relief. In exercising its discretion, the court may employ *cy pres* or fluid recovery mechanisms as a way of providing value to persons injured as a result of a violation of this chapter.

Cal Bus & Prof Code § 16760(e)(1). The statute further specifies that any remaining sums “not exhausted by distribution” escheat to the state. Cal Bus & Prof Code § 16760(e)(3). See also Ariz Rev Stat Ann §§ 41-191.01 to 41-191.02 (establishing a revolving fund for the deposit of monies received by the state as a result of the enforcement of federal or state antitrust statutes

with any precision. Liberal use of *cy pres*, escheatment to the public fisc, and the application of rough justice principles in distributing awards are unquestioned hallmarks of *parens patriae* litigation.<sup>194</sup> And while the defendant surely has a due process interest in ensuring that it does not incur liability greater than the aggregate damages it inflicted upon affected state residents, it surely has no interest in the AG's subsequent disposition of those damages.

A more complicated problem is presented by the potential application, in *parens patriae* cases, of the heightened proof standards demanded by *In re Initial Public Offerings Securities Litigation*<sup>195</sup> and *In re Hydrogen Peroxide Antitrust Litigation*<sup>196</sup> for the certification of damages classes, and by *Dukes* for injunctive cases.<sup>197</sup> As AG-initiated suits come to take the place of private class actions, we expect a push from defendants to subject *parens patriae* cases to a sort of shadow Rule 23 standard, arguing for threshold determinations that mirror commonality and predominance inquiries. Indeed, we have already seen defendants argue that *parens patriae* cases should be removable under CAFA because they resemble class actions; that is, that *parens patriae* cases are often “class actions in disguise” and, when they are, they should be regulated like class actions. And while this view has been rejected by most courts,<sup>198</sup> it was accepted by the Fifth Circuit in *Louisiana v*

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and mandating that a portion of any antitrust recovery be set aside for antitrust enforcement activities).

<sup>194</sup> See, for example, *Boyle v Giral*, 820 A2d 561, 566–67 (DC 2003) (affirming settlement of a *parens patriae* suit where defendants “vigorously attack[ed] the *cy pres* distribution approved by the trial court, and contend[ed] that D.C.Code § 28-4507(b)(2)(B) ‘mandates’ that members of the consumer class receive direct monetary relief,” and finding that the trial court exercised properly its discretion in awarding *cy pres* where “[i]t would be utterly impracticable for the [s]ettlement to provide individual compensation to the [c]onsumer [s]ettlement [c]lass members”). See also Albert A. Foer, *Enhancing Competition through the Cy Pres Remedy: Suggested Best Practices*, 24 Antitrust 86, 87 (Spring 2010):

Some courts in *parens patriae* cases have ordered the entire damage award to be used for public interest purposes, such as education with respect to the industry in which liability was established, even though the consumers on whose behalf the case was brought did not recover their actual damages. In other instances, *cy pres* distributions have been ordered to be used by state attorneys general to fund antitrust enforcement.

(citation omitted).

<sup>195</sup> 471 F3d 24 (2d Cir 2006).

<sup>196</sup> 552 F3d 305 (3d Cir 2008).

<sup>197</sup> See notes 158–61 and accompanying text.

<sup>198</sup> See Alexander Lemann, Note, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits under the Class Action Fairness Act*, 111 Colum L Rev 121, 122 n 9, 134 (2011) (citing cases rejecting the argument that *parens patriae* suits should be treated as class actions for purposes of CAFA removal).

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*Allstate Insurance Co.*<sup>199</sup> and has found predictable traction in conservative circles<sup>200</sup>—which implies it could well receive a favorable reception in the Roberts Court.

If the “class actions in disguise” argument takes hold, why stop at removability under CAFA? Why not subject parens patriae actions to something like commonality and predominance inquiries? It is not difficult to imagine courts conducting an early-stage hearing into parens patriae standing, and demanding the AG make a showing that the injuries to his constituents are capable of cohesive common proof that predominates over individual inquiries, as a prerequisite to finding that the state’s quasi-sovereign interests are implicated. The numerosity requirement is already baked into the standing inquiry, and courts arguably have inherent power to police manageability in any case, even without Rule 23. Presumably, courts would borrow from class action case law the requirement that the AG make these showings by a preponderance standard.<sup>201</sup>

One place where AGs *do* have to make a Rule 23 showing is where the parties wish to endow their settlement with the res judicata reach of a class action settlement.<sup>202</sup> This may not be easy: the Texas Supreme Court, for one, has held a state AG is not a “typical” class representative within the meaning of Rule 23, or Texas’s analogue.<sup>203</sup> However, post-*Concepcion*, obtaining a class-wide global release will often be less consequential, given the reduced risk of additional litigation by nonreleased parties.

Whatever the merits of grafting Rule 23-like requirements onto parens patriae cases, this approach is certainly attuned to the legal zeitgeist and, in our view, represents a plausible outcome. But the effect will be limited and will not reach class action waivers. No

<sup>199</sup> 536 F3d 418 (5th Cir 2008).

<sup>200</sup> See, for example, id at 424, quoting 151 Cong Rec S 1163–64 (daily ed Feb 9, 2005) (Sen Hatch):

If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs’ lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action.

See also McGlinchey Stafford PLLC, *Are Parens Patriae Suits Just Class Actions in Disguise?*, CAFA Law Blog (Feb 21, 2011), online at <http://www.cafalawblog.com/legal-publications-and-articles-are-parens-patriae-suits-just-class-actions-in-disguise.html> (visited Jan 9, 2012).

<sup>201</sup> See *Hydrogen Peroxide*, 552 F3d at 320.

<sup>202</sup> Courts generally hold that res judicata, in the aggregate litigation context, applies only where the potentially barred party was given notice and the opportunity to opt out. See *Brown v Ticor Title Insurance Co.*, 982 F2d 386, 390 (9th Cir 1992) (“[I]f the plaintiff was not adequately represented in the prior action or there was a denial of due process, then the prior decision has no preclusive effect.”).

<sup>203</sup> See *Farmers Group, Inc v Lubin*, 222 SW3d 417, 425 (Tex 2007).

matter how heavily the *parens patriae* standing inquiry borrows from Rule 23, it is clear that the state itself has an interest in redressing widely distributed harms to its citizens and, as a consequence, remains beyond the reach of contractual arbitration clauses. Likewise, there is nothing here to alter the analysis of the ascertainability requirement. The state's ability to make even a rigorous showing of cohesiveness (or numerosity, or commonality) simply will not depend on "proof of purchase" evidence or known lists of injured persons.

### B. Private Lawyers and Public Enforcement in *Parens Patriae*

So state AGs can use *parens patriae* to get at many or most of the cases that would otherwise be the subject of class actions, and they can do so unconstrained by class action waivers and, at least for now, the other, lesser challenges that afflict class actions. But do state AGs have the resources and political will to step meaningfully into the enforcement gap?

At the outset, we take it as a given that state AGs generally<sup>204</sup> lack the resources to take the laboring oar on many of the large-scale cases that have traditionally been the province of the class action plaintiffs' bar.<sup>205</sup> Chronically underfunded, state AGs have typically been consigned to a supporting role in complex class litigations.<sup>206</sup>

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<sup>204</sup> Of course, state AG offices vary tremendously in terms of resources and expertise. New York, for instance, is set up to litigate complex and expensive matters. See Peter J. Brann, *State Attorneys General Consumer Protection Under a New Administration: New Opportunities and New Challenges*, Columbia Law School State Attorney General Project \*2–7 (Oct 31, 2008), online at [http://www.law.columbia.edu/null?&exclusive=filemgr.download&file\\_id=55833&rtcontentdispositi](http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=55833&rtcontentdispositi) (visited Jan 9, 2012) (discussing differences in resources among state AG offices).

<sup>205</sup> See Lemos, 86 NYU L Rev at 761 (cited in note 184) ("[S]tate attorneys general face resource constraints that limit the scope of possible enforcement actions."); Marc Dann, Attorney General of Ohio, *Address to the City Club of Cleveland* \*5 (June 29, 2007), online at <http://www.legalnewslines.com/content/img/f197459/dannspeech.pdf> (visited Jan 9, 2012) ("[Industry groups] know that public officials don't have the resources to finance complicated law suits [sic] that often take years to work their way through the courts."); David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 Mich St L Rev 423, 431 ("[D]efendants in [complex class actions] have deep pockets and are capable of hiring the best legal talent can buy to wear down their opponents, even when that opponent is the state.").

<sup>206</sup> See Jay L. Himes, *When Caught with Your Hand in the Cookie Jar... Argue Standing*, 41 Rutgers L J 187, 217 (2009) ("[I]n recent years, the states' major pharmaceutical-drug antitrust cases have followed on-going private litigations and were generally settled along with the private actions."); Settlement Agreement between Plaintiff States and Bristol-Myers Squibb Co, Watson Pharma, Inc and Danbury Pharmacal, Inc Regarding Buspar, *In re Buspirone Litigation*, No 01-CV-11401 (SDNY Mar 7, 2003) (establishing that state AGs settled multistate monopolization action against pharmaceutical companies, together with

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And these budgetary constraints are only getting worse in the current economic climate. So it is unrealistic to expect state AGs to step into the breach with their own resources.<sup>207</sup>

But state AGs are, by and large, free to leverage the capital resources, expertise, and workforces of the private bar, on a no-cost basis.<sup>208</sup> Putting aside politics—which we discuss below—there is little to stop state AGs from engaging private law firms on a contingent fee basis to pursue claims in *parens patriae* on behalf of injured state residents.<sup>209</sup> The principal legal constraint is the requirement, imposed by several courts, that the AG must maintain total control over all key decision making lest the retainer agreement violate public policy as an unlawful delegation of the AG’s authority.<sup>210</sup> There is no prohibition on outside counsel doing the work—that is, finding and vetting the case, writing the court papers, conducting the discovery, or trying the case—so long as it is subject to the ultimate

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private class actions, for \$100 million and injunctive relief); *In re Cardizem CD Antitrust Litigation*, 481 F3d 355, 357 (6th Cir 2007) (noting that fifty-two state AGs filed their own multistate action after the FTC and private class actions had been initiated). See also Steven B. Hantler, Mark A. Behrens, and Leah Lorber, *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 Loyola LA L Rev 1121, 1160–61 (2005) (listing examples of state AGs piggybacking on regulatory and litigation activity by federal entities and private lawyers).

<sup>207</sup> Wilkins, 2010 Mich St L Rev at 427 (cited in note 205) (“Given both shrinking state budgets and the growing list of potential big-ticket claims involving alleged harms to consumers or the environment, the number of Attorneys General seeking to create [contingency fee] arrangements of this kind will, in all likelihood, only increase.”).

<sup>208</sup> Id (noting that while defendants have argued that AGs lacked “the statutory or constitutional authority to delegate [] public duties to these private parties,” AGs have generally been able to defeat these arguments). But see Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup Ct Econ Rev 77, 101–06 (2010) (asserting constitutional problems with AGs hiring private counsel on contingency).

<sup>209</sup> See Wilkins, 2010 Mich St L Rev at 426 (cited in note 205) (describing various instances of state AGs hiring private counsel on contingency and noting that “in recent years, arrangements of this kind have become increasingly common”).

<sup>210</sup> See, for example, *County of Santa Clara v Superior Court*, 235 P3d 21, 36 (Cal 2010), cert denied, 131 S Ct 920 (2011) (upholding contract where the county hired outside counsel on contingency in public nuisance actions against lead paint manufacturers because “neutral, conflict-free government attorneys retain[ed] the power to control and supervise the litigation”); *State v Lead Industries Association, Inc.*, 951 A2d 428, 477 (RI 2008) (upholding legality of contingency fee agreement between state and outside counsel where AG maintains “absolute control” over the litigation). David Wilkins argues that contingency fee arrangements are superior to hourly fee arrangements:

[E]ven if a state or municipality were able to find lawyers with the requisite expertise and experience who were willing to work for an hourly rate that the government was willing or able to pay, officials would still have to fund the significant up-front costs and expenses that often are required to mount cases of this kind out of public coffers.

Wilkins, 2010 Mich St L Rev at 432–33 (cited in note 205).

control of the AG, who also must retain the last word on any settlement.<sup>211</sup>

There is much to commend this model of public retention of private counsel. Provided that the AG supervision requirement is taken seriously—and it is quite cynical to expect it would not be—the model installs a responsible elected official in a role that promises to moderate the worst abuses of class action practice. Traditionally, in class actions outside the securities field,<sup>212</sup> law firms vie with one another for lead counsel positions, cutting coalition deals based not on operational merits but on the terms of the last coalition deal and the one before that.<sup>213</sup> The public-private partnership model, properly implemented, has the potential to replace that unseemly scrum with a transparent process, in which the AGs select their cocounsel in conformity with whatever state laws and practices might exist governing state contracting.<sup>214</sup> (On the other hand, if improperly implemented, this model courts “pay-to-play” type abuses, where state officials extract benefits for bestowing lucrative engagements upon favored members of the private bar.)<sup>215</sup>

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<sup>211</sup> For cases upholding contingency fee agreements between AGs and private counsel, see *City of Grass Valley v Newmont Mining Corp*, 2007 WL 4166238, \*1 (ED Cal); *Sherwin-Williams Co v City of Columbus, Ohio*, 2007 WL 2079774, \*2–4 (SD Ohio); *City and County of San Francisco v Philip Morris, Inc*, 957 F Supp 1130, 1135 (ND Cal 1997); *State v Hagerty*, 580 NW2d 139, 148 (ND 1998); *Kinder v Nixon*, 2000 WL 684860, \*8 (Mo Ct App).

<sup>212</sup> The Private Securities Litigation Reform Act of 1995 (PSLRA), Pub L No 104-67, 109 Stat 737, codified in various sections of Title 15, provides that the lead plaintiff—the class member with the largest claimed loss who seeks the position—shall “select and retain counsel to represent the class.” PSLRA § 27, 15 USC § 77z-1. The PSLRA “transformed the lead plaintiff process from a ‘race to the courthouse’ to an orderly procedure.” David H. Webber, *Is “Pay-to-Play” Driving Public Pension Fund Activism in Securities Class Actions? An Empirical Study*, 90 BU L Rev 2031, 2038 (2010).

<sup>213</sup> See, for example, *In re Auction Houses Antitrust Litigation*, 197 FRD 71, 75 (SDNY 2000). The lead counsel selection process has been described as:

[T]ypically occur[ing] in one of two ways, neither of which necessarily leads to an optimal outcome. Often, interested counsel jockey for the lead counsel position, leaving the court to choose one of the contenders, sometimes with little guidance. . . . Alternatively, the plaintiffs’ lawyers negotiate among themselves to select lead counsel or a team of lead counsel, and the choice is presented as a *fait accompli* for the court summarily to endorse.

*Id.* The court added that “[g]iven the potential for massive plaintiffs’ recoveries in such cases, the lead counsel position may involve a potentially large attorney’s fee. The role therefore has become a coveted prize to be fought over or bargained for among competing plaintiff’s attorneys.” *Id.*

<sup>214</sup> See, for example, Va Code § 2.2-510.1 (requiring any contingency fee between a state agency and a private attorney where the fees are “reasonably anticipated to exceed \$100,000” to be subject to “an open and competitive negotiation process” in accordance with the Virginia Public Procurement Act, Va Code § 2.2-4300 et seq).

<sup>215</sup> On this point, Samuel Issacharoff observes that this model places AGs in the role of gatekeeper and warns that, sooner or later, gatekeepers tend to become toll collectors. See Email from Samuel Issacharoff, Professor at New York University School of Law, to Myriam

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In terms of case selection too, the responsible AG acts as a filter—a bulwark against unmeritorious cases on which private lawyers might otherwise “take a flier” in order to exploit *in terrorem* effects. And at the settlement stage, class counsels’ rational economic interests might drive them to eschew injunctive relief in favor of damages, but the final-cut authority belongs to the AG, ameliorating a principal basis for the agency costs critique of class actions.<sup>216</sup>

The opportunity to augment scant public resources with the fruits of successful *parens patriae* litigations is, moreover, a public good that offers political benefits.<sup>217</sup> Newspaper accounts accompanying the installation of former Ohio AG Richard Cordray to run the CFPB, for instance, spoke glowingly about his having “recovered more than \$2 billion for Ohio retirees, investors and business owners.”<sup>218</sup> Similar praise followed other active AGs.<sup>219</sup> The

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Gilles, August 2011 (on file with authors). In a general sense, this is surely correct—and it corroborates our, and Issacharoff’s, strong preference for broad-based private enforcement. See Gilles, 100 Colum L Rev at 1414–24 (cited in note 7). But the point here is that the broad-based private enforcement option is off the table after *Concepcion*.

<sup>216</sup> David Wilkins provides an example for avoiding conflicts between private and public lawyers at the settlement stage: when Nevada hired the law firm Cohen Milstein Sellers & Toll PLLC to act as “special attorneys general” in its lawsuit against mortgage lenders engaged in fraudulent lending practices, the contract gave the AG “final and exclusive authority over all aspects of [the] case, including settlement decisions.” Wilkins, 2010 Mich St L Rev at 443, 462 (cited in note 205) (noting that “the agreement g[gave] the Attorney General the right to control all major elements of the litigation, including whether and on what terms the case will be settled”). The contract also provides that should the AG decide to settle the case for injunctive relief, “[Cohen] Milstein will receive ‘costs and hourly fees at fair market value of their legal services expended on behalf of the state.’” Id at 443 n 88. This protects the firm from nonpayment, while allowing the public officials to extract the best settlement for their constituents. It also balances the conflicts that may arise when there are both compensatory and public interest motivations for the litigation.

Whether by adjudication or settlement, there may be questions of whether to pursue injunctive relief, money damages, or both. A person committed to the cause may give greater weight to injunctive remedies. A person seeking to maximize monetary recovery may give less weight to injunctive remedies or, in a class action or other context requiring court approval, may even prefer to include illusory injunctive remedies combined with significant money damages.

Howard M. Erichson, *Doing Good, Doing Well*, 57 Vand L Rev 2087, 2103 (2004).

<sup>217</sup> See, for example, Wilkins, 2010 Mich St L Rev at 433 (cited in note 205):

Public lawyers also have political incentives for bringing in high profile private lawyers to assist them in high profile cases.... Not surprisingly, in seeking to woo voters, these lawyer/candidates are quick to tout their experience in helping to shape public policy by curbing corporate abuses through litigation against defendants like tobacco companies and mortgage lenders.

<sup>218</sup> See, for example, Editorial, *Consumer Watchdog: Ex-Ohio AG Is a Smart Choice for Key Agency*, Pittsburgh Post-Gazette B6 (July 25, 2011) (“Mr. Cordray’s reputation as a consumer advocate is that he’s tough, smart and honest. As Ohio attorney general, he

retention of expert, highly specialized trial lawyers extends this benefit, allowing AGs around the country to take leadership positions in the sort of complex, big-ticket cases that are likely to contribute meaningfully to state coffers.

On the other hand, there may be political risk in hiring outside firms.<sup>220</sup> The poster child here is the tobacco litigation, where state AGs hired well-known plaintiffs' lawyers to sue the cigarette manufacturers on a subrogation theory. Although the private lawyers were able to wrest a \$246 billion settlement from an industry that had enjoyed total success for decades in fending off any damages liability, critics balked at the \$14 billion in aggregate fees paid to outside counsel under contingent fee agreements.<sup>221</sup> Fierce lobbying and popular outcry drove some jurisdictions to place limits on the ability of AGs to hire outside counsel,<sup>222</sup> and led President

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successfully sued financial giants Bank of America and American International Group. And he took on the major securities-rating agencies."); Michael Powell and Mary Williams Walsh, *A.I.G. to Pay \$725 Million in Ohio Case*, NY Times B1 (July 17, 2010) (announcing settlement between the American International Group and three Ohio pension funds in suit brought by Cordray).

<sup>219</sup> See, for example, DC Denison, *Deal Offers Mortgage Relief for Thousands*, Boston Globe B7 (Aug 10, 2011) (announcing the \$125 million settlement reached by AG Martha Coakley with mortgage companies engaged in fraudulent practices); Leslie Wayne, *Go-Between Tied Funds to Carlyle*, NY Times B1 (May 15, 2009) (reporting on the \$20 million settlement between the Carlyle Group and AG Andrew Cuomo). Eliot Spitzer, New York's former AG, was the prototype for aggressive, headline-grabbing litigation activity. See, for example, Press Release, *Invesco and AIM Settle Mutual Fund Timing Cases*, New York State Attorney General (Sept 7, 2004), online at [http://www.ag.ny.gov/media\\_center/2004/sep/sep7c\\_04.html](http://www.ag.ny.gov/media_center/2004/sep/sep7c_04.html) (visited Jan 10, 2012) (reporting on the \$450 million settlement with the Invesco Funds Group and AIM Advisors involving illegal market timing); Brooke A. Masters and Carrie Johnson, *Prudential to Pay \$600 Million to Avoid Fund Trial*, Wash Post D1 (Aug 29, 2006).

<sup>220</sup> See, for example, Editorial, *The Pay-to-Sue Business*, Wall St J A14 (Apr 16, 2009); Adam Liptak, *A Deal for the Public: If You Win, You Lose*, NY Times A10 (July 9, 2007).

<sup>221</sup> See, for example, Barry Meier and Richard A. Oppel Jr, *States' Big Suits against Industry Bring Battle on Contingency Fees*, NY Times A1 (Oct 15, 1999):

The staggering fees prompted public uproar, particularly in Texas, where one lawyer, Marc D. Murr of Houston, who appeared to play little role in the litigation, sought \$260 million in fees. Faced by a state investigation, Mr. Murr, whose request was supported by the former Texas Attorney General who hired him, backed down.

<sup>222</sup> See, for example, Kan Stat Ann § 75-37,135 (requiring any fee agreement between the AG and a private lawyer where the fees "reasonably may exceed \$1,000,000" to be disclosed to the legislative budget committee for public hearing and approval); ND Cent Code § 54-12-08.1 (requiring an "emergency commission" to approve any contingency fee contract between the AG and outside counsel where the amount in controversy exceeds \$150,000). See also Meier and Oppel, *States' Big Suits against Industry Bring Battle on Contingency Fees*, NY Times at A1 (cited in note 221):

As part of a business counteroffensive against the trend, the United States Chamber of Commerce will soon begin an intensive lobbying campaign to get legislatures to drastically restrict states' use of contingency lawyers.... Republican lawmakers with the backing of business groups passed legislation [in Texas] requiring the State Attorney

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George W. Bush to ban the use of contingency fee agreements in federal contracts with outside counsel.<sup>223</sup>

But cooler heads have since prevailed. The Louisiana AG, James “Buddy” Caldwell, recently received permission from the state legislature to hire private attorneys to handle litigation against BP and others arising out of the Deep Water Horizon disaster.<sup>224</sup> Standing firm in the face of critics who cited “pay-to-play” scandals elsewhere, State AG Caldwell emphasized the superior resources of private law firms and observed that, without private contingency counsel, “[i]t’s like we’ve got a slingshot trying to take down a big ol’ giant.”<sup>225</sup> Caldwell explained: “[Y]ou’ve got to get the best lawyers. They’re going to have lawyers that charge \$1,000 an hour. I want something close to a level playing field.”<sup>226</sup> Other AGs have similarly turned to private outside counsel.<sup>227</sup>

In any event, AGs can easily protect themselves from a “tobacco problem” by negotiating to place some sort of limits on fees. Such capping arrangements—often couched as a fee of  $x$  percent but not to exceed  $y$  times the ordinary hourly fees—are not unusual in private contracts, and they need not be particularly draconian to avoid the sort of “windfall” situation that is capable of drawing populist ire.

A more significant political obstacle might be electoral politics in a post-*Citizens United* era.<sup>228</sup> The ability of business groups to amass war chests targeting consumer-friendly AGs may prove formidable in some states.<sup>229</sup> And while trial lawyers are likely to

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General to have contingency-fee contracts approved by a board appointed by top state officials. Legal fees could not exceed \$4,000 an hour.

<sup>223</sup> Executive Order 13433, 3 CFR § 217 (May 16, 2007).

<sup>224</sup> Wilkins, 2010 Mich St L Rev at 426–27 (cited in note 205), citing Bill Barrow, *House Committee Approves Hiring Lawyers for Gulf Oil Spill Cases*, Times-Picayune (June 15, 2010), online at [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/house\\_committee\\_approves\\_hirin.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/house_committee_approves_hirin.html) (visited Jan 10, 2012).

<sup>225</sup> Bill Barrow, *House Committee* (cited in note 224).

<sup>226</sup> Bill Barrow, *Attorney General Seeks Cash, Power to Hire Outside Lawyers in Fight against Gulf Oil Spill*, Times-Picayune (May 31, 2010), online at [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/attorney\\_general\\_seeks\\_cash\\_po.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/attorney_general_seeks_cash_po.html) (visited May 3, 2012) (reporting AG Caldwell’s view that he “needs more firepower to hire outside help” because “[w]e just don’t have the horses’ to handle such a complex case”).

<sup>227</sup> See Wilkins, 2010 Mich St L Rev at 430 (cited in note 205) (listing suits “against the manufacturers of lead paint, HMOs and other health care providers, brewers and distillers, fast food chains, and in the years since the housing market crash, mortgage lenders” as common cases in which private lawyers are brought in to conduct litigation against private parties).

<sup>228</sup> *Citizens United*, 130 S Ct at 913 (lifting ban on campaign spending by corporations).

<sup>229</sup> See, for example, Chris McGann, *Chamber Tells Why It Paid for Anti-Senn Ads*, Seattle P-I A1 (Sept 14, 2004) (reporting that the US Chamber of Commerce spent over \$1.5 million to defeat Deborah Senn’s campaign to be elected state AG in Washington because

provide a counterweight to some extent, these are perilous waters: AGs should expect zero tolerance for “pay to play” regimes in which campaign contributions are, or appear to be, reciprocated by contingent fee engagements.<sup>230</sup> Given the attention paid to this issue in the defense community,<sup>231</sup> it will be critical to distinguish perfectly permissible contributions by trial lawyer groups from donations

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she was viewed as “anti-business”); Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W Va L Rev 1097, 1127 (2008), quoting U.S. Chamber of Commerce Failed to Report Electioneering Spending and Grants, *Public Citizen Asks IRS to Investigate* (Public Citizen Oct 31, 2006), online at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=2305> (visited Jan 10, 2012) (“In 2002, the [US] Chamber [of Commerce] said it planned to spend \$40 million on political campaigns, divided equally between congressional and state-level attorneys general and judicial races.”); Jonathan D. Salant, *Pro-business Groups Invest in Races for Attorney General*, Wash Post A6 (Oct 29, 2006) (reporting that businesses fearing “activist” AGs spent millions to try to have them unseated); Robert Lenzner and Matthew Miller, *Buying Justice*, Forbes (July 21, 2003), online at [http://www.forbes.com/free\\_forbes/2003/0721/064.html](http://www.forbes.com/free_forbes/2003/0721/064.html) (visited Jan 10, 2012) (reporting that the US Chamber of Commerce spent “\$100 million since 2000” in campaigns “taking aim at state attorneys general,” and had “prevailed in 11 attorney general races”).

<sup>230</sup> See, for example, Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum J L & Soc Probs 587, 595 (2009), quoting Judge William H. Pryor, ex-AG of Alabama, as stating that contingency fee contracts with private lawyers can result in “outright corruption for political supporters of the officials who negotiated the [c]ontracts”), quoting Brief of Chamber of Commerce of the United States of America and the American Tort Reform Association as Amici Curiae, *Oklahoma v Tyson Food, Inc*, No 4:05-cv-00329, \*6 (ND OK filed June 12, 2007) (available on Westlaw at 2007 WL 5366927); Mark A. Behrens and Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U Dayton L Rev 173, 180–81 (2006) (providing examples of possible improprieties by Kansas and Texas state AGs); John Fund, *Cash In, Contracts Out: The Relationship between State Attorneys General and the Plaintiffs’ Bar* 6–11, US Chamber Institute for Legal Reform (Oct 14, 2004), online at [http://www.instituteforlegalreform.com/get\\_ilr\\_doc.php?id=820](http://www.instituteforlegalreform.com/get_ilr_doc.php?id=820) (visited Jan 10, 2012) (citing numerous examples of AGs awarding contingency fee contracts to campaign contributors).

<sup>231</sup> See, for example, John Beisner, Jessica Davidson Miller, and Terrell McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs’ Lawyers*, US Chamber Institute for Legal Reform 3–8 (May 26, 2005), online at [http://www.instituteforlegalreform.com/get\\_ilr\\_doc.php?id=939](http://www.instituteforlegalreform.com/get_ilr_doc.php?id=939) (visited Jan 10, 2012); Douglas F. McMeyer, Lise T. Spacapan, and Robert W. George, *Contingency Fee Plaintiffs’ Counsel and the Public Good?*, In-House Defense Quarterly 13 (Winter 2011), online at [http://www.huschblackwell.com/files/Publication/d7a63e97-c943-4ce9-9a5a-aa61a6bfdd92/Presentation/PublicationAttachment/026393d9-9aaa-48aa-bc82-abb484163812/McMeyer\\_Final\\_0611.pdf](http://www.huschblackwell.com/files/Publication/d7a63e97-c943-4ce9-9a5a-aa61a6bfdd92/Presentation/PublicationAttachment/026393d9-9aaa-48aa-bc82-abb484163812/McMeyer_Final_0611.pdf) (visited Jan 12, 2012); Lisa Rickard, *State Attorneys General and the CFPB*, Free Enterprise (Sept 22, 2009), online at <http://freeenterprise.com/2009/09/state-attorneys-general-and-the-cfpb.html> (visited Jan 10, 2012):

While the [US] Chamber [of Commerce] has a number of serious concerns about the proposed Consumer Financial Protection Act, not least among them is the probability of increased litigation from some state attorneys general, who, with new federal authority to enforce the CFPB, will be hiring private plaintiffs’ lawyers on contingency fee contracts.

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made by specific law firms that have economic interests in the AG's office.<sup>232</sup>

### CONCLUSION

Parens patriae litigation may just be poised for a qualitatively new role in the enforcement landscape. Certainly, in the wake of *Concepcion*, state AGs will be on the receiving end of vastly more, and better, large-scale litigation opportunities than ever before. Many cases that would previously have been filed as class actions will, instead, be presented to state AGs. To be sure, there is nothing new about private counsel seeking to enlist AGs to spearhead litigation that private parties are ill-suited to bring; the lead paint nuisance cases are a good example.<sup>233</sup> But thanks to class action waivers and other developments in the law of class actions, private plaintiffs are suddenly barred from bringing many of the cases that most broadly affect US consumers and employees.

Until now, most AGs have been sparing in their use of parens patriae and, especially, in the employment of private counsel.<sup>234</sup> But as companies move to exempt themselves from exposure to private collective litigation for the broadly dispersed harms they inflict, it is reasonable for the electorate to expect state AGs to embrace their role as guardians of the public welfare. Whether the political benefits of embracing this role will outweigh the political risks remains to be seen.

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<sup>232</sup> Toward these ends, the American Legislative Exchange Council in 2008 proposed model legislation entitled the Private Attorney Retention Sunshine Act. The legislation requires "an open and competitive bidding process prior to the awarding of any state contract for legal services," and if "a contract is issued in an amount over \$1 million, the Act calls for at least one legislative public hearing on the contract." Godesky, 42 Colum J L & Soc Probs at 609–11 (cited in note 230) (describing the reforms to the contingency fee system provided by the Sunshine legislation). To date, the legislation has been adopted in ten states—Arizona, Colorado, Connecticut, Florida, Indiana, Kansas, Minnesota, North Dakota, Texas, and Virginia—and is being considered in Georgia, Iowa, Mississippi, Missouri, Montana, Nebraska, New Mexico, Oklahoma, Pennsylvania, and South Carolina. See *Private Attorney Retention Sunshine Act: State Activity on Relevant Legislation*, American Legislative Exchange Council, online at <http://www.alec.org/initiatives/sunshine-in-state-attorney-contracts/> (visited Jan 10, 2012). See also Behrens and Crouse, 31 U Dayton L Rev at 182–83 (cited in note 230).

<sup>233</sup> See note 227.

<sup>234</sup> See McMeyer, Spacapan, and George, *Contingency Fee Plaintiffs' Counsel and the Public Good?* at appendix B (cited in note 231).