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## Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights? Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses under the Federal Arbitration Act 1800-2015

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**UNCONSCIONABLE JUDICIAL DISDAIN FOR  
UNSOPHISTICATED CONSUMERS AND EMPLOYEES’  
CONTRACTUAL RIGHTS?—LEGAL AND EMPIRICAL  
ANALYSES OF COURTS’ MANDATORY ARBITRATION  
RULINGS AND THE SYSTEMATIC EROSION OF  
PROCEDURAL AND SUBSTANTIVE  
UNCONSCIONABILITY DEFENSES UNDER THE  
FEDERAL ARBITRATION ACT, 1800–2015**

WILLY E. RICE\*

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#### I. INTRODUCTION

A fairly recent national study suggested that fourteen percent of the U.S. population is “literally illiterate.” They cannot read or write.<sup>1</sup> Also, large num-

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<sup>1</sup> See Jessica Bliss, *Reading Tutor Benefits From Lessons, Too*, THE TENNESSEAN, Feb. 28, 2014, at A7 (“Thirty-two million adults in the United States—14 percent of the population—can’t read, according to a 2013 report by the U.S. Department of Education and the National Institute of Literacy.”).

bers of adults are “functionally illiterate.”<sup>2</sup> They cannot read or write well enough to deal with everyday requirements.<sup>3</sup> More troubling, among employed adults, 40% are functionally illiterate.<sup>4</sup> And, among adult consumers, “low literacy” is widespread.<sup>5</sup> Numerous low-literate consumers cannot read simple label instructions or understand simple arithmetic or price differentials.<sup>6</sup>

Additionally, and even more troubling, 20% of employed adults are financially illiterate.<sup>7</sup> Among consumers, financial illiteracy has increased steadily in the wake of more complex financial services and instruments.<sup>8</sup> As of this writ-

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<sup>2</sup> See, e.g., Tracy Jones, *Teachers Fear Online Reading Develops Issues With Attention*, FLA. TIMES-UNION, May 11, 2014, at F1 (“According to the National Adult Literacy Survey, nearly 20 percent of the U.S. population is functionally illiterate.”).

<sup>3</sup> See Marty Farrell, *All of Us Need to Know How to Read*, THE ATLANTA J. CONST., Mar. 23, 2014, at 5B (“[Functionally illiterate is] a term defining people whose reading and writing skills are inadequate to meet the everyday needs of modern life.”); Neil Bush & Marty Goossen, *If You Can Read This, Please Help*, HOUSTON CHRON., Nov. 28, 2013, at B7 (“Functionally illiterate adults can’t read a prescription, follow emergency weather alerts or help a child with homework.”).

<sup>4</sup> See Terianne Petzold, *Illiteracy Affects Everyone*, STATESMAN J. (Salem, Or.), May 27, 2012, at C5 (“[S]tudies show that as many as 23 percent of the adult population living in the United States are functionally illiterate. According to the National Adult Literacy Survey, functionally illiterate means lacking basic skills beyond a fourth-grade level. The survey also reveals that 40 percent of the work force lacks basic reading and writing skills . . .”).

<sup>5</sup> See Madhubalan Viswanathan, Jose Antonio Rosa & Julie A. Ruth, *Emerging Lessons—For Multinational Companies, Understanding the Needs of Poorer Consumers Can Be Profitable and Socially Responsible*, WALL ST. J., Oct. 20, 2008, at R12 (“Our research shows that low-literacy consumers process market information and approach purchasing decisions differently than other groups of shoppers. . . . [Low-literacy consumers] tend to choose products based solely on the lowest posted price or smallest package size, even when they have sufficient resources for a larger purchase, because they have difficulty estimating the longevity and savings that come from buying in larger volumes.”).

<sup>6</sup> See *id.* (“Like the 14% of Americans estimated to be functionally illiterate in a U.S. government survey, subsistence consumers have difficulty reading package labels, store signs or product-use instructions, or subtracting the purchase price of an item from cash on hand—all of which hampers their ability to put their limited incomes to best use.”).

<sup>7</sup> Cf. *MetaFund CEO Tom Loy Makes Pitch for Junior Achievement*, J. REC. (Oklahoma City, OK), 2007 WLNR 29557400 (June 1, 2007) (“One in five employees can’t do his job properly because he’s worried about his personal financial problems.”).

<sup>8</sup> See Martha McNeil Hamilton, *Ignorance Costs Plenty—Officials Promote Financial Literacy*, WASH. POST, Feb. 6, 2002, at E1 (“The United States has a high rate of financial illiteracy, and consumers are paying for what they don’t know[:] [h]igh interest rates on short-term ‘payday’ loans . . . paid by an estimated 10 million adults who don’t have a bank or credit union[:] [b]etween \$3 billion and \$4 billion . . . [that Latin American immigrants must pay for] high fees and unfavorable exchange rates to . . . send money home[:] [d]ouble-digit interest rates on credit card debt, which averages \$8,123 per family[:] [and] [m]oney lost in investment scams on the Internet.”).

ing, between 28% and 50% of American consumers are financially illiterate.<sup>9</sup>

Unquestionably, it would be a mistake to assume only certain ethnic or low-wage employees and consumers are functionally and financially illiterate. Obviously, professionals, small-business owners, as well as highly skilled individuals are literate enough to earn commensurate salaries. On the other hand, within various professions and industries, one finds all-too-many professionals who are undisputedly functionally illiterate.<sup>10</sup> In addition, large numbers of upper-income individuals and small-business owners—who purchase goods and services—are financially illiterate.<sup>11</sup> In fact, the greater majority of all consumers do not understand rudimentary principles of finance and investing.<sup>12</sup>

More importantly, when compared to more powerful and sophisticated employers, merchants and lenders, functionally and financially illiterate employees and consumers are disproportionately more likely to be unsophisticated or “legally unsophisticated.”<sup>13</sup> Therefore, state and federal legislatures have passed numerous statutes to prevent powerful employers from violating unsophisticated employees’ interests.<sup>14</sup> States have also enacted statutes which bar

<sup>9</sup> See Walter Hamilton, *Hard Time Making Sense Out of Dollars—Study Co-Author Says Many Americans ‘Pretty Clueless’ About Personal Finance*, CHI. TRIB., Jan. 2, 2014, at 1 (“A 182-page analysis by the Securities and Exchange Commission . . . found that ‘investors have a weak grasp of elementary financial concepts and lack critical knowledge of ways to avoid investment fraud.’”).

<sup>10</sup> See, e.g., Shannon Muchmore, *Speaker Highlights Nutrition*, TULSA WORLD (Oklahoma), Nov. 17, 2012, at D1 (“American physicians tend to focus more on disease management than health care and tend to ignore topics such as nutrition . . . . Changes in diet can be an effective treatment for many conditions, but American physicians are functionally illiterate in nutrition . . . .”).

<sup>11</sup> See Walter Hamilton, *Hard Time Making Sense Out of Dollars—Study Co-Author Says Many Americans ‘Pretty Clueless’ About Personal Finance*, CHI. TRIB., Jan. 2, 2014, at 1 (“Even well-educated and upper-income Americans often have poor financial literacy . . . .”); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12–13 (Mont. 2002) (Nelson, J., concurring) (“Given the sacredness and inviolability of the fundamental right to trial by jury, any contract provision that openly or subtly causes the forfeiture of the exercise of this right must be rigorously examined by the courts. This is all the more necessary when such a contract provision is included in a standard-form contract of adhesion foisted upon unsophisticated and unsuspecting . . . small business people as part of the intercourse of daily life.”).

<sup>12</sup> See Hamilton, *supra* note 11, at 1 (“A survey by the Financial Industry Regulatory Authority, a Wall Street-funded watchdog organization, found that only 28 percent of respondents knew what happens to bond prices when interest rates rise.”).

<sup>13</sup> Cf. Alan White and Cathy Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 234 (2002) (citing numerous literacy studies and concluding that “many, if not most, consumers are unable to extract critical [contractual] information . . . from federally mandated disclosure documents . . . [and, consequently] unable to use the legally-mandated disclosure documents”).

<sup>14</sup> See, e.g., CAL. LAB. CODE § 1044 (West 1991) (“An employee who reveals a problem of illiteracy and who satisfactorily performs his or her work shall not be subject to termina-

powerful and sophisticated business and financial entities from violating the rights of legally unsophisticated consumers.<sup>15</sup>

Even more notably, the Supreme Court has a fairly long history of protecting unsophisticated consumers' legal rights. For instance, from the late-1970s to the mid-2000s, the Court issued several significant pro-consumer rulings: (1) Attorneys may not solicit business directly or in-person from highly stressed and "unsophisticated" laypersons;<sup>16</sup> (2) Sellers may not discriminate irrationally by charging "sophisticated and unsophisticated consumers" different prices for identical goods or services;<sup>17</sup> and (3) The Securities and Exchange Commission may regulate pay-phone "investment contracts," if those instruments offer highly questionable rates of return to extremely vulnerable "older and less sophisticated investors."<sup>18</sup>

The Court also has an extensive history of preventing powerful and more sophisticated corporate employers from abridging unsophisticated employees'

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tion of employment because of the disclosure of illiteracy."). *See also* *Louis v. Department of Transportation and Development*, 819 So. 2d 379, 387 (La. Ct. App. 2002) (citing the Jones Act, 46 app. U.S.C.A. § 688 (1994) and concluding that the negligent employer was liable for the employee's injuries because the employer ordered the "totally illiterate" employee to operate a dangerously defective winch); *Thornton v. National R.R. Passenger Corp.*, 802 So. 2d 816, 823 (La. Ct. App. 2001) (concluding that the employee's functional illiteracy, age and injuries decreased the employee's employability and awarding damages under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.); *Snyder v. Penn Cent. Transp. Co.*, 442 A.2d 300, 303 (Pa. Super. 1982) (embracing the jury's findings that the employer was liable under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. for the functionally illiterate employee's job-related injuries).

<sup>15</sup> Numerous state statutes protect consumers from unconscionable acts or deceptive trade practices which take advantage of consumers' "physical infirmity," "ignorance," "illiteracy," "inability to understand the language of an agreement," or "similar factor." *See* COLO. REV. STAT. ANN. § 5-6-112(3)(e) (West 2000); IDAHO CODE ANN. § 48-603C(2)(a) (West 1990); IND. CODE ANN. § 24-4.5-6-111(3)(d) (West 1994); IOWA CODE ANN. § 537.5108(4)(e) (West 1987); KAN. STAT. ANN. § 50-627(b)(1) (West 1998); ME. REV. STAT. ANN. § 6-111(3)(E) (West 1973); MICH. COMP. LAWS ANN. § 338.3467, Sec. 17(1)(h) (West 2014); NEV. REV. STAT. ANN. § 598.092(12) (West 2011); OHIO REV. CODE ANN. § 1345.031(B)(13) (West 2006); OKL. ST. ANN. 14A, § 6-111(3)(e) (West 1969); OR. REV. STAT. ANN. § 646.605(9)(a) (West 2014); W. VA. CODE § 46B-8-2(c)(5) (West 1993).

<sup>16</sup> *See* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454, 464-65 (1978) ("The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.").

<sup>17</sup> *See* *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 475 (1992) ("Kodak contends that . . . knowledgeable customers will hold down the package price for all other customers. . . . [But], if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.").

<sup>18</sup> *See* *S.E.C. v. Edwards*, 540 U.S. 389, 394-95 (2004).

procedural and substantive rights.<sup>19</sup> To illustrate, in *DelCostello v. International Brotherhood of Teamsters*,<sup>20</sup> three union workers—Philip DelCostello, Donald Flowers and King Jones—sued two employers and two unions.<sup>21</sup> The employees alleged: (1) The employers violated the collective-bargaining agreements by firing the employees;<sup>22</sup> and (2) The unions breached their duty of fair representation—by carelessly, arbitrarily and capriciously preparing, investigating and handling the employees’ grievances.<sup>23</sup> In respective answers, the employers and unions raised a statute-of-limitations defense: Allegedly, the two sets of employees failed to commence their lawsuit within 30 and 90 days—respectively—under Maryland’s and New York’s statutes of limitations.<sup>24</sup>

The defendants prevailed before the Second and Fourth Circuits, and the employees appealed.<sup>25</sup> Under §10(b) of the National Labor Relations Act, the statute of limitations is six months—rather than 30 or 90 days.<sup>26</sup> Accentuating that “legally unsophisticated employees” must overcome difficult hurdles when challenging powerful unions and employers’ discriminatory practices, Justice Brennan wrote:

[A]n individual employee may bring [a] suit against his employer for breach of a collective bargaining agreement. . . . [H]owever, an employee [must] attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement. . . . [T]his rule works an unaccept-

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<sup>19</sup> See, e.g., *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124–27 (1953) (considering whether Ralston Purina offered public securities to its employees and declaring that such offerings must comply with §5 of the Securities Act, because unsophisticated employees—“artist, bakeshop foreman, chow loading foreman, clerical assistant, copywriter, electrician, stock clerk, mill office clerk, order credit trainee, production trainee, stenographer, and veterinarian”—did not have access to all relevant information to determine if the securities were reasonable investments).

<sup>20</sup> 462 U.S. 151, 155–56, 158 (1983). Philip DelCostello joined the International Brotherhood of Teamsters and refused to drive an allegedly unsafe tractor-trailer. *Id.* Anchor Motor Freight—his employer—fired him. *Id.* The other employees—Donald C. Flowers and King E. Jones—worked for Bethlehem Steel Corporation. *Id.* They were skilled craft welders and members of Steelworkers Local 2602 union. *Id.* Bethlehem Steel assigned certain welding duties to non-welders—thereby forcing Flowers and Jones to be laid off. *Id.* DelCostello filed a lawsuit in the Federal District Court of Maryland against both the Anchor and the Teamsters union. *Id.* And, after an arbitrator issued an unfavorable award, Flowers and Jones filed a suit against the ruled in favor of Bethlehem and Steelworkers in the Western District Court of New York. *Id.* The Supreme Court consolidated the two lawsuits, which raised the same statute-of-limitation question. *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 156.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 156–57.

<sup>25</sup> *Id.*

<sup>26</sup> 29 U.S.C. § 160(b) (West 2015).

able injustice when the union representing the employee in the grievance/arbitration procedure acts in . . . a discriminatory, dishonest, arbitrary, or perfunctory fashion. . . . [T]he employee will often be unsophisticated in collective-bargaining matters . . . . We conclude that state limitations periods . . . fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under [the Labor Management Relations Act of 1947, § 301] and the fair representation doctrine.<sup>27</sup>

Certainly, the *DelCostello* Court's ruling is "progressive": It allows legally unsophisticated persons to circumvent a powerful common-law affirmative defense and litigate statutory and common-law claims in a court of law.<sup>28</sup> Nonetheless, on several occasions, extremely powerful and more sophisticated employers, merchants and lenders have asked the Supreme Court to interpret § 2 of the Federal Arbitration Act (FAA) of 1925.<sup>29</sup> In a long string of cases, the Court acquiesced and reaffirmed a hardhearted federal policy: Private arbitrators—rather than juries or judges—must resolve "legally unsophisticated" employee and consumer disputes, if the grievances "arise from" written contracts.<sup>30</sup>

In fact, three years after *DelCostello*, the Court decided *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*<sup>31</sup> to address disputes surrounding two relatively new developments: (1) the explosion of standardized contracts—which govern all types of business relationships and industry-wide commercial transactions;<sup>32</sup> and (2) the widespread inclusion of mandatory-arbitration clauses in standardized contracts.<sup>33</sup> The *Volt* Court reaffirmed the view that when doubt arises, a liberal federal arbitration policy requires courts to enforce

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<sup>27</sup> *DelCostello*, 462 U.S. at 163–66.

<sup>28</sup> See *infra* notes 30–40 and accompanying text.

<sup>29</sup> 9 U.S.C. § 2 (West 2015).

<sup>30</sup> See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 685 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–220 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("[The FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

<sup>31</sup> 489 U.S. 468 (1989).

<sup>32</sup> See, e.g., *U.S. Fidelity & Guaranty Co. v. Treadwell Corp.*, 58 F. Supp. 2d 77, 84 (S.D.N.Y. 1999) (reporting that the insurance industry began using standard-form comprehensive general liability contracts in the 1960s).

<sup>33</sup> *Id.* See *George Watts v. Tiffany & Co.*, 248 F.3d 577, 583 (7th Cir. 2001) ("[M]andatory arbitration clauses are prevalent in a broad collection of contracts, forcing parties to accept the arbitral rather than judicial forum to adjudicate their rights."); *Johnson v. AT&T Mobility*, No. 4:09-CV-4104, 2010 WL 5342825, at \*9 n.6 (S.D. Tex. Dec. 21,



private arbitration agreements.<sup>34</sup> At the same time, citing the FAA § 2's savings clause,<sup>35</sup> the *Volt* Court also reaffirmed unambiguously another principle: The unconscionability defense as well as other contract-based affirmative defenses may "invalidate" arbitration provisions in written contracts.<sup>36</sup> Nevertheless, a common view persists among some jurists and commentators: The Supreme Court's pro-arbitration declarations are exceedingly "irrationally" and "unconscionably" biased against ordinary consumers and employees.<sup>37</sup> Even more disquieting, in the wake of the Court's assertedly "unconscionably biased" arbitration rulings, rancorous judicial discourse and rulings among state and federal courts persist over whether the doctrine of unconscionability may defeat motions to compel arbitration.<sup>38</sup>

Certainly, commentators have published scholarly articles—raising and critiquing several timely mandatory-arbitration questions: (1) whether the frequency of unconscionability challenges increased or declined during a specific period in state or federal courts; (2) whether unconscionability challenges have been more or less effective in a particular jurisdiction; (3) whether a specific state supreme court denied or granted motions to compel arbitration when respondents raised an unconscionability defense; and (4) whether a certain state court should allow an unconscionability defense.<sup>39</sup> Nevertheless, under com-

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2010) ("The court . . . is uncomfortable with the prevalence of arbitration provisions in consumer agreements, and the consequent forfeiture of the consumer's day in court.").

<sup>34</sup> *Volt*, 489 U.S. at 476.

<sup>35</sup> See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685–687 (1996) (reaffirming that under the FAA savings clause, state laws—which govern "the validity, revocability, and enforceability of contracts generally"—also govern arbitration agreements. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA § 2.").

<sup>36</sup> See *Maxwell v. Fidelity Financial Services*, 907 P.2d 51, 57 (Ariz. 1995). See also *Casarotto*, 517 U.S. at 687 ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.") (citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483–484 (1989); *Perry v. Thomas*, 482 U.S. 483, 493, n.9 (1987).

<sup>37</sup> See David Korn and David Rosenberg, *Concepcion's Pro-Defendant Biasing of The Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1151 (2013) ("By mandating that numerous plaintiffs litigate their common question claims separately in individual arbitrations rather than jointly in class action arbitrations, the Supreme Court in *AT&T Mobility LLC v. Concepcion* entrenched a potent structural and systemic bias in favor of defendants."); George A. Bermann, *Arbitrability Trouble*, 23 AM. REV. INT'L ARB. 367, 372 n.34 (2012). See also *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1179 (D.N.M. 2012); *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 364 (S.D.N.Y. 2005).

<sup>38</sup> See discussion *infra* Part V.

<sup>39</sup> Compare Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of*

mon law and equitable principles, the doctrine of unconscionability comprises two prongs—procedural unconscionability and substantive unconscionability.<sup>40</sup> Consequently, an empirical analysis falls extremely short, if a researcher/commentator does not measure the unique, combined, simultaneous and statistically significant effects of procedural and substantive unconscionability challenges on the dispositions of arbitration disputes in both state and federal courts.

Therefore, the purpose of this article is to present a more comprehensive and interdisciplinary analysis—historical, legal, empirical and statistical—of three divisive and continuing FAA-related questions: (1) whether state or federal courts are substantially more or less likely to allow a procedural unconscionability defense to defeat motions to compel arbitration; (2) whether state courts or federal courts are significantly more or less likely to permit a substantive unconscionability challenge to an arbitration motion; and (3) whether a procedural unconscionability defense is substantially more likely to defeat a motion to compel arbitration than a substantive unconscionability defense.

Once more, under the FAA's "savings clause," state and federal courts are not required to enforce mandatory-arbitration agreements, if "grounds . . . exist at law or in equity for the revocation of any contract."<sup>41</sup> In *AT&T Mobility v. Concepcion*,<sup>42</sup> the Supreme Court cited the language in the FAA § 2 savings provision and reaffirmed an earlier declaration: Courts may consider or apply the doctrine of unconscionability to decide whether to grant or deny an arbitration motion.<sup>43</sup> But the *Concepcion* Court was equally adamant about a different preemption issue: The FAA's savings clause preempts a court's weighing of

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*Unconscionability*, 52 BUFF. L. REV. 185, 196 (2004) (finding an increase in the number of unconscionability rulings over two years and stating: "[I]ncreased judicial willingness to find unconscionability in arbitration agreements suggests a latent judicial hostility to arbitration and use of unconscionability contrary to the Federal Arbitration Act's mandate . . ."), and Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 HASTINGS BUS. L. J. 39, 67 (2006) ("Despite clear direction from Congress and the Supreme Court to treat arbitration agreements no less favorably than ordinary contractual terms, the California courts continue to view arbitration agreements as a 'lesser caste' (footnote omitted) of contract provision . . . [and] . . . have attempted to cloak their bias in the generally applicable contract defense of unconscionability . . ."), with Megan Barnett, *There Is Still Hope For The Little Guy: Unconscionability Is Still A Defense Against Arbitration Clauses Despite AT&T Mobility v. Concepcion*, 33 WHITTIER L. REV. 651, 670 (2012) ("[S]uccessfully arguing that an arbitration clause is unconscionable may be harder, but it is still possible even though the Court did not expressly indicate it in *Concepcion*." (footnote omitted)), and David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 396 (2012) (outlining several reasons to explain why "Congress did not exempt arbitration clauses from unconscionability challenges in court").

<sup>40</sup> See discussion *infra* Part II.C.3.

<sup>41</sup> 9 U.S.C. § 2 (West 2015).

<sup>42</sup> 563 U.S. 333 (2011).

<sup>43</sup> *Id.* at 339.

extralegal variables or applying inconsistent state-law principles to decide motion-to-compel-arbitration disputes.<sup>44</sup>

Therefore, in light of the *Concepcion* Court's controversial preemption ruling, two ancillary questions warrant answers: (1) whether a few, some or most state and federal courts permit preempted state rules and other "legal variables"—litigants' common-law, equitable and statutory claims, theories of recovery, and statutory defenses—to influence the dispositions of mandatory-arbitration; and, (2) whether a few, some or most state and federal courts allow preempted extralegal factors—litigants' consumer or employment status, geographic location, and levels of economic and financial sophistication—to determine the outcomes in mandatory-arbitration proceedings.

Part II begins the discussion by briefly reviewing common-law principles of contract—focusing primarily on the formation and enforcement of a valid contract. Necessarily, pertinent equitable doctrines and settled contract-based defenses are also discussed in Part II.

Part III presents a very brief review of arbitration rules and practices in England and in the United States—before the enactment of the Federal Arbitration Act of 1925. Put simply, arbitration was extremely common before the FAA's enactment. Therefore, data are presented to challenge the conventional wisdom regarding the ostensible purpose of the FAA. Later, the discussion focuses on the language in § 2 of the FAA. As mentioned earlier, § 2 has produced plentiful motion-to-compel-arbitration disputes—between powerful employers and less dominant employees, as well as between legally unsophisticated consumers and more sophisticated merchants and lenders. In addition, as discussed more carefully in Part III, many FAA-related judicial splits occur because federal and state courts disagree profoundly about the purpose and scope of the FAA § 2.

Generally, Part IV discusses the applicability and effectiveness of contract-based defenses in motion-to-compel-arbitration trials. More specifically, Part IV.A discusses the procedural unconscionability doctrine and judicial splits over whether a mental-incapacity defense should prevent state and federal courts from enforcing mandatory arbitration provisions in contracts. Even more specifically, Part IV.A addresses the question: whether proof of a consumer's or an employee's "mental incapacity," "insanity" or "mental retardation" is sufficient to establish a successful procedural-unconscionability defense in a motion-to-compel arbitration trial.

Part IV.B continues and expands the procedural unconscionability discussion—focusing on whether consumers' and employees' levels of sophistication increase or decrease courts' likelihood of enforcing mandatory arbitration agreements. More to the point, Part IV.B answers the question: whether a consumer's or an employee's level of illiteracy—literal, functional and/or financial—may establish an effective procedural unconscionability challenge against a motion to compel arbitration.

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<sup>44</sup> *Id.* at 343.

In contrast, Part V answers two very different and immensely pressing questions: (1) whether an arbitration provision must be “merely asymmetrical,” “unreasonably one-sided,” “shockingly asymmetrical and harsh,” or “unduly oppressive” to establish a persuasive substantive unconscionability challenge; and (2) whether arbitration costs must be “unduly burdensome” or “completely prohibitive” to establish an effective substantive unconscionability defense and invalidate an arbitration provision.

Finally, in Part VI, the results of a statistical study appear. The reported findings are based on an analysis of approximately one thousand federal and state court decisions—those reported between 1800 and 2015. Two previously identified questions are addressed in Part VI: (1) whether assertedly “unconscionably biased” state and federal courts are statistically and significantly more or less likely to grant motions to compel arbitration when respondents raised—jointly or individually—procedural and substantive unconscionability defenses; and (2) whether state or federal courts are statistically and significantly more or less likely to allow extralegal factors—litigants’ consumer or employment status, geographic location, levels of economic and financial sophistication and other factors—to shape the outcomes of arbitration motions.

Citing descriptive statistics in two extremely small and methodologically challenged studies,<sup>45</sup> the *Concepcion* Court used the simple percentages to reach a continuing and highly questionable conclusion: State courts are exceedingly likely to undermine the FAA’s arbitration policies by allowing “legally unsophisticated” consumers and employees to abuse the unconscionability defense in motion-to-compel-arbitration proceedings.<sup>46</sup> Yet, acknowledging explicitly that the percentages were “not definitive,”<sup>47</sup> the *Concepcion* Court embraced them, barred the consumers’ unconscionability defense, and forced the consumers to resolve their common-law and statutory claims before private arbitrators rather than in a court of law.<sup>48</sup>

After employing a more appropriate research methodology and powerful statistics, Part VI reveals that a host of extralegal and legal factors influence the dispositions of motions to compel arbitration in state and federal courts. But even more importantly, the reported statistics in Part VI reveal that both federal and state courts are significantly more likely to grant motions to compel arbitration when “legally unsophisticated” consumers and employees raise an unconscionability defense. Stated another way, the Supreme Court will continue to craft strained federal preemption “policies” which chip away everyday consumers and employees’ contract-based defenses under the FAA’s savings clause.<sup>49</sup>

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<sup>45</sup> See discussion *infra* Part VI.

<sup>46</sup> *Concepcion*, 563 U.S. at 342.

<sup>47</sup> *Id.* at 342.

<sup>48</sup> See discussion *infra* Part VI.

<sup>49</sup> See, e.g., Margaret L. Moses, *Privatized “Justice,”* 36 LOY. U. CHI. L.J. 535, 541 (2005) (“The Supreme Court . . . has provided a very strained interpretation of Section 2 of

Therefore, the article concludes by encouraging Congress to enact one of several previously proposed bills that would effectively address these concerns.<sup>50</sup> Congress should act because the statistically significant findings in this study strongly suggest: (1) The Supreme Court will increasingly subvert congressional intent and weaken procedural and substantive unconscionability challenges in mandatory-arbitration hearings; and (2) The Supreme Court as well as many inferior federal and state courts' accelerating propensity to enforce arbitral provisions in standardized contracts will effectively preclude millions of legally unsophisticated consumers and employees from litigating their statutory and common-law claims in courts of law.

## II. COMMON LAW PRINCIPLES OF CONTRACT FORMATION AND ENFORCEMENT

### A. *Contract Formation—Proving the Existence of a Contract*

"A contract is an agreement between two or more parties."<sup>51</sup> Briefly put, each party promises to perform or not to perform an activity for each other's benefit.<sup>52</sup> Parties may mutually bind themselves under a negotiated contract—which may be oral or written.<sup>53</sup> Or, courts may force parties to perform certain legal obligations under an implied-in-fact or an implied-in-law contract.<sup>54</sup> In addition, a more powerful party may fashion a standardized or an adhesion contract—which contain draconian or offensive terms—and a less powerful party may accept or reject the proposed agreement.<sup>55</sup> As mentioned earlier,

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the FAA. In a number of decisions interpreting the FAA, it has italicized 'any,' so the final clause of Section 2 is written as follows: 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.' (Footnote omitted). The word 'any' is in italics to emphasize the Court's view that 'any' actually means 'all.'").

<sup>50</sup> See H.R. Res. 1873, 112th Cong. (2011); H.R. Res. 1844, 113th Cong. (2013); H.R. Res. 2087, 114th Cong. (2015); S. Res. 987, 112th Cong. (2011); S. Res. 878, 113th Cong. (2013); S. Res. 1133, 114th Cong. (2015).

<sup>51</sup> *Gray v. Aiken*, 54 S.E.2d 587, 589 (Ga. 1949); see, e. g., *Boland v. Catalano*, 521 A.2d 142, 144 (Conn. 1987) ("A contract is an agreement between parties whereby one of them acquires a right to an act by the other; and the other assumes an obligation to perform the act."); *State v. Atwood*, 301 P.3d 1255, 1258 (Haw. 2013) ("A contract is an agreement between two or more persons which creates an obligation to do or not do something."); *McCraw v. Llewellyn*, 123 S.E.2d 575, 578 (N.C. 1962) ("A contract is an agreement between two or more persons upon sufficient consideration to do or to refrain from doing a particular act.").

<sup>52</sup> *La Salle Nat'l Bank v. Vega*, 520 N.E.2d 1129, 1131 (Ill. App. Ct. 2d Dist. 1988) ("[A] contract is an agreement between competent parties . . . to do or not to do a particular thing.").

<sup>53</sup> See *Madden v. Kaiser Foundation Hospitals*, 552 P.2d 1178, 1186 (Cal. 1976).

<sup>54</sup> See *Legros v. Tarr*, 540 N.E.2d 257, 264 (Ohio 1989) (quoting *Hummel v. Hummel*, 14 N.E.2d 923, 925–926 (Ohio 1938)).

<sup>55</sup> See *Pyle v. Wells Fargo Fin.*, No. 04AP-6, 2004 WL 2065652, at \*4 (Ohio. Ct. App.

standardized contracts are widespread across multiple industries.<sup>56</sup> And typically, boilerplate agreements present unilateral offers of products, services and employment to legally unsophisticated individuals—who may take, accept, or reject the offers.<sup>57</sup>

More importantly, to qualify as a negotiated, standardized, express or implied contract, proof of the following elements must be present: (1) one person's offer; (2) the other person's acceptance of the offer; (3) each party's intent to be bound under the terms of the contract; (4) each person's consent to be bound; (5) the persons' meeting of the minds regarding the undertaking and legal obligations; (6) the "execution" of the contract; and (7) the "delivery" of the contract.<sup>58</sup>

### B. *Affirmative Defenses and the Enforceability of a Contract*

To enforce a contract, a complaining party must prove that each party gave sufficient consideration.<sup>59</sup> Generally, each party is only required to give a single consideration to enforce an entire contract: A separate consideration for each contractual promise is not mandatory.<sup>60</sup> Even more relevant, if sufficient consideration supports or covers an entire contract, all provisions in the agreement—including an arbitration clause—are covered.<sup>61</sup>

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Sept. 16, 2004) ("It is well-established that an unconscionable [as well as] . . . an adhesive arbitration provision or an arbitration provision . . . may be unenforceable and invalid. An unconscionable contract clause is one where there is the absence of meaningful choice for the contracting parties, coupled with draconian contract terms unreasonably favorable to one party. Similarly, an adhesion contract exists when a party with little or no bargaining power is required to submit to terms to which he has no realistic choice.").

<sup>56</sup> See W. David Slawson, *Standard Form Contracts and Democratic Control of Law-making Power*, 84 HARV. L. REV. 529, 529 (1971) ("Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form . . . . But if they are active, they contract by standard form several times a day."); *Coll. of Notre Dame of Md., Inc. v. Morabito Consultants, Inc.*, 752 A.2d 265, 273–74 (Md. Ct. Spec. App. 2000) ("The standard form contracts drafted by the [American Institute of Architects] are widely used."); *U.S. Fidelity & Guaranty Co. v. Treadwell Corp.*, 58 F. Supp. 2d 77, 84 (S.D.N.Y. 1999) (reporting that the insurance industry began using standard-form comprehensive general liability contracts in the 1960s).

<sup>57</sup> See *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 356 (Cal. Ct. App. 1976).

<sup>58</sup> See *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. Ct. App. 1999).

<sup>59</sup> See *Staubach Retail Servs. v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 524 (Tenn. 2005).

<sup>60</sup> See *Dan Ryan Builders v. Nelson*, 737 S.E.2d 550, 552 (W.Va. 2012).

<sup>61</sup> *Barker v. Golf U.S.A.*, 154 F.3d 788, 791–92 (8th Cir. 1998). See also *Doctor's Assocs. v. Distajo*, 66 F.3d 438, 451–53 (2d Cir. 1995); *W.L. Jordan & Co., Inc. v. Blythe Industries, Inc.*, 702 F. Supp. 282, 284 (N.D. Ga. 1988) ("[W]here the agreement to arbitrate is integrated into a larger unitary contract, the consideration for the contract as a whole covers the arbitration clause as well."); *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 646 (N.Y. 1989).

Under the bargained-for-exchange doctrine, a promise in exchange for a promise is sufficient consideration.<sup>62</sup> Additionally, rights, interests, profits, and benefits—which are transferred between contractual parties—qualify as bargained-for-exchange consideration.<sup>63</sup> Also, a contractual party may prove bargained-for-exchange consideration by establishing that she refrained from exercising a legal right, incurred a loss, or suffered an inconvenience for the other party's benefit.<sup>64</sup>

Courts will not enforce any contractual obligations or terms if the contract is invalid for another reason. A contract is invalid and unenforceable if: (1) the contract violates public policy, a civil statute, or a criminal statute;<sup>65</sup> (2) one or both contractual parties do not have the necessary “mental capacity” to contract;<sup>66</sup> or (3) the contract evolved from fraud, duress, illegality, or unconscionable conduct.<sup>67</sup>

### C. *The Origin and Evolution of the Unconscionability Doctrine*

#### 1. The Unconscionability Defense in English Courts of Equity

Well before and during the seventeenth century, English courts of equity embraced the doctrine of unconscionability.<sup>68</sup> Put simply, courts applied the doctrine to protect both powerful and “legally unsophisticated” persons’ contractual rights, interests and expectancy.<sup>69</sup> More specifically, to prevent injustice, judges sitting in equity used their considerable power and discretion to thwart the enforcement of unconscionable contracts, covenants, deeds and other legal

<sup>62</sup> See *General Electric Capital Corp. v. Transport Logistics Corp.*, 893 A.2d 467, 471 (Conn. App. Ct. 2006).

<sup>63</sup> See *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. Ct. App. 1999).

<sup>64</sup> *Id.*

<sup>65</sup> See *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 606 S.E.2d 752, 758 (S.C. 2004). *But see* *Herron v. Century BMW*, 693 S.E.2d 394, 400 (S.C. 2011) (“[C]ourts will attempt to sever an illegal provision in an otherwise valid contract and enforce the remaining terms.”).

<sup>66</sup> See *Jennings v. Reed*, 885 A.2d 482, 488 (N.J. Super. Ct. App. Div. 2005). *But see* *Longley v. McCullough*, 27 A.2d 831, 835 (R.I. 1942) (“Mere mental weakness, or inferiority of intellect will not incapacitate a person from making a valid contract; nor is it easy to define the state of mind which will have this effect.”).

<sup>67</sup> See *Ramirez-Eames v. Hover*, 775 P.2d 722, 724 (N.M. 1989).

<sup>68</sup> *Cf.* *Berney v. Pitt* (1686) 23 Eng. Rep. 620, 621 (“[Plaintiff filed this] cause . . . to be reheard . . . [B]efore Lord Chancellor Jefferies, it was insisted[.] [T]here was no true difference in the case of an unconscionable bargain—whether it be for money or for wares[.] and, . . . inserting the clause in the defeasance—[stating] that the defendant should lose his money, if the plaintiff died before his father—did not differ . . . at all from any other bargain made by the plaintiff, or, other tenant in tail . . . [T]herefore, the expressing of it particularly in the defeasance . . . made the bargain the worse—[coloring] a bargain [and creating the appearance of an unconscionable contract].”).

<sup>69</sup> See, e.g., *Collier v. Field*, 2 Mont. 205 (Mont. 1874).

instruments.<sup>70</sup> Furthermore, it has been suggested that historically, courts of equity in England “never developed a clear set of rules for analyzing claims of unconscionability.”<sup>71</sup> However, although an iron-clad definition of unconscionability never emerged, there is no serious debate regarding one issue: English courts of equity repeatedly cited some specific factors and weighed the individual and joint effects of those factors to determine whether a legal instrument was unconscionable.

To illustrate, consider the disputes and declarations in a string of English cases which were decided between 1740 and 1814. First, in *Brooke v. Gally*,<sup>72</sup> the question was whether the contract was unconscionable. To uncover probative evidence of unconscionability, the court of equity considered: (1) whether a “legally unsophisticated” minor and a sophisticated person signed a promissory note; and (2) whether the actual business transaction between a “legally unsophisticated” minor and a sophisticated person occurred before the promissory note was fashioned and executed.<sup>73</sup> Answering the question affirmatively, the Brooke court declared:

The law lays infants under a disability of contracting debts, except for bare necessaries[;] . . . [E]ven this exemption is merely to prevent them from perishing . . . . Neither law nor equity know[s] any difference between an infant of sixteen or seventeen . . . . [I]f an unconscionable bargain [was] made with an infant before he comes of age, . . . taking a [hand-written promissory] note . . . from him in two or three days after he [comes] of age . . . is a suspicious circumstance . . . . [A]nd [such conduct] has always been a material ingredient to direct the conscience of this court.<sup>74</sup>

Eight years after Brooke, a different English equity court decided *Pawlet v. Pawlet*.<sup>75</sup> Briefly stated, a marriage-settlement contract gave Lord Pawlet the authority to distribute 30,000£ to his children.<sup>76</sup> Exercising his discretion to distribute the money as he saw fit, Pawlet awarded 29,900£ to his older son and distributed equal shares of the remaining 100£ to the younger children.<sup>77</sup> An action was filed in the Court of Chancery—on behalf of the affected children—

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<sup>70</sup> *Id.* at 209–210 (“[W]here an unconscionable advantage has been gained by mere mistake and misapprehension, . . . equity will interfere in its discretion to prevent intolerable injustice. [T]his also seems to be the rule in England [and] supported by . . . numerous English decisions.”).

<sup>71</sup> *Maxwell v. Fid. Fin. Servs.*, 907 P.2d 51, 57 (Ariz. 1995) (citing DAN B. DOBBS, 2 LAW OF REMEDIES 703 (2d ed. 1993)).

<sup>72</sup> (1740) 26 Eng. Rep. 417.

<sup>73</sup> *Id.* at 418.

<sup>74</sup> *Id.*

<sup>75</sup> (1748) 95 Eng. Rep. 586.

<sup>76</sup> *Id.* at 586.

<sup>77</sup> *Id.*



to void the grossly unequal distributions.<sup>78</sup> The complaint asserted that Lord Pawlet's conduct was self-serving and unconscionable. The Chancery identified several factors that a court of equity might consider to find evidence of unconscionability. Those elements were: (1) whether a particular distribution of funds is "evasive and illusory"; (2) whether a distribution of money creates "inequalities" among intended beneficiaries; and (3) whether the distributions were outwardly "unreasonable."<sup>79</sup>

Nearly seventy-five years after *Brooke* and *Pawlet*, the House of Lords—England's highest court—decided *Willan v. Willan*.<sup>80</sup> The dispute and most relevant facts in *Willan* are not complicated. An uncle leased certain premises from a church.<sup>81</sup> In the course of events, the uncle's nephew wanted to lease the same property; therefore, the uncle fashioned a "fixed rent" sub-lease regarding the tenancy of the same premises.<sup>82</sup> More importantly, the sub-lease contained a "covenant for [a] perpetual renewal," which was "renewable on fines at will of [the] lessors."<sup>83</sup> The uncle encouraged his less sophisticated and literate nephew to sign the lopsided contract. Before the House of Lords, the specific question was whether the perpetually and undisputedly one-sided covenant was unconscionable.<sup>84</sup>

At the outset, the House of Lords highlighted one of equity's limitations: "[I]f . . . [a] contract [can]not be executed, equity [may] not introduce another contract for the parties."<sup>85</sup> On the other hand, the Law Lords stressed: Equity may declare whether a contract or a covenant is unconscionable.<sup>86</sup> And to achieve justice, the House of Lords concluded that a court may weigh several factors: (1) whether an allegedly offensive contractual provision "surprises one or both parties"; (2) whether a party received "proper advice" before executing a contract; (3) whether a party understood the legal effects of executing a binding contract; and (4) whether "imbecility" precluded one or both parties from

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> (1814) 3 Eng. Rep. 863.

<sup>81</sup> *Id.* at 866.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* See also *Willis v. Jernegan* (1741) 26 Eng. Rep. 555, 555.

<sup>86</sup> *Willan*, 3 Eng. Rep., at 864–66 ("Lord Redesdale's doubting whether, even if there had been no evidence of imbecility, such an agreement . . . would not be set aside on the ground of surprise and misapprehension . . . . And since it was unfit that such an agreement should be acted upon in equity, it was held unfit to be acted upon at law. . . . But if the whole was but one contract which could not be executed, equity could not introduce another contract for the parties . . . [I]t was unconscionable in equity that an agreement should be executed . . . . [T]hough equity would not execute the agreement, it would leave the party to his remedy at law.").

having the requisite mental capacity to fashion a legally “valid” contract.<sup>87</sup> Two years after *Willan*, another court decided *Jones v. Davison*.<sup>88</sup> The *Davison* court cited more probative factors that courts of equity might weigh to determine unconscionability: whether a powerful and sophisticated lender employs “usurious intent” or willfully corrupt motives to construct a loan contract.<sup>89</sup>

## 2. The Evolution of the Unconscionability Defense in American Courts

A complete history of pre-American Revolution courts’ civil practices and procedures is absent.<sup>90</sup> Still, historical records reveal several unquestionable developments: (1) equitable doctrines evolved in England more than seven centuries ago;<sup>91</sup> (2) English courts of law have an exceptionally lengthy history of deciding both actions in law and equity;<sup>92</sup> (3) long before the United States’ liberation from England, American courts of law and equity exercised concurrent jurisdiction over many claims;<sup>93</sup> (4) English courts of equity and law have an extensive history of employing equitable affirmative defenses to administer justice quickly and effectively;<sup>94</sup> and (5) American courts of law adopted and used England’s equitable doctrines—fraud, mistake, duress, and unconscionability—to achieve justice.<sup>95</sup>

Additionally, more than two-and-a-half centuries ago, an English court decided *Earl of Chesterfield v. Janssen*<sup>96</sup> and declared: A bargain or contract is unconscionable if “no man in his senses and not under delusion would make on the one hand and . . . no honest and fair man would accept on the other.”<sup>97</sup> The Supreme Court and many state courts have embraced *Janssen’s* awkwardly worded proposition.<sup>98</sup> Furthermore, the Restatement (Second) of Contracts sec-

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<sup>87</sup> *Id.* (“[This agreement] was set aside on the ground of surprise and misapprehension of its effect in one or both of the parties . . . . When he spoke of surprise, he merely meant, that it was a case where, from imbecility, and the absence of proper advice, the testator did not understand the effect of what he did, and that it was unconscionable in equity that an agreement should be executed which was a surprise on both parties . . . . He did not say that here there was any dishonesty; but if an agreement was obtained by surprise, . . . it was against equity to permit any use to be made of it.”).

<sup>88</sup> *Jones v. Davison* (1816) 171 Eng. Rep. 233.

<sup>89</sup> *Id.* at 235–236.

<sup>90</sup> See generally *Atkins v. Chilson*, 52 Mass. 112, 117–118 (1846).

<sup>91</sup> *Estate of Etkins*, 1986 WL 1599, 14 Phila. Co. Rptr. 81, 90 (Pa. Orph. 1986) (Justice Shoyer, dissenting).

<sup>92</sup> *Atkins*, 52 Mass., at 117–118.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., *Griffith v. Townley*, 69 Mo. 13, 17–18 (1878).

<sup>96</sup> (1739) 38 Eng. Rep. 82 (Ch. 1750).

<sup>97</sup> *Id.* at 100.

<sup>98</sup> See, e.g., *Hume v. United States*, 132 U.S. 406, 415 (1889) (quoting *Earl of Chesterfield v. Janssen*, 38 Eng. Rep. 82, 100 (Ch. 1750)). See also *Campbell Soup Co. v. Wentz*,

tion 208 reads in relevant part: “If a contract or term . . . is unconscionable at the time the contract is made, a court may refuse to enforce the contract, . . . may enforce the remainder of the contract without the unconscionable term, or may . . . limit the application of any unconscionable term . . . to avoid any unconscionable result.”<sup>99</sup> Section 208’s comment adopts Janssen’s rule—which actually describes a type of unenforceable contract rather than defining the meaning of unconscionability.<sup>100</sup>

Briefly put, precise definitions of “unconscionable” and “unconscionability” do not appear in section 208.<sup>101</sup> Therefore, given the difficulty of fashioning a universal definition of unconscionability, the Restatement (Second) of Contracts section 208, comment d outlines multiple factors that courts might consider to determine whether a bargain, transaction or contract is unconscionable:

Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.<sup>102</sup>

More than 60% of American consumers and employees reside in states and territories that have adopted the Restatement (Second) of Contracts section 208.<sup>103</sup> Even more remarkable and relevant, federal courts of appeal<sup>104</sup> as well

172 F.2d 80, 84 (3d Cir. 1948) (“[A contract is unconscionable and unenforceable when] the sum total of its provisions drives too hard a bargain for a court of conscience to assist.”); *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979); *State ex rel. State Highway & Transp. Dep’t v. Garley*, 806 P.2d 32, 39 (N.M. 1991).

<sup>99</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

<sup>100</sup> *Id.* § 208, cmt. b (1979). *See also* *Steinhardt v. Rudolph*, 422 So.2d 884, 890 (Fla. Dist. Ct. App. 1982) (“[T]he Restatement (Second) of Contracts § 208 does not even attempt to define unconscionability in a black letter rule of law, whether in procedural-substantive terms or otherwise, because the legal concept involved here is so flexible and chameleon-like.”).

<sup>101</sup> *See Vockner v. Erickson*, 712 P.2d 379, 381 (Alaska 1986) (“The Restatement does not provide an explicit definition of unconscionability. It does identify factors, however, that support a finding of unconscionability.”).

<sup>102</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d (1981).

<sup>103</sup> *See Vockner v. Erickson*, 712 P.2d 379, 381–83 (Alaska 1986); *Maxwell v. Fidelity Fin. Servs.*, 907 P.2d 51 (Ariz. 1995); *IMO Development Corp. v. Dow Corning Corp.*, 185 Cal. Rptr 341, 345 (1982); *Steinhardt v. Rudolph*, 422 So.2d 884, 890 (Fla. Dist. Ct. App. 1982); *Ahern v. Knecht*, 563 N.E.2d 787, 793 (Ill. App. Ct. 1990); *In re Marriage of Shanks*, 758 N.W.2d 506, 515 (Iowa 2008); *Hosp. of Louisa v. Johnson Cty. Fiscal Court*, No. 2009-SC-000280-DG, 2011 WL 1103054, \*5 (Ky. March 24, 2011); *Strong v. Oakwood Hosp.*

as several justices sitting on the U.S. Supreme Court<sup>105</sup> have embraced section 208.

### 3. The Hybrid Unconscionability Defense and the Defendant's Burden of Proof

The doctrine of unconscionability comprises two prongs—procedural and substantive unconscionability.<sup>106</sup> Generally, a procedurally unconscionable act occurs when a powerful and sophisticated party uses “convoluted language,” a superior bargaining position, or substantial economic literacy to take advantage of a less literate and unsophisticated party.<sup>107</sup> Conversely, if a contract contains an oppressively harsh asymmetrical provision, a court is more likely to conclude that the contract is substantively unconscionable.<sup>108</sup>

Still, in several respects, state supreme courts are divided over whether a contract must be procedurally or substantively unconscionable to preclude its enforcement. For example, the Supreme Courts of Illinois and Missouri have declared that a contract is unenforceable if it is procedurally or substantively

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Corp., 325 N.W.2d 435, 437 (Mich. Ct. App. 1982); *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 919-920 (N.J. Sup. Ct. 2002); *Heen and Flint Associates v. Travelers Indem. Co.*, 400 N.Y.S.2d 994 (N.Y. Sup. Ct. 1977); *Rite Color Chemical Co., v. Velvet Textile Co.*, 411 S.E.2d 645, 648 (N.C. Ct. App. 1992); *Taylor Bldg. Corp. v. Benfield*, 884 N.E.2d 12, 22-23 (Ohio 2008); *Snyder v. Rogers*, 499 A.2d 1369, 1371 (Pa. Super. Ct. 1985); *Taylor v. Butler*, 142 S.W.3d 277, 284-85 (Tenn. 2004); *Ski River Development, Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex. Ct. App. 2005); *Derby v. Derby*, 378 S.E.2d 74, 78-79 (Va. Ct. App. 1989); *Richardson v. ESS Support Services*, No. SX-08-CV-535, 2009 WL 8394881, at \*1 (V.I. July 30, 2009); *Adler v. Fred Lind Manor*, 103 P.3d 773, 781 (Wash. 2004); *Lang v. Derr*, 569 S.E.2d 778, 781-82 (W.Va. 2002); U.S. STATES POPULATION AND RANKINGS, <http://www.enchantedlearning.com/usa/states/population.shtml> (last visited: Jan. 2, 2015).

<sup>104</sup> See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59 (1st Cir. 2007); *Alexander v. Anthony Int'l*, 341 F.3d 256, 264-65 (3d Cir. 2003); *Carlson v. General Motors Corp.*, 883 F.2d 287, 296 (4th Cir. 1989); *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1081 (7th Cir. 1986); *Noecker v. Southern California Lumber Industry Welfare Fund*, 522 Fed. Appx. 411, 414 (9th Cir. 2013).

<sup>105</sup> See *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 81 (2010) (Stevens, J. dissenting) (citing the RESTATEMENT (SECOND) OF CONTRACTS § 208, Cmt. d (1979)). See also *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O'Connor, J. concurring in judgment and dissenting in part).

<sup>106</sup> See *Drink, Inc. v. Martinez*, 556 P.2d 348, 351 (N.M. 1976).

<sup>107</sup> See *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 81 (Iowa 2011). But see *Guthmann v. La Vida Llena*, 709 P.2d 675, 679-80 (N.M.1985) (“A contract is procedurally unconscionable . . . only where the inequality is so gross that one party’s choice is effectively non-existent.”).

<sup>108</sup> *In re Marriage of Shanks*, 758 N.W.2d 506, 515 (Iowa 2008). But see *Guthmann v. La Vida Llena*, 709 P.2d 675, 679 (N.M.1985) (A contract is substantively unconscionable when the “contract terms . . . are illegal, contrary to public policy, or grossly unfair.”).

unconscionable.<sup>109</sup> On the other hand, the Arizona, New York, Utah and Washington Supreme Courts embrace a different view: A contract is invalid and unenforceable, if it is substantively unconscionable, yet procedurally unsound.<sup>110</sup>

Under Texas law, the unconscionability doctrine is also a two-prong test—containing elements of both substantive and procedural unconscionability.<sup>111</sup> However, it is less clear whether litigants must prove both procedural and substantive unconscionability before Texas courts will invalidate purportedly unconscionable contracts. To illustrate the uncertainty, in 1999, the Texarkana Court of Appeals only applied a procedural unconscionability analysis and concluded that a contractual provision was unenforceable.<sup>112</sup> But, the Texas Supreme Court decided three years later in *Halliburton Company*<sup>113</sup> that Texas courts “may consider both procedural and substantive unconscionability” in evaluating the validity and enforceability of an arbitration provision.<sup>114</sup> Moreover, seven years after *Halliburton*, the same Texarkana Appellate Court ruled that a successful unconscionability defense may be established by proving only substantive unconscionability.<sup>115</sup>

Presently, most state courts require litigants to prove both procedural and substantive unconscionability before invalidating contracts.<sup>116</sup> Functionally however, significant divisions continue because state courts of law generally require different standards for plaintiffs to prove unconscionability: “preponderance of evidence,” “clear and convincing evidence,” or “circumstantial evidence.”<sup>117</sup> However, only a judge may answer a question of law: whether, say,

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<sup>109</sup> See *Kinkel v. Cingular Wireless*, 857 N.E.2d 250, 263 (Ill. 2006); *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 22 (Mo. 2010), *rev'd on other grounds*, 131 S. Ct. 2875 (2011).

<sup>110</sup> See *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995); *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988); *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985); *Adler v. Fred Lind Manor*, 1103 P.3d 773, 781–82 (Wash. 2004).

<sup>111</sup> See *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006).

<sup>112</sup> See *In re Brookshire Brothers, Ltd.*, 198 S.W.3d 381, 387 (Tex. Ct. App. 2006); *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370, 377 (Tex. Ct. App. 1999).

<sup>113</sup> See *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002).

<sup>114</sup> *Id.* at 572.

<sup>115</sup> *Shamrock Foods Co. v. Munn & Associates, Ltd.*, 392 S.W.3d 839, 847–848 (Tex. Ct. App. 2013) (citing *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995)).

<sup>116</sup> See *Armendariz v. Foundation Health Psychcare Servs.*, 6 P.3d 669, 690 (Cal. 2000); *Hottle v. BDO Seidman*, 846 A.2d 862, 878 (Conn. 2004); *Strand v. U.S. Bank Nat. Ass'n ND*, 693 N.W.2d 918, 994 (N.D. 2005); *Deminsky v. Arlington Plastics Mach.*, 657 N.W.2d 411, 422 (Wis. 2003); *Roussalis v. Wyoming Med. Ctr.*, 4 P.3d 209, 246–47 (Wyo. 2000).

<sup>117</sup> *Compare Resource Management Co. v. Weston Ranch and Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985) (declaring that in a case involving an unconscionability claim, “a duly executed written contract should be overturned only by clear and convincing evidence”), *and Derby v. Derby*, 78 S.E.2d 74, 77 (Va. App. 1989) (reiterating that the one’s

an arbitration provision is unconscionable.<sup>118</sup> Consequently, to answer a general unconscionability question, both equity and law judges invite, accept and weigh legal, extralegal and imprecise evidence by asking: (1) whether some quantum of procedural and substantive unconscionability taints a contract;<sup>119</sup> (2) whether “there is a certain quantum of procedural plus a certain quantum of substantive unconscionability”.<sup>120</sup> (3) whether at least “some small measure” of procedural and substantive unconscionability pollutes a contract;<sup>121</sup> or (4) whether more substantive unconscionability and less procedural unconscionability—or vice versa—contaminates a contract.<sup>122</sup>

In Part IV of this article, several statistically significant findings reveal that courts are more likely to grant motions to compel arbitration when respondents raise a procedural unconscionability defense,<sup>123</sup> and less likely to compel arbitration when respondents raise a substantive unconscionability defense.<sup>124</sup> Furthermore, courts’ willingness to consider imprecise evidence or apply conflicting evidentiary standards to determine unconscionability partially explains courts’ likelihood to enforce purportedly unconscionable arbitration provisions in consumer and employment contracts.

### III. BRIEF OVERVIEW OF THE FEDERAL ARBITRATION ACT

Arbitration clauses appear in all types of consumer and employment contracts. If a contractual party refuses to arbitrate claims, the other party or mo-

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claiming that a contract is unconscionable must prove the allegations by clear and convincing evidence), *with* *Bernina Distributors, Inc. v. Bernina Sewing Mach.*, 646 F.2d 434, 440 (10th Cir. 1981) (employing circumstantial evidence to establish unconscionability), *and* *Worman v. FedEx Ground Package System Inc.*, 76 Pa. D. & C.4th 292, 300 (2005) (“The plaintiff bears the burden of proving this allegation of unconscionability, by a preponderance of the evidence.”), *and* *Gladding v. Langrall, Muir & Noppinger*, 401 A.2d 662, 665 (Md. 1979) (allowing circumstantial evidence to prove unconscionability).

<sup>118</sup> *Flores v. Transamerica HomeFirst*, 113 Cal.Rptr.2d 376, 379–380 (Cal. Ct. App. 2001).

<sup>119</sup> *Strand v. U.S. Bank Nat. Ass’n ND*, 693 N.W.2d 918, 923 (N.D. 2005) (“Most courts take a balancing approach to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability”).

<sup>120</sup> *See, e.g., Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 588 (Wis. Ct. App. 1992); *Wisconsin Auto Title Loans v. Jones*, 714 N.W.2d 155, 165 (Wis. 2006).

<sup>121</sup> *See, e.g., Dan Ryan Builders v. Nelson*, 737 S.E.2d 550, 558 (W.Va. 2012) (“[Under our recent case law], [t]o be unenforceable, a contract term must—at least in some small measure—be both procedurally and substantively unconscionable.”).

<sup>122</sup> *See, e.g., Armendariz v. Foundation Health Psychcare Services*, 6 P.3d 669, 690 (Cal. 2000) (“[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”).

<sup>123</sup> *See* Table 3 and accompanying discussion, *infra* Part VI.C.

<sup>124</sup> *See* Table 3, *infra* Part VI.C.

vant may file a motion to compel arbitration.<sup>125</sup> The movant commences a lawsuit “in equity to compel specific performance of a contract.”<sup>126</sup> Many commentators as well as federal and state court judges continue to embrace a centuries-old misconception: English courts of equity disliked and refused to enforce arbitration agreements solely because arbitration undermined courts’ jurisdictional powers.<sup>127</sup>

Actually, well before and during the 1700s, English equity courts enforced arbitration clauses and upheld arbitrators’ awards,<sup>128</sup> but did not tolerate arbitrators’ capricious rulings or abusive discretionary practices.<sup>129</sup> The increased “hostility” of courts against arbitrators did not occur until the nineteenth century<sup>130</sup> because: (1) courts of equity wanted to retain their power to review and decide any dispute involving the formation, interpretation and enforceability of an arbitration contract; and (2) courts increasingly refused to enforce unconscionable arbitration agreements, which forced weaker and unsophisticated parties into binding arbitration.<sup>131</sup>

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<sup>125</sup> See *Modesta v. Southeastern Pennsylvania Transp. Authority*, 469 A.2d 1019, 1021 (Pa. 1983).

<sup>126</sup> See *Wagner Const. Co. v. Pacific Mechanical Corp.*, 157 P.3d 1029, 1034 (Cal. 2007) (reaffirming that an action to compel arbitration “is in essence a suit in equity to compel specific performance of a contract”).

<sup>127</sup> Cf. *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2308–09 (2013) (“Congress enacted the FAA in response to widespread judicial hostility to arbitration.”).

<sup>128</sup> See, e.g., *Hicks v. Richardson* (1797) 126 Eng. Rep. 796, 796 (“If an arbitrator award . . . that each party shall pay a moiety of the costs of the arbitration . . . and one party—in order to get the award out of the hands of the arbitrator—pay[s] the whole, he may have an attachment against the other party if he refuse to pay his moiety.”).

<sup>129</sup> See, e.g., *Adams v. Buckland* (1705) 23 Eng. Rep. 929, 929 (“[P]rivate meetings of the arbitrators with one of the parties—and admitting him to be heard to induce an alteration in the award—is partiality.”).

<sup>130</sup> See *In re Unterweser Reederei, GmbH*, 428 F.2d 888, 896 (5th Cir. 1970) (“Not until the nineteenth century was the revocability of arbitration agreements simply premised on the courts’ opposition to ‘ouster’ from their jurisdiction.”).

<sup>131</sup> See *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary on S. 1005 and H. R. 646 — Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations*, 68th Cong., 1st Sess. 13–14 (1924) [hereinafter *Joint 1924 Hearings on Federal Arbitration Bills*] (statement of Julius Henry Cohen, Member, Committee on Commerce, Trade, and Commercial Law, American Bar Association and General Counsel for the New York State Chamber of Commerce) (“There are several reasons [why an arbitration contract may be unenforceable in a court of equity] . . . . In a very early case, the *Windgard* case, I am sure the decision of Lord Coke was misunderstood. . . . [One] could make an arbitration agreement . . . in the seventeenth century which was binding, but the remedies . . . were limited . . . . [I]n those days, [one could insert a] penalty [clause] . . . in [one’s] agreement. [And if one party breached the agreement, the other party could] sue for the

Undeniably, the “judicial hostility” argument spurred some congressional members to vote for the Federal Arbitration Act of 1924 (the “FAA”).<sup>132</sup> But, the congressional record clearly reveals that Congress enacted the FAA for other reasons: (1) to allow equally powerful and sophisticated merchants to fashion voluntary arbitration agreements;<sup>133</sup> (2) to encourage courts to enforce voluntary arbitration agreements;<sup>134</sup> (3) to increase merchants’ ability to resolve trade disputes efficiently by eliminating expensive litigation;<sup>135</sup> and (4) to “preserve business friendships” within and between various trade associations.<sup>136</sup>

Section 2 of the FAA reads in relevant part: “A written provision in any . . . contract . . . to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . .”<sup>137</sup> Following the FAA’s enactment, financial institutions, corporations and

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penalty . . . . [But the damages were modest] . . . . [Then, there is the] ouster of jurisdiction [explanation]. [One] could not oust the court of jurisdiction. . . . [A]t the time this rule was made, people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. . . . A judge . . . who is in sympathy with this measure and who approves it . . . told me recently— ‘Cohen you understand . . . the difficulty in this matter . . . [since] England is in possession of shipping, . . . our people do not want to go over there and arbitrate their differences over there.’”).

<sup>132</sup> See *id.* at 13–14.

<sup>133</sup> See *Joint 1924 Hearings on Federal Arbitration Bills*, at 26 (statement of Alexander Rose representing the Arbitration Society of America) (“Arbitration . . . does not by any means seek to supplant the courts or work in opposition to the courts, because . . . it is a purely voluntary thing”); *Joint 1924 Hearings on Federal Arbitration Bills* at 2–6 (statement of Sen. Thomas Sterling, Chairman, H. Comm. on the Judiciary) (“The hearing is upon S. 1005 and H.R. 646, being bills to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the states or territories or with foreign nations.”).

<sup>134</sup> See *id.* at 26 (statement of Alexander Rose representing the Arbitration Society of America) (“[Now], arbitration may . . . have the aid of the court to enforce these provisions which men voluntarily enter into. . . .”).

<sup>135</sup> See *id.* at 22 (statement of M. L. Toulme, Secretary, National Wholesale Grocers’ Association of United States) (“[We] heartily [endorse] principles involved in [the proposed] arbitration act. [It encourages] adjustment of trade disputes and [eliminates] expensive litigation. This association for many years has urged commercial arbitration.”).

<sup>136</sup> See *id.* at 7 (statement of Charles Bernheimer, Chairman of the Committee on Arbitration—Chamber of Commerce of the State of New York) (“[Arbitration] preserves business friendships. . . . Friendliness is preserved in business. It raises business standards. It maintains business honor, [and] prevents unnecessary litigation . . . .”); *Joint 1924 Hearings on Federal Arbitration Bills* at 24 (statement of Samuel M. Forbes, Secretary of Converters’ Association) (“Our association . . . most strongly feel that the adoption of a Federal arbitration act such as is now proposed will be one of the most forward steps in commercial life. Our members have found arbitration to be expeditious, economical, and equitable, conserving business friendships and energy.”).

<sup>137</sup> 9 U.S.C. § 2 (2012).



merchants began inserting involuntary arbitration clauses into consumer and employment contracts.<sup>138</sup> It is important to stress that the FAA's savings clause reads in pertinent part: "[An arbitration provision in any contract] shall be valid . . . and enforceable, save upon such grounds as exist at law or in equity . . ." <sup>139</sup> Generally, the savings clause means: "[T]he FAA places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms."<sup>140</sup> Nevertheless, a variety of contractual, equitable and statutory defenses may invalidate arbitration agreements.<sup>141</sup>

Furthermore, accompanying the substantial rise in arbitration clauses, exceedingly large numbers of unsophisticated consumers and employees began filing federal and state statutory claims against employers, merchants and lenders.<sup>142</sup> Congress did not enact the FAA to force employees or consumers into binding arbitration.<sup>143</sup> Yet, many unsophisticated workers, purchasers and bor-

<sup>138</sup> However, even before the FAA's enactment, arbitration was a popular alternative proceeding for parties to resolve their legal disputes. See *Springfield Fire & Marine Ins. Co. v. Payne*, 46 P. 315, 318 (Kan. 1896) ("[Arbitration] is a popular, cheap, convenient, and domestic mode of trial . . ."). Today, nearly a century after the enactment of the FAA § 2, arbitration agreements are extremely prevalent. See *Rivera v. Am. Gen. Fin. Servs.*, 259 P.3d 803, 810–11 (N.M. 2011) ("[M]illions of arbitration provisions [are] currently in force."). In fact, financial institutions, corporations and merchants insert regularly involuntary arbitration clauses into consumer and employment contracts. See, e.g., *Affiliated FM Ins. Co. v. Bridge Terminal Transp. Servs., Inc.*, No. 14 Civ. 6938, 2015 WL 685244, \*3 (S.D.N.Y. Feb. 18, 2015) (emphasizing the prevalence of arbitration agreements in the shipping industry); *Imptex Int'l Corp. v. Lorprint, Inc.*, 625 F.Supp. 1572, 1572 (S.D.N.Y. 1986) ("The New York courts have repeatedly held that, as arbitration clauses are commonly used in the textile trade, a textile buyer's failure to object to an arbitration clause upon receipt of both the sales agreement signed by the seller and the initial shipment of goods binds the buyer to the arbitration clause.").

<sup>139</sup> 9 U.S.C. § 2 (2012).

<sup>140</sup> *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); and then citing *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

<sup>141</sup> *Id.* (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

<sup>142</sup> See generally, Willy E. Rice, *Courts Gone "Irrationally Biased" in Favor of the Federal Arbitration Act?—Enforcing Arbitration Provisions in Standardized Application Forms and Marginalizing Consumer-Protection, Antidiscrimination, and States' Contract Laws: A 1925-2014 Legal and Empirical Analysis*, 6 WM. & MARY BUS. L. REV. 405, 486–487 (2015).

<sup>143</sup> See *Joint 1924 Hearings on Federal Arbitration Bills* at 21 (statement of Herbert Hoover, Secretary of Commerce) ("My Dear Senator: I have been . . . very strongly impressed with the urgent need of a federal commercial arbitration act. . . . If objection appears to the inclusion of workers' contract in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. Rev. 437, 438, 447, 469–78 (2011) (supporting the view that Congress never intended for the FAA to govern

rowers have been and are being forced continually into binding arbitration—where they are substantially less likely to prevail.<sup>144</sup>

Are consumers and employees more likely to appear before arbitrators because courts reject those complainants' procedural and substantive unconscionability challenges? Or, are federal courts in particular more likely to reject an unconscionability defense, grant motions to compel arbitration and force unsophisticated workers and consumers into binding arbitration? The following sections provide some answers.

#### IV. PROCEDURAL UNCONSCIONABILITY AND JUDICIAL CONFLICTS OVER WHETHER AN INDIVIDUAL'S "INFERIOR STATUS" PRECLUDES ENFORCING AN ARBITRATION AGREEMENT UNDER THE FAA

Under the common law, persons' respective statuses may preclude the formation of valid contracts.<sup>145</sup> Specifically, contracts are invalid as a matter of law if one party is a minor<sup>146</sup> or mentally incapacitated.<sup>147</sup> Additionally, some state statutes prevent certain classes of persons from forming valid contractual relationships.<sup>148</sup> But, even if particular classes have a common-law or statutory right to fashion and execute a contract, that contract is invalid and unenforceable if it evolves from any of the following activities: illegality or criminality,<sup>149</sup> fraud, collusion, a mistake, an accident,<sup>150</sup> public-policy violations, civil

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employment contracts of any sort and that Congress intended the FAA to apply to parties' arm's-length-bargaining contracts rather than to parties' unequal-bargaining contracts).

<sup>144</sup> Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived In The Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 6–7 (2014) ("Forced arbitration . . . has its roots in the Federal Arbitration Act . . . . Surveys . . . indicate that a fast-growing number of employers have adopted . . . forced arbitration [to resolve] workplace claims. . . . [A] survey of senior corporate counsel commissioned by Fulbright & Jaworski LLP reported that [25–27] percent of U.S. employers responding to the survey required forced arbitration of employment disputes in non-union settings. Assuming this self-reported data is accurate, at least 36 million employees nationwide are subject to forced arbitration.").

<sup>145</sup> See, e.g., E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 4.1 at 419–20 (2d ed. 1998).

<sup>146</sup> See *Tracy v. Brown*, 265 Mass. 163, 164–165 (1928).

<sup>147</sup> See *Martin v. Martin*, 270 A.2d 141, 143 (D.C. 1970).

<sup>148</sup> See, e.g., ALA. CODE § 8-1-170 (2015) ("[A]ll contracts of an insane person are void . . . ."); LA. CIV. CODE ANN. art. 1918 (2015) ("All persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting.").

<sup>149</sup> See *McCallum v. McIsaac*, 21 S.W.2d 392, 393 (Tenn. 1929) ("To invalidate a contract for illegality, the illegality must be inherent, not merely collateral.").

<sup>150</sup> See, e.g., *Hallock v. State of New York*, 474 N.E.2d 1178, 1180 (N.Y. 1984) ("Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation.").

statutory violations or unconscionable conduct.<sup>151</sup>

Once more, the unconscionability defense evolved in courts of equity.<sup>152</sup> Hence, only a judge may decide whether a contract or a provision is unconscionable.<sup>153</sup> Moreover, many courts require a litigant to prove both procedural and substantive unconscionability before voiding or terminating an arbitration contract.<sup>154</sup> Generally, to decide whether a contract is procedurally unconscionable, judges consider the parties' respective statuses and conduct during the formation of the contract.<sup>155</sup> Courts are more likely to find a contract procedurally unconscionable if: (1) the contract drafter's age, literacy, sophistication, intelligence and experiences are exceedingly more superior than the non-drafter's attributes;<sup>156</sup> (2) the absence of a better bargain forced an unwilling party to accept an offensive contract;<sup>157</sup> (3) surrounding circumstances decreased an individual's "reasonable opportunity" to understand the contractual terms;<sup>158</sup> or (4) the drafter of the contract concealed material terms "in a maze of fine print."<sup>159</sup>

On the other hand, courts are more likely to find a contract substantively unconscionable if: (1) the contract does not contain mutual contractual obligations or "a modicum of bilaterality";<sup>160</sup> (2) the contract contains unfair, overly harsh or oppressively one-sided terms producing absurd consequences for one

<sup>151</sup> See *Global Travel Mktg., Inc. v. Shea*, 908 So.2d 392, 398 (Fla. 2005) ("[T]he rights of access to courts and trial by jury may be contractually relinquished, subject to defenses to contract enforcement including voidness for violation of the law or public policy, unconscionability, or lack of consideration.").

<sup>152</sup> *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 752 (W.Va. 1986) ("Unconscionability is an equitable principle.").

<sup>153</sup> *Id.*

<sup>154</sup> See discussion *supra* Part II.C.3.

<sup>155</sup> See, e.g., *McGinnis v. Cayton*, 312 S.E.2d 765, 777 (W.Va. 1984) ("Procedural unconscionability addresses inequities, improprieties, or unfairness in the bargaining process and the formation of the contract.").

<sup>156</sup> See, e.g., *High v. Capital Senior Living Properties 2-Heatherwood, Inc.*, 594 F.Supp.2d 789, 799 (E.D. Mich. 2008) ("[To determine procedural unconscionability, a court must] focus on the 'real and voluntary meeting of the minds' of the parties at the time that the contract was executed and consider factors such as: (1) relative bargaining power; (2) age; (3) education; (4) intelligence; (5) business savvy and experience; (6) the drafter of the contract; and (7) whether the terms were explained to the 'weaker' party."); *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 96 (N.J. 2006) (stressing that procedural unconscionability involves a "variety of inadequacies, such as . . . literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process").

<sup>157</sup> See *Nelson v. McGoldrick*, 896 P.2d 1258, 1262 (Wash. 1995).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *Abramson v. Juniper Networks, Inc.*, 9 Cal.Rptr.3d 422, 437-42 (Cal. Ct. App. 2004).

of the parties;<sup>161</sup> (3) the contract contains a commercially unreasonable term that binds or affects only one of the parties;<sup>162</sup> (4) the allocation of risks between the parties is grossly imbalanced or unfair;<sup>163</sup> or (5) contractual terms unreasonably favor or benefit the more powerful party.<sup>164</sup>

Finally, courts generally have been loath to adopt a bright-line set of considerations to determine whether a contract is procedurally or substantively unconscionable,<sup>165</sup> because fairly often, procedural and substantive unconscionability occur simultaneously.<sup>166</sup> Moreover, as disclosed above, courts use a variety of factors to determine the types of unconscionable contracts. Additionally, some judges occasionally weigh identical factors to establish both procedural and substantive unconscionability, blurring the purported distinction between the two concepts.<sup>167</sup> To underscore the difficulty of constructing a bright-line test, consider the Supreme Court of West Virginia's observation: "[O]verwhelming bargaining strength against an inexperienced party (procedural unconscionability) may result in an adhesive form contract with terms that are commercially unreasonable (substantive unconscionability)."<sup>168</sup>

Moreover, section 4 of the FAA reads in pertinent part: "[U]pon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration

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<sup>161</sup> See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010) ("The focus of the inquiry is whether the [contract] term is one-sided and will have an overly harsh effect on the disadvantaged party.").

<sup>162</sup> See *NEC Technologies v. Nelson*, 478 S.E.2d 769, 772 (Ga. 1996). See also *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 23 (Ohio App. 2004) ("Because the determination of commercial reasonableness varies with the content of the contract terms . . . in any given case, no generally accepted list of factors has been developed for this category of unconscionability.").

<sup>163</sup> *Altman v. PNC Mortg.*, 850 F.Supp.2d 1057, 1080–81 (E.D. Cal. 2012) (reiterating that unconscionability comprises procedural and substantive components and emphasizing that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner to constitute a one-sided result).

<sup>164</sup> See *Estate of Hodges v. Meadows*, No. 12-cv-01698, 2013 WL 1294480, at \*6 (E.D. Pa. Mar. 29, 2013) ("Substantively unconscionable terms are those that are 'unreasonably or grossly favorable to one side and to which the disfavored party does not assent.'").

<sup>165</sup> *Hayes v. Oakridge Home*, 908 N.E.2d 408, 414 (Ohio 2009).

<sup>166</sup> See *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 288 (W.Va. 2011), *overruled in part on other grounds by Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012).

<sup>167</sup> *Id.* ("Procedural and substantive unconscionability often occur together, and the line between the two concepts is often blurred."). See also *In re Checking Account Overdraft Litigation*, 734 F.Supp.2d 1279, 1284 (S.D. Fla. 2010) ("There is no specific formula for analyzing substantive unconscionability; rather, it is 'a determination to be made in light of a variety of factors.'").

<sup>168</sup> *Genesis Healthcare Corp.*, 724 S.E.2d at 288.

agreement . . . [is an] issue, the court shall proceed summarily to the trial . . . .”<sup>169</sup> Before the late 1960s, courts generally embraced the proposition: “Under the FAA § 4, a court rather than an arbitrator must decide whether a contract-based affirmative defense invalidates or voids an entire contract.”<sup>170</sup> Consequently, those earlier courts declared that an arbitration clause is unenforceable if it appears in an invalid contract.<sup>171</sup>

However, in the late 1960s, the Supreme Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Company*<sup>172</sup> and changed the rule. In *Prima Paint*, the Court interpreted the FAA section 4’s “making of the arbitration agreement” phrase and fashioned a doctrine of separability out of thin air.<sup>173</sup> The Court concluded that as a matter of federal law, a contractual arbitration clause is “separable” from other provisions in the contract.<sup>174</sup> Therefore, if a party raises a common-law affirmative defense and challenges the legality of the contract generally, a private arbitrator rather than a court must determine the validity of the entire contract.<sup>175</sup> Without a doubt, the separability doctrine favors arbitration. The doctrine also governs the disposition of motion-to-compel-arbitration disputes in both federal and state courts.<sup>176</sup>

Although the Court crafted the doctrine of separability in the late 1960s, the doctrine continues to be extremely controversial. Many jurists and scholars have attacked the Supreme Court, asserting that: (1) the *Prima Paint Court* purposefully misinterpreted the FAA and created bizarre federal arbitration policies which exceed any reasonable interpretation of congressional intent;<sup>177</sup> and (2) the separability doctrine is a foreseeable consequence of the Court’s irra-

<sup>169</sup> 9 U.S.C. § 4 (2014).

<sup>170</sup> See KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 242 (2d ed. 2010) (citing Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1330 (1985)).

<sup>171</sup> *Id.*

<sup>172</sup> 388 U.S. 395 (1967).

<sup>173</sup> *Id.* at 402–04. See also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring) (“[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”).

<sup>174</sup> *Prima Paint*, 388 U.S. at 402 (“[A]rbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.”).

<sup>175</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”).

<sup>176</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (holding that the FAA-mandated federal arbitration laws apply in state courts).

<sup>177</sup> See Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L. J. 251, 254 n.10 (2007).

tional “judicial activism.”<sup>178</sup>

But even more troublesome, the doctrine of separability generates judicial splits. State and federal courts often grapple with two general questions: (1) whether a consumer or an employee must arbitrate a dispute if a common-law procedural defense invalidates the formation of the “entire” contract; and (2) whether a substantive unconscionability challenge prevents the enforcement of an offensive arbitration clause in an otherwise valid contract.<sup>179</sup> Below, these questions are addressed more thoroughly.

A. *Procedural Unconscionability and Judicial Clashes Over Whether a Mental Incapacity Defense Precludes the Enforcement of Arbitration Contracts Under the FAA*

For centuries, English and American courts have embraced the equitable principle: A contract is procedurally unconscionable, invalid and unenforceable if a contractual party was insane or a “lunatic” during the formation of the contract.<sup>180</sup> More concisely, a contract is procedurally unconscionable if a contractual party did not have the requisite mental capacity or competency to understand, approve, or accept material terms and conditions when the contract was made.<sup>181</sup> Thus, conservative readings of the doctrine of unconscionability and the FAA section 4 lead to one conclusion: An individual’s compromised mental status prevents a private arbitrator from hearing and deciding the individual’s common-law or statutory claims.

Nonetheless, state and federal courts continue to struggle with the question of whether the FAA requires a consumer or an employee to arbitrate a dispute if a consumer or an employee’s mental capacity was impaired while forming the arbitration agreement.<sup>182</sup> To illustrate the severity of the problem, consider the arbitration dispute in *Mason v. Acceptance Loan Co.*<sup>183</sup> Charlie Mason and

<sup>178</sup> *Id.*

<sup>179</sup> See discussion *infra* Part VI.

<sup>180</sup> See, e.g., *Waters v. Taylor* (1813) 35 Eng. Rep. 333, 334 (“[If it has been] clearly established . . . that the [p]arty is . . . an incurable [l]unatic . . . [he] contracted to be always actively engaged in [a] [p]artnership, and . . . he could not perform his [c]ontract, there could be no damages for [a] [b]reach . . . [Also] it would be very difficult for a [c]ourt of [e]quity to hold one [m]an to his [c]ontract, when it was perfectly clear that the other could not execute his [p]art of it.”).

<sup>181</sup> See *Jones v. Noy* (1833) 39 Eng. Rep. 892, 893–894 (“[T]he complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract.”). See also *Peterson v. Eritslund*, 419 P.2d 332, 336 (Wash. 1966) (“The mental competency or capacity of an individual to execute an agreement, . . . presents a factual issue . . . with the test being whether the person in question, at the time of executing the contract, possessed sufficient mind or reason to enable him to understand the nature, the terms and the effect of the transaction.”).

<sup>182</sup> See *infra* notes 184–203 and accompanying text.

<sup>183</sup> 850 So.2d 289 (Ala. 2002).

other consumers in Alabama secured loans from Acceptance Loan Company.<sup>184</sup> During the application process and before executing the loan agreements, Acceptance failed to disclose critical information in conspicuous print: The consumers were contractually obligated to purchase credit-life and disability insurance from Protective Life, and automobile insurance from CNL Insurance America, Inc.<sup>185</sup> Claiming that Acceptance conspired with the insurers and citing several common-law theories of recovery,<sup>186</sup> the plaintiffs sued Acceptance, CNL and Protective Life.<sup>187</sup>

Undisputedly, "each plaintiff entered into at least one arbitration agreement and . . . [most] plaintiffs entered into multiple arbitration agreements."<sup>188</sup> Therefore, in response to the underlying lawsuit, each defendant filed a motion to compel arbitration.<sup>189</sup> The trial court granted the motions and plaintiffs appealed.<sup>190</sup>

Before the Alabama Supreme Court, the consumers/respondents alleged that the trial court committed reversible error when it granted the lender and insurers' motions.<sup>191</sup> According to the consumers, the motions should have been denied, because (1) many consumers were "mentally retarded" during the formation of the financial-services and insurance contracts;<sup>192</sup> and (2) each consumer's mental retardation was evident when Acceptance, CNL and Protective Life committed fraud.<sup>193</sup> To prove "insanity," the Alabama consumers submitted several bits of probative evidence: (1) many consumers were "mildly retarded," given their low IQ scores; (2) many consumers were illiterate; (3) most consumers received special education rather than an elementary or a secondary education; and (4) many consumers "could not understand legal or business terminology."<sup>194</sup>

Alabama's "insanity" statute is unambiguous: "[C]ontracts of insane persons are wholly and completely void."<sup>195</sup> However, the Alabama Supreme Court's "cognitive understanding test" is equally clear:

"[T]o avoid a contract on the ground of insanity, it must be satisfactorily shown that the party was incapable of transacting the particular business in

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<sup>184</sup> *Id.* at 291.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 291 n.2 (Generally, the theories of liability sounded in tort—fraudulent misrepresentation and negligence.).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 292.

<sup>189</sup> *Id.* at 291–92.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 294.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 295–96.

<sup>195</sup> *Id.* at 295 (citing *Williamson v. Matthews*, 379 So.2d 1245, 1247 (Ala. 1980); and then citing Ala. Code 1975 § 8–1–170).

question. . . . A party cannot avoid a contract free from fraud or undue influence on the ground of mental incapacity, unless it be shown that his insanity . . . was of such character that he had no reasonable perception or understanding of the nature and terms of the contract.”<sup>196</sup>

Applying the “insanity” test to resolve the dispute in *Mason*, the Alabama Supreme Court rejected the consumers’ mental incapacity defense and ordered the consumers to arbitrate their claims.<sup>197</sup> To justify its ruling, the Alabama Supreme Court stressed: (1) the consumers were merely “mentally weak” rather than “insane”,<sup>198</sup> (2) the “mentally weak” consumers had repeated transactions with the defendants before the controversial transactions occurred;<sup>199</sup> and (3) after the lender disclosed the information, the “mentally weak” consumers knew they were signing “loan papers and insurance papers.”<sup>200</sup>

Seven years after *Mason*, the Texas Supreme Court decided *In re Morgan Stanley & Co.*<sup>201</sup> On September 9, 1999, Helen Taylor, an elderly woman, owned an estate “worth several million dollars.”<sup>202</sup> On the same day, Taylor completed an application, signed a securities agreement, and “transferred several of her securities accounts to Morgan Stanley.”<sup>203</sup> Each of Morgan Stanley’s agreements contained the following arbitration clause:

You agree that all controversies between you or your principals or agents and Morgan Stanley Dean Witter or its agents (including affiliated corporations) arising out of or concerning any of your accounts, orders or transactions, or the construction, performance, or breach of this or any other agreement between us . . . shall be determined by arbitration only . . . .<sup>204</sup>

In 1999, Taylor received a dementia diagnosis. The diagnosis occurred either a few months before or immediately after signing the financial agreements on September 9th.<sup>205</sup> Moreover, about three years after executing the 1999 agreement with Morgan Stanley, Taylor signed a durable power of attorney agreement and a trust agreement.<sup>206</sup> Under the respective agreements, Taylor’s granddaughter Kathryn Albers was the attorney-in-fact and trustee.<sup>207</sup> In the

<sup>196</sup> *Weaver v. Carothers*, 153 So. 201, 202 (Ala. 1934) (emphasis added).

<sup>197</sup> *Mason*, 850 So.2d at 299.

<sup>198</sup> *Id.* at 296 (“[A]s the trial court correctly held, this evidence is not evidence of ‘insanity’ for purposes § 8–1–170, but is rather . . . evidence of ‘mental weakness.’”).

<sup>199</sup> *Id.* at 296.

<sup>200</sup> *Id.* at 295.

<sup>201</sup> 293 S.W.3d 182 (Tex. 2009).

<sup>202</sup> *Id.* at 183.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 183 n.1.

<sup>205</sup> *Id.* at 183.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*



course of events, Albers raided the trust and misappropriated funds.<sup>208</sup> In 2004, a probate court appointed Nathan Griffin to guard Taylor's significantly depleted financial estate.<sup>209</sup>

In May 2005, the guardian sued Kathryn Albers and others, asserting that Taylor's relatives violated the Texas Uniform Fraudulent Transfer Act, committed civil theft, converted funds, and imposed a constructive trust.<sup>210</sup> Approximately one year later, the guardian added Morgan Stanley as a defendant in the case and claimed that the financial services conglomerate breached the 1999 agreements, breached a fiduciary duty, negligently selected unsuitable investments for Taylor, committed malpractice, and violated the Texas Security Act.<sup>211</sup> In response, Morgan Stanley filed a motion to compel arbitration of the underlying claims. The guardian, however, opposed the motion and argued that Taylor did not have the mental capacity to execute financial contracts in 1999.<sup>212</sup>

The trial court refused to compel arbitration.<sup>213</sup> Morgan Stanley appealed. Both the appellate and supreme courts affirmed the trial court's decision.<sup>214</sup> Because Helen Taylor did not have the mental capacity on September 9, 1999 to assent to the terms and conditions in the agreements generally or to those in the arbitration provisions specifically, the Texas Supreme Court declared that the financial contracts were procedurally unconscionable.<sup>215</sup> Like the Alabama Supreme Court's analysis in *Mason*, the Texas Supreme Court's contract-based analysis and ruling in *Morgan Stanley* falls short for several different reasons.

First, in many jurisdictions, a procedural unconscionability defense based on an individual's mental incompetency will preclude the formation of a valid and enforceable contract.<sup>216</sup> In Texas however, a mental incapacity defense simply challenges the continuing validity of a consummated contract.<sup>217</sup> Stated differently, an insanity-based, procedural unconscionability defense does not terminate a contract at its inception.<sup>218</sup> If a mentally incompetent individual fashions

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* See also Relator's Appellate Brief on the Merits at 4, *In re Morgan Stanley & Co. Inc.*, successor to Morgan Stanley DW Inc., 293 S.W.3d 182 (Tex. 2009) (No. 07-0665), 2008 WL 548885 at \*4.

<sup>211</sup> *Id.* at 183–184.

<sup>212</sup> *Id.* at 184.

<sup>213</sup> *Id.* at 183.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 190.

<sup>216</sup> See 53 Am. Jur. 2d Mentally Impaired Persons § 150 (2006); 17A C.J.S. Contracts § 145 (database updated June 2015).

<sup>217</sup> See, e.g., *Neill v. Pure Oil Co.*, 101 S.W.2d 402, 404 (Tex. Civ. App. 1937) (“It is the settled law in this state, we think, that a deed executed by a person of unsound mind is not void but voidable.”).

<sup>218</sup> See *Bolton v. Stewart*, 191 S.W.2d 798, 802 (Tex. Ct. App. 1945) (“It is the universal

and executes a contract, the contract is valid.<sup>219</sup> But, the individual has an option: “[A]t any time” the mentally incapacitated party or his authorized agent may void, annul or repudiate the contract.<sup>220</sup> Accordingly, in Texas, all contractual obligations, terms and conditions remain in effect and bind a mentally incompetent individual, unless or until the individual challenges the enforcement of the contract.<sup>221</sup>

However, in *Morgan Stanley*, the Texas Supreme Court did not address a major inconsistency in Taylor’s mental incapacity defense. Taylor’s guardian argued that “the entire September 9, 1999 new account agreement, including its arbitration provision, [was] unenforceable because Ms. Taylor was . . . mentally incompetent at the time she executed that contract.”<sup>222</sup> Yet, on June 21, 2006, the guardian “added Morgan Stanley as a defendant, alleging” that the financial institution breached a valid contract after recommending “unsuitable investments” to Ms. Taylor.<sup>223</sup> Apparently after Griffin discovered that a major inconsistency appeared in his response to Morgan Stanley’s motion, the guardian “nonsuited [the] breach of contract claim on October 23, 2007 . . . .”<sup>224</sup>

Still, the Texas Supreme Court’s reasoning is wanting. Texas embraces the “direct benefits equitable estoppel” doctrine.<sup>225</sup> It states: An individual—who derives a direct benefit under a contract that contains an arbitration provision may be compelled to arbitrate a claim, even if the individual did not agree to arbitrate.<sup>226</sup> In *Morgan Stanley*, the record is clear: Taylor received a dementia diagnosis in 1999—immediately before or after September 9th. However, Taylor did not challenge the enforceability of the securities contract’s arbitration clause until 2006. Consequently, for nearly seven years, Taylor and her estate received benefits from Morgan Stanley’s investment activities. Simply put, the Texas Supreme Court failed to explain why those benefits were warranted, in light of Taylor’s insanity-based, procedural unconscionability defense.<sup>227</sup>

There is one final observation. The Alabama and Texas Supreme Courts is-

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rule in this state that contracts made by . . . persons of unsound mind . . . may be ratified if the party becomes competent to do so.”).

<sup>219</sup> *Id.*

<sup>220</sup> See *Missouri Pac. Ry. Co. v. Brazil*, 10 S.W. 403, 406 (Tex. 1888).

<sup>221</sup> *Morgan Stanley*, 293 S.W.3d at 193 n.14 (Hecht, J., dissenting) (citing 5 Samuel Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 10:3 (2009)).

<sup>222</sup> See Relator’s Brief on the Merits at 11, *In re Morgan Stanley & Co. Inc.*, successor to Morgan Stanley DW Inc., Relator, 293 S.W.3d 182. (Tex. 2009) (No. 07-0665), 2008 WL 548885, at \*11.

<sup>223</sup> *Id.* at 4.

<sup>224</sup> *Id.* at 4 n.1.

<sup>225</sup> See *Morgan Stanley*, 293 S.W.3d at 184 n.2 (“[T]he doctrine of direct benefits equitable estoppel may apply to compel the arbitration of . . . claims.”).

<sup>226</sup> Cf. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005).

<sup>227</sup> See Relator’s Brief on the Merits, *In re Morgan Stanley*, 293 S.W.3d 182 (No. 07-0665), at 11, n.3.

sued conflicting rulings about the efficacy of a mental-incapacity defense in a motion to compel arbitration trial. Yet, both state supreme courts refused to apply the *Prima Paint* Court's controversial doctrine of separability.<sup>228</sup> Although presenting different reasons, both state supreme courts declared: Courts—rather than private arbitrators—must decide whether an insanity-based procedural unconscionability defense defeats a motion to compel arbitration.<sup>229</sup> In *Spahr v. Secco*,<sup>230</sup> the Tenth Circuit Court of Appeals also rejected the doctrine of separability.<sup>231</sup> From the Tenth Circuit's perspective, the "making" of the arbitration agreement phrase in section 4 of the FAA allows state and federal courts to determine whether a party's mental incapacity precludes the formation of a valid arbitration agreement.<sup>232</sup> On the other hand, the Fifth Circuit embraced the federal separability doctrine in *Primerica Life Ins. Co. v. Brown* and declared that an arbitrator must decide a mental-capacity defense, which does not specifically relate to an arbitration agreement.<sup>233</sup>

B. *Procedural Unconscionability and Judicial Differences Over Whether an Illiteracy Defense Precludes the Enforcement of Arbitration Agreements Under the FAA*

As stressed earlier, literal illiteracy and functional illiteracy are quite preva-

<sup>228</sup> Compare *Mason v. Acceptance Loan Co.*, 850 So.2d 289, 294–295, 295 n.2 (Ala. 2002) (“Generally, a challenge that concerns ‘the making of [a] contract in its entirety, rather than just . . . the arbitration agreement itself’ is for an arbitrator, rather than a court, to resolve. However, a challenge to the very existence of the contract—as is the case when contracts are challenged as being ‘void’ as opposed to ‘voidable’—is an issue for a court, not an arbitrator, to decide. . . . [W]e follow the reasoning of other courts that limit the holding in *Prima Paint Corp.* to ‘voidable’ contracts”), with *In re Morgan Stanley*, 293 S.W.3d, at 186 (“[We address] the distinction the [*Prima-Paint* Court] drew between issues of validity and issues of contract formation. . . . The issue of the contract’s validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. [We do not address] whether the alleged obligor ever signed the contract . . . [and] whether the signor lacked the mental capacity to assent.”).

<sup>229</sup> *Id.*

<sup>230</sup> 330 F.3d 1266 (10th Cir. 2003).

<sup>231</sup> *Id.* at 1273 (holding “mental incapacity defense naturally [attacks the presumed enforceability of] both the entire contract and the specific agreement to arbitrate in the contract.”).

<sup>232</sup> *Id.*

<sup>233</sup> *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (“[U]nless a defense relates specifically to the arbitration agreement, it must be submitted to the arbitrator as part of the underlying dispute.”). But see *In re Morgan Stanley*, 293 S.W.3d, at 189 (“The Fifth Circuit’s decision in *Primerica*, that the defense of mental incapacity is an issue for the arbitrator, not the court, because it is an attack on the whole contract, stands in stark contrast to [other] authorities. [*Primerica*] has been roundly criticized, and we [are] aware of no other court that has followed its reasoning, including the Fifth Circuit.”) (emphasis added).

lent among large percentages of consumers and employees.<sup>234</sup> Consequently, “unsophisticated” workers, borrowers and purchasers are realistically and effectively precluded from (1) reading and comprehending material terms in standardized employment, goods and services contracts; and (2) protecting their legal rights in boilerplate contracts.<sup>235</sup> Furthermore, large numbers of unsophisticated consumers and employees appear in “deeply conservative red states.”<sup>236</sup> Extremely large numbers of consumers also reside in “quintessentially liberal blue states.”<sup>237</sup> Still, other large populations reside in the “swingiest of swing states”—Ohio, Michigan, Wisconsin, and Iowa.<sup>238</sup> Thus, given everyday employees and consumers’ relatively inferior status, courts in “blue,” “swing,” and “red” states have embraced the proposition that written contracts are procedurally unconscionable if one party was “uneducated or illiterate” during the formation and execution of the contract.<sup>239</sup>

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<sup>234</sup> See discussion *supra* notes 1–15.

<sup>235</sup> See Alan White & Cathy Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 233–234 (2002) (citing and summarizing empirical studies which confirm that most consumers and employees cannot read and understand material cash-price, cost of credit, quantity and employment-related terms in standardized contracts, or the material information in “legally mandated disclosure forms”).

<sup>236</sup> Cf. Kirk J. Stark, *Rich States, Poor States: Assessing the Design and Effect of A U.S. Fiscal Equalization Regime*, 63 TAX L. REV. 957, 961 (2010) (labeling Alabama, Arkansas, Louisiana, Mississippi, South Carolina, West Virginia and other states in the Southeastern region of the country as conservative “red states”).

<sup>237</sup> Cf. Bradley A. Smith, *Vanity of Vanities: National Popular Vote and the Electoral College*, 7 ELECTION L.J. 196, 210 (2008) (counting Kansas, Virginia and Wyoming among the “Republican red states” and including Rhode Island, Hawaii and Vermont among the “quintessentially Democratic blue states”); Martin C. Bryce, Jr., *Red State versus Blue State: Surprisingly Most (But Not All) Courts In Both “Red” and “Blue” States Enforce Express Class Action Waivers In Consumer Arbitration Agreements*, 59 CONSUMER FIN. L.Q. REP. 222, 224 n.26 (2005) (listing North Dakota, Tennessee, and Texas as being more conservative “red” states and listing District of Columbia, Delaware, Hawaii, Illinois, Maryland, New Jersey, New York, and Washington as being the more liberal “blue” states).

<sup>238</sup> Mark Silk, *Defining Religious Pluralism In America: A Regional Analysis*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 79 (2007) (“The Midwest is . . . a place with the largest political deviations—from deep-red states like Kansas and Nebraska to the deep-blue state of Illinois to the swingiest of swing states—Ohio, Michigan, Wisconsin, and Iowa.”).

<sup>239</sup> *Compare* *Razor v. Hyundai Motor America*, 854 N.E.2d 607, 622 (Ill. 2006) (“Procedural unconscionability refers to situations where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power.”), *and* *Muhammad v. Cnty. Bank, Rehoboth Beach*, 912 A.2d 88, 96 (N.J. 2006) (reaffirming that procedural unconscionability “can include a variety of inadequacies, such as . . . literacy [and] lack of sophistication . . . during the contract formation process”), *and* *William v. Walker–Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (stating that one’s lack of education and another’s use of fine print are to be considered when applying the procedural unconscionability defense), *with* *Wille v. Southwestern Bell Telephone Co.*, 549 P.2d 903, 907 (Kan. 1976) (“[T]here must be

Yet, since the FAA's enactment, a major question has evolved: whether an illiteracy-based, procedural unconscionability defense prevents state and federal courts from enforcing non-negotiated arbitration clauses in contracts.<sup>240</sup> Surprisingly, this unlikely question has generated major splits—between and among courts in the “deeply conservative red states” and those in the “slightly less conservative swing states.”<sup>241</sup> To demonstrate, consider the Ohio and Texas Courts of Appeals' difficult-to-harmonize answers regarding whether an Alzheimer's-stricken consumer must arbitrate claims if: (1) the incompetent consumer or her supposedly “authorized legal representative” was illiterate or functionally illiterate when the contract was signed; (2) the non-negotiated purchase agreement contains an arbitration clause; and (3) the Alzheimer's-inflicted victim's signature was mandatory, before the seller would deliver the essential goods or services.<sup>242</sup>

In 2004, the Texas Court of Appeals in San Antonio decided *In re Ledet*.<sup>243</sup> The pertinent facts in the underlying lawsuit are clear. Anselma Garza—an elderly lady—was admitted to Retama Manor Nursing Center Laredo South (Retama).<sup>244</sup> At that time, she had Alzheimer's disease, which precluded her reading, comprehending, writing, negotiating or signing of any legal document.<sup>245</sup> Therefore, Alejandro Garza—Anselma's illiterate son—signed Retama's standardized residential contract and “the arbitration agreement.”<sup>246</sup> Seven months after becoming a resident, Anselma fell out of bed.<sup>247</sup> “The fall caused multiple fractures to Anselma's body and face.”<sup>248</sup> Ana Bustamante is Anselma's daughter.<sup>249</sup> Three months after the fall and on behalf of her mother, Bustamante filed a negligence action against Retama and Dan Ledet—Retama's administrator.<sup>250</sup>

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additional factors such as deceptive bargaining conduct as well as unequal bargaining power to render the contract between the parties unconscionable”), and *Taylor Bldg. Corp. of America v. Benfield*, 884 N.E.2d 12, 22–23 (Ohio 2008) (noting that procedural unconscionability focuses on the bargaining process, and the factors considered include “knowledge of the stronger Party that the weaker Party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors”).

<sup>240</sup> See discussion *infra* notes 235–96.

<sup>241</sup> See *id.*

<sup>242</sup> See *infra* notes 242–285.

<sup>243</sup> *In re Dan Ledet and Living Centers of Texas, Inc.*, No. 04-04-00411, 2004 WL 2945699 (Tex. Ct. App. 2004).

<sup>244</sup> *Id.* at \*3.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at \*1.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

Reacting to the underlying lawsuit, Retama and Ledet (“Ledet”) filed a motion to compel arbitration.<sup>251</sup> The trial court denied the motion without giving an explanation and Ledet appealed.<sup>252</sup> Before the Texas Court of Appeals, Bustamante encouraged the court to affirm the trial court’s decision.<sup>253</sup> According to Bustamante, the arbitration agreement was procedurally unconscionable and therefore, unenforceable because: (1) Retama’s agreement did not list Anselma as a contractual partner; (2) Anselma never signed the agreement; and (3) Alejandro Garza did not have legal authority to bind his Alzheimer’s-stricken and incompetent mother under an arbitration contract.<sup>254</sup> The Texas Court of Appeals rejected those defenses.<sup>255</sup>

Bustamante also argued that “the arbitration agreement [was] procedurally unconscionable, because Alejandro Garza [did] not understand, speak, or read English” when he signed Retama’s contract.<sup>256</sup> Even more importantly, Retama’s agents failed to explain the arbitral terms to her illiterate brother, and Alejandro “felt pressured” to sign the arbitration agreement or else Retama would not admit his Alzheimer’s-afflicted mother.<sup>257</sup> The Texas Court of Appeals also rejected the illiteracy defense.<sup>258</sup> The appellate court declared, “Whether a party is illiterate or incapable of understanding English is not a defense to a contract.”<sup>259</sup> Although Alejandro Garza could “not speak English” and “could not read,” his signature alone was sufficient to bind his mother under the arbitration clause.<sup>260</sup>

The Texas Court of Appeals strongly implied that Anselma Garza’s literally illiterate son breached several judge-made obligations: (1) schedule and attend a formal meeting with Retama’s arguably more sophisticated administrator; (2) raise intelligent questions about the legal difference between litigation and arbitration; (3) present educated questions about the legal implications of his mother’s acceptance of the terms of a binding arbitration agreement; and (4) demand timely, uncomplicated, and uncompensated legal answers and explanations—presumably all the while a disease-stricken elderly mother waited to be admit-

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at \*2.

<sup>255</sup> *Id.* at \*1–4 (“Alejandro Garza signed the admittance papers as the ‘responsible party.’ [He also signed an] arbitration agreement as [her] ‘legal representative.’ . . . Despite the ‘resident’ not being identified, the agreement is still enforceable. . . . Given Alejandro Garza’s testimony and the statutory authority, Alejandro Garza had actual authority to sign the arbitration agreement on his mother’s behalf.”).

<sup>256</sup> *Id.* at \*5.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

ted to a nursing home.<sup>261</sup> Are such implied obligations rational or easy for an illiterate or legally unsophisticated consumer to satisfy? Did Congress enact the FAA in 1924, intending to achieve these types of outcomes? The respective answer to each question is a resounding yes, if one considers the numerous mandatory-arbitration rulings that red-state judges have issued in the wake of the Supreme Court's 1967 *Prima Paint* decision.<sup>262</sup>

Now, consider the underlying arbitration disputes in *Wascovich v. Personacare of Ohio*.<sup>263</sup> The underlying material facts in *Wascovich* are very similar to those in *Ledet*. Personacare of Ohio owns and operates LakeMed Nursing and Rehabilitation Center ("Personacare") in Painesville, Ohio.<sup>264</sup> On April 4, 2008, Richard Wascovich, Sr. ("Wascovich"), a 73-year-old retired truck driver, was diagnosed with Alzheimer's disease.<sup>265</sup> On the same date, Richard Wascovich, Jr. ("Richard"), Wascovich's son, instructed the local hospital to release and transfer his father to LakeMed Nursing Home.<sup>266</sup> The elderly Wascovich was admitted into the Nursing home, after Richard and Jillian Hendrickson, Per-

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<sup>261</sup> *Id.* at \*5–6 (“[Alejandro] testified that [a] Retama employee spoke Spanish with him and ‘explained some things but not everything.’ According to Alejandro he signed the agreement because the Retama personnel ‘didn’t explain everything to me as it should be.’ However, Alejandro also admitted that he did not ask questions about the agreement or seek an explanation of the agreement.”).

<sup>262</sup> See *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983, 988–89 (Ala. 2004) (“Owens [argued] that the arbitration agreement is unconscionable because it was ‘signed by [the] daughter of [an] aged widow who had no knowledge of [the] arbitration agreement when her aged and ill mother was admitted to [the] nursing home after medical treatment.’ However . . . [t]he fact that she did not explain the arbitration agreement to Tucker . . . is simply not relevant to whether the arbitration agreement was unconscionable.”); *Green Tree Fin. Corp. v. Lewis*, 813 So. 2d 820, 820 (Ala. 2001) (denying an illiterate consumer's unconscionability challenge against a standardized arbitration clause); *Johnnie's Homes, Inc. v. Holt*, 790 So.2d 956, 960 (Ala. 2001) (One who offers a product or a service “is under no duty to disclose, or explain, an arbitration clause to a buyer.”); *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 679 (Tex. 2006) (granting employer's motion to compel arbitration after rejecting the employees' assertions: (1) the employees were unsophisticated persons; (2) the employer never explained the concept of arbitration; (3) the employees “did not voluntarily waive their right to a jury trial”; and (4) the employees “would not have signed the arbitration agreements” as a basis for invalidating arbitration agreement if the employees had been fully informed); *Vera v. N. Star Dodge Sales*, 989 S.W.2d 13, 17–18 (Tex. Ct. App. 1986) (“It is well settled that illiteracy will not relieve a party of the consequences of a contract. Every person who has the capacity to enter into a contract, in the absence of fraud, misrepresentation, or concealment, is held to know what words were used in the contract, to know their meaning, and to understand their legal effect.”).

<sup>263</sup> 943 N.E.2d 1030 (Ohio Ct. App. 2010).

<sup>264</sup> *Id.* at 1036.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

sonacare's authorized agent, executed an arbitration agreement.<sup>267</sup>

Twenty days after becoming a resident at LakeMed, Wascovich fell on the premises.<sup>268</sup> Six days later, Wascovich fell again, fractured his hip, and received surgery.<sup>269</sup> Medical complications ensued, causing Wascovich's death.<sup>270</sup> Richard commenced wrongful-death and survival claims against Personacare.<sup>271</sup> In response, "Personacare filed a motion to stay the proceedings" and compel arbitration.<sup>272</sup> Challenging the motion, Richard asserted that "the arbitration agreement did not control the wrongful-death portion of the complaint."<sup>273</sup>

In addition, Richard asserted that Alzheimer's-inflicted Wascovich was legally incompetent or functionally illiterate when the arbitration contract was signed.<sup>274</sup> Therefore, according to Richard the arbitration agreement was procedurally unconscionable because: (1) Wascovich's low literacy precluded his comprehending the legal implications of signing an arbitration agreement;<sup>275</sup> (2) he did not have a history of litigating disputes involving the formation, interpretation and enforcement of arbitration contracts;<sup>276</sup> (3) he did not consult an attorney before signing the contract;<sup>277</sup> and (4) Personacare's agent—Jillian Hendrickson—failed to explain the legal consequences of signing the arbitration agreement, since she "was not trained to understand the differences between litigation and arbitration."<sup>278</sup>

The affidavit of Hendrickson stated that "she was not trained to read the contents of the arbitration agreement to new residents"; "she did not explain to new residents about the effects of signing the arbitration agreement"; "she was not trained to understand the differences between litigation and arbitration"; she told "new residents that the arbitration agreement would enable residents to resolve disputes 'faster than litigation'"; she never witnessed "a new resident make changes to the arbitration agreement"; and she never disclosed to residents "that they could make changes to the arbitration agreement."<sup>279</sup> Ultimately, the trial court granted in part Personacare's motion and declared that

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<sup>267</sup> *Id.* at 1032.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1037.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1036–1037 ("[A]ccording to the affidavit of [Richard], Wascovich did not have any prior legal experience or expertise . . .").

<sup>277</sup> *Id.* at 1037.

<sup>278</sup> *Id.* at 1036.

<sup>279</sup> *Id.*



the arbitration agreement was not procedurally unconscionable.<sup>280</sup> Richard Wascovich appealed.

During its deliberations in *Wascovich*, the Ohio Court of Appeals cited and reviewed its rulings in *Manley v. Personacare of Ohio*.<sup>281</sup> *Manley* was another dispute involving the enforceability of an arbitration provision in a nursing-home contract. In *Manley*, the Ohio Court of Appeals stressed, “[p]rocedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible.”<sup>282</sup>

Thus, reaffirming the *Manley* principle, the *Wascovich* court concluded that the nursing-home arbitration agreement was procedurally unconscionable because: (1) Personacare presented no probative evidence of Wascovich’s expressing both an understanding of and a willingness to sign the arbitration agreement;<sup>283</sup> (2) “multiple signatures [on the contract] reflects . . . some physical impairment [undermined Wascovich’s] ability to sign” a legal document;<sup>284</sup> and (3) Personacare did not present any evidence of Wascovich’s having “the mental capacity to enter into a contract of any kind, let alone one that Hendrickson . . . did not comprehend.”<sup>285</sup>

To be sure, judicial splits have also developed among Ohio’s courts of appeals as well as among courts in the “more prototypically liberal blue states” over the general question: whether a party’s “low literacy” precludes the enforcement an arbitration clause.<sup>286</sup> However, among blue-state courts, one finds perhaps a more divisive arbitration question: whether an arbitration agreement is procedurally unconscionable, if the respondent/plaintiff was “highly educated” or “professionally trained”—yet “functionally illiterate”<sup>287</sup>—when the arbitration agreement was created and signed. A review of two cases will illustrate how courts in the blue states have addressed this arguably more contentious question.

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<sup>280</sup> *Id.* at 1033.

<sup>281</sup> No. 2005-L-174, 2007 WL 210583 (Ohio Ct. App. 2007).

<sup>282</sup> *Id.* at \* 2. (emphasis added).

<sup>283</sup> *Wascovich*, 943 N.E.2d at 1037.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Compare *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004) (declaring that the arbitration clause in the nursing-home contract was procedurally unconscionable and the 69-year-old patient’s signature had no effect), with *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777, at \*6 (Ohio Ct. App. 2005) (declaring that an arbitration provision was not procedurally unconscionable, even though the patient was 85-years-old and her daughter—who signed the contract—was 54-years-old).

<sup>287</sup> See discussion *supra* notes 2-13.

First, consider the controversy in *Miller v. Cotter*.<sup>288</sup> Charles Miller, Jr. (“Miller”) had the executed durable power to make binding agreements on behalf of his father, Charles Miller, Sr.,<sup>289</sup> and “the younger Miller also held a valid health care proxy for his father.”<sup>290</sup> On October 10, 2003, Miller transported his ninety-one-year-old father to Birchwood Care Center (“Birchwood”)—wanting his father to become a resident.<sup>291</sup> During the sixty-to-ninety-minute meeting, Miller and Birchwood’s patient-care manager discussed the nursing home’s admission policies and procedures.<sup>292</sup>

A patient could have been admitted to Birchwood without executing an arbitration agreement.<sup>293</sup> Nevertheless, Miller reviewed Birchwood’s sixteen-page admission contract and the arbitration agreement.<sup>294</sup> The latter read in relevant part:

It is understood and agreed . . . that any and all claims, disputes, and controversies . . . arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the [f]acility to the [r]esident shall be resolved exclusively by binding arbitration . . . and not by a lawsuit or resort to court process.<sup>295</sup>

Furthermore, “the arbitration agreement did not limit any remedies available under Federal or State law, but stated that the decisions of the arbitrator ‘shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action.’”<sup>296</sup> After Miller signed all necessary forms and agreements on behalf of his father, the elderly Miller was admitted.<sup>297</sup>

Twenty-four days later, Miller’s father died in the nursing home.<sup>298</sup> On January 13, 2005, Miller filed a lawsuit against several Birchwood defendants—Birchwood, its employees and Dr. Eric Cotter who administered care to the deceased father.<sup>299</sup> Miller’s claims and/or theories of recovery were negligence, wrongful death, “wilful, wanton, and reckless conduct,” and “failure to obtain informed consent.”<sup>300</sup> On April 15, 2005, the Birchwood defendants filed an answer—generally denying the allegations and advancing various defenses. Al-

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<sup>288</sup> 863 N.E.2d 537 (Mass. 2007).

<sup>289</sup> *Id.* at 540.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 540–41.

<sup>296</sup> *Id.* at 541.

<sup>297</sup> *Id.* at 540.

<sup>298</sup> *Id.* at 541.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

so, citing the arbitration agreement, the defendants moved to dismiss the complaint and to compel arbitration.<sup>301</sup> A superior court judge denied the motion, and Cotter and the co-defendants appealed.<sup>302</sup>

Before the Massachusetts Supreme Judicial Court, the Birchwood defendants argued: (1) federal and state statutes required the lower court to enforce the arbitration agreement; and (2) the Superior Court judge “had no legal basis for declining to enforce the arbitration agreement.”<sup>303</sup> Miller raised a procedural unconscionability defense to the motion.<sup>304</sup> While conceding that he received a signed copy of the arbitration agreement, Miller stated expressly: “[I] did not read through all of [the] terms, word by word.”<sup>305</sup> Moreover, Miller highlighted that he received a summary rather than a full explanation of the terms and conditions in the arbitration agreement.<sup>306</sup> But even more importantly, Miller impliedly suggested that he was unsophisticated or “functionally illiterate” because he did not fully understand the legal implications of signing a non-mandatory arbitration agreement.<sup>307</sup>

By many measures, the Supreme Judicial Court of Massachusetts is a fairly “liberal” tribunal, and is more inclined than most courts to protect the rights and interests of actual and allegedly unsophisticated individuals.<sup>308</sup> However, in *Miller*, the state supreme court refused to accept Miller’s illiteracy-based, procedural unconscionability defense.<sup>309</sup> The Massachusetts Supreme Judicial Court gave several reasons: (1) During his deposition, Miller revealed that he understood the contractual terms; (2) he was “an intelligence officer in the United States Air Force”; (3) he served twenty-seven years as a medical and disability claims examiner or manager in the insurance industry; (4) he holds a degree in English from prestigious Tufts University;<sup>310</sup> (5) “[He] was not re-

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<sup>301</sup> *Id.* at 542.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 540.

<sup>304</sup> *Id.* at 541.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* (“Miller testified that during the admission meeting, [Birchwood’s agent] ‘summarized’ the agreements, explaining to him that the arbitration agreement was not a precondition of admission, and that its purpose was to put disputes before an arbitrator rather than a court. He further testified that he could not recall any specifics about the provisions of the agreements . . . . He also testified that he was under great stress at the time of admission and ‘just wanted to make sure that there was no problem getting dad admitted.’”).

<sup>307</sup> *Id.*

<sup>308</sup> See Mark C. Miller, *Lawmaker Attitudes Toward Court Reform In Massachusetts*, 77 JUDICATURE 34, 38 (1993) (reporting that the Massachusetts Supreme Judicial Court’s favorability and prestige ranked fifth among the top-ranked “liberal” and “highly activist courts”).

<sup>309</sup> Miller, 863 N.E.2d at 545 (“Nothing in the setting of its execution suggests that the agreement was procedurally unconscionable.”).

<sup>310</sup> *Id.* at 541.

quired to sign the [arbitration] agreement as a condition of admission”,<sup>311</sup> and (6) his failure to read the agreement “word-for-word” was immaterial, since—absent fraud—“a party’s failure to read or understand a contract provision does not free him from its obligations.”<sup>312</sup> Ultimately, the Supreme Judicial Court reversed the lower court’s order and forced Miller to arbitrate his underlying common-law and statutory claims.<sup>313</sup>

Like the Massachusetts Supreme Judicial Court, California courts have a long history of interpreting and applying legal principles liberally—insisting on protecting the rights of “unsophisticated” persons.<sup>314</sup> Some jurists, however, have strongly asserted that California courts’ mandatory-arbitration rulings are unreasonably biased in favor of “unsophisticated” consumers and employees.<sup>315</sup> Is this assertion true? Part VI of this article carefully addresses this question. But, for now, consider how the California Court of Appeals arguably “[split] the difference”<sup>316</sup> in its decision in *Lateral Link Group v. BLA Schwartz*.<sup>317</sup>

The Lateral Link controversy is a classic example of a complex “case within a case within a case,” or a “trial within a trial within a trial.”<sup>318</sup> The relevant facts in all three controversies, however, are simple. Lateral Link Group (“Lateral Link”) is a limited liability company in California that “specializes in legal

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<sup>311</sup> *Id.* at 545.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 549.

<sup>314</sup> *Cf.* Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J. L. & PUB. POL’Y 533, 551 (2004) (“California courts have been highly liberal in finding a right to political speech in shopping centers.”); Diana Lauretta, *Protecting the Child’s Best Interest: Defending Second-Parent Adoptions Granted Prior to the 2002 Enactment of California Assembly Bill 25*, 33 GOLDEN GATE U. L. REV. 173, 200 (2003) (discussing California courts’ liberal construction of adoption statutes); Farah Z. Usmani, *Inequities in the Resolution of Securities Disputes: Individual or Class Action; Arbitration or Litigation*, 7 FORDHAM J. CORP. & FIN. L. 193, 228–29 (2001) (discussing California courts’ liberal position regarding class-action claims and the enforcement of arbitration agreements).

<sup>315</sup> *See generally* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 HASTINGS BUS. L. J. 39, 62 (2006) (“Under the California approach, it appears that [arbitration] agreements are procedurally unconscionable, irrespective of the particular circumstances surrounding the signing of the agreement.”).

<sup>316</sup> *Cf.* J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-The-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1970–71 (2006).

<sup>317</sup> No. BC520905, 2014 WL 5500382 (Cal. Ct. App. Oct. 31, 2014).

<sup>318</sup> *See also* Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court, 40 Cal.Rptr.3d 446, 450 (Cal. Ct. App. 2006) (“In conducting the ‘trial-within-a-trial’ of a legal malpractice case, ‘the goal is to decide what the result of the underlying proceeding or matter should have been, an objective standard.’”) (quoting RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.1 (West, 2006 ed.)).

recruiting.”<sup>319</sup> Michael Allen (Allen) had a majority interest in the company and T.J. Duane had a “40 percent ownership interest.”<sup>320</sup> BLA Schwartz is a Massachusetts professional legal corporation.<sup>321</sup> Attorneys John Komar, Nicholas Cassie and Irwin Schwartz are BLA’s partners.<sup>322</sup>

In the course of events, a dispute arose between Allen and Duane (the “Duane Dispute”), whereby Allen refused to purchase Duane’s interest in Lateral Link.<sup>323</sup> The parties began to arbitrate an ownership “valuation dispute.”<sup>324</sup> Allen hired BLS and Schwartz to represent Allen and the company’s interests.<sup>325</sup> An arbitration provision also appeared in the law firm and Allen’s retainer agreement. It read in pertinent part:

In the event the parties to this agreement are unable, acting in good faith, to resolve any such question or dispute, they agree to arbitrate the resulting dispute. After exhausting their good faith attempts to resolve their question or dispute informally . . . the aggrieved party will serve on the other party within ten (10) days a written demand for arbitration before the American Arbitration Association (AAA). The parties agree that their disputes will be resolved by binding arbitration . . . in accordance with the AAA commercial arbitration rules and expedited procedures then in effect, except that in no event will the parties be entitled to conduct pre-hearing discovery.”<sup>326</sup>

Ultimately, the private arbitrator—who resolved the Duane Dispute—forced Lateral Link to purchase Duane’s interest.<sup>327</sup> In the wake of that disappointment, Allen and Lateral Link filed a legal malpractice lawsuit against Schwartz—asserting that the law firm breached their fiduciary duties (the “LegalMal Suit”).<sup>328</sup> In reply, BLS and Schwartz filed an action to compel arbitration of the legal-malpractice claim.<sup>329</sup> Allen opposed the motion to compel arbitration, asserting that the arbitration provision was substantively and procedurally unconscionable.<sup>330</sup> The trial court denied the attorneys’ motion because:

<sup>319</sup> *Lateral Link Group*, 2014 WL 5500382, at \*1.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at \*2.

<sup>327</sup> *Id.* at \*1 (“The arbitrator also awarded Duane \$145,319.57 in attorney fees as a prevailing party against both Lateral Link and Allen.”).

<sup>328</sup> *Id.* (“Allen [argued] that he should not have been found personally liable for attorney fees and that defendants otherwise provided him and Lateral Link with flawed advice throughout the arbitration.”).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at \*2 (Allen presented several reasons: “the malpractice claims were not subject to the arbitration provision”; he signed the retainer agreement, understanding that the agree-

(1) the retainer agreement was “slightly procedurally unconscionable”; (2) the arbitration agreement was unenforceable; and (3) the agreement could not be reformed to eliminate the extensive unconscionability.<sup>331</sup> BLS and Schwartz appealed.

The California Court of Appeals resolved the dispute, but the analysis and conclusion were convincing only in part. The AAA rules were not attached to the signed contract; thus, in light of his ignorance about arbitration rules and procedures, Allen argued that the arbitration clause was unconscionable.<sup>332</sup> The court of appeal rejected that defense and ruled:

Standing alone, [BLS Schwartz’s] failure to attach AAA rules does not support a procedural unconscionability finding. . . . [T]he rules are easily accessible . . . on the Internet . . . . Furthermore, Allen, who is a Harvard-educated attorney and owns a legal placement firm, certainly . . . had the ability to locate and retrieve a copy of the AAA rules from the Internet.”<sup>333</sup>

Nonetheless, the court of appeals continued its analysis and stressed that BLS Schwartz’s failure to attach a copy of arbitration rules could be an important factor, if the failure produced surprises.<sup>334</sup> Thus, the liberal court declared that the arbitration agreement was procedurally unconscionable because Allen had been surprised.<sup>335</sup> Even so, Allen did not prevail and the California Court of Appeal granted BLS Schwartz’s motion and compelled arbitration.<sup>336</sup> California Civil Code section 1670.5 (a)(3) permits a court to “limit the application of any unconscionable clause [in order] to avoid any unconscionable result”<sup>337</sup>— if a contract or any contractual provision was unconscionable at its inception.<sup>338</sup> Stated slightly differently, a trial court may sever or restrict an unconscionable provision in a contract or may refuse to enforce the entire agreement.<sup>339</sup> The California Appellate Court reviewed the “pre-hearing discovery” exception in BLS Schwartz’s arbitration clause, declared that the exception did not permeate the entirety of the retainer agreement,<sup>340</sup> severed the unconscionable exception and compelled arbitration.<sup>341</sup> However, in

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ment “only covered fee disputes”; he was unaware that the arbitration provision covered malpractice claims; the AAA rules were not attached to the agreement; and the arbitration clause precluded “pre-hearing discovery.”)

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at \*6.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at \*7.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 8; CAL. CIV. CODE § 1670.5(a)(3) (West 1979).

<sup>338</sup> *Lateral Link Group*, 2014 WL 5500382, at \*8.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at \*9.

<sup>341</sup> *Id.* at \*1 (“[W]e affirm the trial court’s finding of unconscionability, but conclude that the unconscionability may be cured through severance.”).

*Armendariz v. Foundation Health Psychcare Services*,<sup>342</sup> the California Supreme Court refused to sever an unconscionable arbitration provision and compel arbitration.<sup>343</sup> Furthermore, the state supreme court decided the *Armendariz* controversy without even considering or mentioning the employees' levels of education or sophistication.<sup>344</sup>

V. JUDICIAL SPLITS OVER WHETHER A SUBSTANTIVE UNCONSCIONABILITY CHALLENGE PRECLUDES ENFORCING ASYMMETRICAL AND ALLEGEDLY "OVERLY BURDENSOME" COST-SHARING ARBITRATION AGREEMENTS

To repeat, if aggrieving consumers or employees cannot prove both substantive and procedural unconscionability, many state supreme courts will enforce arbitration agreements.<sup>345</sup> On the other hand, a sub-population of supreme courts will invalidate arbitration agreements if unsophisticated consumers and employees establish that the agreements are only substantively unconscionable.<sup>346</sup> Additionally, courts weigh a variety of factors to determine whether an arbitration agreement is substantively unconscionable.<sup>347</sup> For example, courts have considered one or a combination of the following factors: (1) the fairness of contractual terms;<sup>348</sup> (2) the severity of contractual terms' deviation from prevailing standards, customs or practices within a particular industry;<sup>349</sup> (3) the reasonableness of goods-and-services contract prices;<sup>350</sup> (4) "the commercial reasonableness of the contract terms";<sup>351</sup> (5) "the purpose and effect of the terms";<sup>352</sup> and (6) "the allocation of risks between the parties."<sup>353</sup>

Yet, state and federal courts are divided over three pressing and interrelated questions: (1) whether "merely," "merely offensive," "unreasonably harsh" or "shockingly objectionable" asymmetrical arbitration agreements preclude mandatory arbitration;<sup>354</sup> (2) whether the FAA requires courts to apply a uni-

<sup>342</sup> 6 P.3d 669 (Cal. 2000).

<sup>343</sup> *Id.* at 675, 695–699.

<sup>344</sup> *Id.* at 693 (embracing the trial court's finding that "the arbitration agreement was [a one-sided] 'adhesion contract'").

<sup>345</sup> *Id.* at 690.

<sup>346</sup> See discussion *supra* Part II.C.3.

<sup>347</sup> See, e.g., *Garrett v. Hooters-Toledo*, 295 F. Supp. 2d 774, 779–80 (N.D. Ohio 2003) (embracing the view that "no generally accepted list of factors has been developed [to prove substantive] unconscionability").

<sup>348</sup> *Collins v. Click Camera and Video, Inc.*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *State ex rel. Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808, 812 (W. Va. 2012).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> See discussion *infra* Part V.A.

versal or a case-specific evidentiary standard to decide the enforceability of supposedly “prohibitively expensive” and “unconscionable” costs-sharing agreements—fee-splitting, cost-splitting, fee-shifting and cost-shifting clauses;<sup>355</sup> and (3) whether allegedly “prohibitively expensive” cost-sharing fees must be “slightly,” “moderately” or “shockingly” greater than litigation costs, employees’ annual wages, or consumers’ expenditures for non-conforming goods and services.<sup>356</sup> Below, the scope and depth of the conflicts surrounding these questions are discussed.

A. *Judicial Conflict Over the Proper Standard for Determining Whether Asymmetrical Arbitration Agreements Are Substantively Unconscionable Under the FAA*

Briefly, consider three settled common-law principles: (1) judges may not rewrite contractual parties’ obligations or force the parties to embrace judge-made terms;<sup>357</sup> (2) judges sitting in equity, however, may reform or rewrite contracts to state correctly the parties’ true agreements and intentions,<sup>358</sup> and (3) courts of law and equity may refuse to enforce unreasonably or oppressively one-sided contractual terms.<sup>359</sup> In *Concepcion*, the Supreme Court reaffirmed those principles and stressed that unconscionable arbitration agreements are not enforceable.<sup>360</sup>

The *Concepcion* Court also stressed that the FAA—rather than the Court’s policies—places limitations on the applicability of an unconscionability chal-

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<sup>355</sup> See, e.g., *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1021 (6th Cir. 2005) (“[The controversial] provision . . . in *Morrison* was a cost-splitting provision [which] . . . would have . . . required [the employees] to pay 3% of his/her salary while the employer would pay . . . the rest of the costs of arbitration. In this case, the provision is a cost-shifting [requirement], which is arguably more of a deterrent [for] potential litigants [because they] may have to bear the entire costs if they are unsuccessful. Consequently, we . . . [hold] that such a provision would deter a substantial number of litigants in the plaintiff’s position.” (citing *Morrison v. Circuit City Stores*, 317 F.3d 646, 669 (6th Cir. 2003))).

<sup>356</sup> See discussion *infra* Part V.B.

<sup>357</sup> See, e.g., *Brekken v. Reader’s Digest Special Products, Inc.*, 353 F.2d 505, 506 (7th Cir. 1965); *Rogers v. First Tennessee Bank Nat. Ass’n.*, 738 S.W.2d 635, 642 (Tenn. Ct. App. 1987); *Wilson v. Scott*, 672 S.W.2d 782, 786 (Tenn. Ct. App. 1984).

<sup>358</sup> See *Maier v. Hibernia Ins. Co.*, 67 N.Y. 283, 291 (1876) (“It is in the power of a court of equity . . . [to] reform and rewrite the contract . . .”).

<sup>359</sup> See, e.g., *Daley v. People’s Building, Loan & Savings Ass’n*, 59 N.E. 452, 453 (Mass. 1901) (Holmes, J.) (“Courts are less and less disposed to interfere with parties making . . . contracts as they choose, so long as they interfere with no one’s welfare but their own. . . . It will be understood that we are speaking of parties standing in an equal position where neither has any oppressive advantage or power . . .”).

<sup>360</sup> *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011) (citing 9 U.S.C. § 2 and reiterating that arbitration agreements may be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract”).



lenge if: (1) state courts apply a facially discriminatory unconscionability rule to circumvent arbitration;<sup>361</sup> or (2) courts apply a facially nondiscriminatory procedural rule, which seriously interferes with the “fundamental attributes of arbitration”: “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”<sup>362</sup> Put simply, *Concepcion* prevents unconscionability challenges which disproportionately affect the enforcement of arbitration agreements.<sup>363</sup>

Moreover, *Concepcion* also raises an arguably novel question of whether state and federal courts may apply unconscionability rules to address an oppressively harsh condition that does not arise “uniquely in the context of arbitration.”<sup>364</sup> For example, both ordinary contracts—like insurance policies—and arbitration agreements are often asymmetrical.<sup>365</sup> The overwhelming majority of “liberal” and “conservative” courts also embrace the view that contracts generally and arbitration agreements specifically are not substantively unconscionable merely because they are asymmetrical.<sup>366</sup> *Concepcion* however, requires courts to apply state-law principles of contract. Thus, an even more heated question has evolved: whether plaintiffs/respondents must satisfy a minimum-low, moderate-medium, or a stringent-high evidentiary standard to establish that an asymmetrical arbitral agreement is substantively unconscionable.<sup>367</sup>

This latter debate has emerged in part because the FAA does not identify the type of probative evidence that a plaintiff/respondent must present to defeat

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<sup>361</sup> *Id.* at 1748.

<sup>362</sup> *Id.* at 1748, 1751.

<sup>363</sup> *Id.* at 1747.

<sup>364</sup> *See, e.g.,* *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013) (“[S]tate-law rules that do not ‘interfere[ ] with fundamental attributes of arbitration’ do not implicate *Concepcion*’s limits on state unconscionability rules. As our cases have held, such rules may address issues that arise uniquely in the context of arbitration. . . . Moreover, there are other ways an arbitration agreement may be unconscionable that have nothing to do with fundamental attributes of arbitration.”).

<sup>365</sup> *Compare* *Henkel Corp. v. Hartford Accident and Indemnity Co.*, 62 P.3d 69, 80–81 (Cal. 2003) (“An insurance contract is often an asymmetrical relationship: an insured will have fully performed, paying premiums to the insurer, long before the insurer is called on to perform at all.”), *with* *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003) (finding an unconscionable asymmetrical arbitration agreement because the employer granted to itself powers to unilaterally modify the contract and “proscribes an employee’s [rights]”).

<sup>366</sup> *See, e.g.,* *Pinnacle Museum Tower Assn. v. Pinnacle Market Development*, 282 P.3d 1217, 1231 (Cal. 2012); *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 174 (Wis. 2003); *Armendariz v. Found. Health Psychare Servs.*, 6 P.3d 669, 692 (Cal. 2000); *Streams Sports Club, Ltd. v. Richmond*, 457 N.E.2d 1226, 1232 (Ill. 1983); *Ting v. AT&T*, 319 F.3d 1126, 1148–49 (9th Cir. 2003); *First Family Financial Services, Inc. v. Fairley*, 173 F.Supp.2d 565, 572 (S.D. Miss. 2001); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F.Supp.2d 655, 659 (S.D. Miss. 2000).

<sup>367</sup> *See* discussion *infra* notes 373–407.

a motion to compel arbitration.<sup>368</sup> Clearly, a party may not invalidate an arbitration provision merely by raising a general denial.<sup>369</sup> Furthermore, the defending party's evidence may not be speculative.<sup>370</sup> Instead, specific evidence is required to establish a successful substantive unconscionability challenge.<sup>371</sup> Moreover, if a challenger's evidence is specific, the central question still remains whether courts must apply a universal standard or a particular test to determine whether more-than-merely asymmetrical arbitration agreements are substantively unconscionable.

Courts employ a variety of loosely-defined and contentious equitable doctrines to determine the enforceability of one-sided arbitration provisions.<sup>372</sup> Consequently, decidedly conflicting inter-state rules as well as inter-circuit decisions have emerged. For example, the Supreme Court of North Carolina declared that a merely "one-sided" arbitration agreement may be substantively unconscionable.<sup>373</sup> However, the Supreme Courts of Alabama and West Virginia have adopted stricter standards, concluding—respectively—that only "inherently unfair or oppressive,"<sup>374</sup> or unreasonably "one-sided"<sup>375</sup> arbitration

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<sup>368</sup> See *Johnson v. Orkin, LLC*, 928 F. Supp. 2d 989, 1001 (N.D. Ill. 2013) ("The FAA does not expressly identify the evidentiary standard that a party . . . must meet. Most [federal] [c]ourts of [a]ppeals that have examined the issue . . . analogized the standard to be applied when adjudicating the validity of an arbitration agreement to the standard imposed on a party [who opposes] a motion for summary judgment [under] Rule 56(e) of the Federal Rules of Civil Procedure."). See, e.g., *Control Screening LLC v. Technological Application & Prod. Co., HMC-Vietnam*, 687 F.3d 163, 167 (3d Cir. 2012); *Hancock v. Am. Tel. & Tel. Co., Inc.*, 701 F.3d 1248, 1261 (10th Cir. 2012); *Wachovia Bank Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 172 (2d Cir. 2011); *Mazera v. Varsity Ford Mgmt. Servs.*, 565 F.3d 997, 1001 (6th Cir. 2009); *Aliron Int'l, Inc. v. Cherokee Nation Indust., Inc.*, 531 F.3d 863, 865 (D.C. Cir. 2008); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992).

<sup>369</sup> *Johnson*, 928 F. Supp. 2d at 1001.

<sup>370</sup> See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000).

<sup>371</sup> *Johnson*, 928 F. Supp. 2d at 1001.

<sup>372</sup> Cf. *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 212 (Cal. 2013) ("The core of Justice Chin's dissent is his contention that the arbitration agreement . . . is not unconscionable. . . . Justice Chin says we have improperly relaxed the unconscionability standard by using the phrase 'unreasonably one-sided' instead of 'so one-sided as to shock the conscience.' . . . But an examination of the case law does not indicate that 'shock the conscience' . . . is the one true, authoritative standard for substantive unconscionability, exclusive of all others.").

<sup>373</sup> See *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008) (ruling in favor of borrowers and declaring that the merely one-sided arbitration clause in the loan agreement was substantively unconscionable because the arbitration clause preserved lenders' ability "to pursue its claims in court while denying plaintiffs that same option").

<sup>374</sup> See *ex parte McNaughton*, 728 So. 2d 592, 597 (Ala. 1998) (implicitly embracing the proposition that one-sided arbitration clauses are substantively unconscionable only if they

clauses are substantively unconscionable.

Among federal courts in the Fifth and Ninth Circuits, the disagreement is also pronounced. For instance, applying Louisiana's law, a federal district court ruled in favor of unsophisticated cellular-phone consumers—declaring that Cingular Wireless's one-sided arbitration agreements were substantively unconscionable because they were less than "good faith" agreements.<sup>376</sup> Applying California's law, the Ninth Circuit decided in favor of employees, concluding that an asymmetrical arbitration provision in Circuit City's employment contract was unconscionable because the provisions were "unduly harsh or oppressive."<sup>377</sup>

In contrast, applying Alabama's law, the Fifth Circuit decided against unsophisticated borrowers and compelled arbitration—concluding that the lender's alleged "patently unfair and unreasonable" asymmetrical arbitral agreements were not substantively unconscionable.<sup>378</sup> And, applying Mississippi's law, a federal district court ruled against a borrower and compelled arbitration.<sup>379</sup> The

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are "inherently unfair or oppressive," deciding against the employee, and declaring that the arbitration agreement—which required the employee to submit employment-related claims to arbitration, but allowed the employer to choose an arbitral or judicial forum—was not substantively unconscionable).

<sup>375</sup> See *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 553, 558 (W. Va. 2012) (ruling in favor of the consumers/homeowners who purchased a home that contained an illegal septic system and declaring that the unreasonably "one-sided" arbitration clause was substantively unconscionable because the clause barred the homeowners "from initiating any proceeding or action whatsoever in connection with this Agreement," while allowing DRB "to seek arbitration or to file an action for damages").

<sup>376</sup> See *Iberia Credit Bureau Inc. v. Cingular Wireless*, 379 F.3d 159, 169–171 (5th Cir. 2004) (deciding in favor of Louisiana cellular-phone consumers and declaring that the one-sided arbitration agreements were substantively unconscionable because they were not made in good faith and they required the wireless customers to arbitrate, without imposing a reciprocal duty on Cingular Wireless).

<sup>377</sup> See *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (deciding in favor of employees, and declaring that Circuit City's "unduly harsh or oppressive" one-sided arbitration agreements was substantively unconscionable, because the agreement required employees to submit all claims and disputes to binding arbitration while releasing Circuit City from a contractual duty to arbitrate any claims against employees (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000))).

<sup>378</sup> See *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1012–1013 (M.D. Ala. 1997) (deciding against consumers, declaring that one-sided arbitration clauses are substantively unconscionable if the clauses are "so patently unfair and unreasonable," and deciding against borrowers, because the arbitration agreements in the installment sales contracts—which required the borrowers to arbitrate all plausible federal and state claims against Ford Motor FMCC and allowed Ford to seek judicial remedies—were not substantively unconscionable).

<sup>379</sup> See *Pridgen v. Green Tree Fin. Serv. Corp.*, 88 F.Supp.2d 655, 658, 659 (S.D. Miss. 2000) (deciding against the borrower, finding that Green Tree had an option to sue in court

borrower argued that the one-sided arbitration clause was substantively unconscionable, but the federal judge rejected that defense because the clause was not “oppressive.”<sup>380</sup>

Even more surprising, in large states, purportedly “pro-consumer” and “pro-employee” supreme courts have not fashioned a universal or straightforward standard to decide whether one-sided arbitration provisions are substantively unconscionable. To illustrate, the Supreme Court of Wisconsin crafted a circular declaration, stating that asymmetrical arbitration agreements are substantively unconscionable if they are unconscionably “one-sided.”<sup>381</sup> And, on another occasion, the Wisconsin Supreme Court concluded: one-sided arbitration clauses are substantively unconscionable if they are “broad and overly one-sided.”<sup>382</sup>

Within the span of fifteen years, the California Supreme Court fashioned three supposedly bright-line evidentiary standards to determine substantive unconscionability.<sup>383</sup> Between 2000 and 2003, the California Supreme Court stated and reaffirmed the principle that arbitration agreements in employment contracts are substantively unconscionable if they are “unfairly one-sided, [without] a modicum of bilaterality.”<sup>384</sup> However, in 2012, the Supreme Court of California crafted a stricter standard—pronouncing that arbitration provisions in services contracts are substantively unconscionable if the clauses are

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or to submit a claim to arbitration, finding that the borrower had to arbitrate any claim arising from the loan contract, and declaring that the one-sided arbitration clause in the loan agreement was not substantively unconscionable, because the unsophisticated borrower failed to prove that the clause was “oppressive”).

<sup>380</sup> *Id.* at 658.

<sup>381</sup> See *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 174 (Wis. 2006) (ruling in favor of the borrowers and declaring that “[t]he unconscionable one-sidedness of the arbitration provision [was] sufficient” to establish a substantively unconscionable and burdensome arbitration provision, which required borrowers to litigate similar, identical or intertwined claims twice—once before a circuit court and again before an arbitrator).

<sup>382</sup> See *id.* at 175–176 (ruling in favor of an indigent borrower and declaring that the broad and overly one-sided arbitration clause was substantively unconscionable because the provision allowed Wisconsin Auto Title Loans to have full access to the courts without requiring of arbitration, while requiring the borrower to arbitrate).

<sup>383</sup> See *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 692 (Cal. 2000) (deciding in favor of employees and declaring that the arbitration clause was substantively unconscionable because it was “unfairly one-sided,” without a “modicum of bilaterality”—imposing on employees a duty to arbitrate their claims, without imposing a similar duty on employers when they file claims against employees); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 984 (Cal. 2003) (ultimately deciding against an employee, forcing the employee to arbitrate employment-discrimination claims, but declaring that the ultimately severed arbitration clause was substantively unconscionable because (1) it was “unfairly one-sided, [without a] modicum of bilaterality,” and (2) a \$50,000 threshold for an arbitration appeal, which decidedly favored defendants in employment contract disputes).

<sup>384</sup> *Little*, 63 P.3d at 984; *Armendariz*, 6 P.3d at 692.

“so one-sided as to shock the conscience”<sup>385</sup> And, in 2013, the court abandoned the strict standard and adopted an arguably intermediate standard—declaring that an arbitration agreement is substantively unconscionable if it is “unreasonably one-sided” in favor of an employer.<sup>386</sup>

Historically, and by several measures, the California Supreme Court is a highly respected judicial powerhouse.<sup>387</sup> Its consistently insightful analyses and rulings often protect the rights and interests of ordinary consumers and employees.<sup>388</sup> But, even more importantly, the esteemed and highest court in California has been proactive, seizing opportunities to fashion intelligible legal standards which lend themselves to commonsensical and relatively predictable rulings.<sup>389</sup> Yet, the Supreme Court of California has not taken advantage of several opportunities to craft a commonsensical universal standard to determine whether an asymmetrical arbitration agreement is substantively unconscionable.<sup>390</sup>

Following the California Supreme Court’s decisions, other courts have developed competing standards in mandatory-arbitration hearings.<sup>391</sup> For in-

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<sup>385</sup> See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development*, 282 P.3d 1217, 1232–1234 (Cal. 2012) (deciding in favor of a homeowners’ association, finding that a one-sided arbitration clause required construction disputes to be arbitrated, but precluded the association’s right to fully recover damages, and declaring that the one-sided provision was substantively unconscionable because it “shocks the conscience.”).

<sup>386</sup> See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 203, 205, 211 (Cal. 2013) (“[T]he unconscionability doctrine does not mandate the adoption of any particular form of dispute resolution mechanism, and courts may not decline to enforce an arbitration agreement simply on the ground that it appears to be a bad bargain or that one party could have done better. The unconscionability doctrine is instead concerned with whether the agreement is unreasonably favorable to one party, considering in context ‘its commercial setting, purpose, and effect.’”).

<sup>387</sup> Cf. Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 300–301 (1977) (“[T]he California Supreme Court is respected for the quality of its decisions and its leadership in many fields, and because it has been at the center of much of the independent interpretation debate . . .”).

<sup>388</sup> Cf. *id.*

<sup>389</sup> Cf. David J. Szwak, *Louisiana Premises Liability in the Post-Cates v. Beauregard Electric Cooperative Era*, 53 LA. L. REV. 1935, 1951 (1993) (“The California Supreme Court [has been] well respected for the creative legal models set forth in their jurisprudence . . .”).

<sup>390</sup> See, e.g., *Sonic-Calabasas*, 311 P.3d at 213 (“It is enough to observe that courts, including ours, have used various nonexclusive formulations to capture the notion that unconscionability requires a substantial degree of unfairness beyond ‘a simple old-fashioned bad bargain.’ . . . [W]hether ‘shock the conscience’ has a different meaning than ‘unreasonably one-sided,’ . . . [whether one or the other] should be the exclusive formulation of substantive unconscionability . . . whether these different formulations actually constitute different standards in practice, and whether one is more objective than the other are issues that have not been briefed and are not before us.”).

<sup>391</sup> See discussion *infra* notes 373–383.

stance, in the span of a ten-year period, some appellate courts applied the “shock-the-conscience” test.<sup>392</sup> However, during the same period, other appellate courts in California relied heavily on the “overly harsh or oppressive” standard<sup>393</sup> to decide whether to enforce or invalidate a one-sided arbitration agreement. Furthermore, some of the same appellate courts also applied the “unfairly one-sided” test.<sup>394</sup>

However, the California Supreme Court concluded in *Sonic-Calabasas*: “[C]ase law does not indicate that ‘shock the conscience’ is a different standard in practice than other formulations or that it is the one true, authoritative standard for substantive unconscionability, exclusive of all others.”<sup>395</sup> But consider the California Court of Appeals for the Fourth District’s motion-to-compel-arbitration ruling in *Kinney v. United HealthCare Services, Inc.*<sup>396</sup> A controversial one-sided arbitral agreement forced employees to arbitrate their claims—while permitting the employer to litigate claims against the employees in courts of law.<sup>397</sup> Deciding in favor of the employee, the *Kinney* court declared that the one-sided arbitration clause was substantively unconscionable because it “[shocked] the conscience.”<sup>398</sup>

However, four and nine years after *Kinney*, the California Court of Appeal for the Second District decided—respectively—*Martinez v. Master Protection Corporation*<sup>399</sup> and *Roman v. Superior Court*.<sup>400</sup> In both of the latter cases, the arbitral disputes were essentially identical: An arbitration provision in an employment contract and another one in an employment application permitted employers to litigate common-law and statutory claims in courts of law, while forcing employees to arbitrate such claims.<sup>401</sup> Like the *Kinney* employee, the worker in *Martinez* prevailed: The Second District Court of Appeals declared that the arbitration agreement was shockingly “one-sided,” and therefore sub-

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<sup>392</sup> See, e.g., *Bigler v. Harker Sch.*, 153 Cal.Rptr.3d 78, 86 (Cal. Ct. App. 2013); *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group*, 128 Cal.Rptr.2d 330, 339–40 (Cal. Ct. App. 2011); *24 Hour Fitness, Inc. v. Superior Court*, 78 Cal.Rptr.2d 533, 541 (Cal. Ct. App. 1998); *Kinney v. United HealthCare Serv.*, 83 Cal.Rptr.2d 348, 353–54 (Cal. Ct. App. 1999).

<sup>393</sup> See, e.g., *Zullo v. Superior Court*, 127 Cal.Rptr.3d 461, 467–68 (Cal. Ct. App. 2011); *Harper v. Ultimo*, 7 Cal.Rptr.3d 418, 422–23 (Cal. Ct. App. 2003); *Stirlen v. Supercuts, Inc.*, 60 Cal.Rptr.2d 138, 145, 153 (Cal. Ct. App. 1997).

<sup>394</sup> See, e.g., *Olvera v. El Pollo Loco, Inc.*, 93 Cal.Rptr.3d 65, 73 (Cal. Ct. App. 2009); *Martinez v. Master Protection Corp.*, 12 Cal.Rptr.3d 663, 668 (Cal. Ct. App. 2004).

<sup>395</sup> *Sonic-Calabasas*, 311 P.3d at 212.

<sup>396</sup> 83 Cal.Rptr.2d 348 (Cal. Ct. App. 1999).

<sup>397</sup> *Id.* at 353–54.

<sup>398</sup> *Id.*

<sup>399</sup> 12 Cal.Rptr.3d 663 (Cal. Ct. App. 2004).

<sup>400</sup> 92 Cal.Rptr.3d 153 (2009).

<sup>401</sup> See *Martinez*, 12 Cal.Rptr.3d, at 668; *Roman*, 92 Cal.Rptr.3d at 157.

stantively unconscionable.<sup>402</sup> The worker in *Roman* did not prevail.<sup>403</sup> Yet, in *Roman*, the same court reviewed an identical one-sided arbitration clause, refused to declare that the clause “[shocked] the conscience,” and granted the employer’s motion to compel arbitration.<sup>404</sup>

Although the California Court of Appeal referenced and considered the “shock the conscience” doctrine, the court still declared that the one-sided arbitration provision was not substantively unconscionable.<sup>405</sup> Intuitively, something is amiss, because the California Supreme Court permits lower courts to weigh various types of imprecisely defined evidentiary standards—“unfairly one-sided,” “unreasonably one-sided,” “harshly one-sided,” “oppressively one-sided,” “shockingly one-sided,” and “unconscionably one-sided”—to decide whether arbitration clauses are substantively unconscionable.<sup>406</sup>

#### B. *Substantive Unconscionability and Conflicting Evidentiary Standards for Determining “Prohibitively Expensive” Arbitral Costs Under the FAA*

Numerous seasoned practitioners and jurists embrace the view: A “strong judicial policy” favors arbitration over litigation because (1) “arbitration is less expensive and more expeditious than litigation”;<sup>407</sup> and (2) arbitration “relieves court congestion.”<sup>408</sup> Those supposed truths, however, have been challenged. For example, while sitting on the California Supreme Court, the Honorable Associate Justice Marvin R. Baxter made several keen observations. He wrote:

[I must respond] to the majority’s assumption that arbitration is less costly than a judicial proceeding. . . . Arbitrator’s fees for one leading arbitration service in this state are typically in the \$350 to \$500 *per hour* range! In addition, there may be filing or service fees . . . , fees for discovery, and

<sup>402</sup> See *Martinez*, 12 Cal.Rptr.3d, at 668; *Roman*, 92 Cal.Rptr.3d at 157.

<sup>403</sup> *Roman*, 92 Cal.Rptr.3d at 157, 160, 163 (citing *Kinney v. United HealthCare Services, Inc.*, 70 Cal.Rptr.3d 348 (1999)).

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> See, e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 213 (Cal. 2013) (“[Our lower courts] have used various nonexclusive formulations to capture the notion [of substantive] unconscionability. . . . [Thus], whether ‘shock the conscience’ has a different meaning than ‘unreasonably one-sided’ . . . [is not before this court].”).

<sup>407</sup> *Hawkins v. Superior Court*, 152 Cal.Rptr. 491, 493 (1979). See also *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir.1999) (“The benefits of arbitration are widely recognized. . . . The arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least \$50,000 and takes two and one-half years to resolve.”); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15–16 (1st Cir. 1999) (“[A]rbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court.”).

<sup>408</sup> *Id.*

fees for written findings and expedited hearings. That expense and the expenses of the arbitrator or arbitrators . . . must be shared by the parties. The arbitrator's fees . . . [also] include prehearing conferences which the arbitrator or a party may require, mediation or settlement conferences which may be ordered, and the time devoted to preparation of the award.<sup>409</sup>

Even more importantly, six years after Justice Baxter's observations, the Supreme Court decided *Green Tree Fin. Corp.-Ala. v. Randolph*.<sup>410</sup> Chief Justice Rehnquist—who penned *Randolph*—was a fairly conservative justice.<sup>411</sup> Yet, in *Randolph*, the Chief Justice echoed Associate Justice Baxter's concerns about requiring unsophisticated and economically inferior consumers and employees to bear burdensome or excessive arbitration costs.<sup>412</sup> Writing for the majority, Justice Rehnquist declared that an arbitration agreement is substantively unconscionable and therefore unenforceable, if it generates "large arbitration costs [which] . . . preclude a litigant . . . from effectively vindicating her federal statutory rights in [an] arbitral forum."<sup>413</sup> On the other hand, the Chief Justice also cautioned that an employee or consumer must prove the "likelihood of incurring such costs" to invalidate an arbitration agreement for reasons of prohibitive expense.<sup>414</sup>

The *Randolph* Court, however, did not fashion an objective or universal standard to determine whether arbitral fees and expenses are prohibitively burdensome.<sup>415</sup> This omission is problematic for several important reasons: (1) the overwhelming majority of arbitration agreements require disgruntled consumers to travel out of state to arbitrate claims against sellers of goods and services;<sup>416</sup> (2) in recent years, arbitrators have charged between \$1,308 and

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<sup>409</sup> *Moore v. Conliffe*, 871 P.2d 204, 225–226 (Cal. 1994) (Baxter, J., dissenting) (citing Judicial Arbitration & Mediation Services, Inc., J.A.M.S. RULES OF PRACTICE & PROCEDURE (1992), then citing American Arbitration Association, COMMERCIAL ARBITRATION RULES (1992)).

<sup>410</sup> 531 U.S. 79 (2000).

<sup>411</sup> See, e.g., Randall L. Kennedy, *Conservatives' Selective Use of Race In The Law*, 19 HARV. J.L. & PUB. POL'Y 719, 719 (1996) ("[L]eading conservatives, including Chief Justice Rehnquist and Associate Justices Scalia and Thomas, have been hawks in the war against affirmative action.").

<sup>412</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

<sup>413</sup> *Id.* at 90.

<sup>414</sup> *Id.* at 92.

<sup>415</sup> *Id.* ("How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss.").

<sup>416</sup> James Zimmerman, *Restrictions On Forum-Selection Clauses In Franchise Agreements and The Federal Arbitration Act: Is State Law Preempted?*, 51 VAND. L. REV. 759, 760 (1998) ("The use of forum-selection clauses in contracts continues to increase. Emboldened by the Supreme Court's endorsement of forum-selection clauses, large companies now frequently use these clauses in a variety of contracts. . . . Often . . . a party inserts a forum-



\$1,800 per day in states like Indiana, Colorado, Ohio and Illinois;<sup>417</sup> (3) “the average daily fee does not necessarily reflect the likely cost to arbitrate”;<sup>418</sup> and (4) depending on the complexity of a dispute, arbitrators may set a forum fee “as high as \$3,000 per day [or] tens of thousands of dollars per case.”<sup>419</sup>

In 2014, the Bureau of Labor Statistics reported the median weekly earnings was just \$791 for the 106 million full-time, wage-and-salary employees.<sup>420</sup> Low-level employees—individuals who purchase the bulk of sellers’ goods and services—earned a \$41,132 annual salary.<sup>421</sup> Even more telling, small claims courts are found in every state.<sup>422</sup> California, Illinois, Minnesota, Texas and seven other states allow consumers and workers to file small claims to collect damages between \$10,000 and \$15,000.<sup>423</sup> In Alabama, Arizona, Kansas, Kentucky, Mississippi, Nebraska, and New Jersey’s small-claims courts, successful claimants may collect between \$2,500 and \$4,000 in damages.<sup>424</sup> The remaining courts allow plaintiffs to file small claims and secure damages between \$4,000 and \$10,000.<sup>425</sup>

As of this writing, a disgruntled consumer in Texas must pay a \$61 filing fee

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selection clause to limit liability by increasing the barriers to litigation or arbitration. Typically, . . . the other party to the contract, if seeking redress for a breach of the contract, must travel to a distant and unfamiliar jurisdiction to have the claim heard, often before the opposing party’s ‘home court.’ When the party seeking redress is unsophisticated and has no wealth of resources, the costs associated with bringing a suit can be prohibitive. Thus, the party inserting the forum-selection clause is less likely to be sued or held liable for a breach.”).

<sup>417</sup> See *Torres v. Simpatico, Inc.*, 995 F.Supp. 2d 1057, 1063 (E.D. Mo. 2014).

<sup>418</sup> *Id.*

<sup>419</sup> See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15–16 (1st Cir. 1999).

<sup>420</sup> Bureau of Labor Statistics, *Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex (2009)*, <http://www.bls.gov/cps/cpsaat39.htm> (last visited Apr. 24, 2015).

<sup>421</sup> See FREE ADVICE, *Small Claims Court Links to Each State*, <http://www.freeadvice.com/resources/smallclaimscourts.htm> (last visited Apr. 24, 2015). In California, Delaware, Georgia, Illinois, Minnesota, New Mexico, North Dakota, Rhode, South Dakota, Texas and Utah complainants may file actions in small claims courts to secure damages between \$10,000 and \$15,000. *Id.* Depending upon the counties in Oregon, Pennsylvania, and Wisconsin plaintiffs may also file \$10,000 claims. *Id.* On the other hand, in Tennessee and depending on the county, a consumer may file a \$15,000 or \$25,000 action in a small claims court. *Id.* In twenty-seven states, disgruntled employees and consumers may sue to collect between \$5,000 and \$9,999 in small claims courts. *Id.* However, in Alabama, Arizona, Kansas, Kentucky, Mississippi, Nebraska, and New Jersey, claimants may only file actions in small claims courts to secure damages between \$2,500 and \$4,000. *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

to initiate a \$10,000 action in a small claims court.<sup>426</sup> In Oregon, the filing fee is \$158 to file a \$10,000 small-claims complaint.<sup>427</sup> In contrast, under its present rules and procedures, the American Arbitration Association (AAA) requires low-compensated consumers to pay a \$200 non-refundable filing fee if the consumers file a \$10,000 or less arbitral claim.<sup>428</sup> Additionally, AAA's rules state: An arbitrator must receive \$1,500 per day, if the arbitrator conducts an "in-person or telephonic hearing."<sup>429</sup> The fee drops to \$750 per case, if an arbitrator conducts a "desk arbitration/documents only hearing."<sup>430</sup> Similarly, the AAA requires unskilled-to-skilled employees to pay a \$200 nonrefundable filing fee.<sup>431</sup> And, an employer must pay \$1,350 and \$1,800—respectively—for single-member and three-member panels, if an employee files a claim against an employer for, say, \$75,000 or \$400,000.<sup>432</sup>

Nevertheless, some corporate executives, financial brokers, business owners and federal judges insist arbitration is more affordable than litigation for all parties—mega-corporations, large and profitable vendors, employers, unsophisticated consumers and low-pay employees.<sup>433</sup> Undeniably, if a financial advisor, a merchant or an employer is a defendant in a mass-tort or class-action lawsuit, litigation costs would exceed the cost of arbitration.<sup>434</sup> But, as dissent-

<sup>426</sup> Texas Small Claim Court, <http://www.dallascounty.org/department/jpcourts/3-1/smallclaims.php>. (last visited Apr. 30, 2015).

<sup>427</sup> See Oregon Judicial Department, Circuit Court Fee Schedule (2015), [http://courts.oregon.gov/OJD/docs/courts/circuit/Fee\\_Schedule\\_Public.pdf](http://courts.oregon.gov/OJD/docs/courts/circuit/Fee_Schedule_Public.pdf).

<sup>428</sup> American Arbitration Association, *Costs of Arbitration Including AAA Administrative Fees*, <https://www.adr.org/aaa> (last visited Apr. 30, 2015).

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* *Employment Arbitration Rules and Mediation Procedures*, American Arbitration Association <<https://www.adr.org/aaa>> (Last visited: May 1, 2015); *Costs of Arbitration Including AAA Administrative Fees*, American Arbitration Association <<https://www.adr.org/aaa>> (Last visited: April 30, 2015).

<sup>433</sup> See, e.g., *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15–16 (1st Cir. 1999) (“[A]rbitration is . . . more affordable [for] plaintiffs and defendants alike than . . . pursuing a claim in court.”); Daisy Maxey, “Public” Arbitration? *Brokers Balk — Given Druthers, Wall Street Says System Was Fine; Anything But the Courts*, WALL ST. J., Oct. 8, 2010, at C11 (“[A representative of] the Securities Industry and Financial Markets Association [stated that] . . . the arbitration system is fair, cost-effective and works to protect investors . . . . Some lawyers who represent investors are pushing for an end to mandatory arbitration altogether, and letting wronged investors take their cases directly to the courts. [Brokers allege that such] a move would mean high litigation costs . . . .”).

<sup>434</sup> Cf. *NFIB Small Business Legal Center Argues that National Policy Should Trump State Law on Arbitration Agreement*, TARGETED NEWS SERVICE, Feb. 23, 2015 (“Small business owners don’t have the resources to monitor the ever-changing law of arbitration in each state they do business with. . . . This is important because arbitration agreements are intended to avoid unnecessary litigation costs.”).

ing Justice Baxter keenly noted, “[arbitration is not less expensive for a] consumer who, but for [an] arbitration clause in a contract, would resolve a claim in [a] small claims court, or represent himself or herself in [a] municipal or superior court.”<sup>435</sup>

Furthermore, arbitral costs can exceed litigation costs<sup>436</sup> if (1) legally unsophisticated employees and consumers retain highly experienced and expensive attorneys to handle complex employment-related or consumer-protection disputes;<sup>437</sup> (2) plaintiffs’ attorneys hire experts who often charge “\$150 to \$300 per hour—plus expenses”;<sup>438</sup> (3) an arbitration agreement contains a “fee-splitting” provision, which requires employees to share or “split” arbitration costs;<sup>439</sup> or (4) an arbitral “fee-shifting” or “loser-pays” clause requires an unsuccessful employee to pay a prevailing employer’s arbitration expenses and

<sup>435</sup> *Moore v. Conliffe*, 871 P.2d 204, 225–226 (Cal. 1994) (Baxter, J. dissenting).

<sup>436</sup> *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003) (reaffirming that an alternative to a judicial forum—arbitration—must be accessible as well as effective and noting that “a plaintiff [who has been] forced to arbitrate a typical \$60,000 employment discrimination claim will incur costs that range from three to nearly fifty times the basic costs of litigating in a judicial forum, rather than in an arbitral forums” (citing PUBLIC CITIZEN, *THE COSTS OF ARBITRATION* 40–42 (2002))).

<sup>437</sup> *See, e.g., Gutierrez v. Autowest, Inc.*, 7 Cal.Rptr.3d 267, 272–273 (Cal. Ct. App. 2003) (declaring that an arbitral cost provision was substantively unconscionable and affirming the trial court’s conclusion that complainants would have had to expend more than \$10,000—exclusive of attorney fees—to have a multiple-claims class action arbitrated); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 367–68 (N.C. 2008) (finding that the plaintiffs and other similarly situated borrowers’ limited financial resources precluded the hiring of an hourly compensated attorney and stressing that the financially strapped complainants’ entering forming a contingency fee agreement with lawyers—who were willing to advance arbitral costs and expenses and assume the risk of no recovery—was the only realistic means for such consumers to arbitrate their claims).

<sup>438</sup> *See, e.g., Tillman*, 655 S.E.2d at 368 (“To successfully prosecute a complex case, including a class action such as this one, a law firm would likely need the assistance of expert witnesses. The hourly fees of experts in the fields of economics, lending practices, and credit insurance can [be fairly expensive].”); Seth L. Lipner, *Is Arbitration Really Cheaper?*, FORBES, JUL. 14, 2009, <http://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html> (last visited Apr. 25, 2015) (“The other big expense in a securities case is retaining the services of an ‘expert witness’ to analyze the account and testify on technical matters. The cost of an expert can range from a few thousand dollars to tens of thousands, depending on the kind of case and the kind of expert. Some attorneys will advance all these case expenses, while others require their clients to pay the expenses as the case goes along. Either way, the client is responsible to pay these fees eventually, so these are real costs. [T]he need to hire an expert witness . . . exists both in arbitration and court . . .”).

<sup>439</sup> *Cf. Maldonado v. Mattress Firm, Inc.*, No. 8:13-cv-292-T-33AEP, 2013 U.S. Dist. LEXIS 58742, at \*18 (M.D. Fla. Apr. 24, 2013) (holding that the fee-splitting provision in the arbitration agreement was enforceable even though the employee filed a claim under the Fair Labor Standards Act).

fees.<sup>440</sup>

Therefore, in light of the Supreme Court's holding in *Randolph*, some courts embrace the principle that mandatory arbitration clauses are substantively unconscionable per se if they force employees to pay any arbitration costs.<sup>441</sup> Most state and federal courts, however, endorse that an arbitration clause might be substantively unconscionable if it makes arbitration "prohibitively expensive" for low-wage workers or consumers.<sup>442</sup> Generally, if an individual wants to avoid "prohibitively expensive" arbitration proceedings, she must prove three undisputed elements: (1) the total cost of arbitration—presenting specific evidentiary facts rather assumed or speculative facts;<sup>443</sup> (2) indigency—offering specific evidence of one's financial hardship, inability to pay arbitration cost, income, and assets;<sup>444</sup> and (3) an inability to waive, reduce or defer alleg-

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<sup>440</sup> Cf. *Hernandez v. Colonial Grocers, Inc.*, 124 So.3d 408, 410 (Fla. Dist. Ct. App. 2013) (declaring the fee-shifting clause in the arbitration agreement was unenforceable because the fee-shifting provision undermined the remedial purpose of the Fair Labor Standards Act, which allows prevailing employees rather than employers to recover attorney's fees and costs).

<sup>441</sup> See, e.g., *Cheroti v. Harvey & Madding, Inc.*, No. HG10500986, 2014 WL 1395564, at \*14 (Cal. Ct. App. April 10, 2014) ("Outside of employment claims, . . . [no] California decision has found that an arbitration clause requiring a plaintiff to pay arbitration costs is *per se* unconscionable."); *Holley v. Cochran Firm*, No. B201114, 2009 WL 606725, at \*9 (Cal. Ct. App. March 11, 2009) (reaffirming the view that "an arbitration provision in the written employment which requires an employee to bear any costs is *per se* unconscionable"); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 456 P.3d 669, 765 (Cal. 2000) ("[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court."); *Cole v. Burns Intern. Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

<sup>442</sup> Compare *Franco v. Arakelian Enterprises, Inc.*, 149 Cal.Rptr.3d 530, 554 (Cal. Ct. App. 2012) ("[M]ost courts interpreting [*Randolph*] have . . . arrived at divergent meanings of the 'prohibitively expensive' standard [established in *Randolph*]. Some courts have interpreted that term narrowly. . . . Other courts have held that [*Randolph*] . . . requires a case-by-case analysis based on such factors as the employee's ability to pay the arbitration fees and the differential between projected arbitration and litigation fees." ), with *Brady v. Williams Capital Group, L.P.*, 928 N.E.2d 383, 388 (N.Y. 2010) (reiterating that the inquiry should at minimum consider: "(1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum").

<sup>443</sup> See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000); *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1055 (Ariz. Ct. App. 2005).

<sup>444</sup> See *Clark v. Renaissance West, LLC*, 307 P.3d 77, 80 (Ariz. Ct. App. 2013) ("[A] party must make a specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration. This evidence must consist of more than conclusory allegations stating a person is unable to pay the costs of arbitration. Rather, parties must

edly excessive arbitration costs.<sup>445</sup>

The *Randolph* Court, however, did not fashion precise evidentiary standards to prove each element of a “prohibitively expensive” defense.<sup>446</sup> In response, two developments have emerged: (1) state and federal courts continually craft and apply an inordinate number of divergent evidentiary standards to determine whether arbitration is “prohibitively expensive,”<sup>447</sup> and (2) many legally unsophisticated employees and consumers are precluded from satisfying or even comprehending those bewildering arbitral standards—without purchasing legal advice.<sup>448</sup>

To help demonstrate the arguably exorbitant number of competing arbitral standards, consider the question: What evidentiary proof must complaining consumers and employees present to prove the “total cost of arbitration”? One court crafted an arguably bright-line standard and stated: Arbitral costs must be computed from the vantage point of unsophisticated consumers and less powerful employees—weighing heavily those individuals’ daily cost-of-living expenses.<sup>449</sup> Most courts, however, reject an application of a bright-line test. Citing the language in *Randolph*, these latter courts assess total arbitral costs on a case-by-case basis.<sup>450</sup>

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show that based on their specific income/assets, they are unable to pay the likely costs of arbitration.”).

<sup>445</sup> Compare *id.* (finding that the arbitration clause was still substantively unconscionable even though the movant waived conditionally some of the arbitral fees), with *Jones v. Gen. Motors Corp.*, 640 F.Supp. 2d 1124, 1134 (D. Ariz. 2009) (finding that arbitration fee was not substantively unconscionable under Arizona law in part because arbitration rules referenced in arbitration agreement provided for waiver and deferral of fees based on financial hardship).

<sup>446</sup> *Randolph*, 531 U.S. at 92. See also *Harrington*, 119 P.3d at 1055 (explaining that the question—whether arbitration is prohibitively expensive—is a question of fact, requiring an examination of the unique circumstances of each case).

<sup>447</sup> See discussion *infra* note 450–58.

<sup>448</sup> See, e.g., *Bolter v. Superior Court*, 104 Cal.Rptr.2d 888, 894–895 (Cal. Ct. App. 2001) (declaring that the terms in arbitral place-and-manner provision are unduly oppressive when such terms require franchisees—wishing to resolve any dispute—to close their shops, pay airfare, pay out-of-state accommodations, and pay the cost of hiring an attorney who is familiar with the laws in an out-of-state forum). See also *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, 801 N.E.2d 1017, 1029 (Ill. App. Ct. 2003) (stating that “there is no authority which explicitly prohibits an out-of-state attorney from representing a client in arbitration in Illinois” and concluding that “the arbitrator correctly determined that [the out-of-state attorney] could participate”).

<sup>449</sup> See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003) (Whether the cost is prohibitive “must be considered from the vantage point of the potential litigant . . . including the fact that the litigant must continue to pay for housing, utilities, transportation, food and other necessities of life in contemporary society despite losing her primary and most likely, only source of income.”).

<sup>450</sup> See *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 n.5 (4th

Still, other state and federal courts apply a variety of competing, multi-pronged rules: (1) consumers who oppose arbitration must make “a reasonable, good faith effort to estimate costs,”<sup>451</sup> prove “reasonably anticipated costs,”<sup>452</sup> or prove “potential arbitral costs”;<sup>453</sup> (2) consumers in motion-to-compel-arbitration hearings need only prove “reasonably certain arbitration costs”;<sup>454</sup> and (3) an employee in a mandatory-arbitration hearing must prove his “expected or actual arbitration costs.”<sup>455</sup> One Texas court of appeals declared: A consumer who opposes arbitration must prove his exact arbitral costs<sup>456</sup> and his “likelihood of incurring [arbitration] costs.”<sup>457</sup> To be sure, this latter evidentiary stan-

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Cir. 2001) (“The cost of arbitration . . . cannot be measured in a vacuum . . . . Rather, an appropriate case-by-case inquiry must [be made] . . . .”); *Phillips v. Associates Home Equity Services, Inc.*, 179 F.Supp. 2d 840, 847 (N.D. Ill. 2001) (“We are satisfied that Phillips has met her burden . . . [and proved] that the expense of arbitration would be prohibitive in this case . . . . We caution, however, that the cost showing made [in this case] does not create [a] bright-line rule for future litigants. Instead, the inquiry must be determined on a case-by-case basis.”); *Parada v. Superior Court*, 98 Cal.Rptr.3d 743, 765–766 (Cal. Ct. App. 2009) (stressing that the substantive unconscionability of financial agreements must be evaluated on a “case-by-case basis,” focusing on the claimant’s the ability to pay, the anticipated costs of the arbitration, and the amount at issue in the arbitration).

<sup>451</sup> See *Phillips*, 179 F.Supp. at 847 (“Phillips has made a reasonable, good faith effort to estimate her arbitration costs with assistance from the AAA.”).

<sup>452</sup> See *Cheroti v. Harvey & Madding, Inc.*, No. HG10500986, 2014 WL 1395564, at \*14 (Cal. Ct. App. April 10, 2014) (“Accordingly, to demonstrate substantive unconscionability on grounds of affordability, Cheroti was required to submit evidence of his own financial resources, the reasonably anticipated cost of this particular arbitration, and the amount of the potential award. The record contains no concrete evidence of Cheroti’s financial circumstances.”).

<sup>453</sup> See *Morrison*, 317 F.3d at 663 (rejecting a strict case-by-case analysis to determine prohibitive arbitral costs and holding that “potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum”).

<sup>454</sup> See, e.g., *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1055 (Ariz. Ct. App. 2005) (declaring that an opponent of arbitration must present specific facts showing with reasonable certainty the likely costs of arbitration).

<sup>455</sup> See *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 n.5 (4th Cir. 2001) (“The cost of arbitration . . . cannot be . . . premised upon a claimant’s abstract contention that arbitration costs are ‘too high.’ Rather, an appropriate case-by-case inquiry must focus upon a claimant’s expected or actual arbitration costs and his ability to pay those costs, measured against a baseline of the claimant’s expected costs for litigation and his ability to pay those costs.”).

<sup>456</sup> See *Caballero v. Contreras*, Nos. 13-10-00125, 13-10-00150, 2010 WL 3420527, at \*10 (Tex. Ct. App. Aug 31, 2010) (stressing that the party who opposes arbitration must prove the exact costs of arbitration and prove excessive cost without speculating).

<sup>457</sup> *Id.* (“While neither [the *Randolph* Supreme Court nor the Texas Supreme Court has] specified how detailed [a] showing of prohibitive expense must be, the party opposing arbi-

dard is remarkably draconian and needlessly contradictory, given that extremely large populations of legally unsophisticated and functionally illiterate employees and consumers reside in Texas.<sup>458</sup>

But consider another timely question: What evidentiary proof must complaining consumers and employees present to prove one's "inability to pay" arbitration costs? First, courts require respondents in a motion-to-compel-arbitration trial to file an affidavit of indigency.<sup>459</sup> Generally, the affidavit must contain sufficient or probative evidence of one's financial hardship.<sup>460</sup> More specifically, the affidavit must present a "factual record" which allows a judge to determine definitively whether respondent's individualized financial circumstances prevent the respondent from paying arbitral fees and expenses.<sup>461</sup> Answering the second question, some courts allow employees and consumers to present all sorts of evidence to prove one's inability to pay allegedly unconscionable arbitration costs.<sup>462</sup> Many other state and federal courts require re-

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tration must prove the likelihood of incurring such costs and produce some specific information substantiating the alleged costs.").

<sup>458</sup> See, e.g., Melissa Fletcher Stoeltje, *Literacy Hindered by Lack of Funds—State Not Keeping Pace With Demand*, SAN ANTONIO EXPRESS-NEWS, Oct. 13, 2013, at A1 ("[A] survey in 2003, revealed that 17 percent of Bexar County residents . . . can't read at all or struggle to read anything beyond basic text in English . . . Some areas of Texas deal with extremely high levels of adult illiteracy . . . In Cameron County, 43 percent of adults lack basic literacy skills . . ."). But see *Duran v. Intex Aviation Services, Inc.*, No. 95-11180, 1996 U.S.App. LEXIS 42732, at \*6-8 (5th Cir. Sept. 13, 1996) ("Texas courts have consistently held that individuals are charged with knowing and understanding the contents of what they sign" and stressing that under Texas law, an individual's illiteracy of the English language does not void an otherwise acceptable waiver).

<sup>459</sup> Cf. *Patterson v. ITT Consumer Financial Corp.*, 18 Cal.Rptr.2d 563, 566 (Cal. Ct. App. 1993) ("Prepayment of hearing fees can be waived for individuals, but only after filing an affidavit of indigency."); *Phillips v. Associates Home Equity Services, Inc.*, 179 F.Supp. 2d 840, 847 (N.D. Ill. 2001) ("In further support of her argument, Phillips provides an affidavit stating that she 'cannot afford to pay' the filing fees and other costs, and that she is in 'severe financial straits.'").

<sup>460</sup> Cf. *Cheroti v. Harvey & Madding, Inc.*, No. HG10500986, 2014 WL 1395564, \*14 (Cal. Ct. App. Apr. 10, 2014) ("While in certain circumstances expense of arbitration is a proper ground for finding substantive unconscionability, Cheroti has failed to create the factual record necessary to prevail under this theory. . . . Although Cheroti characterized them as having "limited means," both he and his wife were employed as small business owners, and he presumably felt sufficiently confident of their financial circumstances to purchase two new cars that together cost nearly \$50,000.").

<sup>461</sup> *Id.*

<sup>462</sup> See, e.g., *Phillips*, 179 F.Supp. 2d at 847 ("Defendants further argue that Phillips' cost showing amounts only to "pure speculation," and that Phillips' "generalized assertions" of possible costs should not defeat arbitration. We disagree. . . . [W]ithout actually going through arbitration and receiving a final bill, we see no way for her to provide a more precise showing of her costs than she has done here.").

spondents/plaintiffs to present specific evidence—stating precisely and truthfully respondents' total income, assets and expenditures for travel, rentals and other auxiliary services.<sup>463</sup>

On the other hand, several courts have applied ratio tests. For example, an appellate court in Texas crafted a ratio test that compares one's earnings to one's arbitral costs.<sup>464</sup> After applying this ratio test, the court of appeals decided in favor of the consumers and declared: (1) the total arbitration costs, \$70,000, were unconscionable because they exceeded nearly three times the price of the homeowners' service contract, \$22,650; (2) the total arbitration costs were approximately forty-five percent of one consumer's gross yearly earnings; and (3) the arbitral costs approximated twenty-eight percent of the homeowners' aggregate-gross-annual income.<sup>465</sup> In contrast, several state and federal courts have fashioned a ratio test that compares the cost of arbitration to litigation costs.<sup>466</sup> And, after applying the latter test, courts have refused to

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<sup>463</sup> See *Clark v. Renaissance West, LLC*, 307 P.3d 77, 80 (Ariz. Ct. App. 2013) (“[A] party must make a specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration. This evidence must consist of more than conclusory allegations stating a person is unable to pay the costs of arbitration. Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration.”).

<sup>464</sup> See *Olshan Found. Repair Co. v. Ayala*, 180 S.W.3d 212, 214–16 & n.4 (Tex. Ct. App. 2005) *petition denied*, 2006 LEXIS 1089 (Tex., Oct. 27, 2006) (determining that the trial court properly denied arbitration where the arbitration costs were almost three times the amount of the original contract and the claimants' share of the arbitration costs was over twenty-five percent of the family's annual gross income).

<sup>465</sup> *Id.* at 215.

<sup>466</sup> See *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (declaring that the arbitration agreement was substantively unconscionable after finding that the borrowers' cost of arbitration would be approximately 10 times that of bringing an action in state court); *Phillips*, 179 F. Supp. 2d at 847 (N.D. Ill. 2001) (“We see no reason to doubt Phillips' assertion regarding her financial viability, particularly in light of Phillips' inclusion in the 'subprime' market targeted by Associates Home Equity. Thus even if we disregard the filing fee, the cost of pursuing arbitration appears to be prohibitive for Phillips, and it is likely to be at least twelve times what it currently costs to file a case in federal court.”); *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 606 (Wash. Ct. App. 2002) (ruling in favor of the consumer who made a purchase of \$12,000 and established that the initial arbitral filing fee of \$2,000 was 20 times higher than the fee for filing an action in superior court—and that he reasonably anticipated additional costs for the arbitrators' fees and expenses); *Spence v. Omnibus Indus.*, 119 Cal.Rptr. 171, 173 (Cal. Ct. App. 1975) (declaring that the arbitration clause was substantively unconscionable because the stipulated arbitration fees were 14 to 50 times greater than the fees the buyer would have paid if dispute taken to court). See also *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003) (reaffirming that an alternative to a judicial forum—arbitration—must be accessible as well as effective—and noting that a plaintiff will incur three to nearly fifty times more costs to litigate than arbitrate a typical \$60,000 employment discrimination claim).



compel arbitration because the employees and consumers' arbitration fees were 10-, 12-, 20-, 30-, and 14-to-50 times greater than litigation costs.<sup>467</sup>

Finally, many courts force consumers and employees to arbitrate common-law and statutory claims, even after the complainants establish that the arbitral costs are "prohibitively expensive."<sup>468</sup> Consider the arbitration agreement in *Livingston v. Associates Finance, Inc.*,<sup>469</sup> which reads in pertinent part:

If you start arbitration, you agree to pay the initial filing fee and required deposit required by the American Arbitration Association . . . If you believe you are financially unable to pay such fees, you may ask the American Arbitration Association to defer or reduce such fees . . . If the American Arbitration Association does not defer or reduce such fees . . . , we will—upon your written request, pay the fees, subject to later allocation of the fees and expenses between you and us by the arbitrator. There may be other costs during the arbitration, such as attorney's fees, expenses of travel to the arbitration, and the costs of the arbitration hearings. The Commercial Arbitration Rules determine who will pay the fees.<sup>470</sup>

Citing the AAA's Commercial Arbitration Rules as well as cost-reduction, cost-deferment and cost-waiver clauses in arbitral agreements, some state and federal courts have granted motions to compel arbitration, even though employees and consumers prove to be indigent.<sup>471</sup> However, after considering the same Commercial Arbitration Rules and pondering whether arbitration costs were prohibitively or unconscionably expensive, other courts have declared that the AAA's rules do not control because the rules allow an arbitrator to decide whether to reduce, waive or defer costs.<sup>472</sup> Thus, another judicial split has evolved.

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<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> No. 01 C 1659, 2001 WL 709465 (N.D. Ill. 2001).

<sup>470</sup> *Id.* at \*2 n.6.

<sup>471</sup> *See, e.g.*, *Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1134 (D. Ariz. 2009) (finding arbitration fee not substantively unconscionable under Arizona law in part because arbitration rules referenced in arbitration agreement provided for waiver and deferral of fees based on financial hardship); *Universal Underwriters Life Ins. Co. v. Dutton*, 736 So.2d 564, 570 (Ala. 1999) (noting that the AAA's Commercial Rules allow an arbitrator to apportion, defer, or reduce the administrative fees); *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So.2d 33, 37-38 (Ala. 1998) (rejecting the argument that an arbitration filing fee might be a financial hardship on the basis because the AAA's Commercial Rules allow administrative fees to be deferred, reduced, or apportioned between the parties).

<sup>472</sup> *See, e.g.*, *Phillips v. Assocs. Home Equity Servs, Inc.*, 179 F. Supp. 2d 840, 846 (N.D. Ill. 2001).

VI. A MULTIVARIATE EMPIRICAL STUDY—MEASURING THE DIFFERENTIAL IMPACTS OF PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY CHALLENGES AND OTHER FACTORS ON THE DISPOSITIONS OF MOTIONS TO COMPEL ARBITRATION IN STATE AND FEDERAL COURTS, 1800-2015

Legally unsophisticated consumers and employees commence single, joint and class actions against various employers, merchants and lenders.<sup>473</sup> Generally, in the underlying lawsuits, the plaintiffs allege that the more powerful defendants violated the common law or a mixture of federal and state consumer-protection and anti-discrimination statutes.<sup>474</sup> In response, defendants in the underlying lawsuits often file motions to compel the respondents/plaintiffs to arbitrate claims before private arbitrators, or alternatively, file declaratory judgment actions.<sup>475</sup> In other instances, movants/defendants file motions only after disgruntled employees and consumers commence underlying lawsuits in courts of law.<sup>476</sup>

In 2000, Larketta Randolph and a class of disgruntled consumers who purchased mobile homes in Alabama were the plaintiffs in *Randolph*.<sup>477</sup> The defendants were Green Tree Financial Corporation and Green Tree Financial Corp.-Alabama (“Green Tree”).<sup>478</sup> Green Tree financed the mobile-home purchases and charged the consumers a premium for credit insurance.<sup>479</sup> Discovering the hidden fee, Randolph sued, alleging that: (1) Green Tree violated the Truth in Lending Act<sup>480</sup> by failing to disclose the additional finance charge;<sup>481</sup> and (2) Green Tree violated the Equal Credit Opportunity Act<sup>482</sup> by requiring consumers to arbitrate statutory causes of action.<sup>483</sup> Responding to the underlying class action, Green Tree filed a motion to compel arbitration.<sup>484</sup> The respondents/plaintiffs, therefore, commenced a substantive unconscionability challenge.<sup>485</sup>

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<sup>473</sup> See generally Willy E. Rice, *Courts Gone “Irrationally Biased” in Favor of the Federal Arbitration Act?—Enforcing Arbitration Provisions in Standardized Applications and Marginalizing Consumer Protection, Antidiscrimination, and States’ Contract Laws: A 1925–2014 Legal and Empirical Analysis*, 6 WM. & MARY BUS. L. REV. 405, 433–45 (2015).

<sup>474</sup> *Id.*

<sup>475</sup> *Id.* at 487.

<sup>476</sup> *Id.*

<sup>477</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000).

<sup>478</sup> *Id.* at 82.

<sup>479</sup> *Id.*

<sup>480</sup> 15 U.S.C.A. § 1601 et seq. (West 2015).

<sup>481</sup> *Randolph*, 531 U.S. at 83.

<sup>482</sup> 15 U.S.C.A. §§ 1691–1691f (West 2015).

<sup>483</sup> *Randolph*, 531 U.S. at 83.

<sup>484</sup> *Id.*

<sup>485</sup> *Id.* at 90–92 (“[Randolph] contends instead that the arbitration agreement’s silence [regarding arbitral] costs and fees creates a ‘risk’ that she will be required to bear prohibitive

Assuredly, the *Randolph* Court could not ignore an unconscionability defense.<sup>486</sup> Why? Between 1987 and 2010, the Supreme Court reaffirmed the following principles: (1) written arbitration agreements are enforceable under the FAA, if they are enforceable in law and equity;<sup>487</sup> and (2) procedurally and substantively unconscionable arbitration agreements are not enforceable under the FAA.<sup>488</sup> Nevertheless, as stated earlier, the Court has never fashioned a specific test to assess whether an arbitration agreement is unconscionable.<sup>489</sup> Therefore, in *Randolph*, the Court adopted a case-by-case approach to answer the question.<sup>490</sup>

Like most courts,<sup>491</sup> state and federal courts in California also employ a case-by-case analysis to decide whether an arbitral provision is procedurally or substantively unconscionable.<sup>492</sup> However, in 2011, the *Concepcion* Court harshly criticized the California courts' case-by-case analyses and their practice of accepting unsophisticated consumers and employees' procedural and substantive unconscionability defenses.<sup>493</sup> More specifically, writing for the majority in

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arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against petitioners. . . . 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. . . . [A] party [who] seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs.”)

<sup>486</sup> *Id.* at 83–84, 89.

<sup>487</sup> *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1210 (11th Cir. 2011). *See also* *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (“Like other contracts, [arbitration agreements] . . . may be invalidated [using] ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’”); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

<sup>488</sup> *Id.*

<sup>489</sup> 531 U.S. at 92.

<sup>490</sup> *Id.*

<sup>491</sup> *Compare* *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (concluding that the enforceability of a particular class action waiver provision in an arbitration agreement is a case-by-case determination), *and* *Bradford v. Rockwell Semiconductor Sys.*, 238 F.3d 549, 556 (4th Cir. 2001) (“We believe that the appropriate inquiry is . . . a case-by-case analysis . . .”), *with* *Wernett v. Service Phoenix, LLC*, No. CIV-09-168-TUC-CKJ, 2009 WL 1955612, at \*5 (D. Ariz. July 6, 2009) (reporting that Arizona requires a case-by-case analysis to determine whether arbitral terms preclude a potential litigant from vindicating rights), *and* *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008) (reaffirming that “[a] party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability” and stressing that an unconscionability analysis is fact-intensive, and must be made on a case-by-case basis).

<sup>492</sup> *See, e.g., Parada v. Superior Court*, 98 Cal.Rptr.3d 743, 765–766 (Cal. Ct. App. 2009); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 272–273 (Cal. Ct. App. 2003).

<sup>493</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333, 344 (2011).

*Concepcion*, Justice Scalia declared: California courts “interfere[ ] with [the] fundamental attributes of arbitration” and apply the facially neutral unconscionability defense in an offensive manner to discriminate against pro-arbitration movants.<sup>494</sup>

To reach that conclusion, Justice Scalia cited “trend” percentages from two extremely small studies, which revealed: (1) consumers and employees’ “unconscionability challenges” increased significantly in California courts between 1982 and 2006;<sup>495</sup> and (2) the challenges were significantly more likely to be successful if a dispute concerned the enforceability of written arbitral agreements, rather than the enforceability of written non-arbitration contracts.<sup>496</sup> In fact, after interpreting simple outcome percentages in one of the studies, the commentator/researcher reached an unexpected and highly debatable conclusion:

California courts are clearly biased against arbitration . . . . Their disdain manifests in unique unconscionability requirements applicable solely when arbitration agreements are [disputed] . . . . It is therefore evident that California’s unconscionability jurisprudence violates the basic mandate of the FAA that arbitration agreements be placed on equal footing with ordinary contractual provisions.<sup>497</sup>

Countering those pro-arbitration conclusions, a commentator highlighted the controversial analysis and conclusion in *Concepcion* and wrote:

[*Concepcion*] is the latest and most expansive step in the Supreme Court’s ongoing project of transforming the Federal Arbitration Act . . . into a

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<sup>494</sup> See *id.* at 333. See also *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013) (“*Concepcion* reaffirmed that the FAA ‘permits arbitration agreements to be declared unenforceable [under] . . . contract defenses, such as fraud, duress, or unconscionability’ . . . . *Concepcion* goes further to make clear that such rules, even when facially nondiscriminatory, must not disfavor arbitration as *applied* by imposing procedural requirements that ‘interfere[ ] with fundamental attributes of arbitration . . . .’” (quoting *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011))).

<sup>495</sup> Broome, *supra* note 315, at 44–48; and Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–195 (2004) (“Litigants rarely invoked unconscionability prior to the increase in the use of arbitration agreements . . . . However, as the use of arbitration agreements has increased, claims of unconscionability have also increased and those claims have been surprisingly successful. A systematic examination shows that in 2002–2003, litigants raised issues of unconscionability in 235 cases . . . . Of those . . . 68.5% involved arbitration agreements. Significantly, courts were much more likely to find arbitration agreements, as opposed to other sorts of contracts, unconscionable. Courts found 50.3% of the arbitration agreements unconscionable, as opposed to 25.6% of other types of contracts. Although federal and state courts in California decided a significant number of these cases, a total of seventeen state courts and fifteen federal courts found provisions in arbitration agreements unconscionable.”).

<sup>496</sup> *Id.*

<sup>497</sup> Broome, *supra* note 315, at 41.

virtually irrebuttable federal preference for arbitration that displaces states' power to develop . . . contract law . . . . After *Concepcion*, . . . [state courts] are essentially powerless to protect [a weaker party by applying] the doctrine of unconscionability . . . . The decision is all the more remarkable because the [majority's] disdain for consumer . . . litigation and individuals' access to courts outweighs any commitment to federalism and state autonomy.<sup>498</sup>

To be fair, in *Concepcion*, Justice Scalia acknowledged that the statistical findings were "not definitive."<sup>499</sup> Yet, the *Concepcion* majority weighed these findings fairly heavily and employed them to defeat the plaintiffs' unconscionability challenges.<sup>500</sup> Additionally, *Concepcion* did not provide a definitive answer to an even more pressing question: whether California courts systematically discriminate against corporations and employers by rejecting their motions to compel arbitration and accepting respondents' unconscionability challenges. Of course, Justice Scalia and the majority could have, but did not, answer the latter question by merely analyzing the simple descriptive statistics or percentages. Why?

Very briefly, consider two findings, which are based on the current author/researcher's cursory review of numerous cases: (1) In federal courts, corporate employers are more likely to prevail in motion-to-compel-arbitration trials when highly paid employees<sup>501</sup> rather than lower level employees advance an unconscionability defense;<sup>502</sup> and (2) In federal courts, corporate employers are

<sup>498</sup> Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response To Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1204–05 (2013).

<sup>499</sup> *Concepcion*, 563 U.S. at 342–43 (“[A]lthough these statistics are not definitive, it is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.” (citing Broome, *supra* note 315, at 54, 66; then citing Susan Randall, *Judicial Attitudes Toward Arbitration*, 52 BUFFALO L. REV., 185, 186 (2004))).

<sup>500</sup> *Id.* at 352 (concluding that the FAA preempted the lower court’s unconscionability finding under California law).

<sup>501</sup> See, e.g., *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 557–59 (4th Cir. 2001) (finding that a terminated employee—who was earning a base salary of \$115,000 and sales incentives averaging \$53,000 per year for the prior three years—was a highly-compensated employee, declaring that a fee-splitting clause in the arbitration agreement was not substantively unconscionable, and forcing the high-level employee to arbitrate his claims under the Age Discrimination in Employment Act); *Goodman v. ESPE Am.*, No. 00-CV-862, 2001 WL 64749, at \*1–4 n.4 (E.D. Pa. Jan. 19, 2001) (finding that the terminated president of the company was a high-level employee, who “received \$80,000 in compensation upon his termination and over \$2,000 for accrued vacation,” declaring that the “loser pays” clause in the arbitration agreement was not substantively unconscionable, and forcing the terminated president of the company to arbitrate his claims under Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act); *Zumpano v. Omnipoint Commc’ns.*, No. CIV. A. 00-CV-595, 2001 WL 43781, at \*5–11 (E.D. Pa. Jan 18, 2001).

<sup>502</sup> See, e.g., *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1286–87 (11th Cir.

substantially more likely to be successful in motion-to-compel-arbitration trials when female employees<sup>503</sup> rather than male employees raise an unconscionability defense.<sup>504</sup> Thus, in light of those findings and applying Justice Scalia's analysis in *Concepcion*, are federal courts significantly and statistically biased against females and prejudiced against "highly paid employees"? Of course the sensible answer is no.

Without a doubt, the *Concepcion* ruling began to erode the effectiveness of unconscionability challenges in mandatory-arbitration trials.<sup>505</sup> But even more importantly, the *Concepcion* Court's erosion of the unconscionability defense began without the Court seriously employing sound methodological and statistical tools to answer three pressing questions: (1) whether allegedly "unconscionably biased" state and federal courts are significantly and statistically more likely to grant motions to compel arbitration when respondents/plaintiffs raise a procedural unconscionability defense; (2) whether allegedly "unconscionably biased" state and federal courts are significantly and statistically

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2001) (finding that an airport security guard was a low-level employee, declaring the fee-splitting clause was substantially unconscionable, because it required the employee and employee to share equally arbitral fees and expenses, and declaring that the low-level employee did not have to arbitrate her sex-discrimination claim under Title VII of the Civil Rights Act of 1964, because arbitration would be prohibitively expensive); *Giordano v. Pep Boys-Manny, Moe & Jack, Inc.*, No. CIV. A. 99-1281, 2001 WL 484360, at \*6-7 (E.D. Pa. March 29, 2001) (finding that an automobile mechanic was a low-level employee who received \$400 per week, declaring the fee-splitting clause was substantially unconscionable because it required the employee and employer to share equally arbitral fees and expenses, ordering the employer to pay the arbitration costs, but declaring that the low-level employee had to arbitrate his over-time-pay claim under the Federal Fair Labor Standards Act and the Pennsylvania Minimum Wage Act).

<sup>503</sup> See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 659-60 (6th Cir. 2003); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 214-215 (3d Cir. 2003); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604-10 (3d Cir. 2002); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 763-64 (5th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366 (7th Cir. 1999); *McCaskill v. SCI Mgmt. Group*, No. 00 C 1543, 2000 WL 875396, at \*3-4 (N.D. Ill. June 22, 2000); *Arakawa v. Japan Network Grp.*, 56 F. Supp. 2d 349, 354-55 (S.D.N.Y. 1999); *Palmer-Scopetta v. Metropolitan Life Ins. Co.*, 37 F. Supp. 2d 1364, 1370 (S.D. Fla. 1999).

<sup>504</sup> See, e.g., *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 554 (4th Cir. 2001); *Shankle v. B-G Maintenance Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997); *In re Poly-America, L.P.*, 262 S.W.3d 337, 356 (Tex. 2008).

<sup>505</sup> See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013) ("What is new is that *Concepcion* clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration agreements. . . . [S]uch rules must not facially discriminate against arbitration and must be enforced evenhandedly.").

more likely to deny motions to compel arbitration when respondents/plaintiffs advance a substantive unconscionability challenge; and (3) whether state or federal courts are statistically and significantly more likely to allow extralegal factors, such as a litigants' consumer or employment status, geographic location, and levels of economic and financial sophistication, to determine the outcome of motions to compel arbitration. Therefore, to help answer these questions, the author conducted an empirical study.

#### A. Sources of Data and Sampling Procedures

Two general and uncomplicated null hypotheses appear in this study: (1) extralegal factors have no statistically significant effect on the dispositions of motions to compel arbitration in state and federal courts; and (2) procedural and substantive unconscionability challenges have no statistically significant effect on the dispositions of motions to compel arbitration in state and federal courts. To build a database, the author used Westlaw and Lexis's data retrieval systems as well as regional reporters to locate every "reported" and "unpublished" motion-to-compile-arbitration decision.

Using a broad query,<sup>506</sup> more than 10,000 state and federal court cases were retrieved for the time period between 1800 and 2015.<sup>507</sup> Ultimately, the author analyzed two proportional stratified random samples of the cases.<sup>508</sup> The first proportional sample contains 285 state-court cases.<sup>509</sup> The second sample contains 299 federal-court cases.<sup>510</sup> Therefore, to compare dispositions of cases in arbitral and judicial forums, the author took several proportional stratified random samples of arbitrators' decisions that were reported in several databases between 1925 and 2015.<sup>511</sup> About 303 private-arbitrator cases are included in

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<sup>506</sup> The following query was constructed: sy(arbitration/p contract). Executing that expression in Westlaw's ALLSTATES and ALLFEDS databases generated 6,386 and 4,680 cases, respectively.

<sup>507</sup> The investigator searched Westlaw's MIN-CS, ALLSTATES, ALLFEDS, CTA and DCT databases between April 2012 and November 2015. In addition, the author searched various regional reporters as well as "LEXIS ADVANCED" during the same period.

<sup>508</sup> See, e.g., *Ratanasen v. Cal. Dep't of Health Servs.*, 11 F.3d 1467, 1470–72 (9th Cir. 1993) (explaining the differences between and the efficacy of employing "simple random sampling" and "stratified random sampling"); Bruce M. Price, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (And Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 138 (2007) ("Using a proportional, stratified, random sample of bankruptcy cases from [two twelve-month periods, the author created a] . . . database of cases for every state in the Tenth Circuit.").

<sup>509</sup> See *infra* Table 1 and the accompanying discussion.

<sup>510</sup> See *infra* Table 1 and the accompanying discussion.

<sup>511</sup> To secure a proportional and stratified sample of arbitrators' decisions, several research queries were executed—respectively—in the following Westlaw and Lexis databases: (1) AAA EMPLOYMENT ARBITRATION AWARDS—SEARCH: "discrim"; (2) AAA EMPLOYMENT ARBITRATION AWARDS—SEARCH: "find! for claimant!" "in favor of claimant"; (3)

this study,<sup>512</sup> and the entire database comprises 887 cases.<sup>513</sup>

Finally, after selecting the cases, a content analysis was performed on each.<sup>514</sup> Quite simply, the author constructed binary variables, read each case and coded each case. In the end, the author made comparisons and measured the statistical effects of numerous variables on the dispositions of arbitration motions in state and federal courts.<sup>515</sup>

B. *Simple Comparisons of Arbitral and Judicial Proceedings—  
Demographic Characteristics, Underlying Claims, Theories of  
Recovery, Defenses and Dispositions of Disputes Between  
1800-2015*

Once more, in a proceeding to compel arbitration, the movant/defendant is the defendant in the underlying lawsuit. An employee or a consumer is the respondent/plaintiff in the underlying lawsuit. Table 1 illustrates some attributes of individuals who resolved disputes before private arbitrators.

The table also provides pertinent information about individuals who litigated disputes in state and federal courts. The first variable in Table 1 is “Respondents/Plaintiffs’ Underlying Allegations Against Movants/Defendants.” The findings indicate that large-to-exceedingly-large numbers of plaintiffs in the underlying state-court lawsuits alleged that defendants committed intentional torts (82.3%), violated consumer-protection laws (77.8%) and engaged in deceptive practices (42.3%). Conversely, the plaintiffs in the underlying federal-court lawsuits are slightly more likely to allege that defendants breached contracts (40.9%), practiced employment discrimination (46.3%) and committed deceptive acts (44.1%). Additionally, in the presence of arbitrators, consumers and employees alleged that defendants deviated from an ordinary or a professional standard of care (92.4%), practiced racial discrimination (77.8%), harassed employees (56.4%) and committed securities fraud (62.0%).

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FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA/NASD) Arbitration Awards—SEARCH: “breach w/8 stocks” (4) WASHINGTON ARBITRATION DECISIONS—SEARCH: “injury” (N=2705) and “defense award” (N=2267). Only 60 cases were sampled; (5) WASHINGTON ARBITRATION AWARDS—SEARCH: “injury,” plus (“plaintiff award” and Insurance) and (not “admitted liability”); and (6) WASHINGTON ARBITRATION DECISIONS—SEARCH: “injury” (N=2705) and “plaintiff award” (N=2445). Only 150 cases were sampled.

<sup>512</sup> See *infra* Table 1 and the accompanying discussion.

<sup>513</sup> See *infra* Table 1 and the accompanying discussion.

<sup>514</sup> See generally Robert Edward Mitchell, *The Use of Content Analysis for Explanatory Studies*, 31 PUB. OPINION Q. 230, 237 (1967); Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman’s Theory of Constitutional Change*, 122 YALE L.J. 1990, 2010–13 (2013) (“With technology making it easier to manipulate larger and larger sets of data, several tools have become available . . . . Social scientists engaged in content analysis have long recognized that such studies often have embedded causal assumptions . . . .”).

<sup>515</sup> See Tables 1–4 *infra* and the accompanying text.



TABLE 1. ARBITRATORS' DISPOSITION OF LITIGANTS' DISAGREEMENTS AND STATE AND FEDERAL JUDGES' PROCEDURAL AND SUBSTANTIVE DISPOSITIONS OF MOTION TO COMPEL ARBITRATION 1800-2015 (N=887)

Allegations, Theories of Recovery and Dispositions	Arbitration (N = 303)	State Courts (N = 285)	Federal Courts (N = 299)	TOTAL (N = 887)
	Percent	Percent	Percent	
<b>RESPONDENTS/PLAINTIFFS' UNDERLYING ALLEGATIONS AGAINST MOVANTS/DEFENDANTS:</b>				
"Simple & Professional Negligence"	92.4	7.6	- 0 -	(N = 53)
"Defendants Breached Contracts"	22.1	31.0	40.9	(N = 303)
"Defendants Torts Were Intentional"	- 0 -	82.3	17.7	(N = 34)
"Age Discrimination"	33.3	- 0 -	66.7	(N = 3)
"Disability Discrimination"	57.1	- 0 -	42.9	(N = 7)
"Employment Discrimination"	35.0	18.7	46.3	(N = 80)
"Gender Discrimination"	65.0	17.5	17.5	(N = 17)
"Racial Discrimination"	77.8	7.4	14.8	(N = 27)
"Workplace Harassment"	56.4	15.4	28.2	(N = 39)
"Violated Consumers' Laws"	- 0 -	77.8	22.2	(N = 54)
"Deceptive Trade Practices"	13.6	42.3	44.1	(N = 111)
"Violated Financial Laws"	- 0 -	50.0	50.0	(N = 22)
"Securities Fraud & Violations"	62.0	11.0	27.0	(N = 137)
<b>RESPONDENTS/PLAINTIFFS' UNDERLYING THEORIES OF RECOVERY:</b>				
State & Federal Statutes				
Anti-Discrimination & Civil-Rights	48.5 **	15.1	36.4	(N = 198)
Banking, Credit & Securities	49.0 **	19.9	31.1	(N = 186)
Consumer & Deceptive Trade	11.0	61.7 **	27.3	(N = 128)
Common-Law Contract Theory				
Breach of Standardized Contracts	29.2	40.1**	30.7	(N = 212)
Breach of Negotiated Contracts	5.5	29.6	64.9 **	(N = 91)
Common-Law Tort Theories	68.0 **	27.8	4.2	(N = 72)
<b>LITIGANTS' UNDERLYING AND MOTION TO COMPEL ARBITRATION DEFENSES</b>				
Federal Preemption	61.8	3.5	34.7	(N = 489)
Procedural Unconscionability	- 0 -	58.3	41.7	(N = 180)
Substantive Unconscionability	- 0 -	75.2	24.8	(N = 218)
<b>OUTCOME — ARBITRATORS' RULINGS:</b>				
Plaintiffs/Respondents Won	47.0	31.8	1.0	(N = 336)
Defendants/Movants Won	53.0 **	68.2 **	36.4	
— MOTIONS TO COMPEL ARBITRATION OUTCOMES —				
<b>OUTCOME — TRIAL COURTS</b>				
Respondents/Plaintiffs Won	- 0 -	62.1**	49.0	(N = 585)
Movants/Defendants Won	- 0 -	37.9	51.0 **	
<b>OUTCOME — COURTS OF APPEALS</b>				
Respondents/Plaintiffs Won	- 0 -	41.0	39.2	(N = 578)
Movants/Defendants Won	- 0 -	59.0	60.8	
<b>OUTCOME — SUPREME COURTS</b>				
Respondents/Plaintiffs Won	- 0 -	38.7	14.3	(N = 175)
Movants/Defendants Won	- 0 -	61.3	85.7	
Levels of Statistical Significance for Chi Square tests: ***p < .0001 **p < .001				

Generally, an allegation and a claim are synonymous.<sup>516</sup> A theory of recovery and an allegation however, are not synonymous.<sup>517</sup> Therefore, the second variable in Table 1 is “Respondents/Plaintiffs’ Underlying Theories of Recovery.” The reported percentages reveal statistically significant findings. Specifically, in arbitral forums, plaintiffs are more likely to commence actions, citing federal and state antidiscrimination statutes (48.5%), banking and consumer-credit statutes (49.0%) and common-law tort-based theories of recovery (68.0%). On the other hand, in the underlying state-court trials, plaintiffs/respondents are significantly more likely to commence actions under consumer-protection and deceptive trade practices statutes (61.7%). Also, many plaintiffs (40.1%) filed breach of standardized-contract actions. But, in the underlying federal-court proceedings, breach of negotiated-contract actions appeared in abundance (64.9%).

Also, as previously mentioned, some state supreme courts require a contractual party to prove both procedural and substantive unconscionability before invalidating a contract.<sup>518</sup> Other state courts will invalidate a contract if a party establishes procedural or substantive unconscionability.<sup>519</sup> Consider the third variable in Table 1—“Litigants’ Underlying and Motion-to-Compel Arbitration Defenses.” Of 887 cases, unconscionability challenges appeared in nearly half. And of 180 procedural unconscionability challenges, 58.3% and 41.7% occurred in state and federal courts, respectively. But even more surprising, of 218 substantive unconscionability challenges, the overwhelming majority occurred in state courts rather than in federal courts. The respective percentages are 75.2% and 24.8%.

The last six rows of simple percentages in Table 1 illustrate the dispositions of motions to compel arbitration in trial, appellate and supreme courts. Among the 585 trial-court cases, state-court judges are statistically and significantly more likely to rule in favor of the respondents/plaintiffs or to deny movants/defendants’ motions (62.1%). Conversely, judges in federal district courts are significantly more likely to grant the movants/defendants’ motions. Of the 585 trial-court decisions, dissatisfied litigants appealed 578 (51.0%). Among the appellate cases, the findings are stark: The greater majority of both state and federal appellate court are likely to grant movants/defendants’ arbitration mo-

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<sup>516</sup> Cf. *DiBartolo v. Abbott Labs.*, 914 F. Supp. 2d 601, 611 (S.D.N.Y. 2012) (“Under New York law, ‘failure to warn claims are identical under strict liability and negligence theories of recovery.’” (quoting *Lewis v. Abbott Labs.*, No. 08 Civ. 7480, 2009 WL 2231701, at \*4 (S.D.N.Y. July 24, 2009))).

<sup>517</sup> Cf. *Snyder v. Yonkers Public Sch. Dist.*, 315 F. Supp. 2d 499, 501 (E.D.N.Y. 2004) (involving two complaints with “identical [factual] allegations,” but different legal theories of recovery).

<sup>518</sup> See discussion *supra* Part II.C.3.

<sup>519</sup> See, e.g., *Strand v. U.S. Bank Nat. Ass’n ND*, 693 N.W.2d 918, 922 (N.D. 2005) (“Some courts hold that a showing of either procedural or substantive unconscionability is sufficient to invalidate a contract.”).

tions. The percentages are 59.0% and 60.8%, respectively. Among state and federal supreme courts, movants/defendants are still significantly more likely to prevail—61.3% and 85.7%, respectively.

C. *Bivariate Computations—The Effects of Contractual Parties’ Background Attributes on the Dispositions of Arbitration Motions in State and Federal Courts*

Under the FAA’s “savings clause,” state and federal courts may consider and apply ordinary principles of contract law as well as equitable doctrines to decide whether to enforce arbitration agreements or clauses.<sup>520</sup> On the other hand, the savings clause prohibits judges’ weighing potentially prejudicial, irrelevant or extrajudicial factors—i.e. a litigant’s social status, geographic origin, gender or ethnicity—to decide whether to grant or deny a motion to compel arbitration.<sup>521</sup>

Nevertheless, Table 2 suggests both state and federal judges, intentionally or unintentionally, allow such impermissible factors to determine whether to grant or deny arbitration motions. Consider the four columns of win/loss ratios illustrated in Table 2. Now, focus on the two columns of win/loss ratios on the left, which appear under the subheading: “Motion to Compel Arbitration—Corporations and Financial Institutions’ Win/Loss Ratios in State Appeals Courts.”

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<sup>520</sup> See, e.g., *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); *Dan Ryan Builders v. Nelson*, 737 S.E.2d 550, 555 (W. Va. 2012).

<sup>521</sup> Cf. *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999); *Bellemere v. Cable-Dahmer Chevrolet, Inc.*, 423 S.W.3d 267, 272 (Mo. Ct. App. 2013).

TABLE 2. MOTION-TO-COMPEL-ARBITRATION MOVANTS' WIN-LOSS RATIOS BY SELECTED DEMOGRAPHIC VARIABLES AND LITIGANTS' ATTRIBUTES IN STATE AND FEDERAL COURTS OF APPEALS (N=578)

Selected Attributes of Litigants	— MOTIONS TO COMPEL ARBITRATION — CORPORATIONS AND FINANCIAL INSTITUTIONS' WIN/LOSS RATIOS IN STATE APPEALS COURTS (N = 285)		— MOTIONS TO COMPEL ARBITRATION — CORPORATIONS AND FINANCIAL INSTITUTIONS' WIN/LOSS RATIOS IN FEDERAL APPEALS COURTS (N = 293)	
	Corporations		Corporations	
	Win/Loss (N = 189)	Financial Institutions (N = 96)	Win/Loss (N = 188)	Financial Institutions (N = 105)
	Ratios	Ratios	Ratios	Ratios
Region of Country:				
East	.539 / .461 (N = 13)	.875 / .125 (N = 8)	.633 / .367 (N = 49)	.690 / .310 (N = 29)
Midwest	.521 / .479 (N = 48)	.500 / .500 (N = 22)	.600 / .400 (N = 45) ***	.790 / .210 (N = 19)
South	.687 / .303 (N = 66) **	.687 / .333 (N = 30)	.684 / .316 (N = 38)	.571 / .429 (N = 21)
Southwest	.294 / .706 (N = 17)	.608 / .394 (N = 9)	.800 / .200 (N = 20)	.579 / .421 (N = 19)
West	.489 / .511 (N = 45) **	.741 / .259 (N = 27)	.333 / .667 (N = 36) ***	.471 / .529 (N = 17)
Respondents/Plaintiffs' Underlying Theories:				
Breach-of-Contract	.691 / .309 (N = 81) ***	.613 / .387 (N = 31)	.563 / .437 (N = 96)	.519 / .481 (N = 27)
Deceptive Trade Statutes	.457 / .543 (N = 81) ***	.714 / .286 (N = 35)	.558 / .442 (N = 43)	.692 / .308 (N = 13)
Financial Services Statutes	.167 / .833 (N = 6)	.778 / .222 (N = 21)	.750 / .250 (N = 4)	.663 / .317 (N = 41)
Anti-Discrimination Statutes	.524 / .476 (N = 21)	.608 / .394 (N = 9)	.689 / .311 (N = 45)	.625 / .375 (N = 24)
Respondents/Plaintiffs' Affirmative Defenses in Motion to Compel Arbitration Proceedings:				
Unconscionability Defense	.539 / .461 (N = 180) *	.669 / .341 (N = 88)	.605 / .395 (N = 86)	.763 / .237 (N = 38) *
Other Defenses	.889 / .111 (N = 9) *	.625 / .375 (N = 8)	.588 / .412 (N = 102)	.552 / .448 (N = 67) *

\*\*\* Chi square test statistically significant at  $p \leq .005$  \*\* Chi square test statistically significant at  $p \leq .02$  \* Chi square test statistically significant at  $p \leq .03$

First, among corporations that appealed adverse arbitration motions in state courts, the statistically significant ratios reveal that state courts' geographic locations<sup>522</sup> influenced whether judges granted or denied corporations' motions. More specifically, state appellate courts in the East, Midwest and South are significantly more likely to grant mandatory-arbitration motions. The respective ratios are .539/.461, .521/.479 and .697/.303 (the respective percentages are 53.9%, 52.1% and 69.7%). However, state appellate courts in the Southwest and West are less likely to grant corporations' motions. The percentages are 29.4% and 48.9%, respectively. On the other hand, within every geographic region, state appellate courts are overwhelmingly more likely to grant financial institutions' motions to compel arbitration. The percentages in favor of financial institutions vary from 50% to 87.5%.

Second, among corporations, the statistically significant ratios indicate that respondents/plaintiffs' underlying theories of recovery influence whether state appeals courts grant or deny corporations' motions. Precisely, after respondents/plaintiffs commenced breach-of-contract and anti-discrimination actions in the underlying lawsuits, state courts are more likely to grant corporations' motions for mandatory arbitration. The statistically significant proportions are .691 and .524, respectively. Contrarily, after respondents/plaintiffs filed underlying deceptive-trade and consumer-protection actions against corporations, state appellate courts are less likely to grant corporations' motions. The respective statistically significant percentages are 45.7% and 16.7%. But note: Regardless of respondents/plaintiffs' underlying theories of recovery, state appellate court judges are exceedingly more likely to grant financial institutions' motions to compel arbitration. The percentages vary from 60.6% to 77.8%, and they are not statistically significant.

Are federal courts of appeal more or less likely to grant corporations and financial institutions' mandatory-arbitration motions? The answer is located in Table 2 under the subheading: "Motion to Compel Arbitration—Corporations and Financial Institutions' Win/Loss Ratios in Federal Appeals Courts." Examine the two columns of win/loss ratios on the right. Put simply, federal appellate courts in the West are significantly less likely to grant corporations and

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<sup>522</sup> In Part IV.B, *supra*, a brief discussion of "blue states" and "red states" appears. Simply stated, those political labels are not good proxies for geographic location. Therefore, in this study, a "geographic regions" variable was created. The East comprises Connecticut, Delaware, District of Columbia, Guam, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island and Vermont. The Midwest includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, West Virginia, and Wisconsin. The South includes Alabama, Georgia, Florida, Mississippi, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia. The Southwest comprises Arkansas, Louisiana, Oklahoma, and Texas. The West includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

financial institutions' requests—refusing to force consumers and employees to arbitrate claims (the percentages are 33.3% and 47.1%, respectively).

However, federal appellate courts in the Eastern, Midwestern, Southern and Southwestern parts of the United States are significantly more likely to grant both financial institutions and corporations' motions to compel arbitration. Among the corresponding percentages, the lowest is 57.1% in the South and the highest is 80.0% in the Southwest. Furthermore, unlike the outcomes in state appellate courts, respondents/plaintiffs' underlying legal theories of recovery have no statistically significant effects on the dispositions of arbitration motions in federal appellate courts. Or, regardless of consumers and employees' underlying causes of action, federal courts of appeal are exceptionally more likely to grant corporations and financial institutions' motions and compel arbitration. The movants/defendants' probability of winning vary from 51.9% to 75.0%

To reiterate, the FAA's savings clause does not permit courts to weigh any extra-legal factors when deciding whether to enforce or invalidate arbitration agreements.<sup>523</sup> Also, the Court reaffirms the specific policy that "as a matter of federal law, any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ."<sup>524</sup> In addition, both state and federal courts of appeal regularly embrace that policy.<sup>525</sup> Nevertheless, the Supreme Court's pro-arbitration policies are contradictory.<sup>526</sup> And those contradictions differentially influence the dispositions of arbitration motions among, as well as between, state and federal courts.

The statistically significant findings in Table 2 clearly reveal that motions are granted or denied differently among, as well as between, state and federal

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<sup>523</sup> See discussion *supra* notes 506–507.

<sup>524</sup> *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Compare *Matter of Brady v. Williams Capital Grp., L.P.*, 14 N.Y.3d 459, 467–68 (2010) (noting "strong state policy favoring arbitration agreements" and that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration), with *NCR Corp. v. Korala Associates, Ltd.*, 512 F.3d 807, 813 (6th Cir. 2008) ("As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

<sup>525</sup> On December 14, 2015, the author searched the State and Federal databases on Westlaw® using the query (rule): "Any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration." The search generated more than two thousand decisions in which courts embraced or applied the rule.

<sup>526</sup> Compare *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24–25 (1983) ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem . . . is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."), with *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991) (stating that the presumption of arbitrability does not fully apply in cases where the arbitration agreement is contained in an expired fixed-term contract and also stressing that courts must determine whether the particular dispute falls within the scope of the arbitration agreement).

courts. Likewise, other irrelevant or impermissible factors also influence whether arbitration motions are granted or denied: Financial institutions are more likely to prevail than corporations, and corporations are more likely to prevail in federal courts rather than in state courts. In the West, state courts are more likely to deny corporations' motions. However, federal courts in the West are more likely to deny both financial institutions and corporations' motion.

Finally, the last variable in Table 2 is entitled, "Respondents/Plaintiffs' Affirmative Defenses in Motion to Compel Arbitration Proceedings." The proportions in the bottom two rows answer the general question: whether respondents/plaintiffs' defenses are likely to influence the dispositions of motions to compel arbitration in state and federal appellate courts. The short answer is yes. First, state appellate courts are significantly less likely to grant corporations' arbitration motions when respondents/plaintiffs raise an unconscionability defense or other defenses. The respective percentages are 53.9% and 88.9%. Conversely, federal courts of appeal are significantly more likely to grant financial institutions' motions and compel arbitration when respondents/plaintiffs raise unconscionability challenges rather than some other defenses. The statistically significant percentages are 76.3% and 55.2%, respectively.

Again, in *Concepcion*, Justice Scalia chided state and federal courts in California.<sup>527</sup> Allegedly, those tribunals allow unsophisticated consumers to raise an inordinate number of unconscionability challenges and successfully circumvent the Court's pro-arbitration policies.<sup>528</sup> The statistically significant findings in Table 2, however, are exceedingly clear: Both federal and state courts allow unconscionability challenges to influence the dispositions of mandatory-arbitration motions. Moreover, unconscionability challenges are likely to be successful or unsuccessful, depending on the movants/defendants' business, legal, or socioeconomic status. An even more important and related question begs for an answer: Do procedural and substantive unconscionability challenges have identical effects on the dispositions of motions to compel arbitration in federal and state courts of appeal? In *Concepcion*, Justice Scalia did not distinguish between the two defenses when he penned his controversial opinion and rebuked California courts for increasingly applying the doctrine to bar arbitration.<sup>529</sup> To address this latter question, consider the statistics in Table 3 entitled, "The Effects of Unconscionability Defenses and Other Variables on the Dispositions of Arbitration Motions in State Supreme Courts and in Federal Courts of Appeals."

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<sup>527</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333, 340–351 (2011).

<sup>528</sup> *Id.*

<sup>529</sup> *Id.*

TABLE 3. THE EFFECTS OF UNCONSCIONABILITY DEFENSES AND OTHER VARIABLES ON THE DISPOSITIONS OF ARBITRATION MOTIONS IN STATE SUPREME COURTS AND IN FEDERAL COURTS OF APPEALS (N=363)\*

SELECTED PREDICTOR VARIABLES	SUBCATEGORIES	Procedural Unconscionability Defense and Its Effects on the Dispositions of Motions To Compel Arbitration in State Supreme Courts and in Federal Courts of Appeals				Substantive Unconscionability Defense and Its Effects on the Dispositions of Motions To Compel Arbitration in State Supreme Courts and in Federal Courts of Appeals			
		MOTION Denied	MOTION Granted	Percent	Number	MOTION Denied	MOTION Granted	Percent	Number
Combined Effects: Federal Appellate Courts And Their Sister State Supreme Courts' Geographic Locations	Fifth Circuit & Supreme Courts	36.4	63.4	36.4	36.4	63.4	36.4	63.4	(N = 22) ****
	Sixth Circuit & Supreme Courts	30.0	70.0	30.0	54.2	45.8	30.0	45.8	(N = 24) ****
	Ninth Circuit & Supreme Courts	52.8	47.2	52.8	61.4	38.6	52.8	38.6	(N = 57) ****
	Eleventh Circuit & Supreme Courts	35.1	64.9	35.1	25.6	74.4	35.1	74.4	(N = 39) ****
	Other Circuits & Supreme Courts	38.4	61.6	38.4	52.0	48.0	38.4	48.0	(N = 75) ****
Specific Effects: Types of State and Federal Courts	State Supreme Courts	35.2	64.8	35.2	52.7	47.3	35.2	47.3	(N = 134) ***
	Federal Courts of Appeals	43.5	56.5	43.5	33.3	66.7	43.5	66.7	(N = 48) ***
Movants/Defendants In Mandatory Arbitration Trials	Financial Services Institutions	28.9	71.1	28.9	34.2	65.8	28.9	65.8	(N = 45) **
	Insurers and Business Entities	28.6	71.4	28.6	59.3	40.7	28.6	40.7	(N = 28) **
	Small and Large Corporations	45.8	54.2	45.8	50.0	50.0	45.8	50.0	(N = 142) **

\*\*\*\* Chi square test statistically significant at  $p \leq .001$

\*\*\* Chi square test statistically significant at  $p \leq .01$

\*\* Chi square test statistically significant at  $p \leq .05$

\* Chi square test statistically significant at  $p = .10$

+ On appeal to state supreme courts, the number of cases decreased.



In the center of Table 3, three (3) columns of statistics appear under the subheading, "Procedural Unconscionability Defense and Its Effects on the Dispositions of Motions to Compel Arbitration in State Supreme Courts and in Federal Courts of Appeals." And, on the right side of the table, three (3) additional columns of statistics are illustrated under the subheading, "Substantive Unconscionability Defense and Its Effects on the Dispositions of Motions to Compel Arbitration in State Supreme Courts and in Federal Courts of Appeals."

Focusing on the three columns of statistics on the left, the findings reveal that the Ninth Circuit and its sister state supreme courts are somewhat more likely to deny arbitration motions when consumers and employees raise a procedural unconscionability challenge (52.8%). This specific finding is marginally congruent with the more general unconscionability finding that Justice Scalia discussed in *Conception*.<sup>530</sup> However, it is important to stress: The current finding is not statistically significant. Even more revealing, the Fifth, Sixth and Eleventh Circuits—along with their respective sister state supreme courts and other federal appellate courts—are significantly more likely to grant mandatory-arbitration motions when respondents/plaintiffs raise a procedural unconscionability defense. The displayed percentages are 63.4%, 70.0%, 64.9%, and 61.6%.

Clearly, when procedural unconscionability challenges are raised, the geographic locations of state supreme courts and their sister federal appellate courts have no statistically significant impact on the dispositions of arbitration motions. Furthermore, disregarding the geographic locations of courts, the findings in Table 3 disclose: State supreme courts as well as federal courts of appeal are more likely to grant motions to compel arbitration when respondents/plaintiffs raise a procedural unconscionability defense. The respective percentages are 64.8% and 56.5%.

But note: About half (45.8%) of the courts are more likely to deny motions and about half (54.2%) are more likely to grant motions—when the movants/defendants are "small or large corporations" and respondents/plaintiffs advance a procedural unconscionability defense. Contrarily, the overwhelming majority of courts are more likely to grant motions to compel arbitration when the movants/defendants are "financial services institutions" or "insurers," and respondents/plaintiffs raise a procedural unconscionability challenge. The statistically significant percentages are 71.1% and 71.4%, respectively.

Without a doubt, in this study, the most surprising findings are the statistically significant effects of substantive unconscionability challenges on the dispositions of mandatory-arbitration motions. Examine the three columns of statistics on the right in Table 3. The unexpected findings are telling. First, along with their respective sister state supreme courts, the Sixth and Ninth Circuits are

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<sup>530</sup> *Id.* at 342 ("California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.").

more likely to deny mandatory-arbitration motions—when respondents/plaintiffs raise a substantive unconscionability defense. The respective statistically significant percentages are 54.2% and 61.4%.

In contrast, together with their respective sister state supreme courts, the Fifth and Eleventh Circuits are exceedingly more likely to grant motions to compel arbitration—when respondents/plaintiffs present a substantive unconscionability challenge. The statistically significant percentages are 63.4% and 74.4%, respectively. Of the remaining federal courts of appeal and their sister state supreme courts, the statistically significant percentages disclose: Half of the latter courts are more likely to deny motions and about half are more likely to grant motions when respondents/plaintiffs advance a substantive unconscionability defense. The corresponding percentages are 52.0% and 48.0%, respectively.

Furthermore, discounting the geographic locations of courts, the findings in Table 3 unveil a major and bothersome judicial conflict: Federal courts of appeal are statistically and tremendously more likely to grant motions to compel arbitration when unsophisticated consumers and employees raise a substantive unconscionability challenge (66.7%). On the other hand, state supreme courts are statistically and significantly more likely to deny arbitration motions when respondents/plaintiffs present a substantive unconscionability defense (52.7%). Why are these unexpected and contradictory substantive-unconscionability findings—between state supreme courts and federal appellate courts—rather troublesome? The answer is found in a long string of important and highly cited Supreme Court decisions.

Briefly, the author crafted and ran a research query in a WESTLAW database.<sup>531</sup> The question generated 52 federal appellate courts cases. And, in the overwhelming majority of the retrieved cases, federal courts of appeal cited the Court's strict admonitions in *Perry v. Thomas*,<sup>532</sup> *Allied-Bruce Terminix Cos. v. Dobson*<sup>533</sup> and *Doctor's Associates v. Casarotto*.<sup>534</sup> In *Barker v. Golf U.S.A., Inc.*,<sup>535</sup> the Eight Circuit presents an excellent summary of the Court's instructions and the scope of lower federal courts' authority under the FAA:

To decide whether the parties' agreement to arbitrate is valid, we look to state contract law. '[S]tate law, whether of legislative or judicial origin, is applicable if [it] arose to govern . . . the validity, revocability, and enforceability of contracts . . . . We may apply state law to arbitration agreements only to the extent that it applies to contracts in general . . . . [And]

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<sup>531</sup> The query—ARBITRATION /S (APPLY APPL! /S (STATE /S DEFENSES))—was submitted between May 24-25, 2015.

<sup>532</sup> 482 U.S. 483, 493–94 n.9 (1987).

<sup>533</sup> 513 U.S. 265, 281 (1995).

<sup>534</sup> 517 U.S. 681, 687 (1996).

<sup>535</sup> 154 F.3d 788 (8th Cir. 1998).

we may apply . . . a state's general contract defenses.<sup>536</sup>

Stated succinctly, both state supreme courts and federal appellate courts must perform substantially similar tasks in motion-to-compel-arbitration proceedings: (1) find a negotiated or a standardized arbitration agreement;<sup>537</sup> (2) consider, explain, and interpret controversial terms in the arbitral agreement;<sup>538</sup> (3) consider the movant's motion and weigh the respondent's underlying claims and theories of recovery;<sup>539</sup> and (4) apply state-law principles of contract formation and related defenses to decide whether to grant or deny a motion.<sup>540</sup> However, the statistically significant and gross disparities between outcomes in state supreme courts and federal courts of appeal strongly suggest: The latter courts are more likely to apply the Supreme Court's strong pro-arbitration policies and ignore states' common-law defenses—when deciding whether a consumer's or an employee's substantive unconscionability challenge defeats a motion to compel arbitration.<sup>541</sup>

The last set of bivariate findings in Table 3 should also generate some interest. Movants and respondents have equal likelihoods of prevailing in state-supreme and federal-appellate courts—when the respondents/plaintiffs advance a substantive unconscionability defense and the movants/defendants are “small and large corporations” (50.0%). However, the same courts are substantially and statistically more likely to grant motions to compel arbitration—when consumers and employees file a substantive unconscionability challenge, and the movants/defendants are financial services institutions (65.8%). The opposite is

<sup>536</sup> *Id.* at 791 (citing *Perry*, 482 U.S. at 493–494, n.9).

<sup>537</sup> Compare *Gorlach v. Sports Club Co.*, 148 Cal.Rptr.3d 71, 77 (Cal. Ct. App. 2012), with *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000).

<sup>538</sup> *Stout*, 228 F.3d at 714.

<sup>539</sup> Compare *Allied–Bruce Terminix Companies, Inc. v. Dobson*, 684 So.2d 102, 108 (Ala. 1995), and *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So.2d 454, 457 (Ala. 1999) (“[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.”), with *J.D. Byrider*, 228 F.3d at 714 (stating that a federal court must determine whether Congress intended for the non-movant claims to be arbitrated).

<sup>540</sup> See *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 782 (9th Cir. 2002) (“In determining the validity of an agreement to arbitrate, federal courts should apply ordinary state-law principles that govern the formation of contracts.”).

<sup>541</sup> Cf. *Hawkins v. Region's*, 944 F.Supp.2d 528, 531 (N.D. Miss. 2013) (“[This] court recognizes that the Supreme Court's decision . . . might be regarded by some as creating a legal ‘black hole’ which inevitably sucks in disputes and sends them to arbitration . . . . If this is true, then the fact nevertheless remains that this court has no choice but to follow this law. The U.S. Supreme Court has, in recent years, adopted an approach which highly favors arbitration, including overturning the decisions of state supreme courts when it finds that they have established laws which are contrary to the pro-arbitration policies behind the FAA.” (citing *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1745 (2011))).

true when insurers and various business associations are the movants and the respondents submit a substantive unconscionability challenge. Federal courts of appeal and state supreme courts are meaningfully and statistically more likely to deny arbitration motions (59.3%).

D. *A Multivariate Two-Stage Probit Analysis—Individual and Simultaneous Effects of Procedural and Substantive Unconscionability Challenges and Other Predictors on the Dispositions of Motions to Compel Arbitration in State and Federal Courts of Appeals*

Again, in *Concepcion*, Justice Scalia, writing for the majority, embraced the suppositions: (1) California state courts and their sister federal courts are biased against arbitration; and (2) those tribunals are more likely to undermine federal arbitration policies because consumers and employees are substantially more to raise successful unconscionability challenges in those jurisdictions.<sup>542</sup> First, the *Concepcion* Court's conclusions are not well grounded in sound or statistically significant evidence. Instead, the Court used less-than-definitive percentages to reach those conclusions.<sup>543</sup> Standing alone, percentages and other descriptive statistics' explanatory and predictive powers are extremely weak.<sup>544</sup> Consequently, one must employ significantly more powerful and complex statistical procedures<sup>545</sup> to establish that "California's unconscionability jurisprudence violates the basic mandate of the FAA . . . ."<sup>546</sup>

Second, even if simple percentages were powerful predictors, the reported percentages and statistically significant bivariate relationships in the present study do not support the *Concepcion* Court's general conclusion.<sup>547</sup> Once more, both state and federal courts are significantly more likely to grant arbitration motions, when consumers and employees raise procedural unconscionability challenges, and, depending on the geographic location, federal courts are more

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<sup>542</sup> AT&T Mobility v. *Concepcion*, 563 U.S. 333, 344 (2011).

<sup>543</sup> *Id.*

<sup>544</sup> See Lee Petherbridge, *The Claim Construction Effect*, 15 MICH. TELECOMM. & TECH. L. REV. 215, 228–230 (2008) ("There has been an increase in the rate that the court uses claim construction in connection with decisions on the doctrine of equivalents . . . . The empirical evidence reported in this study comes from the application of several statistical techniques. Some are simple descriptive statistical techniques, such as . . . percentages and . . . [the] odds of success with respect to response variables . . . . The study also employs more complex statistical arguments, including linear regression, the chi square test, which is useful for exploring whether there are relationships between certain variables, and logistic regression, which is a particularly good complement to chi square . . . because it is highly effective at estimating not only the probability that certain variables predict (or explain) positive outcomes for response variables, but also the strength of the predictive power.").

<sup>545</sup> *Id.*

<sup>546</sup> *Broome*, *supra* note 315, at 41.

<sup>547</sup> See discussion *infra* Table 4.

likely to grant arbitration motions—when respondents advance substantive unconscionability challenges. Briefly, in motion to compel arbitration proceedings, state and federal courts' decisions—to apply the unconscionability doctrine and/or to deny motions—are more complex. Therefore, a researcher's purportedly sound cause-and-effect explanations and conclusions are highly suspect if they are derived completely from an analysis of descriptive statistics.<sup>548</sup>

Furthermore, when using survey data, a researcher should always avoid the strong temptation to prove a legal theory simply by weighing or stressing the statistically significant bivariate relationships between certain predictors and judicial outcomes.<sup>549</sup> Instead, a conscientious analyst must employ more complex and powerful statistical tools, which can “predict or explain” simultaneously the unique, as well as the multiple effects of certain predictors on: (1) courts' decisions to apply the procedural or substantive unconscionability doctrines; and/or (2) courts' decisions to grant or deny mandatory-arbitration motions.<sup>550</sup>

Even more importantly, the same conscientious researcher must address a serious question: Whether the researcher's sampled survey data—cases in regional law reporters—represent fairly the universe of all persons who have claims and litigated those claims in state and federal courts.<sup>551</sup> Reported cases have known problems or limitations.<sup>552</sup> First, reported cases do not reflect the universe of persons' presenting claims because some persons choose not to litigate in state or federal courts.<sup>553</sup> Second, courts often issue unfavorable rul-

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<sup>548</sup> See generally Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments-1900-1997*, 47 AM. U. L. REV. 1131, 1194–1214, 1208–09 (1998) (presenting a case study of state and federal courts' disposition of lawsuits involving corporate entities, insurers, and insurance consumers, and discussing statistical problems which are associated with a researcher's using only reported cases and simple percentages to make “causal” inferences).

<sup>549</sup> See Petherbridge, *supra* note 544 at 228–30.

<sup>550</sup> See *id.* at 230.

<sup>551</sup> Cf. Thomas J. Campbell, *Regression Analysis In Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299, 1300 n.7 (1984) (“Finally, purely from the statistical viewpoint, strict preconditions must be established for the use of regression analysis. Expert statisticians' testimony frequently concerns whether or not these conditions are met. Chief among these are . . . basic assumptions about the data, including the bell-shaped, ‘normal’ distribution of error terms with a constant variance . . . [and] absence of systematic errors in the reporting of sample data.”).

<sup>552</sup> *Id.*

<sup>553</sup> See G.S. Maddala, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS, 257–71, 278–83 (1983) (discussing “self-selectivity bias” and “other-selectivity bias” in various settings). See also Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual At-*

ings in mandatory-arbitration trials.<sup>554</sup> Also, for a number of competing reasons, some movants and respondents accept the adverse rulings and decide not to appeal.<sup>555</sup> Other litigants, however, appeal the adverse decisions—hoping to secure more favor rulings.<sup>556</sup>

Given litigants' different decisions, major differences could exist between those who appeal adverse rulings and those who do not. To determine whether a statistically significant difference exists between the two subpopulations, a careful analyst must test for "selectivity bias" in the sample data.<sup>557</sup> If the researcher finds significant differences between non-appellants and appellants, the analyst may reasonably conclude that the appellants' dissimilar background characteristics—rather than "judicial bias" or extralegal predictors—explain appellants' likelihood of winning or losing motion-to-compel-arbitration lawsuits in state and federal courts of appeal.<sup>558</sup> On the other hand, if meaningful self-selection or other-selection bias is not present, the researcher may proceed to measure the individual, multiple, simultaneous and statistical effects ("explanations") of various predictors on the dispositions of motions to compel arbitration.<sup>559</sup>

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*tempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act—1941-1993*, 43 CATH. U. L. REV. 399, 446–48 (1994) (discussing litigants' choices and how those choices might affect judicial outcome estimates in sample data).

<sup>554</sup> *Id.*

<sup>555</sup> See *infra* Table 4 and compare the total sample size (N=887) with the number of litigants (N=578) who decided to appeal adverse decisions to state and federal courts of appeal. Also, in this study, the reason for focusing on appellate court decision is not complicated. Unlike the decisions in state trial courts or in federal district courts, appellate courts' decisions are significantly more authoritative. In addition, appellate decisions are significantly more likely to end or resolve the controversy completely.

<sup>556</sup> See *infra* Table 4.

<sup>557</sup> The tests for detecting "selectivity bias" in sample data and the accompanying problems have been discussed in the author's other publications. See Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900-1991*, 41 CATH. U. L. REV. 325, 371–76 nn.157–59 (1992) (explaining and testing for "selectivity bias" in "choice data").

<sup>558</sup> *Id.*

<sup>559</sup> *Id.*

TABLE 4. A MULTIVARIATE PROBIT ANALYSIS—THE EFFECTS OF SELECT PREDICTORS ON THE DECISION TO APPEAL ADVERSE RULINGS AND ON THE DISPOSITIONS OF MOTIONS TO COMPEL ARBITRATION IN STATE AND FEDERAL COURTS, 1800-2015 (N=887)

Predictor Variables	Decision to Appeal Motion to Compel Arbitration Rulings to Federal and State Courts of Appeals (N=578)			Dispositions of Motion to Compel Arbitration Disputes in Federal and State Courts of Appeals (N=578)		
	Probit Values	Robust Std. Errors	Absolute Z Values	Probit Values	Robust Std. Errors	Absolute Z Values
<b>Types of Respondents/Plaintiffs:</b>						
Consumers	-.0673	.2167	0.31	0.1665	.1113	1.50
Employees	-.3306	.3103	1.07	0.1788	.1421	1.26
<b>Types of Movants/Defendants:</b>						
Corporations	.1789	.3377	0.53	0.2107	.1939	1.09
Financial Institutions	-.7043	.4434	1.59	<b>0.9375</b>	.2069	<b>4.53 ****</b>
<b>Lawsuits' Origins:</b>						
In State Courts, Only	2.133	.2401	8.88 ****	<b>-8293</b>	.1924	<b>4.31 ****</b>
In California State Courts	-1.641	.5001	3.28 ***	-.2736	.3456	0.79
In Washington State Courts	-.2338	.4688	0.50	.3670	.2548	1.44
<b>Courts' Jurisdictions:</b>						
Within the Fifth Circuit	.3129	.2070	1.51	.2909	.1157	0.25
Within the Ninth Circuit	.3471	.2038	1.70	<b>-2521</b>	.0993	<b>2.54 **</b>
Within the Eleventh Circuit	1.488	.1963	7.58 ****	<b>-3197</b>	.0857	<b>3.73 ***</b>
<b>Respondents/Plaintiffs' Underlying Legal Theories:</b>						
Breach-Standardized Contract	.0773	.2439	0.32	-.2255	.1376	1.64
Breach-Negotiated Contract	.1813	.3000	0.60	-.1465	.1570	0.93
Antidiscrimination Action	.4506	.4081	1.10	<b>-3893</b>	.1432	<b>2.70 ***</b>
Financial-Services Action	.3567	.2984	1.20	.0134	.1191	0.11
Consumer-Protection Action	.0979	.1791	0.55	-.0554	.0829	0.67
<b>Respondents/Plaintiffs' Affirmative Defenses:</b>						
Procedural Unconscionability	-.0109	.3795	0.03	.0793	.1558	0.51
Substantive Unconscionability	-.0101	.3961	0.02	<b>4084</b>	.1522	<b>2.68 ***</b>
<b>UNCONSCIONABILITY DEFENSES' INTERACTION EFFECTS:</b>						
Procedural*Corporations	-.2899	.4082	0.71	.2038	.2204	0.92
Procedural*Financial Entities	.2248	.5229	0.43	<b>-6075</b>	.2227	<b>2.73 ***</b>
Substantive*Corporations	.1594	.4159	0.38	-.2251	.2035	1.11
Substantive*Financial Entities	.6976	.5284	1.32	<b>-12057</b>	.2299	<b>5.24 ****</b>
CONSTANT	-2.340	.4238	5.52 ****	1.1122	.2875	3.87 ****

Wald test for independent equations ("selectivity bias"): Chi square = .9600,  $p$ -value = .3281

\*\*\*\* Z statistic is statistically significant at  $p < .0001$  \*\*\* Z statistic is statically significant at  $p < .001$

Consider Table 4. It presents a multivariate, two-stage probit analysis<sup>560</sup> of the dispositions of arbitration motions in state and federal appellate courts.<sup>561</sup> Several distributions of probit values and statistics are displayed in the table. Again, the sample comprises 887 cases.

Of this number, 65% of the “observed” litigants (578) appealed adverse decisions. The remaining 35% decided not to appeal. Thus, they were “unobserved” in state and federal courts of appeal.

Reiterating significant differences between “observed” and “unobserved” litigants could suggest the presence of statistically significant “selectivity bias.” If such bias were present, a researcher would be effectively precluded from making the following conclusions: (1) State, rather than federal appellate courts, are more likely to deny mandatory-arbitration motions, or to be “biased” against federal arbitration policies; (2) state appellate courts are more likely to deny arbitration motions—when procedural unconscionability challenges are raised; (3) state courts of appeal are more likely to deny arbitration motions—when substantive unconscionability challenge are advanced; and (4) federal and state courts of appeals are more likely to weigh extrajudicial factors when deciding whether to grant or deny mandatory-arbitration motions.<sup>562</sup>

In Table 4, multiple predictors or “dummy” variables<sup>563</sup> appear under four headings: “Types of Respondents/Plaintiffs,” comprising two (2) variables; “Types of Movants/Defendants,” containing two (2) predictors; “Lawsuits’ Origins” containing three (3) dummy predictors; “Courts’ Jurisdictions,” comprising three (3) independent variables; “Respondents/Plaintiffs’ Underlying Legal

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<sup>560</sup> In multiple published law review articles, the author has discussed and employed this statistical procedure to measure simultaneously independent and multiple effects of “independent variables” on the disposition of court decisions. See Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts—An Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts, 1925-2011*, 3 WILLIAM & MARY BUS. L. REV. 419, 544–551 nn.790–838 (2012); Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts’ Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act-1941-1993*, 43 CATH. U. L. REV. 399, 445–49 nn.213–19 (1994); and Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre-and Post-Grove City Analysis*, 5 REV. LITIG. 219, 287 nn.406–09 (1986) (using StataCorp’s Stata Statistical Software to analyze the data generally and to compute the multivariate-probit coefficients in particular).

<sup>561</sup> A copy of the author’s database is available at the Office of the Boston University Public Interest Law Journal.

<sup>562</sup> See discussion *supra* Tables 3 and 4. See also G.S. Maddala, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS, *supra* note 553 at 257–71, 278–83.

<sup>563</sup> Put simply, the subcategories or subgroups are individual binary (0, 1) or “dummy variables.” See WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 116–18 (N.Y.U., 5th ed. 2003) (explaining the purpose and use of dummy variables in regression analysis).



Theories,” consisting of five (5) dummy variables; “Respondents/Plaintiffs’ Affirmative Defenses,” encompassing two (2) independent variables; and “Unconscionability Defenses—Interaction Effects,” consisting of four (4) dummy predictors. Also, Table 4 illustrates two distributions of probit values—along with their respective distributions of robust standard errors, z-statistics, and levels of statistical significance.<sup>564</sup>

On the left, the first distribution of probit values appears under the label “Decisions to Appeal Motion-to-Compel-Arbitration Rulings to State and Federal Courts of Appeals (N = 578).” Those probit values answer the question: whether the unique, multiple and simultaneous effects of the dummy variables are statistically and significantly more or less likely to influence litigants’ decisions to appeal. A review of the dummy variables’ effects demonstrates: Litigants were significantly more likely to appeal if their underlying lawsuits began in California state courts, but less likely to appeal is the underlying lawsuit began in state courts within the Eleventh Circuit. Additionally, two of the dummy variables influenced the decisions to appeal. Thus, a test for “selectivity bias” is required to determine whether any meaningful similarities exist between the 578 appellants and non-appellants.

At the bottom of Table 4, the results of a Wald test for independent equations appear. The Chi-square statistic is not statistically significant—suggesting an absence of bothersome “selectivity bias” in the sample data.<sup>565</sup> Therefore, that concern has been removed, the next mission is to assess whether the predictors are more or less likely to influence appellate courts’ dispositions of motions to enforce arbitration clauses.

Consider the subheading—“Dispositions of Motion to Compel Arbitration Disputes in State and Federal Courts of Appeals”—that appear on the right in Table 4. Eight probit values<sup>566</sup> appear in bold print, revealing the corresponding

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<sup>564</sup> See David L. Schwartz and Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J.L. & TECH. 429, 460 n.187 (2013) (“Statistical significance is the probability that an observed relationship is not due to chance. A *p*-value of less than 0.05 is usually considered statistically significant. A 5% probability is equal to a *p*-value of 0.05 or less. Results with a *p*-value of less than 0.01 are considered highly statistically significant.”); ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 93, 233–234 n.4 (Aspen 2010) (“[W]hen a result has less than a 5 percent chance of having been observed but is observed anyway, it is said to be statistically significant,” and explaining that a 1% chance “represents a ‘higher’ level of significance because it indicates a less probable outcome and hence a more rigorous statistical test.”).

<sup>565</sup> See *supra* TABLE 4.

<sup>566</sup> The “positive” and “negative” probit values must be viewed from the perspectives of the plaintiffs who filed the underlying lawsuits in state trial courts and in federal district courts. More specifically, the plaintiffs are the respondents/plaintiffs in the motion-to-compel-arbitration trials. But, defendants filed motions to compel arbitration in those same lower state and federal courts. Therefore, focusing on the motion-to-compel-arbitration litigation,

predictors' statistically significant individual, multiple and simultaneous effects on movants and respondents' likelihoods of prevailing in courts of appeal. Generally, barring two exceptions, the predictors are substantially more likely to decrease unsophisticated employees and consumers' chances of winning in mandatory-arbitration proceedings.

More specifically, among the background variables or extralegal predictors, the "Financial Institutions" variable has a positive (.9375) probit value. It reveals: When financial institutions file motions to compel arbitration, consumers, employees and other respondents/plaintiffs are more likely to prevail and escape arbitration. In contrast, after controlling for the effects of other factors, state appellate courts as well as the Ninth and Eleventh Circuits are more likely to force unsophisticated persons into binding arbitration. The statistically significant and negative probit values are -.8293, -.2521 and -.3197, respectively. Furthermore, as reported earlier, the Concepcion Court concluded: Without knowing more, California state courts are extremely biased against federal arbitration policies. To be sure, the Ninth Circuit is not. And a close review of the negative probit value (-.2736) in Table 4 reveals: Although the coefficient is not statistically significant, California state courts are generally more inclined to force consumers and employees to arbitrate.

Do respondents/plaintiffs' underlying theories of recovery affect the dispositions of motions to compel arbitration in state and federal courts of appeal? Yes. Examine Table 4 and focus on the predictor, "Antidiscrimination Actions." The corresponding statistically significant probit value is negative (-.3893). It means: Respondents/plaintiffs are substantially less likely to win motion-to-compel-arbitration disputes, when those consumers and employees commence underlying gender-, race- and age-based discrimination actions against employers, financial institutions, corporations, and other entities. Very tellingly, when controlling for all other factors and theories, an antidiscrimination action is the only cause of action that decreases markedly and statistically consumers and employees' ability to litigate in courts. And this result supports

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this question begged for an answer: What was the outcome of each motion-to-compel-arbitration trial? Thus, a dependent "dummy" variable—"OUTCOME-Trial-Court"—was constructed. It comprised two values (0, 1). If an underlying respondent/plaintiff prevailed in a state trial court or in a federal district court, the value 1 was assigned. Conversely, if the underlying respondent/plaintiff did not prevail at the trial level, a zero (0) was assigned. Among cases, which were decided in state and federal appellate courts, a second dependent "dummy" variable—"OUTCOME-Appellate-Court"—was fashioned. And, the same coding methodology was employed. Thus, in TABLE 4, a negative probit value means: the corresponding predictor decreased respondents/plaintiffs' likelihood of winning a motion-to-compel-arbitration dispute. Conversely, a positive probit value means: The predictor increased respondents/plaintiffs' likelihood of winning a mandatory-arbitration dispute in appellate courts.

other published empirical findings.<sup>567</sup>

Finally, an earlier examination of the percentages in Tables 2 and 3 revealed: Unconscionability challenges influence differentially federal and state courts' decisions to grant or deny motions to compel arbitration. But, the findings in Tables 2 and 3 have serious limitations: They do not measure the separate effects of procedural and substantive unconscionability challenges on the dispositions of arbitration motions—after controlling for the separate, multiple and simultaneous effects of other predictors. Consequently a multivariate probit analysis is required.

Locate the two dummy variables under the heading, "Respondents/Plaintiffs' Affirmative Defenses." Near the bottom of Table 4, the probit values answer several questions. First, consider the "Procedural Unconscionability" predictor. The corresponding positive probit value (.0793) is not statistically significant and it does not support the Supreme Court's strongly implied assertion in *Concepcion*: Procedural unconscionability challenges in state and federal courts undermine liberal federal arbitration policies.

Yet, do substantive unconscionability challenges influence the dispositions of motions to compel arbitration in state and federal courts of appeal? The answer is yes. More specifically, unsophisticated consumers and employees are more likely to prevail when state and federal courts decide motions-to-compel-arbitration disputes. The corresponding positive probit value (.4084) is statistically significant. Does this latter statistical finding establish definitively that state and federal appellate courts are biased against arbitration? Does this result establish conclusively that state and federal appellate courts frequently abuse the substantive unconscionability doctrine to undermine the Supreme Court's "draconian"<sup>568</sup> arbitration policies?

The short answer to both questions is no, because the multivariate analysis reveals two powerful and contrary interaction effects. Specifically, federal and

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<sup>567</sup> This finding is consistent with similar findings that appear in a published article. See generally Willy E. Rice, *supra* note 473, at 506–507.

<sup>568</sup> See e.g., Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform" Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, 469 (2015) ("[T]he United States Supreme Court has been on a bit of a pro-arbitration tear recently, upholding ever-more draconian dispute resolution clauses inserted in standard-form contracts against all sorts of legal and policy-based challenges."); Paul B. Marrow, *Determining If Mandatory Arbitration Is "Fair": Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks*, 54 N.Y.L. SCH. L. REV. 187, 214 (2009) ("[O]ne noted author warns that '[t]he Supreme Court has created a monster' [because the Court's policies make] arbitrator's decisions virtually unreviewable while accepting procedural and substantive results that would be considered unfair in a judicial setting.' . . . The motivation for the imposition of such draconian methods is said to be the selfish desire to reduce transaction costs, to transfer risk to the party upon whom arbitration is imposed, and to secure a forum where the deck is stacked in favor of the party imposing the process.").

state appellate courts are substantially more likely to grant motions to compel arbitration—when consumers and employees present substantive unconscionability challenges and the movants/defendants are financial institutions. In Table 4, the “Substantive\*Financial Entities” predictor’s corresponding probit value (-1.2057) is negative and statistically significant. Even more telling, state and federal courts of appeal are also markedly more likely to grant motions to compel arbitration—when the movants/defendants are financial institutions and the employees and consumers raise procedural unconscionability challenges. The “Procedural\*Financial Entities” predictor’s corresponding probit value (-.6075) is negative and statistically significant.

Finally, one major finding in the present study is exceptionally clear: Both federal and state courts are substantially more likely to force unsophisticated consumers and employees into binding arbitration. Does this finding comport with the Concepcion Court’s controversial conclusion: Unlike federal courts, state courts are substantially more likely to be biased against, and have disdain for, the Court’s “draconian” federal arbitration policies? The answer is no.

## VII. SUMMARY — CONCLUSION

For centuries, English and American courts embraced and applied two highly compatible contract-based principles: Courts must enforce valid negotiated contracts and arbitral agreements to protect the parties’ intentions and rights.<sup>569</sup> On the other hand, courts may not enforce any unconscionable contract—which unjustly undermines unsophisticated and less powerful contractual parties’ rights, privileges or interests.<sup>570</sup> In fact, fifty years before and after Congress enacted the Federal Arbitration Act section 2, federal and state courts applied both principles concurrently to resolve contractual disputes.<sup>571</sup> However, during the mid-to-late twentieth century, powerful corporate employers and industries flooded the business world with standardized contracts, which contain mandatory arbitration clauses.<sup>572</sup> The latter produced an explosion of motions-to-compel arbitration in state and federal courts.<sup>573</sup> To counter, consumers and employees filed increasingly more unconscionability challenges to escape

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<sup>569</sup> See, e.g., *Tumlin v. Vanhorne*, 3 S.E. 264, 266 (Ga. 1887) (“It is unquestionably the duty of courts to enforce contracts, and protect the rights of parties arising from them.”).

<sup>570</sup> Cf. *Kitchen v. Rayburn*, 86 U.S. 254, 263 (1873) (“The complainants . . . come into court with[out] clean hands. They are seeking the benefit of a contract obtained by their fraud . . . [They] have no standing in a court of equity . . . [which will not] enforce an unconscionable bargain.”).

<sup>571</sup> See generally discussion *supra* Part II.C.1.

<sup>572</sup> See discussion *supra* notes 32–33.

<sup>573</sup> See Will Pryor, *Alternative Dispute Resolution*, 65 SMU L. REV. 247, 252 n.32 (2012) (“[O]ne commentator provides statistical analysis that documents a nationwide increase in the number of motions to vacate arbitration awards. A number of factors appear to be encouraging the increase in such motions, including the increase in the number of arbitrations generally and the ever-higher stakes of commercial arbitration.”).

arbitration.<sup>574</sup>

How has the Supreme Court responded to the avalanche of mandatory-arbitration disputes? Again, under the FAA section 2, courts must apply state-law principles—which “exist at law or in equity”—to determine whether an arbitration clause is valid and enforceable.<sup>575</sup> Has the Court consistently and emphatically encouraged inferior courts to follow all FAA section 2’s directives? No. Between the late-1970s and early-1980, the Supreme Court fashioned and encouraged lower courts to apply a novel and draconian set of liberal federal arbitration policies<sup>576</sup>—which weigh heavily against the application of contract principles in many arbitration-motion trials.<sup>577</sup>

Consequently, the Court’s extremely harsh “federal policies” have gradually, systematically, and significantly eroded consumers and employees’ ability to defend themselves in compulsive-arbitration trials.<sup>578</sup> In particular, the *Concepcion* Court’s ruling severely limits the effectiveness of unconscionability challenges in mandatory-arbitration proceedings. Further, the erosive effects of the *Concepcion* ruling should generate alarm because the Court did not clearly ex-

<sup>574</sup> See Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1, 11–12 (2011) (“Although observers disagree over whether [the] increase in unconscionability challenges and rulings is desirable as a policy matter, there is little dispute[:] . . . [T]he number of such challenges has increased substantially since the early 1990s . . . [U]nconscionability as a basis for refusing enforcement of arbitration agreements is increasingly invoked but inconsistently applied.”).

<sup>575</sup> 9 U.S.C. § 2 (2012).

<sup>576</sup> See *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (stating that the FAA reflects an emphatic federal policy in favor of arbitral dispute resolution and “[t]he Arbitration Act establishes . . . as a matter of federal law, [that] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (reaffirming the “liberal federal policy [which] favor[s] arbitration agreements”); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 626 (1985) (discussing *Mitsubishi Motors Corp.* and reaffirming that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”)); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475 (1989) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 626 (1985) (reaffirming *Mitsubishi Motors Corp.* and stressing that “any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration”)).

<sup>577</sup> See generally, Willy E. Rice, *Courts Gone “Irrationally Biased” in Favor of the Federal Arbitration Act?—Enforcing Arbitration Provisions in Standardized Application Forms and Marginalizing Consumer-Protection, Antidiscrimination, and States’ Contract Laws: A 1925-2014 Legal and Empirical Analysis*, 6 WM. & MARY BUS. L. REV., 405, 450–461 (2015) (establishing that state and federal courts ignore the FAA § 2’s “written contract” requirement, ignore settled contract principles and enforce—contrary to the FAA—arbitration clauses in applications for goods, services and employment).

<sup>578</sup> See Tables 3 and 4 *supra* Part VI.D and accompanying discussion.

plain whether the application of both procedural and substantive unconscionability challenges must be restricted.<sup>579</sup>

For centuries, procedural unconscionability challenges have precluded the formation and enforcement of an entire contract, if the contract evolved from duress, illegality or unconscionable conduct.<sup>580</sup> And substantive unconscionability challenges have prevented state and federal courts from enforcing all types of “shockingly one-sided” or “oppressively harsh” provisions in valid contracts.<sup>581</sup> However, under the Court’s exceedingly liberal federal “severability” policy, courts may now force unsophisticated consumers and employees to arbitrate claims—even if an arbitration agreement contains a substantively unconscionable clause.<sup>582</sup> Departing from the FAA section 2’s exceedingly clear directives and settled contract principles, the Supreme Court’s “severability policy” requires lower tribunals to sever “unconscionable” arbitral words and phrases in negotiated as well as in standardized or adhesion agreements, and force consumers and employees into binding arbitration.<sup>583</sup>

More disquieting, the Court’s extreme “severability policy” has generated a set of highly complicated and conflicting “severability” rules among and between state and federal courts.<sup>584</sup> Yet, state and federal courts are still exceedingly more likely to compel arbitration, even if a severability clause is substan-

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<sup>579</sup> See *AT&T Mobility v. Concepcion*, 131 S.Ct., 1740, 1747 (2011) (embracing two researchers’ statistical findings—which failed to measure the effects of both procedural and substantive unconscionability defenses on the dispositions of arbitration motions—and fashioning an anti-consumer federal arbitration policy without appreciating or understanding the differential effects of procedural and substantive unconscionability challenges). See also Broome, *supra* note 315 at 54, 66 (failing to investigate and discuss the effects of both procedural and substantive unconscionability challenges); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 *BUFF. L. REV.* 185, 186–187 (2004) (failing to measure the unique effects of both procedural and substantive unconscionability defenses in arbitration trials).

<sup>580</sup> See generally discussion *supra* Part II.C.1.

<sup>581</sup> See generally discussion *supra* Part V.A.

<sup>582</sup> Compare *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 221–22 (3d Cir. 2003) (holding that a substantively unconscionable fee-splitting and attorney fees provisions could be severed from the agreement even in the absence of a severability clause), and *Adler v. Fred Lind Manor*, 103 P.3d 773, 791 (Wash. 2004) (holding that “the attorney fees and limitations provisions of the arbitration agreement are substantively unconscionable [but severable, and so] the parties’ intent to arbitrate [is preserved]”), and *Bylund v. Countrywide Home Loans, Inc.*, No. B153167, 2002 WL 31744919, at \*2 (Cal. Ct. App. Dec. 9, 2002), with *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1058 (11th Cir. 1998) (refusing to compel arbitration after finding that a substantively unconscionable clause tainted the entire arbitration agreement, and refusing to sever the clause that only authorized an award of damages for breach of contract); *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 208 (3d Cir. 2010); *Gessa v. Manor Care of Florida, Inc.*, 86 So.3d 484, 494 (Fla. 2011).

<sup>583</sup> See generally discussion *supra* Part IV.

<sup>584</sup> See generally discussion *supra* Part IV.

tively unconscionable.<sup>585</sup> Why raise alarm about the Supreme Court's harsh severability policy, when it applies to the enforcement of an adhesionary—rather than a negotiated<sup>586</sup>—arbitral agreement? Why raise concerns about the accelerated erosion of consumers and employees' unconscionability challenges in both federal and state? In *Sosa v. Paulos*,<sup>587</sup> the Utah Supreme Court penned an exceptionally perceptive and intelligible answer:

Dr. Paulos contends that . . . procedural unconscionability [did not preclude] the formation of the agreement . . . [and] severance of the unconscionable term would not interfere with . . . the arbitration of medical malpractice disputes. Were we to adopt [this] argument . . . , the doctrine of procedural unconscionability would be effectively destroyed. . . . [A]ny party in a stronger bargaining position would have an incentive to engage in procedurally unconscionable behavior to induce a weaker party to sign an agreement containing extremely unfavorable terms. . . . [A] severance clause enforced in this fashion would encourage procedural and substantive overreaching because the stronger party will have nothing to lose by trying to intimidate.<sup>588</sup>

Furthermore, it has been suggested that the criticisms of forced arbitration and the increasing ineffectiveness of unconscionability challenges are “based on hyperbole, speculation, unsubstantiated assumptions, and anecdotal evidence . . . .”<sup>589</sup> But, a California court of appeal's insight is worth repeating:

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<sup>585</sup> Compare *In re Poly-America, L.P.*, 262 S.W.3d 337, 344 (Tex. 2008) (declaring that the arbitration agreement's provisions precluding remedies under the Workers' Compensation Act were substantively unconscionable, citing the severability clause, severing the unconscionable remedial provisions and compelling arbitration), and *McKee v. AT&T Corp.*, 191 P.3d 845, 861 (Wash. 2008), and *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 769 (Wash. 2004), with *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 752 S.E.2d 372, 394 (W. Va. 2013) (refusing to strike the severability clause in the arbitration agreement, declaring that the “voluntary” fee-shifting provisions in the consumer-loan contract were not substantively unconscionable and compelling arbitration), and *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1287 (N.D. Ala. 2000), and *Etokie v. Carmax Auto Superstores, Inc.*, 133 F. Supp. 2d 390, 394 (D. Md. 2000).

<sup>586</sup> See, e.g., *Management Servs. Corp. v. Development Assocs.*, 617 P.2d 406, 408 (Utah 1980) (stressing that contract provisions are severable if the parties intended severance “at the time they entered into the contract,” and if the primary purpose of the contract could still be accomplished following severance). See also *Sosa v. Paulos*, 924 P.2d 357, 364 (Utah 1996).

<sup>587</sup> 924 P.2d 357 (Utah 1996).

<sup>588</sup> *Id.* at 363–364.

<sup>589</sup> Cf. Paul B. Marrow, *Determining If Mandatory Arbitration Is “Fair”*: Asymmetrical-ly Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks, 54 N.Y.L. SCH. L. REV. 187, 212 (2009/2010) (“So, is mandatory arbitration a fair process? Resolving this question is potentially impossible if one takes into account nothing other than hyperbole, speculation, unsubstantiated assumptions, and anecdotal evidence.

While arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not. . . . [I]t is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high. Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself.<sup>590</sup>

An exhaustive review of the FAA's legislative history fails to disclose that Congress enacted the FAA section 2's "savings clause," expecting successful procedural and substantive unconscionably challenges to turn on whether the movants are corporations, employers, nursing homes, banks, or other commercial entities.<sup>591</sup> And Congress certainly did not enact the FAA section 2, intending for numerous other extrajudicial variables to influence the dispositions of arbitration motions in federal and state courts.<sup>592</sup> Should a twenty-first-century Congress address these offensive judicial realities—which are significantly eroding contract-based defenses under the FAA, and forcing increasingly large numbers of unsophisticated consumers and employees into binding arbitration? The answer is yes.

What must Congress do? Recently, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act<sup>593</sup>—which spawned the Consumer Financial Protection Bureau (CFPB).<sup>594</sup> As of this writing, the CFPB has taken steps to educate consumers about the perils of hidden and complicated arbitration provisions in contracts.<sup>595</sup> But, the CFPB's activities are not enough. Ex-

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. . . While the results are inconclusive, the cumulative weight of these studies points toward the conclusion that arbitration is perceived as a fair process. . . . [F]urther empirical examination may be needed to shed more light on the matter . . .”).

<sup>590</sup> *Gutierrez v. Autowest, Inc.*, 7 Cal.Rptr.3d 267, 277 (Cal. App. Ct. 2003).

<sup>591</sup> See discussion *supra* Part III.

<sup>592</sup> See discussion *supra* Part III.

<sup>593</sup> 12 U.S.C. § 5581 (2010).

<sup>594</sup> Under 12 U.S.C. § 5581, the Wall Street Reform and Consumer Protection Act transferred many functions from multiple federal agencies and departments to the Bureau of Consumer Financial Protection. In pertinent Part, § 5581(a)(1) reads: “for purposes of this Part, the term ‘consumer financial protection functions’ means—(A) all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines; and (B) the examination authority described in subsection (c)(1), with respect to a person described in section 5515(a) of this title . . . .”

<sup>595</sup> In addition, 12 U.S.C. § 5518(b) gives the newly created Consumer Financial Protection Bureau authority to regulate pre-dispute arbitration agreements in consumers' financial products or services contracts. § 5518(b) reads:

The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if



ceedingly large populations of unsophisticated employees also need assistance because they are increasingly forced to arbitrate state and federal claims.<sup>596</sup> In recent years, numerous bills have been introduced in Congress to address the concerns raised in this article.<sup>597</sup> Enactment of any one of those proposed acts would effectively end the Supreme Court's unconscionably biased pro-arbitration policies, and allow unsophisticated employees and consumers to litigate their contractual and statutory claims in courts of law—before a jury of their peers rather than before a private arbitrator.

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the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

See also Jonnelle Marte, *Firms May Face Limits on Mandatory Arbitration*, WASH. POST, Mar. 4, 2015, at A12 (“The Consumer Financial Protection Bureau is expected to issue a major report next week on what consumer advocates say is one of the leading but most misunderstood ways that companies limit a customer’s rights . . . Consumers instead are steered into arbitration, which critics say is a secretive process that is often stacked in the company’s favor and leads to little benefit for consumers . . . In some cases, consumers . . . face fees and other restrictions, such as requiring that arbitration take place in a certain state. . . . ‘Companies are controlling the system,’ said . . . legislative director for the National Association of Consumer Advocates. ‘They’re writing the clauses, they decide where the arbitrator will be and they decide the payment terms.’”).

<sup>596</sup> See Editorial, *Consumers Losing Right to Sue*, USA TODAY, Feb. 1, 2000, at 13A (“Buy an item off the popular eBay auction web site, and you’ve just given away your right to sue. If you have a beef with eBay, you’ll go before a private arbitrator instead of a judge in court. The Web giant has even picked the place: San Jose, eBay’s home, but not exactly convenient to the vast majority of consumers. A growing number of e-world businesses are joining the ranks of banks and credit card companies that quietly force customers into arbitration agreements. Customers, simply by making a purchase, often automatically give up their right to sue.”).

<sup>597</sup> See *Wascovich v. Personacare of Ohio*, 943 N.E.2d 1030, 1034 (Ohio Ct. App. 2010) (“Known as the ‘Fairness in Nursing Home Arbitration Act,’ H.R. 1237 (which was introduced on February 26, 2009, but was discharged on June 21, 2010) aimed to amend the Federal Arbitration Act to invalidate predispute arbitration agreements between a long-term nursing home and a resident.”); Joshua T. Mandelbaum, *Stuck In A Bind: Can The Arbitration Fairness Act Solve The Problems of Mandatory Binding Arbitration In The Consumer Context?*, 94 IOWA L. REV. 1075, 1078 (2009) (“Advocates and legislators have rallied around the Arbitration Fairness Act . . .” (citing the Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007))); The Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); The Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). See also the proposed Fair Arbitration Act of 2013, S. 878 (1st Sess. 2013).